

## **Toward a Theory of Legal Interpretation**

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By “legal interpretation” I mean the legally authoritative resolution of questions about what the content of the law is in its application to particular cases. It is the interpretation of legal texts *by legally authoritative actors*. One aspect of it is epistemological and one is constitutive. The epistemological task is to ascertain the content of laws resulting from previous actions of other legally authoritative sources. The constitutive task is to render an authoritative judgment that itself plays a role in determining what the content of the law is. Sometimes this judgment changes the content of the laws, or legal provisions, that were the focus of the epistemological task.

The content of a law is (to a first approximation) that which the appropriate lawmakers assert, stipulate, or otherwise prescribe by adopting an authoritative text. Just as the assertive content of an ordinary conversation cannot, in general, be identified with the meanings of the sentences used there, or with conversationalists’ goals in saying what they do, so the assertive or stipulative content of a legal text cannot, in general, be identified with the ordinary or technical meanings of the sentences in the text, or with the policy goals motivating lawmakers to approve it. Nor can the content of the text be identified with any normative improvement of what they asserted or stipulated, or with any idealization of their speech act, such as what they would have stipulated had they known all relevant facts. The content of a legal text is determined in essentially the same way that the contents of other texts or linguistic performances are, save for complications resulting from the fact that the agent of a legislative speech act is often not a single language user but a group, the purpose of the speech act is not usually to contribute to the

cooperative exchange of information, but to generate behavior-modifying stipulations, and the resulting stipulated contents are required to fit smoothly into a complex set of pre-existing stipulations generated by other actors at other times.

Lawmakers, in my broad sense, are those whose official actions and linguistic performances are constitutive of the contents of the law. They include legislators enacting statutes, administrative bodies issuing rules implementing them, ratifiers of constitutions, voters on ballot initiatives, and judges issuing precedent-setting opinions. In the sphere of “private law,” lawmakers include the parties to a contract, those responsible for legislation regulating the law of contracts, and judges as well as other official bodies adjudicating contractual disputes. Crucially, legally authoritative interpreters of the law are included among lawmakers the actions of which are subject to further interpretation.

When legal interpretation is understood as the interpretation of legal texts by legally authoritative actors, it naturally follows that such interpretation is itself law governed. The governing legal rules determine the responsibilities of officials who interpret legal texts and make authoritative decisions about them. These rules may or may not be codified in statutes, or expressed in written constitutions. Whether or not they are so codified, they are binding social conventions concerning the duties of specific legal actors. Since the contents of these duties may vary from one legal system to the next, what constitutes *correct* legal interpretation may vary from system to system.

What is the content of the general legal rule governing interpretation and adjudication? Here is my rough and ready take on the content of the legal norm.

JR. Courts are not to legislate, but are to apply the laws adopted by legislative authorities to the facts of particular cases. When the content of the laws fails to provide reliable guidance in determining a unique acceptable legal outcome – either because it leads to inconsistent outcomes, or because it fails to lead to any

outcome, or because it leads to a an outcome that is both patently absurd and unforeseen (in cases in which a single, definite, and otherwise acceptable outcome is needed) -- the task of the judicial authority is (i) to discern the predominant legislative rationales of the lawmaking bodies in adopting the laws or legal provisions, and (ii) to fashion the minimal modification of existing legal content that removes the deficiency and allows a decision to be reached, while maximizing the fulfillment of the discernable legislative rationales of the relevant laws or legal provisions.

Several distinct questions can be asked about this contentious formulation. First:

Q1. Is this, or some such, rule, in fact, part of our legal system (or some other system)?

This is a broadly sociological question, to be discovered by empirical investigation of the accepted governing norms of a given legal culture. I believe that the rule is a reasonable approximation of the law governing the legal interpretation and adjudication in some courts in the United States. But I don't think I am *obviously* right about this. The situation is muddled by the fact that the norms governing legal interpretation and adjudication continue to be fought over. When it comes to the Supreme Court of the United States, as well as those of individual states, there has been, and continues to be, movement toward a more expansive and overtly legislative role for the Court, not unlike the British House of Lords of the late nineteenth century<sup>1</sup>. Whether or not I am right that something like the more conservative governing norm is, though under challenge, still more or less in place is not a philosophical or a normative question, but an empirical one.

The second question one can ask about the governing norm I have formulated is:

Q2. Should our legal system (or some other designated system) incorporate it?

This is a moral and political question. It shouldn't be worth saying, though I am afraid it is, that for some legal systems and some candidates for governing legal norms, the

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answer to Q1 may be “Yes, it is part of the legal system,” even if the answer to Q2 is “No, it shouldn’t be.” In point of fact, I believe that the rule I have sketched is a reasonably good one that not only does, but should, govern the practice of judicial interpretation in many U.S. Courts. That is a matter of political philosophy.

The question I am most interested in today differs from the previous two.

Q3. What precisely does my purported legal rule JR require of interpreters, how much latitude does it allow them, and what factors are they to take into account in their interpretations?

To answer this question, one must distinguish it from Q4.

Q4. What is the morally right thing for judges and other legal interpreters to do in particular cases; what factors is it morally right for them to take into account?

Q4 is a nakedly moral question; whereas Q3 is not. Answers to Q3 specify the *delegated powers and responsibilities* of certain legal actors. Whether or not these actors should always fulfill those responsibilities, as opposed to violating the legal rules governing them in the name of a higher good, is an independent moral question, which should not be prejudged. Though it may be indelicate to say so, there is nothing but intellectual confusion to be gained by denying the possibility that reaching a morally correct decision may *sometimes* require the members of a court of last resort to overstep, not only their *actual* legal authority, but also their *legitimate* legal authority in a system in which the legal norms governing their actions are politically and morally optimal.

Finally, I distinguish all the questions so far raised from the “realist” question:

Q5. What do judges and other legal interpreters actually do? What putative legal norms, if any, do they follow in their interpretations?

For me, the chief interest in answering this question lies in the light that doing so sheds on the other questions – particularly the first, empirical, question about the content of the legal norms governing interpretation. To the extent that judges routinely disregard a legal

norm governing their actions, without being rebuked, overturned, disregarded, or ignored by other legal and political actors, their behavior erodes the norm, and may lead to its replacement by another norm. This is especially evident for a court of last resort, like the United States Supreme Court. There is, I think, a trend in the jurisprudence of this court in the past 60 years that has put the norm of legal interpretation I have articulated under stress. For example, it is arguable that much of the jurisprudence involving the equal protection clause of the Fourteenth Amendment to the Constitution,<sup>2</sup> substantive due process,<sup>3</sup> the Civil Rights Act of 1964,<sup>4</sup> and the alleged general right of privacy “emanating” from “penumbras” of limited privacy rights mentioned in different constitutional amendments<sup>5</sup> – does not easily fit into the traditional model of politically impartial interpretation of the laws. If, in the end, it doesn’t fit, then we face a difficult dilemma: we must either rethink much of this jurisprudence and replace some of it, or rethink the traditional understanding of the relationship between democratic legislation and judicial interpretation, and replace it with a governing norm that elevates the judiciary and legitimizes its expanded political role.

Since resolving such a dilemma is a daunting task, we do well, before undertaking it, to investigate more closely what precisely the traditional norm of legal interpretation demands and allows. With this in mind, I return to Q3, and ask, “What factors go into interpretation?” and “What latitude do legal interpreters have?” As I indicated earlier, interpretation has both an epistemological and a constitutive side. The epistemological

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<sup>2</sup> US Const. amend. XIV.

<sup>3</sup> *See, e.g.*, *Beauharnais v. Illinois*, 343 U.S. 250, 277 (1952) (Reed, J., concurring).

<sup>4</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

task is to determine the content of the existing law bearing on the case at hand. The rough and ready rule for doing this is originalist, even textualist, in nature – but not the form of textualism most commonly espoused. Existing legal content is, I think, neither *original intent* nor *original meaning*; rather, it is the content originally asserted or stipulated by lawmakers in adopting the text. Contemporary philosophy of language and theoretical linguistics distinguish *the meaning of a sentence S* from its *semantic content relative to a context*, both of which are distinguished from (the content of) *what is said, asserted, or stipulated by an utterance of S*. Although in some cases the three types of content coincide, while in still others the final two do, there are many cases in which the third differs from the other two.<sup>6</sup> In every legal case in which there is such a difference, it is the third – asserted or stipulated – content that is required by any defensible form of textualism. Failure to recognize this – due to confusing the three types of content with one another -- has led to errors in the law itself, as well as to theoretical errors about the relation of the law to its authoritative sources.<sup>7</sup>

The tendency to confuse the meaning of a sentence in a text with what the sentence was used to say or stipulate is all too common. The result confuses two different interpretive principles – fidelity to the meaning of the legislature’s statutory language vs. fidelity to what the legislature asserted or stipulated in using that language. This confusion is evident in Justice Antonin Scalia’s otherwise brilliant dissent in *Smith v. United States*, concerning the question whether an attempt to trade a gun for drugs

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<sup>6</sup> See, Soames (2009b), “The Gap between Meaning and Assertion: Why What We Literally Say Often Differs from What Our Words Literally Mean,” pp. 278-97 in Soames (2009c), *Philosophical Essays*, vol. 1, Princeton and Oxford: Princeton University Press; Soames (2009a), , and chapter 7 of Soames (2010).

<sup>7</sup> Neale (2007), “On Location,” in M. O’Rourke and C. Washington, eds., *Situating Semantics: Essays in Honor of John Perry*, Cambridge: MIT Press, pp. 251-393; Soames (2009a), “Interpreting Legal Texts: What Is, and What Is Not Special about the Law,” pp. 403-23 of Soames (2009c).

constituted *a use of a firearm in a drug trafficking crime*.<sup>8</sup> Dissenting from the majority ruling that it did, Scalia argues:

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.<sup>9</sup>

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 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.*<sup>10</sup>

Here, Scalia is strikingly correct both about *what question is asked* by a use of the interrogative sentence “Do you use a cane?” in the situation imagined, and about *what is asserted* when an agent answers “no” to the prosecutor’s question “Have you ever used a firearm?” in his second scenario. The proper lesson to be drawn from these scenarios for *Smith v. United States* is that *what the legislature asserted or stipulated* in using the sentence “Whoever ... uses or carries a firearm [in the course of committing a crime of violence or drug trafficking], shall, in addition to the punishment provided for such [a] crime ... be sentenced to imprisonment for five years,”<sup>11</sup> was that the *use of a firearm as a weapon* (or carrying it for that purpose) is subject to additional punishment. This is

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<sup>8</sup> 508 U.S. 223, 241 (1993).

<sup>9</sup> *Id.* at 228-42.

<sup>10</sup> *Id.* at 242, fn. 1 (emphasis added).

what Scalia would have concluded, had not he, and the rest of the Court, confused the meaning of that sentence with what it was used to assert.

Unfortunately, due to this confusion, he formulated his conclusion differently, maintaining that the *ordinary meaning* of “anyone who uses a firearm...” pertains only to the uses of a firearm as a weapon.<sup>12</sup> This is not so, as the majority correctly points out..

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 every day meaning of that term*. Petitioner “used” his [gun] in an attempt to obtain drugs by offering to trade it for cocaine.”<sup>13</sup>

Of course, Smith’s action *can be described* that way, and, of course, the statute employs the phrase “uses a firearm” with its ordinary literal meaning. The reason the action *can be so described* is that the ordinary meaning of “uses an N” is *silent* about how the thing in question is used. Because of this, when the phrase occurs in a sentence, the resulting assertion must be *completed*, either by the content provided by an explicit qualifying phrase – such as “as a weapon,” or “as an item of barter” – or (when no such qualifying phrase is present) by content that is presupposed by those using the sentence to assert or stipulate something. Since the latter option was employed by the Congress, the job of the Court was to infer *what Congress asserted* from the incomplete semantic content provided by the statutory language. What textualists should be seeking is fidelity to what the legislature asserts or stipulates, not what the sentences used to do so mean.

The focus on meaning rather than assertion or stipulation has also led textualists to wrongly dismiss the role of legislative intent in legal interpretation. Taking the

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<sup>11</sup> 18 U. S. C. § 924(c)(1)

<sup>12</sup> Smith at ?

<sup>13</sup> *Id.* at 228.



contents of legal texts to be “their ordinary meanings,” Scalia concludes that inquiries into legislative history to discover the *intent* of the lawmakers are irrelevant. Worse, he worries that formidable epistemic problems often make it impossible to identify true legislative intent, leaving jurists free to read their own policy preferences into texts under the pretext of reading the legislative mind. Note how Scalia leans on the contrast between *what is said* versus *what one means or intends to say* to support this extreme view about irrelevance of legislative intent in these two passages from *A Matter of Interpretation*.

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.’ . . . Unfortunately, it [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 the statute is clear, that is the end of the matter. Why should that be so, if what the legislature *intended*, rather than what it *said*, is the object of our inquiry. . . .<sup>14</sup>

When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant* . . . your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . .<sup>15</sup>

While Scalia is right to give primacy to *what was said* in adopting a given legal text over what *further* legislative goals were intended by legislators, this quite defensible priority must not be confused with giving the *linguistic meanings* of the sentences they used priority over *all* their intentions, and it cannot be used to justify the claim that when *linguistic meaning* is clear, all appeal to intentions is to be ruled out.

If Scalia weren’t so prone to confuse what is said with the meanings of the sentences used to say it, he would see this. Since what language users *intend* to say, assert, or stipulate is a crucial factor, along with the linguistic meanings of the words they

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<sup>14</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 16 (1998)

<sup>15</sup> *Id.* at 18.

use, in constituting what they *do* say, assert, or stipulate, the intentions of lawmakers are directly relevant to the contents of the laws they enact. In many cases, these constitutive intentions are completely clear, as are the relevant assertive or stipulative contents. When this is so, Scalia is right in maintaining that no further appeal to intent is needed – provided that what is said is not crucially vague, that what is said together with the facts of the case is not jointly inconsistent with other equally authoritative laws or legal provisions, and that applying the asserted or stipulative content of the text enacted does not lead to transparently absurd and unforeseen results that fail to advance, or even subvert, the lawmakers’ legislative rationale. Subject to these provisos, what is said is primary, even though certain intentions are constitutive of it, and even though other intentions may be brought into play by different sorts of conflict.

For these reasons, we cannot accept Scalia’s dismissal of intentions at face value. Nevertheless, his worries have a point. They are, I believe, grounded in a proper understanding of the rule that courts are to apply the law enacted by legislative authorities to the facts of particular cases, avoiding constitutive changes in the content of the law except in special, designated circumstances. Although he mischaracterizes the rule in certain ways, he is right both in judging that some such rule is operative in our legal system, and in taking it to be normatively desirable. This makes it all the more important to correct his errors, in order to elucidate more clearly what is really going on. Since legislative intent of two different sorts play at least two distinguishable roles in legal interpretation, it is worthwhile to begin with a fundamental distinction.

The most basic distinction between different types of legally relevant intentions is between *illocutionary* intentions – to say, assert, or stipulate that P, by enabling one’s

audience to recognize one's intention to do so – and broader *perlocutionary* intentions – to cause or bring about something as a result of one's having said, asserted or stipulated that P.<sup>16</sup> For example, members of a legislative town council might intend to reduce the risk of sexual assault against the town's school children by enacting a law prohibiting them from accepting rides from strangers. They enact the law by adopting a text with the illocutionary intention that their linguistic performance be recognized as asserting or stipulating that, henceforth, accepting such rides to and from school shall be a misdemeanor. Since it is this intention that gives the law its content, no theory of legal content, or of legal interpretation, can afford to dismiss it.

The role of *illocutionary* intentions in determining what is asserted or stipulated in adopting a legal text makes identifying them a central component of the first, epistemological, part of the interpretative task. Although this part of the task is often routine, there are cases in which it is not, including those involving uses of vague language,<sup>17</sup> referential uses of expressions to make assertions about things to which those expressions do not semantically apply,<sup>18</sup> and uses of grammatically complete, but semantically underspecified, sentences, the contents of which must be contextually filled out in order for an asserted or stipulated content to be reached.<sup>19</sup>

Once the epistemological task of identifying the asserted or stipulated contents is complete, legal interpreters may ignore the lawmakers' perlocutionary intentions unless

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<sup>16</sup> See John L. Austin (1962) for the distinction between illocutionary and perlocutionary acts.

<sup>17</sup> See Soames forthcoming, "Vagueness in the Law," in Andrei Marmor, ed., the *Routledge Companion to the Philosophy of Law*, and also pp. 418-421 of Soames (2009c).

<sup>18</sup> See pp. 407-10 of Soames (2009c).

<sup>19</sup> pp. 412-15 of Soames (2009c).

one of three situations holds.<sup>20</sup> The first occurs when the asserted or stipulative content is vague, and facts crucial to the resolution of the case fall within the range of this vagueness. In these cases, no definite verdict is entailed by the facts plus the pre-existing legal content. In many cases of this sort, the court's duty is to modify the vague content by partially precisifying it so as to reach the result that most closely conforms to the legislators' rationale for adopting the law or legal provision.<sup>21</sup> The rationale of a law is, to a first approximation, what the legislators intended to accomplish by adopting it. To discover this, interpreters need to identify certain of the lawmakers' perlocutionary intentions, which often requires an inquiry into legislative history of precisely the sort disparaged by Justice Scalia.

The second kind of interpretive situation in which lawmakers' perlocutionary intentions are relevant to legal interpretation is one in which several equally authoritative laws bear on a case in opposite ways, with the result that inconsistent verdicts are entailed by the contents of the laws plus the particular facts of the case. When this occurs, the legal interpreter may be required to fashion the minimal modification of existing legal content that removes the inconsistency and allows a single unique verdict to be reached, while maximizing the fulfillment of the discernable legislative rationales of the laws in question. Again, this appeal to legislative rationale is an appeal to certain *non-illocutionary* intentions of lawmakers.

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<sup>20</sup> The three types of situations summarized below are discussed in greater detail in my "What Vagueness and Inconsistency Tell Us about Interpretation," in Marmor and Soames *The Philosophical Foundations of Language in the Law*, Oxford: Oxford University Press, 2011.

<sup>21</sup> As discussed in Soames forthcoming, different accounts of what vagueness is sometimes lead to different legal results in cases like this, and to different elucidations of the function of vagueness in law and interpretation.

The final interpretive situation in which perlocutionary intentions are relevant is one in which the facts of a particular case generate an inconsistency not between the contents of different statutes, but between the content of a single law and the transparent purposes for which it, or related laws, were adopted. In these cases, the law as it exists, plus the facts of the case, entail an unforeseen result that does nothing to further the purposes for which it was passed, while violating either its rationale, or the rationales of other legal provisions. In such cases, the legal interpreter may, again, be required to make the minimal modification of the content of an existing law, while maximizing the fulfillment of discernable legislative purposes.

Lest this discussion seem too abstract, consider again the imaginary ordinance -- “It shall be a misdemeanor in the Township of Plainsboro for children on their way to or from school to accept rides in automobiles from strangers” -- enacted for the purpose of putting a stop to a rash of sexual assaults by men from out of town picking up high school girls after school. Imagine that months after the wave of crimes has abated, Susan, a high school senior late for her afterschool job at the Mini Mart, accepts a ride from an obviously sweet, distinctly undangerous, little old lady, whom she doesn’t know, but who works at the school cafeteria, and lives next to the Mini Mart. Since in this circumstance a literal application of the law would harm Susan, without serving the purpose for which the ordinance was clearly intended, the local magistrate might defensibly rule in Susan’s favor in a way that narrows the legal effect of the ordinance. Surely, this exercise of judicial discretion is justified.

It might even be expected. Why, after all, might the town council have formulated the law as it did? Perhaps they considered various formulations explicitly referencing the

danger they were concerned to minimize, e.g. “It shall be a misdemeanor in the Township of Plainsboro for children on their way to or from school to accept rides in automobiles from *dangerous* strangers.” Such formulations might well have been rejected on the sensible grounds that asking the children to make judgments about who was dangerous and who was not could be counterproductive, and also that including such a contentious term in the statute might easily make for uncertainty in enforcement and difficulty in prosecution. Better, the council members may have reasoned, to leave the language unadorned, and let the judge be guided by their evident intention -- to reduce unnecessary risk of assault to the town’s school children -- when sorting out cases in which the ordinance should apply from those in which it shouldn’t.

To adopt this policy is to put anyone accepting a ride from a stranger on notice that he or she may be subject to criminal penalties. The council members may plausibly have taken it to be predictable that innocent exceptions would come to be recognized, and, eventually, would lead to the carving out of special cases that would narrow the effective legal content of the ordinance. However, they may also have regarded the precise identity of such carve outs to be unforeseeable in advance, and best arrived at piecemeal. In any case, the result was to leave the boundaries between them and cases in which one’s behavior in accepting a ride might make one vulnerable to legal penalty vague and usefully unpredictable. Seen in this light, passing the ordinance establishes a strong, but rebuttable, presumption against the behavior to be discouraged. Expressing the presumption in a broad and open-ended way provides motivation to avoid any behavior that might fall into that category. Recognizing that presumption to be judicially rebuttable reduces the disadvantages of the (overly) universal description of that behavior

in the ordinance itself. All in all, the counsel members may reasonably have thought, a good bargain.

A similar dynamic is at work between original enactment and discretionary interpretation in constitutional law – which is often framed in sweeping and easily understood language that requires considerable adjustment over time. Think of the portion of the First Amendment to the United States Constitution guaranteeing freedom of speech.

Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>22</sup>

Despite the broad, unqualified language of the amendment, the Supreme Court has acknowledged that there may be forms of speech that are sometimes validly restricted by law, including defamatory and libelous speech,<sup>23</sup> commercial speech,<sup>24</sup> publication of state secrets injurious to national security,<sup>25</sup> and incitements of violence (including the use of “fighting words”).<sup>26</sup> Today there are even legal restrictions on political speech, in the form of campaign contribution restrictions. Although the correctness of some of these

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<sup>22</sup> U.S. Const. amend. I (emphasis added).

<sup>23</sup> See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (acknowledging that false and defamatory statements may be unprotected if made with “actual malice”).

<sup>24</sup> See, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 566 (noting that commercial speech may be restricted if it concerns illegal activity, is misleading, or if the government’s interest is substantial, the restrictions directly advance the government’s asserted interest, and the restrictions are no more extensive than necessary to serve that interest).

<sup>25</sup> See *Snepp v. United States*, 444 U.S. 507, 509 n.3 (implying that the “compelling interest” of national security could justify the government imposing some restrictions on the activity of its employees that would otherwise be protected by the First Amendment).

<sup>26</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (stating that “fighting words”—“those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”—are a limited exception to the right of free speech); see also *Brandenburg v. Ohio* 395 U.S. 444, 447 (1969) (implying that free speech guarantees may not prohibit the State from proscribing advocacy directed at inciting imminent lawless action and likely incite such action).

exceptions is contentious, and the scope of any of them could be challenged, there is, I think, no serious argument supporting the conclusion that what the First Amendment requires is precisely what its words seem, literally, to mean – namely, that there shall be no law whatsoever restricting *in any way* what one may choose to say, or the press may choose to publish.

To understand this gap between the meaning of the English sentence “Congress shall make no law abridging the freedom of speech, or of the press,” and the content of the (relevant part of) the First Amendment as we accept it today, it is important first to recognize the gap between the meaning of that sentence and that which the framers and ratifiers asserted in adopting it. Surely, it is safe to assume, they did not take themselves to be endorsing a complete ban on all conceivable laws governing all conceivable speech – i.e., they were not asserting what the sentence they used literally meant. There are, it is natural to think, two significant contributors to this gap between meaning and assertion. First, it may plausibly be argued that ‘freedom of speech,’ as used by the framers and ratifiers of the First Amendment, was already a legal term of art, the meaning of which was narrower than the literal (compositionally determined) meaning of the phrase in English – which is roughly, “the freedom to speak (without restriction).” Rather, the argument goes, it was understood along the lines “the freedom to speak *in ways long recognized as protected and legitimate in common law*.” Though these ways were, to be sure, vague and open-ended, it would be foolish to suppose that they didn’t provide an important starting point for future discussions of the distinction between protected and unprotected speech. However, it would also be foolish to suppose that they rigidly established all relevant parameters for establishing the contours of this distinction as we



recognize today. This brings us to the second contributor to the gap between the meaning of the framers' sentence and the assertion they used it to make. Since the range of quantified expressions of the sort *no law ...* on a given occasion of use is determined by the illocutionary intentions reasonably attributed to users of the phrase, there is room to view the asserted or stipulated content enacted by the framers of the First Amendment to be both something less than a complete ban on all conceivable laws limiting the freedom to speak in ways then long recognized as protected and legitimate in common law, and something more than a blank check to impose restrictions on new types of speech not previously contemplated (and thus not so recognized). If this is right, then the original assertive content enacted with the ratification of the First Amendment must be seen as considerably more nuanced than the literal meaning of the sentence used to express it. Even so, however, the amendment's original assertive content surely did not encompass all the exceptions (and expansions) that have now come to be recognized as legitimate. Rather, these accretions are the result of legitimate legal interpretation and adjudication.

This interpretation and adjudication is a vastly more important and complicated version of the same template on which the simple story about the magistrate's interpretation of the ordinance passed by the Plainsboro Town Council was based. The key point was the Town Council's goal of reducing sexual assault, their adoption of a broadly formulated legislative stipulation as a means to that end, and their anticipation that future adjudication would lead to piecemeal refinements by carving out innocent but unanticipated exceptions preserving their original rationale. A similar, though admittedly hypothetical, story can be told about a line of reasoning open to the framers and ratifiers of the First Amendment. What was wanted, we may imagine, was a strong, but

rebuttable, legal presumption against the passage of laws by Congress regulating the freedom of speech, or of the press.<sup>27</sup> The sweeping, open-ended content of the language used was, we may suppose, reasonably intended to put present and future members of Congress on notice that any law restricting freedom of speech, or of the press, risked being judged unconstitutional (and so invalid).<sup>28</sup> We may further suppose that it was anticipated, at least by some, that, over time, reasonable exceptions to the prohibition would come to be recognized, with a consequent narrowing of the legal content of the amendment's guarantee. This is not to say that the precise scope and contents of these exceptions could be foreseen. What could be foreseen was that the process by which the exceptions would come to be recognized would be piecemeal, and that the boundaries between them and the laws to which the prohibition would continue to apply would remain vague and usefully unpredictable. In short, the First Amendment provision on freedom of speech, and of the press, would amount to a strong, but rebuttable, legal presumption discouraging the sort of legislation the framers and the ratifiers wished to limit.<sup>29</sup> Not perfect perhaps, but, again, not a bad bargain – and well within the range of acceptable interpretation provided by the traditional conception of the norm governing legal interpretation formulated above (JR). If this is what it takes to have a “living Constitution,”<sup>30</sup> then, long live the Constitution!

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<sup>27</sup> In the interest of simplicity, I here put aside the other freedoms covered by the amendment.

<sup>28</sup> Who might make that judgment, and what its consequences would be, are, of course, historically complicated matters, since when the First Amendment was ratified judicial review did not yet exist. For purposes of rational reconstruction, I put this complication aside.

<sup>29</sup> Here, and throughout, I use the term ‘legal presumption’ or simply ‘presumption’ in their ordinary senses, which are looser than their technical understanding in the law as designating a rule shifting the burden of legal proof. In the sense in which I use the term, a legal presumption is a policy to be followed by relevant legal actors (which need not concern the burden of legal proof).

<sup>30</sup> Scalia explains his use of this term at pp38 and following of *A Matter of Interpretation*.

What I have said up to now about the traditional model of legal interpretation rests on the assumption that legal interpreters often are able to discern the purposes of a piece of legislation. The identification of such purposes typically occurs in the second, constitutive, stage of interpretation -- which calls for interpreters to make normative judgments about what modifications of existing legal content *best* advance the lawmakers' legislative rationale. Identifying these purposes is primarily a descriptive task that needn't involve subscribing to them. However, it does require clarity about the kinds of purposes one is looking for.

The search for legislative rationale is *not* a search for causally efficacious factors that motivated the required number of lawmakers to enact the law or legal provision. In addition to being private, and often difficult to discern, these motivating factors may be as individual and various as the legislators themselves. An individual lawmaker may be motivated by personal or political self-interest, a desire to advance the economic interests of friends or former associates, devotion to the political fortunes of a particular faction or party, or identification with a privately held, or publically expressed, ideology. Any attempt to aggregate these, and identify the dominant motivators of the relevant group or majority, will, typically, face severe epistemic obstacles. Whether or not these obstacles can ever be overcome in interesting cases, the attempt to do so in the service of legal interpretation is fundamentally mistaken. The purposes of a law or other legal provision, sought in the adjudication of hard cases for which a constitutive judicial decision is needed, are *not* the causally efficacious motivators that produced the law or provision, but the chief *reasons* publically offered to *justify* its adoption.

In the simple case alluded to earlier of a Town Council adopting an ordinance prohibiting school children from accepting rides from strangers, the purpose was to reduce the risk of sexual assault on trips to, and from, school. This, we may imagine, is what the local newspaper agitated for, and how the council members explained and defended their action. Whatever private personal or political motives they may have harbored are irrelevant. The same is true of complicated real-life cases, like the Affordable Healthcare Act that passed the United States Congress in March of 2010..<sup>31</sup> Among the motivators of individual lawmakers were political payoffs in the form of special benefits for their states or districts, political contributions from groups favoring, and companies profiting from, the legislation, fear of retaliation from the administration and its allies, a desire to advance the fortunes of their party and the agenda of their new President, as well as an ideological commitment to expanding government control over the economy and ushering in a more socialistic system of medicine and political economy. However, none of these were among the purposes of the legislation, in the sense relevant to subsequent legal interpretation. Rather its chief purposes were, (i) expansion of health insurance among the previously uninsured, (ii) reduction of the total amount spent on health care without jeopardizing quality, (iii) reduction of its cost to most citizens, including the poor who would be more heavily subsidized, (iv) equalizing access to health care and health insurance, and (v) making both more reliably available by severing their connection to employment.

Since these were central elements of the public rationale offered for the Affordable Healthcare Act, the bills' purposes are easily discernable, and recognizing

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<sup>31</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 42 U.S.C.).

them does not presuppose endorsing them. In this case, knowledge of legislative purposes is relatively unproblematic, and does not involve substituting the normative judgments of legal interpreters for those of legislators. Genuine normative issues can be expected to arise when details of implementation collide with presently unappreciated facts in ways that bring either the chief purposes of the bills, or the more specific, subsidiary purposes behind particular sections or clauses, into conflict with the contents of the bills' many provisions. At that point normative decisions will be required in implementation and administration, as well as in likely judicial challenges. However, the normativity involved is defensible, and, I believe, easily conforms to the limitations recognized by the essentially conservative conception of the role of the courts, and other legal interpreters of complex legislation, encapsulated in the rule JR.

Although this discussion barely scratches the surface, its analytical framework applies to many instances of legal interpretation, of which constitutional interpretation is a particularly good example. Often, constitutional provisions are stated in language the broad purpose of which is plain, even though the assertive content of that language is, by design, overly general. The intent is to articulate a clear, enduring normative goal, the advancement of which, over time, will involve concrete implementations that cannot be foreseen. The overly general content of the provision keeps the normative goal in mind, while signaling that although care must be taken to adhere to it, the actions counted as doing so may not always strictly conform to the literal content of the provision, but rather are, to some extent, up for negotiation. The foundational feature of the law exploited in this process is the necessary role of interpretation in resolving conflicts that arise when

the purposes a law is designed to serve clash with literal applications of its existing content in new cases.

Though the legislative function inherent in this procedure is unavoidable, it must also be limited, lest the Supreme Court's traditional deference to constitutional and other democratic authority be undermined, and the legal rule governing its position in our system of government be subverted. The Court is no House of Lords, with the authority to veto or amend any legislation with which it has policy disagreements. Its proper role is to legislate only when it must, (i) in order to fit vague laws to borderline cases in ways that advance the lawmakers' legislative rationale, (ii) in order to resolve conflicts between different legal provisions jointly inconsistent with relevant and established facts in a way that minimizes changes in legal content while maximizing the realization of the legislative rationales, and (iii) to reconcile clear discrepancies between the literal content of a statute or constitutional provision and the evident rationale that the statute or provision was intended by its framers or ratifiers to advance. The most important element in all these cases is the identification of the relevant legislative rationale. If judicial legislation is to be contained, and abuses minimized, there must be strong constraints on what counts as a proper identification of this sort.

The point is illustrated by a slight extension of my earlier example of the Plainsboro Town Council. The purpose of the ordinance it passed was to reduce the danger of sexual assaults against the town's children going to and from school. Since such assaults on the children constitute a form of harm to the town's residents, the ordinance may also be said to be aimed at reducing the danger of harm to residents. However, it is only the more specific and complete of these two designations of purpose

(rather than the more general designation, which provides a merely partial specification of the aim of the legislation) that is relevant to future judicial interpretation. For example, even if the Mini Mart, where Susan worked, were in a dangerous part of town, and so a likely target for armed robbery, no one could reasonably argue that she should be held guilty of violating the ordinance for accepting a ride to work -- even though the motorist was both undangerous and someone with whom she had a nodding acquaintance -- on the grounds that ruling against her would further its purpose of reducing the danger of harm to residents. On the contrary, since the purpose of the ordinance, in the sense relevant to deciding the case, is its complete purpose (given by the more specific designation), a ruling in her favor would be correct.

Though the case is artificial, the point it illustrates is essentially the same as the one standardly made against the landmark decisions reached in *Griswold v. Connecticut*<sup>32</sup> (concerning laws restricting the sale of contraceptives) and *Roe v. Wade*<sup>33</sup> (concerning laws restricting abortion). According to Justice William O. Douglass, writing for the majority in *Griswold*,

[The guarantees in] The Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create *zones of privacy*. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that *privacy*. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create *a zone of privacy* which government may not force him to surrender to his detriment.<sup>34</sup>

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<sup>32</sup> 381 U.S. 479, 484 (1965).

<sup>33</sup> 410 U.S. 113 (1973).

<sup>34</sup> *Griswold*, 381 US at 484 (emphasis added).

The standard criticism of this decision is that whereas it is true that several constitutional amendments were adopted to establish particular privacy rights, no general right of privacy covering contraception (or abortion) was established. Using the analytical framework outlined here, we acknowledge that the provisions mentioned by Douglass were adopted for the purpose of establishing strong, but rebuttable, presumptions against the passage of laws infringing the particular privacy rights specified. We further acknowledge that the original assertive or stipulative contents of the relevant Constitutional clauses were not intended to settle, for all time, precisely which prospective laws would be constitutionally prohibited. The earlier discussion of the First Amendment emphasized legitimate future narrowings of the original guarantee applying to speech. A similar allowance can be made for a limited expansion to some forms of expression, which, though not strictly speech, share with speech the primary function of communicating ideas. Even recognizing all this, under our framework, Douglas's decision cannot be reached. Although the contents of the constitutional guarantees he mentions may evolve over time to better serve their motivating purposes, and although each may correctly be said to have been aimed at securing privacy (of a certain sort), such a characterization of purpose is incomplete, and insufficiently specific. Once this defect is eliminated, and the purposes governing the constitutional provisions are fully and specifically stated, the resulting set of privacy rights does not encompass any general right to privacy that prohibits laws against contraception or abortion.

Similar points can be made about *other* landmark decisions interpreting the Fourteenth Amendment to the United States Constitution. Here is the relevant section, the most salient part of which is italicized.



“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*”<sup>35</sup>

The primary rationale for the amendment, adopted in 1868, was to guarantee the full rights of citizenship to the newly freed African Americans and their descendants after the Civil War.<sup>36</sup> More broadly, that rationale may legitimately be described as preventing the states from denying the normal rights of citizenship on the basis of race.<sup>37</sup> Since what those rights amounted to in 1868 were not the same as what they are now (regarding voting, participation in public life, and public education for example), the proper scope of the guarantee is not limited to the particular rights that the framers of the amendment had in mind. Rather, the assertive content of the amendment indicates that the rights guaranteed are those of *citizens*, whatever those rights may be at any given time. As for the language specifying the right of *persons* to due process of law and equal protection of the laws, both the specific rights guaranteed and the class of individuals to which the guarantees apply are less clear -- though it is certainly not unreasonable to think, as the Supreme Court has held, that some rights, such as the right to trial by jury, and closely related rights of this sort, apply to many noncitizens, as well as citizens.<sup>38</sup>

The importance of the rights guaranteed by the Fourteenth Amendment became particularly prominent in modern jurisprudence in the 1954 case *Brown v. Board of*

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<sup>35</sup> U.S. Const. amend XXIV, § 1 (emphasis added).

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*Education*,<sup>39</sup> which struck down legally mandated segregation by race in public education. Though the assertive content of the vague and abstract phrase, ‘equal protection of the laws’, as understood in 1968, is unclear and imprecise, the centrality of race to the rationale of the amendment, and the clear intention of its framers to bestow full citizenship on former slaves and their descendants, lend a high degree of credence to the idea the rights of the African American plaintiffs in 1954 fall within the purview of the amendment. Since the state of public education in America in 1868 was very uneven, and far from universally available, there was then little thought about what, if anything, the Fourteenth Amendment would mean to access to public schools, even for full-fledged citizens. By 1954, however, the ubiquity and importance of systems of public education made it *prima facie* plausible that citizens of a state have a right to the public education provided by the state. It was also plausible that the so-called “separate but equal” system to which African Americans were in some places then confined,<sup>40</sup> was, in fact, inherently unequal to the system reserved for the majority, and hence that some individuals, including descendants of those the plight of whom the amendment was originally intended to address, were being denied the rights of citizens because of their race.

Though this core aspect of the reasoning in *Brown* is justifiable within the traditional conception of legal interpretation I have defended here, it is not clear that the same can be said for later appeals to the Fourteenth Amendment in general, and the Equal Protection and the Due Process Clauses in particular. In the decades following *Brown*, the section of the amendment quoted above, including the concepts of equal protection and due process have repeatedly been put to use in all manner of cases, including those

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<sup>39</sup> 347 U.S. 483 (1954).

involving welfare benefits,<sup>41</sup> exclusionary zoning,<sup>42</sup> municipal services,<sup>43</sup> the apportionment of seats in state legislatures,<sup>44</sup> sexual discrimination,<sup>45</sup> morals legislation,<sup>46</sup> the rights of aliens,<sup>47</sup> abortion,<sup>48</sup> and access to the courts.<sup>49</sup> Though the use, or misuse, of the Fourteenth Amendment in these cases deserves extensive investigation in each of these areas, there is a general worry uniting them. If one starts by considering the content asserted by the framers of the amendment, constituted in part by their illocutionary intentions, and one continues by supplementing this content with the perlocutionary intentions that provided their rationale for adopting the amendment, one will *not*, I suggest, reach the broad content read into it by the Supreme Court in a string of related decisions in the last fifty years. Nor, I think, can the cumulative increments of constitutional substance arising from these decisions be fully explained as the result of (i) justified judicial precisification of vague language required in cases for which no legal result would otherwise have been forthcoming, (ii) justifiable judicial rewritings of the equal protection clause required by the joint inconsistency of the facts of specific cases together with either (a) other equally authoritative constitutional provisions, or (b) the clearly discernable rationale of the framers in adopting the amendment.

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<sup>40</sup> *Id.* at 488.

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<sup>45</sup> *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>46</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003).

<sup>47</sup> *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>48</sup> *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>49</sup>

Whether or not I am right about this is a large and contentious question. If I am, then an important strain in authoritative constitutional interpretation in the past half century is not in accord with the rule, JR, that I have put forward as a social convention that is both normatively justified and empirically embedded in our legal system with the force of law. Since I take this rule to be both normatively justified and legally authoritative, I am inclined to view some portion of one substantial body of court-made law of the last fifty years as problematic, and to think that, henceforth, it should be construed as having only limited precedential weight. Those who think otherwise are invited either to show that this body of court-made law is, in fact, consistent with something like my traditional conception of the norm governing legal interpretation and judicial responsibility, or to articulate an alternative governing norm with which this body of law is consistent. Those opting for the latter task must show either (i) that a strong empirical case can be made that the alternative norm is the one that is actually operative in our legal system, or (ii) that a strong moral or political argument can be given that shows it to be normatively preferable to the conception I have outlined, or both. In my mind, the chief challenge to doing this is to justify the idea that, for example, Justices of the Supreme Court, who hold lifetime positions designed to be insulated from democratic politics, possess either the political wisdom or the moral authority to exercise what might fairly be described as an absolute and largely unconstrained legislative veto over all other representative bodies and offices in a democratic republic.

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