

**Antonin Scalia's Philosophy of Interpretation:
From Textualism to Deferentialism
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The opening sentence in Justice Scalia's "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...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*... That is to say it is not "customary law," but is rather law developed by the judges.²

Since, in Scalia's view, common-law judges were, essentially, legislators, he finds it unsurprising that law professors, legal scholars, and many 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..[N]o wonder so many law students...aspire for the rest of their lives to be judges.³

This is the stage Scalia sets. Before giving arguments, he sets up a rhetorical 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 Congress and none in the judiciary, and with state constitutions that do the same. On the other side, we have a legal culture dominated by institutions that reject the conception of law that our founding documents put in place. Although the message

¹ Page 3, my emphasis Scalia (1997), *A Matter of Interpretation*, Princeton: Princeton University Press.

² P. 4, my emphasis.

³ P. 7.

isn't explicitly stated, Scalia's language and imagery drive it home. Sober and respectable science *versus* the passion of 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. 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 couldn't confine himself to expounding the principles of objective, scientific judging. He had to persuade the culture, first to allow, and then to demand, it. He believed that American judges should be textualists, where we may think of a legal text as a linguistic object, like a novel. The law enacted is the content of the lawmakers' use of that linguistic object. It is what they asserted or stipulated in adopting it. The job of the judge is to discern that assertive content and apply it to cases--not to alter it to reach desirable political results.

That was Scalia's doctrine of the judicial interpretation. He believed that textualism is enshrined in the Constitution, 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." If he is right, then American judges who willfully legislate from the bench violate their legal duty. He further believed the 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.

Being a textualist, Scalia developed a remarkable intuitive grasp of the messages conveyed by spoken or written words. Being not only a legal scholar but also a legal polemicist, he became a master of political persuasion, whose rhetoric was aimed

as much at the general educated public as it was at legal professionals. In what follows, I will try to illustrate both of these remarkable abilities. But I will also argue that Scalia was neither a linguistic theoretician nor a systematic legal philosopher. Because of this, it is important to identify and correct certain of his errors and to reformulate and unify some of his most important insights in order to advance his project of developing a workable version of originalism. In what follows I will try to do that.

From Original Meaning to Original Asserted Content

Although Scalia's textualism officially 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, this was a mistake. *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.* Usually all parties know the meanings of the sentences used and the purpose of the communication, as well as 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 a sentence. But how is *what S means* related to *what a speaker means* by a particular use of S? Often, when *S means* that so-and-so, *speakers mean* that-so-and-so by uses of S. In many, but not all, contexts, the converse is also true; *when speakers ordinarily mean* that so-and-so, often *S does too*. But the exceptions to these rough and ready rules are important.

The sentence "*I am finished*" is grammatically complete but interpretively incomplete. When it is used, the completion can be provided by the non-linguistic situation of use, the larger discourse, or the presuppositions of speaker/hearers. This isn't linguistic ambiguity arising from several linguistic conventions, it is linguistic under specificity. Another example is "*Susan will go to a nearby restaurant.*" Nearby what? Our present location, her present location, a location she, or we will be visiting next week? It depends on the context of utterance.

Next consider possessive noun phrases *NP's N*. Interpreting them requires identifying the possession relation *R* holding between the referent of the possessor NP and the individual designated by the phrase. When *N* is a relational noun, it provides a default possession relation. 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', and 'Tom's birthplace'. Crucially, however, the default choice can be overridden. Imagine two journalists, Tom and Bill, have each been assigned to interview a local student. 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. In these cases what is asserted isn't fully determined by the linguistic meanings of the sentences 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, or has requested from the library. As before, this

isn't ambiguity; it is 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 R. Hence, linguistic meanings of sentences containing possessive noun phrases often aren't what they are used to assert.

Matters like these can be legally important. The phrase *attorney's fees* occurs in a case that came before Justice Scalia in 1988 that involved reimbursements of plaintiffs expenses in a civil right's case. The controlling legal language specified that plaintiffs could recover *attorney's fees*, as part of the costs in bringing the case. What does the use of that phrase in this context designate? Does it include expenses an attorney charges her client for all aspects of the defense, including those paid to witnesses? Or does it include only fees paid for her services alone? You can ponder the linguistic meaning of 'attorney's fees' forever and come up with nothing because the answer must come from context. According to some commentators, Scalia missed this when he opted for the narrower interpretation.⁴

Another Scalia's dissent in *Smith v. United States* concerning what the Congress used the follow clause to assert.⁵

"Whoever ... uses or carries a firearm [in 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 was whether to trade a gun for drugs was to use a firearm in committing a crime. Scalia thought not.

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*

⁴ See Victoria Nourse (2016) *Misreading Law, Misreading Democracy*, Harvard University Press.

⁵ 508 U.S. 223, 241, 1993.

⁶ 18 U. S. C. § 924(c)(1) (2006).

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.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

Scalia correctly identifies *what question is asked* by one who says “Do you use a cane?” and *what is asserted* when one answers “No” to the prosecutor’s question “Have you ever used a firearm?” Applying his reasoning to the Smith case, he correctly concluded that in adopting the text cited above Congress *asserted* that using a firearm as a weapon in committing a crime is subject to additional punishment. However, he misstated his conclusion, stating that the *ordinary meaning* of “uses a firearm” pertains only to the uses of a firearm as a weapon.⁹

The majority rightly pointed out that this was false, but not for the right reason. The linguistic meaning of “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 a qualifying phrase—e.g., “as a weapon,” or “as an item of barter,” or by extracting needed content from the shared presuppositions of the language users – 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 seen as relying on obvious presuppositions in the communicative context.

⁷ *Id.* at 242 (emphasis added).

⁸ *Id.* at 242, n.1 (emphasis added).

⁹ 508 U.S. at 242, n.1.

The job of the Court was to infer *what Congress asserted* from the semantically unspecific linguistic meaning the statutory language plus the context of use.

This result requires revising textualism by identifying the content of a legal text with what the lawmakers asserted in adopting it. This isn't a retreat from originalism; it is an adjustment that brings it into line with current thinking about language. It is now common in linguistics and the philosophy of language to distinguish the meaning of a sentence from what is asserted 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.¹⁰

In some of his formulations Scalia implicitly recognized this. Many passages in Scalia (1997) describe the law to as what lawmakers *said* or *promulgated*. For example, in describing the widely accepted rule "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."¹¹ His insight is correct; it shouldn't be muddied with misleading talk about meaning.

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

When it is clear what the lawmakers asserted in adopting a text, the duty of judges is to deduce an outcome from that asserted content plus the facts of the case. Sometimes, however, no determinate outcome is deducible because the law is vague, and so neither determinately applies nor determinately fails to apply to the

¹⁰ See Scott Soames (2013) "Deferentialism," *Fordham Law Review* 82, 101-122; reprinted in Soames (2014), *Analytic Philosophy in America*, Princeton University Press, 320-341. See also Soames (2017a) "Deferentialism, Living Originalism, and the Constitution," Brian Slocum (2017) *The Nature of Legal Interpretation; What jurists can learn about legal interpretation from linguistics and philosophy*, Chicago University Press.

¹¹ Scalia (1997), p. 16.

relevant facts. Judges must then *precisify* vague legal contents to reach definite results. In other cases, relevant laws plus new facts determine inconsistent outcomes. In both types of cases, judges must modify legal content, thereby creating new law. Since Scalia believed that judges shouldn't legislate, he needed a way of grounding *judicial rectification* in some form of deference. However, he never articulated such a principle, and sometimes seemed to reject using the intent of the legislature to formulate one.

In speaking of legislative intent, he says:

You will find it frequently said...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?¹²

The expected answer, "It should not be so," is correct as far as it goes, but it wasn't Scalia's last word. He also distinguished subjective intent (as an aggregate of the aims and motives of individual legislators) from objective intent, inferable from the content of a law and its place in the larger body of law.

[W]e 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 *corpus juris*... "[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, *exactly, the meaning which the subject is authorized to understand the legislature intended.*"¹³

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." In an

¹² Ibid. p. 16.

¹³ Ibid. pp. 17.

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 in adopting the text, and, by aggregating, converge on a meaningful result is, as Scalia rightly suggests, absurd.

Objective intent is another matter. Scalia gives two examples. One involves resolving ambiguities.

Another 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.¹⁴

When the text contains an expression governed by linguistic conventions generating multiple meanings, resolution of the ambiguity is needed to determine what the legislature asserted. Since allowing *what the legislature meant or intended to say* to play this role doesn't threaten the identification of law with *what was said* in adopting the text, Scalia doesn't contest it. He also appeals to objective intent in correcting scribes errors.

I acknowledge an interpretive doctrine of what the old writers call *lapsus linguae* (slip of tongue), and what our modern cases call "scribe'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.¹⁵

In both cases – resolving linguistic ambiguity and correcting scribe's errors -- the interpreter uses the text as a whole to determine what the legislature *intended to say or assert*, which is then identified with what the legislature *did say or assert*,

¹⁴ Ibid., p. 16

¹⁵ Ibid., 20-21.

despite inartfully doing so. This is natural, and fits our ordinary treatment of slips of the tongue and other harmless errors of articulation. What Scalia doesn't do is use such intent-based disambiguation or correction to *substitute* what the legislature intended to say for what it actually did say. It was this harmony between original intent and original assertion that allowed him to acknowledge legislative intent as sometimes useful.

But why shouldn't objective legislative intent be more broadly useful? If objective intent can help decide which of two different things *the legislature said or asserted* in adopting an ambiguous or incorrectly articulated text, why shouldn't *what the legislature objectively intended the law to do* help us precisify vagueness or resolve inconsistencies? If the objective *intent* of the legislature is often rationally inferable, despite not being an aggregate of intentions of individual legislators, then surely the objective *goals, beliefs, and assertions* of the legislature are often rationally inferable, despite not being aggregated sums of the subjective attitudes of individual legislators. Scalia himself maintains that the legislature, like other collective bodies, does *assert* or *stipulate* that so-and-so. Presumably he would agree that 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*.

Scalia (1997) offers two reasons 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.¹⁶ Though laudable, these sentiments deprive originalists of crucial resources when rectifications of original asserted contents are needed to precisify vague content or amend inconsistent content. In these cases, the goal is to supplement, not supplant, original content to reach a verdict that comports with original intent.

The Need for Intent-Based, Gap-Closing Constitutional Interpretation

Scalia recognized that constitutional cases pose special difficulties.

There is plenty of room for disagreement as to what original meaning was, and *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...In such new fields, the Court must follow the trajectory of the First Amendment.”¹⁷

Scalia identifies two loci of controversy – the originally stipulated content of the First Amendment guarantee of freedom of speech (and of the press), and the application of that content to new technologies. This suggests that the latter controversy might persist even if the former is resolved. This will be so if the originally stipulated content is vague, and so neither determinately applies, nor determinately fails to apply, to some new technologies today. Scalia needs a principle, which he never stated, to govern the search for acceptable outcomes in such cases..

¹⁶ Ibid., 17-18.

¹⁷ Ibid., p. 45, my emphasis.

The point is illustrated by his concurring opinion in *Citizens United v. Federal Election Commission*.¹⁸ At issue was the 2002 McCain-Feingold 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 concurrence asked *Whose freedom is guaranteed – only individuals and newspapers, or groups of individuals, including those that are legally incorporated?* Noting that the speech of religious, educational, social, and political groups organized under general incorporation statutes was unregulated at the founding, he argued that to restrict such speech now would be to *abridge* the freedom of speech that then existed. His evidence supports the thesis that the common understanding of the assertion made by using of the free-speech clause 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, more troubling, issue. How, if the original content of the First-Amendment guarantee is as austere as this, do originalists 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.

¹⁸ 588 US 50 (2010),

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...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.¹⁹

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 deciding what the original asserted content was; it was deciding how to extend that content to new circumstances. Scalia’s description of the movie as *core political speech* reflects a conception of how the content of the First Amendment had already been extended long before the case was heard.

Was that extension justified? 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 they judged free speech and communication on matters of public or political importance to be a right of free citizens and a necessary feature of a self-governing republic.

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, it would be easier to reconcile his stated originalist principles of interpretation with the body of his free-speech jurisprudence. His opinion in *Citizens United* was originalist. Some others appear not to be.

¹⁹ 588 U.S. 310, 2010, *my emphasis*.

One borderline case is Scalia's dissent from the decision in *Hill v Colorado* 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... [T]he 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.²⁰

This provocative first paragraph of the dissent sets the tone of what is meant to be both a legal argument aimed at his fellow justices, and their successors, and a rhetorically powerful indictment of the Court aimed at a broader public audience. The legal argument is that the limitation on speech isn't content neutral, and so the restriction on personal counseling and conversation should be stricken from the statute. The political message is that the Court's obsessive insistence on constitutionalizing abortion robbed opponents of their democratic rights to play a role in determining abortion policy, and is now restricting their First-Amendment right to freedom of expression. Hence the rhetoric of the final section of the dissent. (Note the rhetorical force of the italicized words.)

[T]he public spaces outside of health care facilities [have] become...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...Those whose concern is for the physical safety and security of clinic patients...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 trying to persuade individual women of the rightness of their cause, will be deterred...As I have suggested...today's decision is not an isolated distortion of our traditional constitutional principles, but is one of many

²⁰ 530 U.S. 703 (2000)

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.²¹

Stripped of this final rhetorical flourish, the originalist credentials of Scalia's legal argument are questionable. The key premise of the argument, expressed in the first paragraph, is that if the statute's restriction on speech isn't content neutral, it violates the First-Amendment. Although that assumption is supported by precedent, it is not clearly supported by the original assertive content or the original intent of the 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.

Scalia's argument to the contrary is an extraordinary combination of naked political commentary, original-intent jurisprudence, and scathing criticism of the Supreme Court. In effect, he argues 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, does fall under the *original intended content* of the First Amendment (though of course he doesn't say “intended content”). 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 what Scalia regarded to be wrongly decided cases, the Court removed the contentious issue of abortion from the give and take of normal democratic processes, he saw those decisions as leaving opponents few avenues for changing the legal situation imposed on

²¹ Ibid.

them. To deny them even this venue to make their case to their fellow citizens would, he suggested, be to allow wrongly decided Fifth Amendment “due process” cases to weaken the free-speech guarantee of the First Amendment. This argument, though rooted in strong originalist objections to earlier decisions is not, I am afraid, very well directed to the Colorado statute. No matter, Scalia’s rhetorical guns were aimed at winning future battles.

Originalist worries are also raised by his position in other cases in which he found deviations from content neutrality to be unconstitutional, despite the fact that the particular form of communication or expressive conduct was hardly *core political speech*. In *Texas v Johnson* Scalia joined the majority in ruling that burning the American flag was constitutionally protected.²² In *R.A.V. v City of Saint Paul* he invalidated a city ordinance prohibiting swastikas, burning crosses, and other symbols known to arouse “anger, alarm, or resentment...on the basis of race, color, creed, religion, or gender.”²³ Writing for the Court, he ruled that although the prohibited symbolic conduct might be a species of unprotected “fighting words,” and so not protected free speech, the government may *not* selectively ban some fighting words while permitting others.

The relation of these opinions to the original assertive content of the First Amendment, and to its original intent of protecting core political speech, 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

²² 491 US 397 (1989)

²³ 505 US 377 (1992)

by the conduct. For these reasons, it is doubtful that the conduct determinately falls under the original assertive content of the First Amendment.

Some may argue 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 to reach verdicts. Even then it is not obvious that one could reach Scalia's results. 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 discussion. Thus, I doubt that Scalia's decisions in these cases can be justified by his originalist philosophy of interpretation.

His opinion in *Brown v Entertainment Merchants Association* extended his exquisite sensitivity to apparent violations of content neutrality to another form of expressive content.²⁴ The issue in *Brown* concerned an attempt by the state of California to restrict violent video games for minors. Writing for the majority, 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), 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 is that relevant? Perhaps because if there is no tradition of such restrictions, then there were no such restrictions at the

²⁴ 564 US 76 (2011)

founding, in which case to add one would be to *abridge* a freedom enjoyed then. But that argument is weak, since no similar form of expressive or symbolic conduct existed then. In addition, the propositional content of the games, to the extent they have such coherent content, falls well 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.

Deferentialist Originalism

Three changes are needed to extract a defensible originalist philosophy of interpretation from Scalia's theory and practice. 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; it should be identified with what lawmakers or ratifiers originally used it to assert or stipulate. That 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 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 the examples used there to support his theory and some of his own judicial practice.

Second, cases in which it is necessary to judicially rectify original content must be recognized. The initial duty of a judge is to ascertain the original asserted content and to reach the verdict it determines. But when the content is vague, no definite verdict may be determined; when it is inconsistent with surrounding law plus facts presented in a case, inconsistent verdicts may be determined. In these

cases, the judge must modify existing legal content by deferring to the original intent of the lawmakers, as Scalia himself implicitly did in *Citizens United* and *Hill*.

Third, when rectifying original content, the task is to make a minimal change in existing content that maximizes original intent. This intent is not, as Scalia observed, a sum of private understandings of individual lawmakers, or of the factors motivating them. It is rationally derived from viewing the original asserted content in light of the publically offered and understood reasons for it. Although this use of intent is a clear emendation of Scalia's explicit textualism, it is one that reflects not only an aspect of his practice, but also that of virtually every other jurist.

Defending Deferential Originalism

The question of whether this deferentialist version of originalism is correct can be taken in two ways. One queries whether it accurately describes the legal duties of judges in the United States today. The other asks whether it is *normatively* superior to other conceptions of what the legal duties of those judges *ought to be*. The questions are independent. Since I have sketched my answers elsewhere, I won't repeat them here.²⁵ I will, however, relate them to Scalia.

What the legal duties of judges are is, at bottom, a question of what the body politic recognizes to be the basis of their legal authority. Since the written Constitution is still that basis, most prominent Supreme Court decisions have been clothed in originalist rhetoric and reasoning.²⁶ This, more than anything else, provided the fuel that fired Scalia's powerful and influential rhetoric. Yes, there have been a number of prominent, widely accepted, nonoriginalist results. But many remain vulnerable to Scalia-style attacks because the originalist understanding of

²⁵ See Soames (2013).

²⁶ See William Baude (2015) "Is Originalism Our Law," *Columbia Law Review* 115:2349.

the role of the judiciary remains embedded in the American psyche. No one knew this better than Scalia.

It should also be noted that respect for precedent is itself originalist. Because of the constitutional authority of the Supreme Court, all precedents are law, and so deserve a degree of deference, even though the bad ones can be, overturned, limited or isolated, by revisiting the Constitution itself. Scalia knew that, like any workable theory, originalism doesn't demand perfection.²⁷

One's normative evaluation of the role of the judiciary is tied to one's conception of the American project. During his 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, cognitive elite whose claim to expertise, real or imagined, separated them from ordinary citizens, and provided them with privilege and influence. He saw these changes as threats to our representative government. The man behind the passionate opinions felt 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 derived from our deepest values using all the information we can gather. These are, he insisted, best made by the people and their elected representatives, not unelected justices or bureaucrats. In short, 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.

²⁷ See Soames (2017b) section 5.