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Originalist Reflections on Constitutional Freedom of Speech

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ORIGINALIST REFLECTIONS ON CONSTITUTIONAL FREEDOM OF SPEECH

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ABSTRACT

In this brief Article, I would like to offer some reflections on the First Amendment freedom of speech and press guarantee from an originalist perspective. This area seems to me to be one that is particularly difficult for originalists, and I think that there is insufficient acknowledgment of that fact among them.

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I. THE ORIGINAL INTENTION OF FIRST AMENDMENT FREEDOM OF SPEECH AND PRESS

WHAT is the original intention—or, better, "real meaning"—of the guarantee of free speech and press? I think it is pretty clear that the original intent of the First Amendment is much narrower than the modern understanding of free speech that has developed since the clear and present danger opinion of Justice Oliver Wendell Holmes Jr. in *Schenck v. United States*[1] and *Gitlow v. New York*.[2] In *Abrams v. United States*, Justice Holmes said,

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.[3]

1. 249 U.S. 47 (1919).
2. 268 U.S. 652 (1925).
3. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (citation omitted).

But Holmes himself gives grudging acknowledgment to the original intention in *Schenck* when he said, "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*."[4] Holmes fudges in both *Patterson* and *Schenck* by saying that the "main" purpose was to prohibit previous restraints—he should have said simply that it was *the* purpose. That is, the common law understanding of freedom of the press as expressed in Blackstone was what the founders wrote into the First Amendment. Leonard Levy, despite his rather different policy preferences, was an honest enough historian to recognize this fact.[5]

But Holmes wasn't interested in historical honesty—he wanted to use history to undo the original intention by expanding the scope of speech and press protections through an appeal to Congress's repaying of the fines under the Sedition Act (at Thomas Jefferson's behest).[6] Jefferson's position, which, as Levy shows, was developed in the 1790s, especially during the Alien and Sedition Act controversy, was based on the enumerated character of federal powers and the absence of any enumerated power to regulate speech.[7] But, unlike modern speech libertarians, Jefferson recognized the legitimacy of suppressing seditious speech—he merely wanted it done by the states, not the federal government.[8] The original understanding of the First Amendment (that it adopted the common law of seditious libel), however, is more accurately stated in the minority report on the Virginia Resolutions, which is thought by some historians to be the work of John Marshall.[9]

It is easy for modern Americans to disdain the founders' narrower understanding of the scope of free speech because they forget the fragility of government in the Founding Era. We know how "it turned out"—that America became a transcontinental nation, survived the Civil War, became the world's great power, and has (despite continual political differ-

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4. *Schenck*, 249 U.S. at 51–52 (citation omitted).

> But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practised by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.

Patterson v. Colorado, 205 U.S. 454, 462 (1907) (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313–14 (Mass. 1825)).

5. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 281 (1985).

6. *See* EMERGENCE OF A FREE PRESS, *supra* note 5, at 250–51.

7. *See id.* at 255.

8. *See* LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 56 (1963). One of the main problems with Jefferson's position is that the First Amendment's guarantee is rather similar to many of the states' free speech guarantees, so, if the states could suppress free speech under their constitutional guarantees, the federal government could suppress free speech under the First Amendment.

9. *See* Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 435–36 (2007).

ences and battles) an extraordinary degree (by historical standards) of stability. But the framers could only hope for that—they were trying to keep the nation alive, in a world of much greater powers (especially Great Britain) that constantly threatened it and might very well have reduced the new country to colonial status once more. They understood that democracy was an experiment, and, witnessing the French Revolution, they were not blindly optimistic that it would inevitably work out. In that world—so foreign to us and our sensibilities—sedition was not a marginal annoyance but a very real threat. That they miscalculated and exaggerated instances of alleged sedition is true. But a sensitive historical imagination will prevent us from dismissing their concerns about sedition as illusory or simply self-interested.[10]

II. INTERPRETING THE TEXT OF THE FIRST AMENDMENT

So far I have discussed history, but originalism is more properly rooted in the text of the Constitution than in historical research.[11] So let us turn to the text. What we shall find is that interpretation of First Amendment freedom of speech and press is a salient example of the shift from traditional to modern constitutional interpretation.[12]

Justice Hugo Black is regarded by many as a twentieth-century constitutional literalist and absolutist.[13] He certainly claimed himself to be committed to the text of the Constitution. Among his most famous assertions is: "I read 'no law abridging' to mean *no law abridging*."[14]

But Justice Black ignored the rest of the phrase. No law abridging *what*? Abridging the freedom of speech. Black simply assumes that this means people have the right to say whatever they want to say. But that is a distinctively modern understanding of "freedom." For the founders (un-

10. The same thing can be said about the mother country from which they derived the law of seditious libel. Englishmen had experienced the Puritan and Glorious Revolutions of the seventeenth century (in the former of which a king had lost his head). Hobbes's description, in *Leviathan*, of life as "solitary, poor, nasty, brutish, and short" was a reflection of the consequences of political instability he had witnessed in his own lifetime. THOMAS HOBBES, LEVIATHAN 84 (J.C.A. Gaskan ed., Oxford Univ. Press 1996) (1651). That these genuine and understandable concerns were constantly blended with simply selfish interests of those who held power should not blind us to their reality.

11. See my discussion and criticism of the modern era's proto-originalist, Raoul Berger, in CHRISTOPHER WOLFE, HOW TO READ THE CONSTITUTION 43–82 (1996).

12. For a more detailed account of the transformation of constitutional interpretation and judicial review in American history, see generally CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (rev. ed. 1994).

13. David M. O'Brien, *Justice Hugo L. Black, Liberal Legalism, and Constitutional Politics*, 19 REVS. AM. HIST. 561, 566 (1991).

14. Justice Black stated:

> [T]he First Amendment's language leaves no room for inference that abridgments of speech and press can be made just because they are slight. That Amendment provides, in simple words, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law . . . abridging" to mean *no law abridging*.

Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) (alterations in original) (quoting U.S. CONST. amend I).

like many of our contemporaries), it would have been second nature to distinguish "freedom" and "license."

The fact is that virtually NO ONE thinks "no law abridging" means "no law abridging" in the sense that the right to speak is absolute. There are simply too many examples of speech that can be—must be—prohibited. We cannot abolish libel law altogether, for example, or allow newspapers to publish battle plans on the very eve of those battles.

So what does "freedom of speech" mean, if you take the text seriously? It could mean that people are free to speak (no previous restraints)[15] but not free from punishment for abusing that freedom.[16] This is what the common law understanding of freedom of the press was: no prior restraint. This protects speech to some extent, since normally the punishment occurs after the fact, and that requires a showing that there was notice of what was prohibited—a law that prohibits the speech in question. Moreover, in the context of the First Amendment, there was the very important limit that federal powers were all delegated—there was no general enumerated federal power to regulate speech, which limited the power to regulate speech. There might still be limited implied powers to regulate speech—most obviously, seditious speech (based on the government's right of self-preservation).[17]

Over time, however, many (most) have come to consider this protection of speech inadequate, and so they have rejected this reading of the First Amendment's language. But, if so, how is it possible to interpret that language? The answer is found in modern notions of constitutional "interpretation" that don't demand actual fidelity to the text. Rather, in the modern mode of constitutional interpretation, the First Amendment is regarded as a "general presumption in favor of free speech," which is not (of course) an "absolute," and therefore must be "specified" according to various circumstances. That "specification" is left to judges.

I do not consider this specification to be "interpretation," in the proper sense of the word.[18] It is equivalent to saying that "freedom of speech is a really good thing, and we shouldn't restrict it except when it's really necessary to restrict it, and judges should decide when that is necessary." But

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15. Blackstone's common law understanding of freedom of the press was directed especially against the earlier "licensing" system, in which those who published without a license (effectively, state censorship) could be prosecuted simply for the fact of publication, irrespective of the content. *See* EMERGENCE OF THE FREE PRESS, *supra* note 5, at 237, 251. Note, however, that even "no previous restraints" is not an absolute, as the example of publishing battle plans on the eve of battle shows.

16. *See id.* at 251.

17. *See* Henry Lee, *Report of the Minority on the Virginia Resolutions* (Jan. 22, 1799), *reprinted in* 5 THE FOUNDERS' CONST. 20 (Phillip B. Kurland & Ralph Lerner eds., 1987). Again, Jefferson rejected this implied power, maintaining that even speech intended to undermine the federal government could only be punished by the states.

18. There are, of course, more latitudinarian senses of the word "interpret"—as, for example, when someone has an "interpretation" of a particular stage or film role (so that Richard III or Hamlet end up being Nazis, or whatever else the imagination of the producers find appealing). Whether or not this notion of interpretation is appropriate for theatrical performances, it is difficult to square with any reasonable grounds for judicial review.

that decision, whatever else it is, is not "interpretation" in any serious sense of the word. This specification, rather, treats the Constitution as having delegated to the judiciary the power to define—give content to, apply—certain general presumptions. That, in my view, is a fundamentally legislative power—declaring what the law should be—rather than an interpretive one—discerning in the text of the Constitution what the principle of free speech is.

III. WHAT ARE ORIGINALISTS TO DO?

Free speech is a pretty clear case where the precedents that have expanded the meaning of the Constitution, as it was written and generally understood, are so old and so deeply settled that an insistence by originalists on returning to the original intent of the founders is impractical and undesirable.

Having to deal with precedents that an originalist considers wrongly decided is not new. Originalism (at least as I understand it) is a theory not only of interpretation but also of judicial power. For example, I think originalism dictates that judges strike down laws only in "clear cases." There will be different opinions about which cases are clear, but an originalist will recognize that judicial review is only appropriate when it is an act defending and applying the will of the people in the Constitution, rather than judicial will.[19] Accordingly, when it is conceded that a constitutional provision (even after careful construction) is unclear—it could reasonably be understood in different ways—then the conditions for judicial review simply don't exist. The ground of judicial review is that the Constitution is clear and that a law or act clearly or manifestly (as Publius says)[20] violates it.

Another aspect of an originalist understanding of "judicial power" is that it is embedded in a long-standing common law system in which, in the interests of clarity and consistency, precedent has significant weight.[21] The weight of precedent is what led James Madison to sign the bill establishing the Second Bank of the United States, notwithstanding his continued "abstract opinion" that Congress lacked the constitutional power to

19. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

20. *Id.* ("By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.").

21. For more extensive reflections on originalism and precedent, see HOW TO READ THE CONSTITUTION, *supra* note 11, at 175–91. The weight of precedent in constitutional adjudication is one of the most salient differences between the originalism of Justice Antonin Scalia and that of Justice Clarence Thomas.

establish a national bank.[22]

A conflict between original meaning and settled precedent is always a very awkward position for originalists since it puts them in the position of making distinctions that are based not simply on legal interpretation but also on prudential considerations, which are not rooted directly in the Constitution or law. That is because, as Madison argued, precedent isn't always clear (what exactly constitutes a "settled" opinion?) and it doesn't always control (there are cases which are exceptions and which must "justify themselves").[23]

In the case of free speech, however, I think the force of precedent is so strong that originalists have to accept the authority of decisions expanding free speech significantly—extending beyond "no prior restraint" to encompass most subsequent punishment as well.

But I would retain fairly stringent limitations on judicial review in the area of speech regulation in two ways. First, I would adopt Justice Felix Frankfurter's general approach to judicial review and free speech. He emphasized that, even with respect to questions of free speech, the courts should keep in mind that the balancing of various social interests is the responsibility, first and primarily, of legislatures.[24] The judges should employ a reasonableness standard that accords great deference to legislative judgments.[25]

Second, I would adopt a position on incorporation similar to that of Justice John Marshall Harlan in *Roth v. United States*.[26] In his partial concurrence and partial dissent in that case, he argued for a dual standard in

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22. When charged with inconsistency, because of his signing of the bill to establish the Second Bank of the United States, Madison responded:

> [T]he inconsistency is apparent only, not real; inasmuch as my abstract opinion of the text of the Constitution is not changed, and the assent was given in pursuance of my early and unchanged opinion, that, in the case of a Constitution as of a law, a course of authoritative expositions sufficiently deliberate, uniform, and settled, was an evidence of the public will necessarily overruling individual opinions. It cannot be less necessary that the meaning of the Constitution should be freed from uncertainty, than that the law should be so. That cases may occur which transcend all authority of precedents must be admitted, but they form exceptions which will speak for themselves and must justify themselves.

Letter from James Madison to C.E. Haynes (Feb. 25, 1831), *reprinted in* THE WRITINGS OF JAMES MADISON 442–43 (Gaillard Hunt ed., 1910).

23. *See id.*

24. *See* Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

25. Frankfurter develops and defends this understanding of judicial review in the area of free speech especially in his long concurrence in *Dennis*. *See id.* at 517. I think Frankfurter's approach was an effort to restore a genuine presumption of constitutionality of legislation in the free speech area. Brandeis's classic opinion in *Whitney v. California* (a concurrence that was effectively a dissent) said, "The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied." 274 U.S. 357, 379 (1927) (Brandeis, J., concurring). But it must be asked whether a "merely" rebuttable presumption was really a presumption at all, given that, once the defendant disputed the existence of a clear and present danger, the burden was clearly on the state to show a clear and present (serious and imminent) danger.

26. 354 U.S. 476, 496 (1957) (Harlan, J., concurring).

obscenity cases, which would restrict the federal government much more than the state governments.[27] His rationale was that the federal interest in obscenity was rather restricted, being based primarily on the postal power, whereas the states have traditionally had the police powers to regular the health, safety, welfare, and morals of the community.[28]

Generalizing this, I would say that state interests in a multitude of different areas of the law justify giving them more leeway in the regulation of speech. There are so many areas in which reasonable people can disagree about the scope of free speech. For example, what are the free speech rights of high school students? What is the dividing line between "speech" and "obscenity"? Is the burning of the American flag a free speech right? Can a rock band use the name "Slants" and get a trademark? Ideologues may say that there are obvious answers to these questions, but they seem to me to fall in the category of matters about which people may reasonably disagree.

The Court, however, has taken on itself the power to elaborate a constitutional common law of free speech—an extensive and complex set of legal rules that establish the framework of speech regulation. Some of these rules seem to me to be quite reasonable, others much less so. But I don't think the power to establish these rules comes from the Constitution and, accordingly, I think it is necessary to constrain or limit this judicial power.

IV. IS FREE SPEECH *NOT* AN ISSUE FOR THE DEMOCRATIC PROCESS?

John Stuart Mill argued in *On Liberty* that free speech was necessary (even in the cases where "received opinions" —the ones to be protected by law—were true) because not having to defend those opinions would lead to a loss of understanding of their grounds and a lack of vitality in living by them.[29]

James Bradley Thayer makes a parallel argument about judicial review: that if the American people developed the habit of leaving important constitutional issues to the courts, that would undermine their own political capacity.[30] Judicial review, he said, is "always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the

27. *Id.* at 505–06.

28. *Id.* at 504.

29. JOHN STUART MILL, ON LIBERTY 85 (Edward Alexander ed., 1999).

30. JAMES BRADLEY THAYER ET AL., JOHN MARSHALL 86 (Univ. Chicago Press 1967) (1901). Thayer made this argument largely with respect to the growing conservative judicial activism on behalf of property rights in the late nineteenth and early twentieth century. There is no good reason to think that it applies any less to other forms of broad judicial legislative power, including the area of free speech.

ordinary way, and correcting their own errors."[31]

Even if striking down a bad law would save the country trouble and harm, still

> the good which [comes] to the country and its people from the vigorous thinking that ha[s] to be done in the political debates that follow[ ], from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that [comes] out of it all, — that all this far more than outweigh[s] any evil which ever flow[s] from the refusal of the court to interfere in the work of the legislature.[32]

So, Thayer concluded, the "tendency of a common and easy resort to this great function [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."[33]

The question I want to ask is whether, in light of the observations of Mill and Thayer taken together, we have fallen victim to a loss of the understanding of, and the vitality of, free speech in our society because those questions have been left too much to judges to work out, rather than being worked out in the ordinary political process. And did our commitment to free speech become so ideological—unquestioned, simply assumed, not needing argument—that when it has been challenged, many Americans (perhaps especially on university campuses) have lacked the intellectual wherewithal to resist those challenges?

There is certainly no guarantee that leaving a wider range of decisions about the scope of free speech to the ordinary political process (that is, especially legislatures) would necessarily have increased the public understanding of, and commitment to, free speech. And it certainly cannot be said that representative bodies based on democratic majorities would always decide questions regarding free speech well. As Alexis de Tocqueville said in *Democracy in America*, "It is incontestable that the people frequently conduct public business very badly."[34] But Tocqueville also thought that the participation of ordinary people in public life made them "better informed and more active."[35] One can only hope that current debates on the limits of free speech, most notably the legitimacy of suppressing "hate speech," will stimulate a thoughtful re-examination of the

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31. *Id.* at 85–86. See also CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 99–110 (rev. ed. 1997), which includes arguments back and forth on Thayer's proposition.

32. THAYER ET AL., *supra* note 30, at 86.

33. *Id.*

34. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 251 (Phillips Bradley ed., 1972).

35. *Id.*

foundations of free speech.[36]

V. CONTEMPORARY CONSERVATIVES AND FREE SPEECH

Conservatives have become the great defenders of free speech in our era, and it is the Court conservatives that can most often be regarded as the free speech absolutists.[37] It is astonishing for someone like myself, who grew up in the 60s, an era in which free speech absolutism was characteristic of liberals, to see liberals retreating (sometimes in a rout) from the protection of free speech.[38] (The American Civil Liberties Union (ACLU) might well consider re-naming itself the American Equality Union, since it subordinates liberty to equality so often now, especially with respect to the rights of women and sexual minorities.)[39] It was conservatives who were more likely in those days to hold up a hand and say: "Yes, free speech is important, but there have to be reasonable limits on it as well."[40]

But it is not surprising that conservatives have become more rigorous in their understanding of free speech, given that they are the ones most likely to be subject to free speech restrictions. If the main objects of legal limits on free speech in the 1950s were communists and atheists,[41] today it is defenders of traditional morality and other conservatives.[42]

So the irony is that if originalists or conservatives were to return to a more deferential approach to free speech issues at the state and local level, it is likely that conservatives might be the ones most likely to suffer from abusive forms of speech regulation (especially in "blue states").

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36. I would recommend, in particular, on the subject of hate speech, a recurrence to Justice Robert Jackson's thoughtful dissent in *Beauharnais v. Illinois*. 343 U.S. 250, 287–305 (1952) (Jackson, J., dissenting).

37. Justice Samuel Alito is a notable exception to this generalization. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 463 (2011) (Alito, J., dissenting); *see also* Garrett Epps, *The Free Speech Jurisprudence of Justice Samuel Alito*, KNIGHT FIRST AMEND. INST. (May 1, 2018), https://knightcolumbia.org/news/free-speech-jurisprudence-justice-samuel-alito [https://perma.cc/2P4V-KR9U] (offering a hostile viewpoint).

38. For second thoughts by liberals about broad protection of free speech, see Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/2018/06/30/US/politics/first-amendment-conservatives-supreme-court.html [https://perma.cc/5MXD-GP63].

39. *See, e.g.*, Wendy Kaminer, *The ACLU Retreats from Free Expression*, WALL STREET J. (June 20, 2018), https://www.wsj.com/articles/the-aclu-retreats-from-free-expression-1529533065 [perma.cc/T7Q6-89AH]. For additional work authored by Kaminer, a former member of the ACLU national board, see generally WENDY KAMINER, WORST INSTINCTS: COWARDICE, CONFORMITY AND THE ACLU (2009). Note that various parts of the ACLU itself are rather divided on these issues.

40. *See, e.g.*, FRANCIS CANAVAN, FREEDOM OF EXPRESSION: PURPOSE AS LIMIT (1984). For a more recent expression of this view, see generally Hadley Arkes, *Conservatives and Freedom of Speech*, CLAREMONT REV. BOOKS, Winter 2018, at 40.

41. *See, e.g.*, Dennis v. United States, 341 US 494, 497 (1951) (communists); *see also* Torcaso v. Watkins, 367 U.S. 488, 489 (1961) (atheists).

42. *See, e.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2365 (2018); *see also* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006), *cert. granted*, *vacating as moot* Harper ex rel. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262, 1262 (2007); Hill v. Colorado, 530 U.S. 703, 703 (2000); Madsen v. Women's Health Ctr., 512 U.S. 753, 757 (1994).

This is rather similar to what happened when Justice Antonin Scalia's originalist opinion in *Employment Division v. Smith*[43] had the effect of making it much more difficult for conservative religious believers to protect themselves in court (especially against some states' anti-discrimination laws). I don't think Justice Scalia was unaware of the potential consequences of his opinion in that case. He just thought that his job was to say what the law is, and he objected to the earlier *Sherbert* test, which effectively required judges to make policy judgments about what state interests were or were not sufficiently compelling to override religiously-motivated action. Deciding cases on the basis of what the law says, not its consequences, is simply what an originalist does.

But Justice Scalia was less originalist, I think, in his opinion for the Court in *R.A.V. v. St. Paul*,[44] in which he establishes a rather convoluted framework for the case and then has to make some complex distinctions to harmonize the decision with precedents. (Justice Byron White's opinion is, by contrast, a fairly straight-forward application of the overbreadth doctrine.)[45] Justice Scalia's opinion may reach a good public policy result (curtailing hate speech statutes regarding what causes "anger, alarm or resentment"[46] that can very easily be abused), but it seems to me to be a perfect example of an elaborate constitutional common law opinion that can't be justified by an appeal to textual original intent.

I think this analysis leaves originalists with a tough decision: either abandon originalism (explicitly or implicitly) and emulate much of the modern constitutional decision-making to which they ordinarily object or adopt a generally deferential standard regarding regulation of speech (especially at the state level) that may have some unpleasant policy consequences.

Of course, a deferential standard doesn't mean no limits at all. There will be reasonable grounds for striking down some cases that are rather clear. I find it difficult to see how anyone would find it consistent with freedom of speech and press to prohibit corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication" or that expressly advocates the election or defeat of a candidate within thirty days of a primary or sixty days of a general election. (And yet significant parts of the legal academy consider the Supreme Court's decision striking down such limits[47] an outrageous abomination.) And I think there is a wide range of speech precedents that can reasonably be considered settled and which an originalist can apply (though they will differ among themselves on some cases).

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43. 494 U.S. 872 (1990).
44. 505 U.S. 377 (1992).
45. *Id.* at 397–415 (White, J., concurring).
46. *Id.* at 380.
47. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 377 (2010).

Still, originalists have a difficult task cut out for them, in articulating and defending an originalist stance on freedom of speech and press for today's constitutional law that protects as wide a range of speech as they would like. The deference to the political branches in matters not clearly governed by the text of the Constitution, which is (in my view) an integral part of originalism, may require considerable intellectual fortitude and the ability to accept some unpleasant consequences.