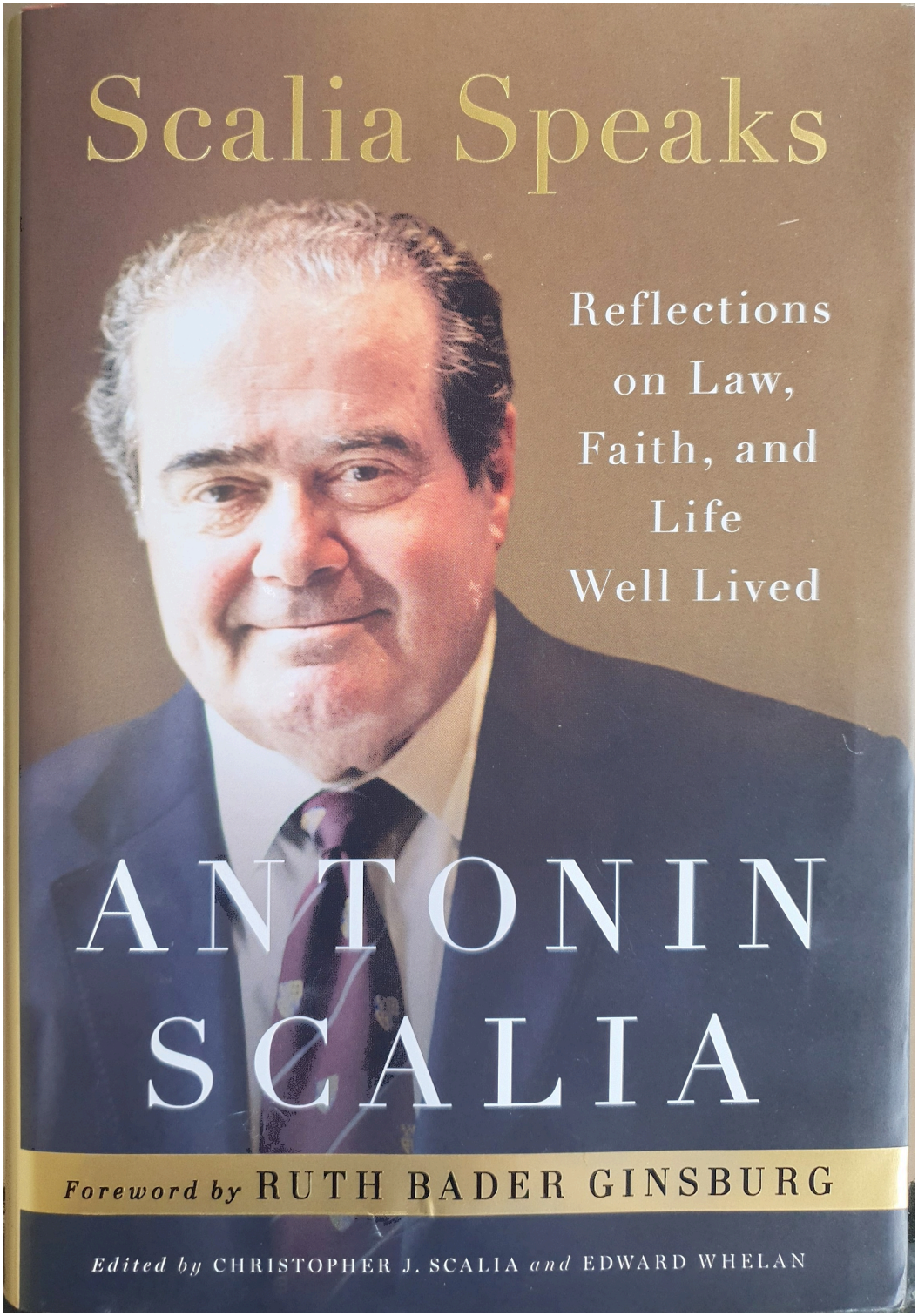

ON LAW – ORIGINAL MEANING
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Original Meaning

Antonin Scalia was a judge on the U.S. Court of Appeals for the D.C. Circuit when he accepted Attorney General Edwin Meese's invitation to speak at the Attorney General's Conference on Economic Liberties on Saturday, June 14, 1986. On June 13, the speaking engagement suddenly took on added drama: Meese called Scalia to invite him to meet with President Reagan at the White House the following Monday. What wasn't yet known publicly was that Chief Justice Warren E. Burger had informed Reagan that he would be retiring.

Scalia's speech might well have turned into a sort of audition. If so, it was a successful one: during their interview on Monday, June 16, Reagan offered to nominate Scalia and on June 18 he announced his plan to elevate Associate Justice William H. Rehnquist to chief justice and to have Scalia fill Rehnquist's seat. In September, the Senate confirmed Scalia's nomination by a 98–0 vote.

Scalia's proposal to rebrand "original intent" as "original meaning" is significant in the intellectual history of originalism, the school of interpretation that holds that a legal text bears the meaning that it had when adopted. The "original meaning" approach, which aims to discover the original public meaning of the Constitution's provisions rather than the subjective intentions of the Framers, soon became the dominant school of originalism—thanks in large part to Scalia's continued advocacy and to the powerful example of his opinions as a justice.

When I was in law teaching, I was fond of doing what is called "teaching against the class"—that is, taking positions that the students were almost certain to disagree with, in order to gen-

erate some discussion, if not productive thought. I have tended to take a similar contrary approach in public talks; it is neither any fun nor any use preaching to the choir. Thus, when Prof. [Richard] Epstein and I last appeared on the same program in Washington it was at the Cato Institute, where I took the position that we should not extend (or re-extend) the concept of substantive due process to economic rights. I did not have the feeling that I was the home team. This endearing quality of saying the right thing at the wrong time is the secret of my popularity.

When I was invited to give this luncheon address, I was initially at a loss to think of a subject that would be sufficiently obnoxious. On the expansion of substantive due process, for example, I figured this audience would be split about 50-50. I could whine about why judges should be paid more money, even though attorneys general and assistant attorneys general should not—but that subject has such an air of unreality about it that if it raised any hackles they would be make-believe hackles. As I was musing in my chambers over this perplexing problem, the room was filled with the sound of a voice—loud, though it was in a whisper—which seemed to be coming from the picture of Mount Sinai that we have hanging in the D.C. Circuit's conference room. It said: CRITICIZE THE DOCTRINE OF ORIGINAL INTENT. The voice, I must admit, sounded a little like David Bazelon.* Then again, it sounded a bit like Robert Bork.† In any case, since I am rarely given these revelations, I thought that was what I should do.

There is also a less supernatural urging that led me to the same conclusion—and that is, public reaction to what is referred to in my chambers as the Speech. You may recall that when President Reagan ran in 1980, he had a set talk that he would give around the country, with minor alterations as the circumstances warranted. Well, I have found that to be a pretty useful format for at least some of those events at which federal judges are invited to speak. Each year I have picked out one particular subject that

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* Longtime liberal judge on the D.C. Circuit.

† Scalia's originalist colleague on the D.C. Circuit.

interests me and have addressed it in a number of talks—the text gradually expanding over the course of the year as I have time for new research, or as new ideas occur to me.

The Speech for this year has been about judicial use of legislative history in the interpretation of statutes. My general attitude toward it can be summed up (I don't want to give the entire Speech here) by saying that I regard it as the greatest surviving legal fiction. If you can believe that a committee report (to take the most respected form of legislative history) in fact expresses what all the members of Congress (or at least a majority of them) "intended" on the obscure issues that it addresses; if you can believe that a majority of them even *read* the committee report; indeed, if you can believe that a majority of them was even *aware* of the *existence* of the obscure issue; then you would have had no trouble, several hundred years ago, in permitting all tort actions to be squeezed into the writ of assumpsit by the patently phony allegation that the defendant had *undertaken* (assumpsit) to be careful. Even beyond the unreliability of almost all legislative history (most of which is now cooked-up legislative history) as an indication of intent, it seems to me that asking what the legislators *intended* rather than what they *enacted* is quite the wrong question.

Nero, it is said, used to have his edicts posted high up on the pillars of the Forum, thus rendering them more difficult to read and more easy to transgress unknowingly. The secrets of legislative history are the twentieth-century equivalent of high-posting. Statutes should be interpreted, it seems to me, not on the basis of the unpromulgated intentions of those who enact them (assuming—quite unrealistically as to most points of interpretation—that such unpromulgated intentions actually existed on the part of more than a few legislators) but rather on the basis of what is the most probable meaning of the *words* of the enactment, in the context of the whole body of public law with which they must be reconciled.

But to return to the point: On most occasions on which I delivered the Speech, I would receive a Pharisaic question from the floor (modeled after the question "Master, is it lawful to pay tribute to Caesar?"), which would go something like this: "From what

you say, Judge Scalia, I presume you disagree with Attorney General Meese concerning original intent as the correct criterion for interpreting the Constitution." Of course there is a lot less to that question than meets the ear. The debate regarding the doctrine of original intent—which has, after many years, finally been elevated to a public level—focuses upon the first, rather than the second, word of the doctrine. The fighting issue is not whether "intent" should govern, but rather whether *original* intent should govern, as opposed to some manner of interpretation that permits application of the provision to evolve over time.

So much of the attention has been focused on the first word, however, that I am not sure whether even the main participants in the debate (whoever they are) are clear about what they mean by the second. The burden of my brief remarks today is that it seems to me they should mean not "original intent of the Framers" but "original intent of the Constitution." What was the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended?

This does not mean, of course, that the expressions of the Framers are irrelevant. To the contrary, they are strong indication of what the most knowledgeable people of the time understood the words to mean. When the proponents of original intent invoke the Founding Fathers, I in fact understand them to invoke them *for that reason*. It is not that "the Constitution must mean this because Alexander Hamilton thought it meant this, and he wrote it"; but rather that "the Constitution must mean this because Alexander Hamilton, who for Pete's sake must have understood the thing, thought it meant this."

How else to explain, for example, reliance on those five numbers of the *Federalist Papers* written by John Jay, who was not a delegate to the Constitutional Convention? Or, come to think of it, reliance upon Thomas Jefferson, who also was not there? Indeed, how to explain greater reliance upon those knowledgeable national figures who were present at the Convention than upon the remarks in the state ratifying debates—since it was ultimately

the *states* (or the *people*) who were the parties to this contract, and whose innermost "intent" (if anyone's) is relevant?

But really the trump card to establish that "original intent" would more accurately be expressed "original meaning" is this: Even if you believe in original intent in the literal sense, you must end up believing in original meaning, because it is perfectly clear that the original intent was that the Constitution would be interpreted according to its original meaning. If you had asked the participants at the Constitutional Convention whether their debates could be an *authoritative* source for construing the Constitution, there is no doubt that the answer would have been no. This is apparent not only from the fact that the use of legislative history was in those days anathema—as it remains today in England—but also from many extrinsic indications. The *Journal of the Convention*, for example (which was taken in fairly slipshod form and never reviewed by the whole body), was not immediately published but was turned over to George Washington, subject to disposition by the future Congress under the new Constitution. It remained under seal in the Department of State until it was published by resolution of Congress (after editing by Secretary of State John Quincy Adams) in 1818.

This presents an interesting quandary, by the way. If original intent in the narrow sense is the touchstone, then we have got it all wrong in believing that judicial decisions that date closest to the Constitution are the most reliable. To the contrary, the benighted judges writing before 1818 did not have the *Journal of the Convention* to guide them. Those writing before 1840 did not have Madison's extensive notes; and before 1845, *Elliot's Debates*, which included debates in the ratifying conventions. And only in 1911 did Farrand undertake a comprehensive compilation of all the records pertaining to the adoption of the Constitution. More documentation has of course come to light since. So, logically, Chief Justice Burger should know more about what the Constitution originally prescribed than Chief Justice Marshall.

Beyond the decision not to publish the *Journal* as an indication that the original intent was to use the original meaning, there are

quite explicit statements on the point by some of the most prominent Framers. In his 1791 "Opinion to President Washington on the Constitutionality of an Act to Establish a Bank," Alexander Hamilton wrote:

> [W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to *express* and *effect*, more or less than was intended. . . . [A]rguments drawn from extrinsic circumstances, regarding the intention of the convention, must be rejected. [Emphasis in original.]

In one of his letters, James Madison drew a sharp distinction between the "true meaning" of the Constitution and "whatever might have been the opinions entertained in forming the Constitution." The reason Madison gave for not publishing his notes of the Convention until his death was that he wished to wait until

> the Constitution should be well settled by practice, and till a knowledge of the controversial part of the proceedings of its framers could be turned to no improper account. . . . As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character.

In yet another letter, Madison wrote:

> [W]hatever respect may be thought due to the intention of the Convention, which prepared and proposed the Constitution, *as a presumptive evidence of the general understanding at the time of the language used*, it must be kept in mind that the only authoritative intentions were those of the people of the States, as expressed through the Conventions which ratified the Constitution. [Emphasis in original.]

Of course it was true in the eighteenth century, as it remains true now, that there is one very good (if unprincipled) reason for using legislative history: it sometimes supports the position one wishes to establish. As it turns out, even George Washington was not immune to the blandishment of this reality. In 1796, when the House was debating whether certain treaties had to be concurred in by the lower house, President Washington sent the House a message opposing that position. It included the following:

> If other proofs than these, and the plain letter of the Constitution itself, be necessary to ascertain the point under consideration, they may be found in the journals of the Great Convention, which I have deposited in the office of the Department of State. In those journals it will appear, that a proposition was made, "that no Treaty should be binding on the United States which was not ratified by a law," and that the proposition was explicitly rejected.

(Although George Washington did write a wonderful letter to the Jewish Community of Newport, Rhode Island, it is not recorded that he was familiar with the word *chutzpah*. The above quoted message, however, relying upon documentation that only he and his administration knew about, since it was under seal in the State Department, suggests that he had some grasp of the substance of the thing.) The reaction by the House was outrage. Madison objected to use of the *Journal* as "a clue to the meaning of the Constitution," and said he "did not believe a single instance could be cited in which the sense of the Convention had been required or admitted as material in any Constitutional question" in Congress or the Supreme Court.

As I have said, therefore, it seems to me a no-win situation: even if you believe in original intent, you must believe in original meaning. I suppose it is tolerable to use the one term to mean the other—Alexander Hamilton did just that in his "Opinion on the Constitutionality of an Act to Establish a Bank," which I quoted from earlier. He used the term "intent of the Convention"

to mean the "true meaning" as it was determined by the "obvious & popular sense" of the constitutional provision in question (the Necessary and Proper Clause) and the "whole turn of the clause containing it." And as far as I know, Attorney General Meese and Justice Brennan use the term in the same sense.

In the interests of precision, however, I suppose I ought to campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning. As I often tell my law clerks, terminology is destiny.