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Creating Meaning, Creating Citizens: The U.S. Supreme Court and the Control of Meaning in the Public Sphere

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I Introduction

It seems safe to say that the American legal system abhors ambiguity.[1] At least since legal formalism's attempt to turn law into a scientific endeavor,[2] American law has been pursuing certainty not only within the profession, but also by exporting that ideal to the general public. In other words, by turning law into a scientific enterprise that has a foundation of certainty, law has attempted to increase its legitimacy in the public sphere while at the same time masking its management of the public sphere. That is, admittedly, a broad statement. However, this paper will argue that one can see this process at work in the U.S. Supreme Court's struggle, played out in an array of First Amendment cases since 1919, to understand meaning. In these cases one can see an inherent conflict between the postmodern, polysemic quality of public expressive acts,[3] and the attempt to fix the meaning of public expression in order to stay within the confines of an American legal system built on modernist principles such as predictability, efficiency, and control. As a result, justices find themselves trapped between two differing, and in many ways, incompatible perspectives.

A good example is Justice Anthony Kennedy's concurring opinion in *Texas v. Johnson* (1989), agreeing that burning the United States flag as an act of political protest is protected by the First Amendment. Kennedy notes that we live in an age when "absolutes are distrusted" and adds, "Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit."[4]

This paper examines the conflict reflected in Justice Kennedy's reasoning. On the one hand, Kennedy admits that the meaning of symbols is far more complex than simply what an authority says something means. The flag does not mean the same thing to all people. However, Kennedy also struggles not to let that fall into the relativism so often associated with postmodern thought. So, Justice Kennedy ends by declaring that even though the meaning of symbols is open, the flag is a unique symbol with a prescribed set of meanings. In the end, his logic fails to support adequately either claim and it raises more questions than it answers. If the meaning of public expressive acts, such as flag burning, is open to individual interpretation, then what does that mean for our understanding of the regulation of freedom of speech in a democratic society? Why is a nation's flag different from other symbols in its ability to fix meaning? And what role does the discourse about that meaning play in democratic life?

Justice Kennedy's comments reflect the tension that is the subject of this paper. It will begin its examination of these questions by looking at the question of law and the creation of meaning. Section II will argue that law, as a modernist enterprise, has struggled to understand the complexity of meaning, as reflected in several interpretive strategies explored by judges and scholars. It will be argued that the legal literature fails to reflect the importance of meaning creation in promoting an active public sphere. In Section III, the article will examine the influence of cultural studies on the understanding of the meaning of public expressive acts and its significance for the law. I will argue that the Court has ignored the insight of cultural studies that has powerfully demonstrated that public expressive acts can have a multiplicity of meanings. Section IV illustrates how the Court has tended to see citizens more as spectators to democracy rather than as active creators of meaning. It will do this through an examination of cases in two areas: 1) cases related to protests against war, 2) and the public display of religious symbols. Section V will put forward some modest proposals for what the Court might do to empower citizens to participate in the democratic act of meaning creation, but still retain a role for the law

in a democratic society. In the end, it will be argued that by refusing to recognize the polysemic nature of meaning, the Court not only helps turn citizens into spectators, but also finds a way to manage public life. Figuring out a way to empower citizens to participate in the democratic act of meaning creation is vital to the realization of participatory democracy.

II Law and the Creation of Meaning

There has been much discussion about the interpretation of statutes and constitutions, but legal commentators have generally ignored the law's role in structuring the public creation of meaning. This section will briefly review two leading movements in legal interpretation to demonstrate that despite significant differences between the two, law ignores the role meaning plays in the creation of democracy. Legal theorists focus on the interpretive strategies used by judges and lawyers and are far less concerned about how those strategies might influence public life. In other words, they see the interpretation of meaning as a legal problem, not a problem associated with public life.

Originalism

Originalism is the idea that the original intention of the writers of statutes and constitutions can be discovered, and that once it has been determined, it should be controlling. Just as importantly, originalism does not view the meaning of texts as something that evolves over time, but rather it views meaning as fixed and discoverable. U.S. Supreme Court Justice Antonin Scalia has been a defender and practitioner of this methodology while providing a gentle critique.[5]

Scalia argues that while originalism has never been the sole method for unpacking meaning, justices "have almost always had the decency to lie, or at least to dissemble, about what they were doing."[6] While recognizing that originalism is difficult to do and has its problems, Scalia sees it as the best option for maintaining the legitimacy of law in a democratic society. It is interesting to note that Scalia claims that the advocates of a nonoriginalist methodology believe that "words have no meaning," something he refuses to take seriously.[7]

For Scalia, the challenges facing originalism are two-fold: (1) it is difficult to discover the original meaning of something and (2) a strict originalism would be forced to support laws that have lost their public legitimacy. Scalia sees the discovery of meaning as the most difficult obstacle for originalists to overcome. Uncovering the historical documents to capture meaning is a time-consuming process, "better suited to the historian than the lawyer,"[8] and one not suited to the time pressures required of judges.[9]

As for the second challenge, Scalia argues that originalism "is medicine too strong to swallow."[10] To illustrate the problem, Scalia assumes that a state recently has approved a law permitting public lashing or branding of a person's hand as punishment for certain crimes. Scalia argues that no judge today would seriously argue that such legislation does not violate the Eighth Amendment to the U.S. Constitution.[11] However, if originalist thinking is to be followed, flogging and handbranding should be allowable today as long it was not viewed as being cruel and unusual punishment in 1791. The way out of this problem for Scalia is to be a "faint-hearted originalist," one who recognizes that the discovery of meaning is difficult, if not impossible, and that judges need to be cautious. As he writes:

> Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge

> himself. And the principal defect of that approach—that historical research is always difficult and sometimes inconclusive—will, unlike nonoriginalism, lead to a more moderate rather than a more extreme result.[12]

In that same general vein, Chief Justice William Rehnquist has argued for originalism not because the Founding Fathers laid out a plan that can be expected to address every problem,[13] but rather because he does not believe that the Supreme Court should enjoy the power to make an "end run around popular government."[14]

Originalist thinking is also evident in a judge's adoption of the neutral principles that guide decision-making.[15] As former Federal Judge Robert Bork writes, "Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by the Constitution."[16] How does a judge go about finding those enduring principles? It is not clear from Bork's writings. He assumes that judges can pull from the Constitution—both through its text and history—principled rules that were the intent of the framers.[17] At least when interpreting the First Amendment, however, Bork finds the text and literature lacking, allowing a judge to use other evidence. For Bork, it is clear that its authors only intended for the First Amendment to protect a very narrow range of political speech.[18]

In the end, originalists see expressive acts as having concrete meanings that can be discovered, and see the work of judges in interpreting those words not unlike that of a social scientist engaged in an objective enterprise. They view expressive acts that might have multiple meanings as a threat to the status quo or worse, as a nondemocratic way of establishing meaning.

Nonoriginalism

Scalia refers to those who do not believe that judges might be able to uncover the original intent as "nonoriginalists." Many fall into that category. In order to argue that there is more to interpretation than the search for historical meaning, past Supreme Court justices have used the term "living constitution."[19] William Brennan, for example, has written:

> [T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.[20]

Justice Brennan publicly wrestles with the idea of the constitutional search for meaning. He opposed the search for the original intent of the writers of the Constitution, labeling the search as "arrogance cloaked as humility."[21] He argues instead that judges should search for the "community's interpretation."[22]

While this seems to place Brennan in similar stead with modern-day literary critics such as Stanley Fish, Brennan does not advocate that there is no meaning in the constitution outside of community beliefs.[23] Not unlike Bork, Brennan finds in the Constitution certain value choices that he believes are beyond interpretation. For example, at one point Brennan proclaims, "It is the very purpose of our Constitution—and particularly the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities."[24] Brennan illustrates his interpretive strategy through the example of capital punishment. He finds capital punishment to be cruel and unusual punishment, but that is not the reason it is unconstitutional in his eyes. It is unconstitutional because it is "inconsistent with the fundamental premise of the Constitution that even the most base criminal remains a human being of some potential, at least, for common

human dignity."[25] Brennan realizes that his interpretation was not shared by the community. But it is a justice's duty to correct the community, if needed, he argues:

> Yet, again in my judgment, when a Justice perceives an interpretation of the text to have departed so far from its essential meaning that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path. On this issue, the death penalty, I hope to embody a community, although perhaps not yet arrived, striving for human dignity of all.[26]

Over the years, a number of other legal commentators have addressed the idea of nonoriginalism, seeking answers to the problems posed by Brennan. Some of the ideas central to nonoriginalist thought can be traced to the so-called legal realists, a reform movement popular in the 1920s to 1940s that challenged legal rules and facts that governed how judges decided cases. The realists, however, never sought a complete break from law as a scientific endeavor. As the legal realist and judge Jerome Frank notes, judges depend on the facts of the case to make decisions, but those facts are "merely a guess about the actual facts."

> The actual events, the real objective acts and words … happened in the past. They do not walk into court. The court usually learns about those real, objective, past facts only through the oral testimony of fallible witnesses.[27]

Frank viewed legal decision-making as a difficult art, and interpretation as an indispensable tool for a judge.[28] While the realists campaigned against rules and facts, they, too, failed to break from the influence of the authoritarian nature of meaning. Realists recognized that meaning was difficult to determine, but that did not mean that there was not a meaning to be discovered. For the realists, the problem of meaning was a methodological problem. As James Boyle notes: The two central legal realist arguments depended upon a *critique* of essentialist rationality in linguistic interpretation and a *defense* of the essential rationality of science. Thus the judge was supposed to give up playing with words and to begin playing with policy science.[29]

In recent years, the idea of nonoriginalism in legal interpretation has been picked up by a number of other writers. I will use the work of Ronald Dworkin and Steven Winter will be used here as examples of nonoriginalist legal interpretation.

Dworkin's often cited work on legal interpretation compares the writing of law to the writing of a chain novel, in that law is similar to a group of people who join together to write a novel, with each writer being responsible for a different chapter. As Dworkin writes: [E]very novelist but the first has the dual responsibilities of interpreting and creating, because each must read all that has been done before in order to establish, in the interpretivist sense, what the novel so far created is.[30]

For Dworkin, each judge is like a novelist in that chain.[31] His point is that legal interpretation provides judges with freedom to take the "story" in a new direction, but they must do so within the confines of the existing story. As such, judges enjoy freedom but are also constrained by the institution of the law. As Dworkin writes, "A judge's duty is to interpret the legal history he finds, not to invent a better history."[32]

Dworkin's work, then, argues that discovering the meaning of legal texts is far more complex than the originalists suggest because judges do not just discover law, they also make it. However, Dworkin stops short of endorsing the polysemic nature of meaning. Not only are judges confined by the parameters of the institution, but a "good" interpretation must also demonstrate its political value.[33] Dworkin seeks to demonstrate that legal interpretation can accommodate both the idea of the divergent meaning of expressive acts and the legal system's

need for determinacy. [34]

Winter offers a more complex model of the creation of meaning, one that is linked to the cognitive structure of communication. For Winter, meaning is largely indeterminate, but that does not mean that society falls into subjectivity. Winter argues that judges, just like citizens, rely on idealized cognitive models (ICMs) to help them make sense of the world in which they live. ICMs are like "stock stories or folk theories by which humans in a given culture organize the diverse inputs of daily life into meaningful gestalts that relate that which is 'relevant' and ignore that which is not."[35] For example, Winter notes that in the United States discourse concerning the First Amendment often makes use of the ICM "the marketplace of ideas," a metaphor that brings with it a cultural understanding about why unpopular ideas should be tolerated.[36]

For Winter, judges must rely on these existing narratives to ground the law in social experience. Without that grounding, the law runs the risk of being illegitimate.[37] However, Winter argues that the recognition of the importance of these narratives does not automatically lead to determinacy in the law. As he writes, "There is nothing that requires any storyteller to tell a particular story or to tell it in a particular manner."[38]

Both Dworkin and Winter try to identify ways for alternative meanings to surface, but yet also find ways through which law will remain firmly entrenched in its institutional and societal structure. Dworkin puts great faith in the ability of judges to take the "story" in new directions, but yet stay within the larger confines of the law. Winter sees judges as being free to adopt a new ICM, or at the very least a different interpretation of an existing ICM, that would lead to a new understanding of the law. For both, an explicit mission is maintaining the legitimacy of an existing legal structure in society. Dworkin, I would argue, sees the existing confining structure as legitimate. He refuses to recognize that the chains in the storytelling process are not merely chains that control rogue judges, but also chains that prevent fundamental change. Winter, while arguing that dominant stories might be reinterpreted, still sees the primary purpose of interpretation as a legal enterprise. Both fail to recognize the importance of the creation of meaning as a way of empowering the public sphere.

III Cultural Studies and Public Meaning

As described, much of the literature on legal interpretation takes a professional, institutional view of the purpose of interpretation. Missing is any attempt to recognize the democratic nature of interpretation and what role that search for meaning might play in the realization of a more participatory form of democracy. If we recognize that the courts play a fundamental role in the structure of public life, the courts' authoritarian view of the nature of meaning becomes significant.[39] While it is true that citizens do not often engage in the business of interpreting statutes and constitutions, they do engage in the process of trying to understand the meaning of public expressive acts. As judges search for certainty upon which to build law, they often close off this process. By failing to move their study out of the institutional level, Scalia, Brennan, Dworkin and Winter fail to recognize the democratic potential of meaning-making. This section will suggest that cultural studies provides a framework for understanding the role that meaning creation plays in the realization of democracy.

Cultural studies has long recognized the importance of meaning to the study of public communication and put forward a more democratic idea of meaning creation. Prior to the growth

of the cultural studies movement, most examinations of mass communication focused on what impact media has on citizens. Studies focused primarily on the media's creation of messages or their influence on their recipients. Most mass communication research focused on the individual, trying to explain differences in interpretation through social psychology or institutional influence.[40] As Jesse Delia writes in his history of mass communication research:

> [T]he notion of the audience as atomistic, as consisting of disparate and independent individuals, is in general harmony with the research practices of many early mass communication researchers and became progressively more accepted with the shift to survey and marketing research methods.[41]

Tom Streeter has argued that this view reflected the fears about modern society shared by early researchers —that "the plural quality of individuals was in danger of being erased by the massifying tendencies of modern media."[42] Cultural studies is an attempt to break away from the atomistic and institutional way of understanding mass communication. The cultural study of mass communication recognizes a more open understanding of meaning to give voice to disempowered groups within society.[43]

Meaning creation has long occupied a central place in cultural studies. Rather than viewing meaning as being something that is transmitted from media to audience, cultural studies understands the audience as potentially constructing oppositional interpretations of messages. An example is this observation by John Fiske about television:

> Far from being the agent of the dominant classes, it is the prime site where the dominant have to recognize the insecurity of their power, and where they have to encourage cultural difference with all the threat to their own position that this implies.[44]

As such, cultural studies says much about the relationship between political power, the creation of meaning, and the role of citizens in a democratic society. The power of citizens to interpret texts to reflect their own needs and desires, even if done so within established frameworks, has been viewed by some as being empowering. Henry A. Giroux has noted the importance of cultural studies in the creation of "active and critical citizens capable of fighting for and reconstructing democratic public life."[45] For Giroux, cultural studies is important not only because it recognizes the social construction of knowledge, and the role of meaning in that construction, but also because it sees culture as "contested terrain" where difference matters.[46] As such, Giroux has called for "organizing schools and pedagogy around a sense of purpose and meaning that makes difference central to a critical notion of citizenship and democratic public life."[47]

Jodi R. Cohen has argued that the more highly developed critical viewing skills are among television watchers, the better able they are to participate in democratic life. Part of critical viewing is learning to acknowledge the idea that there might be multiple meanings of an expressive act. As she writes, "[t]he viewer who is critically empowered considers the range of subjectivities and corresponding interpretations, and is thus able to choose freely and effectively among possibilities."[48] In Cohen's eyes, while critical viewing does not automatically lead to social action, "critical viewing can provide the resources for full participation in democratic life."[49] As she writes:

> A critical viewer who recognizes that their (sic) meanings were generated over time, in a social context, through symbolic choices that are often arbitrary, may have some control in the production and acquisition of knowledge by choosing among and/or

creating an entire range of "possible" meanings.[50]

Henry Jenkins draws similar conclusions and finds the reconstruction of television narratives by fans to be a spark to participatory culture. While Jenkins stops short of saying that fandom makes all audiences active, he argues it does prove that not all audiences are passive.[51] While critics of contemporary culture point to the manipulative forms of communication and the desire to create audiences where none exist, Jenkins argues that fans work to carve participatory space out of a cultural enterprise that is intended to isolate them. As such, Jenkins argues, "fans find the ability to question and rework the ideologies that dominate the mass culture they claim as their own."[52] Jenkins writes, "Fandom celebrates not exceptional texts but rather exceptional readings (though its interpretive practices make it impossible to maintain a clear or precise distinction between the two)."[53]

The insights of cultural studies, especially the idea that public expressive acts might be open to a multiplicity of readings and how that idea might serve to activate citizens within a democratic society, has generally been ignored by the American courts. In fact, judges have been openly opposed to the idea of contested meaning. Madhavi Sunder argues that law, especially reflected in freedom of association cases, has openly opposed more diverse understandings of meaning. Law protects cultural survival, but refuses to give that same level of protection to cultural dissent, Sunder claims.[54] As she writes:

> [L]aw legitimates exclusive rights to culture, protecting cultural borders not just against encroachment from outsiders but from members themselves. Law regressively treats +cultural meanings like the private intellectual property of aculture's leadership.[55]

Sunder argues that instead law should be required to "recognize the plurality of meanings within a culture" as a way to allow for the "proliferation of cultural meanings."[56]

Clay Calvert has also noted the problematic nature of the law's search for meaning, especially in libel law. Calvert argues that meaning is a poor standard for libel law because "[t]here is no benchmark against which the defendant's alleged state of mind about meaning may be evaluated …."[57]

Over the years, courts have sometimes adopted the rhetoric of pluralism, as reflected in Justice Kennedy's opinion at the beginning of this paper, but they have steadfastly refused to make the structural changes needed to value and protect that pluralism. Lawrence Lessig has noted that First Amendment law is "obsessed" with the regulation of texts, while ignoring the regulation of context. While courts impose strict limitations on government's ability to limit what people can say or print, they turn a blind eye to government's role in the creation of social meaning.[58] The Supreme Court has refused to acknowledge the value of meaning in the creation of an active public sphere. While the control of meaning works to manage public life, it does little to activate citizens to participate in the practice of democracy.

IV The Supreme Court, Meaning, and Public Expressive Acts

Stuart Hall has suggested that once meaning is problematized, it becomes a source of social struggle.[59] Courts, however, do not seek to problematize meaning, but rather to establish a dominant reading. What is forgotten in the process to establish a dominant meaning is the value of the public construction of meaning to public life. The perceived judicial need to set meaning works towards an authoritarian understanding of discourse—that meaning is what someone with power and authority says it means. When the court sets meaning, therefore, a discursive moment

is missed.[60]

The following examines how the U.S. Supreme Court has wrestled with the concept of meaning and used it to manage the public sphere in two areas: dissent during times of war and the interpretation of religious symbols.

War and the Control of the Public Sphere

Issues of free speech during times of war have over the years come to be important for understanding how the courts view public expression. During times of conflict, it is not unexpected that government would try to exert some control on the behavior of dissidents. However, in its opinions in free speech cases during wartime one can see the way the Court has tried to overtly control the public sphere through the authoritarian construction of meaning. Early free-speech cases to reach the U.S. Supreme Court centered on public criticism of United States' involvement in World War I. These cases, usually prosecuted under the Espionage Act of 1917 and the Sedition Act of 1918, called on the courts to make interpretations about the intent of the speaker. The Court generally faced questions such as: Was it the intent of the speaker to cause insubordination in the military? Was it the intent of the speaker to obstruct recruiting and enlistment in the U.S. military?

For example, when the Court upholds the conviction of Charles T. Schenck, the general secretary of the Socialist Party, for obstructing the draft by circulating leaflets, Justice Oliver Wendell Holmes constructs a clear model for how courts are to determine the meaning of a statement. As Holmes writes in *Schenck v. United States* (1919): "If the act, (speaking, or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."[61] The point here for Holmes is that public reaction to speech is not an important part of the equation. Courts should instead try to evaluate the act itself rather than make judgments about its tendency, and examine the intent of the speaker or actor. Of course, judgments about the tendency of the speech might be linked to the intent of the speaker. As Holmes notes about Schenck's writing:

> Of course the documents would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.[62]

Justice John Clarke follows much the same test several months later in *Abrams v. United States* (1919), where five Russian citizens living in the United States were convicted for publishing and distributing seditious material during times of war. After reviewing the leaflets distributed by Jacob Abrams and his compatriots, Clarke writes: "The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the Government of the United States, and to cease to render it assistance in the prosecution of the war." [63] Clarke argues that people "must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."[64] Such a test of meaning assumes a notion of an inactive public. Citizens obviously play some role in the creation of meaning in that they exist to be influenced in some way by the message. Judgments about that influence, Clarke argues, are made by the Court, not by the public. The government can prohibit speech if the speaker's intent is judged to negatively influence the audience. The public becomes the way for the Court to justify its decision—to make it legitimate—but the public plays little role in the actual creation of meaning. The Court determines meaning and then uses a phantom

public to support its decision.

Holmes, in his famous dissent in *Abrams*, follows his general test for determining meaning, but breaks from the majority because he is far less certain that there is an intent to "cripple or hinder the United States in persecution of the war." For Holmes, it is less a question of the motives of Abrams and his friends, than one of the power of the defendants to achieve their goal. In an oft-quoted phrase from his dissent, "[n]ow nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[65] As an alternative, Holmes puts forward his marketplace theory: "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .."[66] While it has been argued that market-based tests give power to the public sphere to increase diversity and the creation of meaning, Holmes theory of truth is less a recognition of the polysemic nature of meaning than a statement on citizenship. It raises questions about whether citizens are capable of discovering truth and whether they ought to be trusted to make that discovery. Holmes is willing to trust the marketplace as long as the speaker is not convincing, as was Abrams. However, if the speaker is judged to pose a potential threat, as was Schenck, then the marketplace and citizens can no longer be trusted. It is the duty of the courts to make that determination. As R. Jeffrey Lustig notes, Holmes might have been "a friend of the common man, but only to the extent that such men and women would benefit by life in a society where order flowed from the needs of objective institutions rather than subjective rights."[67]

Following Holmes, the duty of the courts, then, is not to create the space to allow citizens to create meaning, but rather to search for and discover the natural meaning and tendency of an expressive act. This exists not so much in the words themselves, but rather in the context in which the words were used.[68] This becomes obvious in Holmes' opinion for the Court in *Debs v. United States* (1919), where Socialist Party leader Eugene Debs was convicted for delivering an antiwar speech that tended to disrupt military recruitment. In upholding Debs' conviction, Holmes writes of trying to discover the "natural and intended effect" of Debs' speech.[69] Holmes notes of Debs' call for public opposition to the war and the jury's search for his intent:

> Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service …."[70]

The theme of searching for the natural meaning of expressive acts carried over to *Gitlow v. United States* (1925). There the Court upholds the conviction of socialist Benjamin Gitlow's publication of his manifesto in *The Revolutionary Age* urging the overthrow of organized government. So, when Gitlow writes, "The Communist International calls the proletariat of the world to the final struggle!", the Court, through Justice Edward Sanford, notes, "This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement."[71] Sanford writes that Gitlow can be constitutionally punished if "the natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent."[72]

Holmes, joined by Justice Louis Brandeis, dissents not based on a different theory of interpretation, but rather on the question of whether Gitlow's actions had any chance of succeeding. As Holmes notes, "[W]hatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."[73]

In arguing to protect speech that had little chance of triggering action, Holmes advocates restrictions on speech that might threaten the status quo. There is no doubt that Holmes and others believed strongly that government had a right to protect itself. However, the idea of trying to anticipate public reaction as a way of deciding whether speech ought to be protected turns out to give a great deal of power to courts to manage the public sphere and control the creation of meaning.

The Court continues to make judgments about the public creation of meaning involving protests against the United States' participation in war. In 1974, the Court rules that the First Amendment protected a student's right to display an American flag with a peace symbol taped on it. In a *per curiam* opinion, the Court writes, "A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it."[74]

In the judgment of the Court, the intent and successful communication of the message helps move the use of the flag from unprotected conduct to protected expression. As the Court notes, "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[75] For this Court, at least some of the protection provided to expression, then, is linked to the successful transmission of meaning from author to audience. Might the speech not have been protected if the message was not clear? The Court does not answer that question. The Court also does not create any space for citizens to create their own meaning or to interpret the message in a new or different way. One cannot help but come to the conclusion that if the public interprets a message in a way that differs from the actor's intent, that conduct would not receive First Amendment protection.

It is interesting to note that the Court has not always relied on this interpretation of meaning. In 1943, the Court, through Justice Robert Jackson, defines meaning in a very different way. In deciding that public schools cannot force students to pledge allegiance to the American flag, Jackson writes, "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's just and scorn."[76] While that definition still falls short of recognizing the discursive nature of meaning creation, it does acknowledge that meaning can and often does differ from the creator's intent. It is interesting to note that today the Court seems to have broken from Justice Jackson's idea and more firmly placed meaning in the hands of the speaker.

Over the years, the Court has continued to acknowledge that the public plays some role in determining intent, but that role has never been clearly articulated. For example, in *Watts v. United States* (1969), when 18-year-old Robert Watts was convicted of knowingly and willfully threatening the president of the United States, the Court relied on the determination of intent to overturn the conviction. During a public rally at the Washington Monument, Watts said:

> They always holler at us to get an education. And now I have already received my draft classification as I-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is

L.B.J. They are not going to make me kill my black brothers.[77]

The Court, through a *per curiam* opinion, ruled that Watts' speech was a "crude" method of expressing his political opinion that, "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." [78]

The Court reiterated the importance of context in its decision in *City of Ladue v. Gilleo* (1994). Margaret Gilleo had placed a sign on her front lawn in 1990 expressing her opposition to the Gulf War.[79] After one sign disappeared and a second was knocked to the ground, the City of Ladue, a suburb of St. Louis, Missouri, informed Gilleo that her signs were prohibited by city ordinance. She then placed a sign in a second-floor window of her home stating, "For Peace in the Gulf." The city passed another ordinance prohibiting the placement of signs other than such signs as small residential identification signs, for sale signs, commercial signs in commercially zoned areas, and churches, schools or religious institutions.

While the Court unanimously agreed that the city's ordinance unconstitutionally restricted free speech, it took note of the important role that a sign's location plays in the creation of public meaning. Justice John Paul Stevens argues that signs carrying the same message can take on different meanings in different locations.[80]

> A sign advocating "Peace in the Gulf" in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.[81]

While Stevens' argument seems to value the public creation of meaning, it does, in the end, follow the same logic as earlier Supreme Court First Amendment reasoning. The public creation of meaning is valued not so much for itself—for the public's ability to exchange views and ideas—but rather because it is directly related to the ability of individuals to express themselves. As Stevens notes, "The elimination of a cheap and handy medium of expression is especially apt to deter *individuals* from communicating their views to the public . . .."[82]

Today it seems that the Court has come to recognize the polysemic nature of public expressive acts, but it is viewing that idea through the lens of a First Amendment that values the individual rights of speakers more than the public's right to associate for the creation of meaning. The public remains important not because it is the creator of meaning, but rather because it is needed as a way to justify and legitimizes existing freedoms of expression. Freedom of expression is good, in the eyes of the Court, because it allows individuals to express themselves and it aids society's need for ideas. Citizens are seen as playing little role in the creation of meaning. The public is either a group of people that might be energized by dangerous ideas or an audience for individual speech. The flow of information to the public sphere only goes one way. The public sphere is portrayed as a passive receiver of information and not an active interpreter of meaning.

The Public Meaning of Religious Symbols

The placement of religious symbols on publicly owned property has long occupied the decisions of the Court. Bringing together the speech and religion clauses of the First Amendment, the justices have wrestled with trying to establish when it is acceptable for these powerful symbols to

be displayed in areas such as public parks, public buildings, and on the premises of governmental buildings. Through the years, the question that has occupied the Court is whether a person who views the display will come away feeling that, because of the placement of the symbol, government has expressly endorsed that religious view. For example, the Court has held that the placement of a Christmas tree and a menorah on the grounds of a county courthouse is acceptable, but the placement of a crèche (a representation of the nativity of Jesus) on an inside grand staircase of a county courthouse during the Christmas season is not. For at least a majority of the court, the placement of the crèche signifies official endorsement, while the menorah and the Christmas tree, placed side-by-side, signify diversity. As Justice Harry Blackmun writes in 1989, "No viewer could reasonably think that (the crèche) occupies this location without the support and approval of the government."[83]

Throughout these cases, justices have struggled with how to interpret the public meaning of religious symbols. They struggle to acknowledge that not all people view these symbols through the same lens, but yet fight to establish a preferred meaning on which to set policy. I will highlight the debate by looking at *Capital Square Review and Advisory Board v. Pinette* (1993), where various justices struggle to define the polysemic nature of public meaning.

Under Ohio law, Capital Square in Columbus, Ohio, was a forum for public discussion and activities. The Advisory Board had authority to regulate access to the square and it required users to complete an application and meet several content-neutral criteria. In 1993, the Board rejected an application from the Ku Klux Klan to place an unattended cross on the grounds. A divided Court sided with the Klan.

Of central importance to most of the justices was how citizens might interpret the placement of the cross, its meaning, and whether its placement on the square would bring with it official governmental sanction. Justice Scalia, writing for the majority, argues that since most citizens realized that the square was open for public use, there was little if any chance that people would associate the cross' placement with government sanction. He argues that precedent requires the Court to rely on "the community" for the dominant interpretation, even though "outsiders" or uninformed members of the community might come to a different interpretation. As Scalia writes, "erroneous conclusions do not count."[84] Scalia builds off and sets a dominant interpretation. If a citizen comes to the conclusion that government has endorsed the placement of the cross, Scalia labels that an erroneous interpretation. Only evidence of direct government preference would raise constitutional questions. For Scalia, there was no governmental intent to endorse a particular form of religion, therefore it is unreasonable for citizens to come to such a conclusion.

Justice Sandra Day O'Connor, concurring with the decision but for different reasons, departs from Scalia's rejection of erroneous interpretation. For O'Connor, if a "reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid."[85] She argues that her idea of a "reasonable observer" is less tied to individual interpretation and more linked to the idea of community or collective social judgment.[86] She denies, however, that she is empowering majority views:

> There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.[87]

O'Connor agrees with the majority decision in this case, but not because of a lack of government intent. Rather, she believes that no reasonable observer can come away with an interpretation that would endorse state sanctions. She admits that she is troubled by the fact that the cross is the only display on the square and for that reason endorses adding a disclaimer to the display, an action that Scalia soundly rejects.[88]

The complexity of interpreting symbols was not lost on the Court. Justice Clarence Thomas, voting with the majority, argues that the cross, as used by the Klan, was a political, racist symbol rather than a religious symbol. He notes, "The Klan has appropriated one of the most sacred religious symbols as a symbol of hate."[89] However, he leaves little indication of how such a conclusion might influence his decision.

In dissent, Justice Stevens noted the complexity of determining the meaning of the cross. Yet while the meanings vary, Stevens was willing to take a stand against any government endorsement of religion. He rejects O'Connor's argument about competing interpretations. Instead, he calls on interpretations to be "objectively reasonable" adding, "A person who views an exotic cow at the zoo as a symbol of the Government's approval of the Hindu religion cannot survive this test."[90]

He goes on to argue that any reasonable observer, seeing an unattended symbol in front of a capital building, would assume the government "has sponsored and facilitated its message."[91] The placement of a United Way Thermometer and the booths of artisans during a craft show carry equal governmental support, Steven argues. It is not the cross itself that produced the controversy, but where the cross is placed. For Stevens, the particular location demonstrates perceived government involvement.[92] For Stevens there is only one meaning that can be derived from the placement of the cross.

The debate among the justices in this case demonstrates the difficulty they have wrestling with the complexity of meaning. The majority of the Court acknowledges that there is something that they need to take into account beyond the intent of the communicator. Yet, while recognizing that, in the end they fall back on the establishment of a dominant meaning upon which to base law. Members of the Court disagree about what that meaning is and how it is established. What they refuse to accept is that the Klan's cross will mean different things to different people and that viewpoint diversity is acceptable in a democratic society. The Court focuses on the establishment of meaning and ignores the public process of meaning creation that is vital to a participatory democracy.

V Meaning, Active Citizenship and Management

The cases involving dissent during times of war and the meaning of religious symbols demonstrate not only how justices have struggled to interpret the meaning of public expressive acts, but also show how the interpretation of meaning is used by the Court to manage the public sphere. In the war cases, the Court establishes a dominant meaning of an expressive act and attempts to hide this act behind an objective methodology. As we have seen, the Court increasingly has recognized the importance of context in the establishment of meaning, but has failed to recognize that the public plays any role other than that of a passive spectator in the establishment of that meaning. The Court fails to break free of liberal constraints, tentatively recognizing the polysemic nature of expressive acts but turning that into a justification for greater individual freedom instead of a justification for promoting the value of associations. In

important ways, the Court puts forward a new understanding of meaning—one that finds a way to acknowledge the openness of meaning while still protecting the Court's institutional role in the establishment of meaning.

In First Amendment jurisprudence, intent plays a critical role in the discovery of meaning. Through the attempt to discover the original intent of a speaker, a text, or an act, law seeks to fix the meaning of public expressive acts in space and time. The search for original intent is an authoritative action that is often used to block challenges and to claim a higher status for an idea. The interpretation is no longer just the opinion of one isolated individual, but rather an imposed meaning that has historical and cultural power.

This becomes apparent in the writings of Justice Scalia. He recognizes that the discovery of meaning is difficult, if not impossible, and that judges need to be cautious. If we begin from the idea that intent can be fixed in time and space, then the discovery of that intent becomes a question of finding the proper methodology. But more than anything else, the search for original intent makes the individual speaker or text the focus of attention rather than the public sphere. Recent free speech doctrine puts the control of meaning securely in the hands of either the creator or speaker (or, perhaps more accurately, in the hands of the owner). The meaning of a public event, such as a parade or public demonstration, is what the speaker or owner intends it to be. So, for Scalia, a cross placed in front of a state capital can only be interpreted as state endorsement of religion through an "erroneous" interpretation—the state did not intend that meaning. Applied in this fashion, free speech doctrine endorses an authoritarian approach to the establishment of meaning.

Justice Scalia's opinion in *Capital Square*, as well as comments from dissenting justices, demonstrates that the intent of the speaker is far more important to the Court than how members of the public might interpret such symbols. It is entirely possible that citizens might see no connection between the placement of the cross and government endorsement of a religious view, as Scalia argues. However, Scalia has little evidence to make such a determination and, for that matter, neither do the other justices who make assumptions about what "reasonable observers" might think. The important point, however, is not that either view is right or wrong, rather it is that by making judgments about what the dominant meaning is, the Court is cutting off discursive opportunities for the public. By building its decisions around the assumption that the establishment of a dominant meaning is necessary in order to set public policy, it limits discursive opportunity for citizens to wrestle with what these symbols mean—to engage in what some might call "public work."[93] It assumes that citizens are passive spectators to democracy, waiting for a dominant institution to tell them what a public expressive act means, how it fits into our constitutional scheme, and how they are to relate to and understand it.

The control of meaning then allows the Court to maintain its legitimacy as a major cultural force, but it also helps the Court manage public life. As we have seen, in different political periods that management allows different levels of protection for individual expression, but the Court is consistent in its refusal to recognize the value of the public creation of meaning. The Court, and liberal theorists in general, have tended to overvalue individual freedom and idealize the marketplace.[94] While liberalism's ideas of individual freedom and the marketplace of ideas emerged separately, and exist in an uneasy tension, they are nonetheless influential. The merging of liberal thought and the marketplace creates an instrumental approach to freedom of expression. Liberal theory, with its connections to the marketplace metaphor, creates avenues in which individuals are to fight to achieve expressive victory. Free speech in our modern

understanding of the concept deemphasizes the exchange of ideas and emphasizes individual expression and winning the debate in the marketplace of ideas. The goal is not understanding, but instead the goal is winning. The power of this instrumental understanding of free speech is illustrated in numerous writings by free speech proponents, from John Milton's famous phrase, "who ever knew truth put to the worse in a free and open encounter?"[95] to Holmes' classic articulation of the marketplace of ideas, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[96] The marketplace in liberal free speech thought is not a place where ideas are exchanged for the sake of deliberation and the creation of meaning, but a place to find a way to assure that an idea becomes dominant.

This becomes obvious when we analyze the ideas that underlie Holmes' vision of a marketplace and its role in democratic life. Seeing combinations as a fact of modern life, he attempted to create the space for combinations (be they workers or businesses) to establish what would pass as truth. Holmes was content to allow the status quo to dominate and determine what was considered true. And so in his *Abrams* decision, he granted protection because there was little threat they would achieve their objectives. The marketplace of ideas does not serve a discursive function, but rather helps establish order in the chaotic world of democratic life.

Creating an Active Public Sphere

Public meaning is discursively redeemed and does not exist solely in the creator's intent, but in complex linguistic, symbolic and cultural relationships. The key to creating that discourse is allowing all citizens who want to participate to do so. If we recognize the creation of meaning is a process, the focus of protection changes. No longer is protection predicated on the intentions or clarity of the individual speaker but on the creation of meaning through the interaction of the speaker or display and audience. Public areas—including those that are government owned and those are privately owned but generally open to the public—need to be regulated to promote discursive principles. In government-owned fora, where courts have looked at the traditional use of property and/or examined the rules that have been put in place to govern speech at those locations,[97] we need a more functional approach.

Joshua Cohen has suggested that free speech theory ought to include the "presumption that any location with dense public interaction ought to be treated as a public forum that must be kept open to the public."[98] Allowing access to facilities that have been made public does not give speakers the right to interfere with, disrupt or block another speaker's expressive activity. The speech of antiwar protestors ought to be protected not simply to allow people to express themselves, but to allow citizens to be exposed to diverse ideas. To allow speakers to do so would be to allow coercion to enter the public sphere. The idea is to create opportunities for citizens to speak, not assure effective discourse; it merely allows speakers to enter the public sphere and use it for discursive purposes and, more importantly, provide opportunities for citizens to be actively involved in the creation of meaning.

In addition to access issues, freedom of association is vital to the public creation of meaning. And while association is not a recognized constitutional right, the U.S. Supreme Court has been protecting associational rights for a long time. Not surprisingly, however, the Court has tended to see freedom of association through a liberal framework that is not protective of the public's discursive rights.

Generally speaking, there are two ways that the Supreme Court justifies freedom of association. The first is linked to the idea that freedom of association is an individual right. It allows the individual to come together with other members of society to give that citizen a

stronger voice in democracy. As Justice William Brennan once wrote, "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[99] Brennan saw freedom of association not as an intrinsic discursive right, but an instrumental right that serves the free speech needs of individuals.[100]

The second way the Court has justified freedom of association stems from the perceived need to protect organizational autonomy. In this line of reasoning, association is important less as a way of protecting individual freedoms than as a way of allowing organizations to exist absent governmental interference. As Chief Justice William Rehnquist put it in defending the right of the Boy Scouts of America to exclude homosexuals, the right of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas."[101] In this view, it is not the right of individual members to express themselves that is paramount, but rather the right of the organization's official position to dominate. Today, the Court seems to have moved away from viewing freedom of association as an individual right and more towards the idea that it is an organizational right.[102]

Both interpretations fail to aid in the formation of a discursive public because of their emphasis on autonomy rather than the creation of community. There is no doubt that the ability to protect the right of individuals to join associations is important to democracy, as well as the right of associations to be free from government sanctioned beliefs. It is through those associations that public life is often played out. However, too much associational freedom—either for individuals or for organizations—is bad for democracy. It fragments society, creating private interest groups that often tend to speak only to themselves. Associations are not simply about communicating within groups, but rather communicating between groups. One of the dangers to public life is that as the public sphere splinters into discrete associations, as a whole loses its vitality.

Therefore, the two ways in which the Supreme Court has chosen to look at associations merely reflect different sides of the same coin. Both have direct connections to liberal ideas of free speech and association, while Justice Rehnquist's ideas seem to more directly reflect the growing expansion of corporate rights. The disagreement between Brennan and Rehnquist is not over the role that associations play in a democratic society, but rather over who gets to control the meaning of an association. Brennan would allow individuals to control the meaning; Rehnquist would allow the organization itself to make that determination. The Court fails to recognize the role associations play in the communication of ideas to members of society. An important value of associations is the role they play in the creation of public meaning.

VI Conclusion

I have argued that the Court, through its construction and use of the meaning of public expressive acts, has a direct impact on limiting the role citizens play in democracy. As I have suggested, the Court needs to recognize that democratic structures ought to value not just the ability of citizens to speak as individuals, but also opportunities to come together and grapple with the meaning of public acts. The lack of respect for public meaning-making by the Court serves not only to disempower the public sphere, but to manage public life. By limiting the ideas that are put into

the public sphere, the ability of citizens to come together to discuss those ideas, and the possibility that alternative frameworks might be created from that discussion, the Court maintains the status quo. As Richard Delgado notes, alternative interpretations of public events is one way that disempowered groups are able to promote change in a democratic society.[103] The Court too often discourages those alternative interpretations.

Of course, it can be argued that the Court's management of public life is functional for democratic society. It makes for a more efficient, orderly society, which undoubtedly is an important role for law. But more importantly, the Court's use of meaning also supports the modern understanding of democratic life in the United States that Peter Bachrach refers to as the theory of democratic elitism where "the masses are inherently incompetent" and where citizens are "unruly creatures possessing an insatiable proclivity to undermine both culture and society."[104] Elitist theories of democracy justify the Court's need to fix meaning and control public life. Working off of a different theory of democracy, one that values citizen activism and the Court's role in promoting that activism, we can find support for valuing the formation of alternative interpretations of public expressive acts.

Does such a view of democracy require the Court to surrender all attempts at the discovery of meaning? Obviously not. Interpretation, especially of the Constitution and legislation, is an important role of the Court. That does not mean, however, that the justices cannot recognize the complexity of meaning creation and work to protect the public space that would aid citizens in the creation of meaning. As argued in this paper, the Court has used the question of meaning as a way to maintain order and to protect the individual rights of those people with whom the justices agree. One solution to the problem facing the Court is to take the process of meaning creation and alternative interpretations of expressive acts seriously. And while this paper does not attempt to detail a new theory of the First Amendment, such a solution might take the Court in new directions. It would protect discourse in venues open to public use, value association and assembly, not allow a speaker's intent to determine meaning, and examine how people have reacted to expressive acts. While the establishment of meaning allows the political views of justices to dominate, a focus on the process of meaning-making might encourage more diverse interpretations and empower citizens.

In these cases, the Court is called on to walk a fine line between aiding an orderly society and the creation of meaning in a dynamic society. Meaning has come to serve the needs of that orderly society. The Court too often uses meaning as a way to quell disagreement and dissent, failing to recognize the value of discourse about the meaning of symbols in aiding the orderly transition of society. By protecting the process, the Court might aid the transition to a more democratic society and a more active public sphere.

Notes

[1] As former Supreme Court Justice William Brennan once wrote, "Unlike literary critics, judges cannot merely savor the tensions or revel in the ambiguities inherent in the text —judges must decide." Brennan, "The Constitution of the United States: Contemporary Ratification," *South Texas Law Review*, 27 (1986): p. 434.

[2] See Thomas Streeter, "Some Thoughts on Free Speech, Language, and the Rule of Law," in *Freeing the First Amendment: Critical Perspectives on Freedom of Expression*, eds. David S. Allen and Robert Jensen, New York: New York University Press (1995): pp. 31-53.

[3] As used here, public expressive acts intends to capture a broad range of speech activities. It refers to not only what First Amendment scholars might refer to as symbolic speech—speech that has no vocal component—but also what might be termed pure speech, which has a strong vocal component. Public expressive acts are any speech or symbolic act that invites members of the public to wrestle with its meaning. A speech by an anti-war protester invites citizens to determine what the speaker means by her words. In that regard, a sign placed on a citizen's front lawn supporting war also invites interpretation.
[4] *Texas v. Johnson*, 491 U.S. 397 (1989): p. 422.
[5] Originalism is also examined in Robert H. Bork, "Neutral Principles and Some First Amendment Problems," I*ndiana Law Journal*, 47 (1971): pp. 1-35; H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review*, 98 (1985): pp. 885-948; Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review*, 34 (1982): pp. 739-763; Terrance Sandalow, "Constitutional Interpretation," *Michigan Law Review*, 79 (1981): pp. 1033-1072; Jacobus tenBroek, "Use by the United State Supreme Court of Extrinsic Aids in Constitutional Construction," *California Law Review*, 27 (1939): pp. 399-421; and Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review*, 96 (1983): pp. 781-827.
[6] Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review*, 57 (1989): p. 849, 852.
[7] Ibid, p. 856. Of course, Scalia overstates this criticism. No theorist would seriously argue that words are without meaning, only that the words have no fixed meaning.
[8] Ibid, p. 857.
[9] Ibid, p. 862.
[10] Ibid, p. 862.
[11] Ibid, p. 862.
[12] Ibid, p. 864.
[13] Rehnquist agrees with the view advocated by Justice Oliver Wendell Holmes. Holmes wrote, "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation." *Missouri v. Holland*, 252 U.S. 416 (1920): p. 433. Rehnquist notes that "scarcely anyone would disagree." Rehnquist, "Observation: The Notion of a Living Constitution," *Texas Law Review*, 54, 4 (May 1976): p. 694.
[14] Rehnquist, p. 706.
[15] See Herbert Wechsler, *Principles, Politics, and Fundamental Law*, Cambridge: Harvard University Press (1961).
[16] Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal*, 47 (Fall 1971): p. 3.
[17] Ibid, p. 17.
[18] Ibid, pp. 22-23. Bork would protect only "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country." However, Bork would exclude from protection speech that would advocate the forcible overthrow of the government or the violation

of the law. Ibid, pp. 29-30.
[19] The phrase appears to have appeared initially in a book by Howard McBain, *The Living Constitution: A Consideration of the Realities and Legends of Our Fundamental Law*, New York: The Workers Education Bureau Press (1927).
[20] Brennan, "The Constitution of the United States: Contemporary Ratification," *South Texas Law Review*, 27 (1986): p. 438.
[21] Ibid, p. 435.
[22] Ibid, p. 434.
[23] See Stanley Fish, *Is There A Text In This Class? The Authority of Interpretive Communities.* Cambridge: Harvard University Press (1980); "Interpretation and the Pluralist Vision," *Texas Law Review*, 60 (1982): pp. 495-505; and "Working on the Chain Gang: Interpretation in Law and Literature," *Texas Law Review*, 60 (1982): pp. 551-567.
[24] Ibid, p. 436.
[25] Ibid, p. 444.
[26] Ibid, p. 444.
[27] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice*, Princeton, NJ: Princeton University Press (1949): pp. 15-16.
[28] Ibid, pp. 292-309.
[29] James Boyle, "The Politics of Reason: Critical Legal Theory and Local Social Thought," *University of Pennsylvania Law Review*, 133, 4 (April 1985): p. 707. Emphasis in original.
[30] Ronald Dworkin, "Law as Interpretation," *Texas Law Review*, 60 (April 1982): p. 541.
[31] Ibid, p. 542.
[32] Ibid, p. 544.
[33] Ibid, p. 543.
[34] Lawrence Tribe has described this issue. See *American Constitutional Law*, Mineola, New York: The Foundation Press (1978): p. 30.
[35] Steven L. Winter, "The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning," *Michigan Law Review*, 87, 8 (August 1989): p. 2233.
[36] Ibid, p. 2234.
[37] Ibid, p. 2270.
[38] Ibid, p. 2271.
[39] For example, James Boyd White has written that the idea of original intent is a way of shutting down discussion. "Closing off conversation in this way, in the name of a deliberatively created fictional reality, is a radically authoritarian, not a democratic, act." White, *Justice as Translation: An Essay in Cultural and Legal Criticism*, Chicago: University of Chicago Press (1990): p. 136.
[40] See Jesse Delia, "Communication Research: A History," in *Handbook of Communication Science*, eds. Charles R. Berger and Steven H. Chaffee, Beverly Hills: Sage (1987): p. 39.
[41] Ibid, p. 67.
[42] Thomas Streeter, "Polysemy, Plurality, and Media Studies," *The Journal of Communication Inquiry*, 13 (1989): p. 92.
[43] This idea is also reflected in some of the legal literature. For example, see Robert M. Cover, "Foreward: Nomos and Narrative," *Harvard Law Review*, 97, 1 (November 1983): pp. 4-68; Richard Delgado, "Storytelling For Oppositionists and Others: A Plea for Narrative," *Michigan Law Review*, 87, 8 (August 1989): pp. 2411-2441; and Kim Lane Scheppele,

"Foreward: Telling Stories," *Michigan Law Review*, 87, 8 (August 1989): pp. 2073-2098.
[44] John Fiske, *Television Culture*, New York: Methuen (1987): p. 326.
[45] Henry A. Giroux, "Resisting Difference: Cultural Studies and the Discourse of Critical Pedagogy," *Cultural Studies*, eds. Lawrence Grossberg, Cary Nelson, and Paula Treichler, New York: Routledge (1992): p. 199.
[46] Ibid, p. 202.
[47] Ibid, p. 209.
[48] Jodi R. Cohen, "Critical Viewing and Participatory Democracy," *Journal of Communication*, 44, 4 (Autumn 1994): p. 107.
[49] Ibid, p. 111.
[50] Ibid, p. 110.
[51] Henry Jenkins, *Textual Poachers: Television Fans & Participatory Culture*, New York: Routledge (1992): p. 287.
[52] Ibid, p. 284.
[53] Ibid, p. 284.
[54] Madhavi Sunder, "Cultural Dissent," *Stanford Law Review*, 54, 3 (December 2001): 549.
[55] Ibid, p. 552.
[56] Ibid, p. 557.
[57] Clay Calvert, "Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique," *The Northern Illinois University Law Review*, 16 (Fall 1995): p. 139.
[58] Lawrence Lessig, "The Regulation of Social Meaning," *University of Chicago Law Review*, 62 (Summer 1995): p. 1041.
[59] See Stuart Hall, "Encoding/decoding," *Culture, Media, Language: Working Papers in Cultural Studies, 1972-79*, ed. Hall, London: Hutchinson (1980): pp. 128-138.
[60] This is similar to an argument made by Mary Ann Glendon suggesting that when citizens make rights-based claims, it hinders discourse. This is because Glendon sees rights as being absolute and closes off any compromise. See Glendon, *Rights Talk: The Impoverishment of Political Discourse*, New York: The Free Press (1991).
[61] *Schenck v. U.S.*, 249 U.S. 47 (1919): p. 52.
[62] Ibid, p. 51.
[63] *Abrams v. U.S.*, 250 U.S. 616 (1919): p. 621-622.
[64] Ibid, p. 621.
[65] Ibid, p. 628.
[66] Ibid, p. 630.
[67] R. Jeffrey Lustig, *Corporate Liberalism: The Origins of Modern American Political Theory, 1890-1920*, Berkeley: University of California Press (1982): p. 120.
[68] For a discussion of the idea that Holmes brought context into First Amendment deliberations, see Louis Menand, *The Metaphysical Club: The Story of Ideas in America*, New York: Farrar, Straus, and Giroux (2001): p. 427.
[69] *Debs v. U.S.*, 249 U.S. 211 (1919): p. 215.
[70] Ibid, p. 216. It does not seem that Holmes believed this to mean that there was some natural meaning to words. He believed that meaning was context dependent. The meaning of language was a social good, much as Pragmatists of the day believed. Holmes did not, however, share the Pragmatists optimism. For an explanation of this idea, see Menand, pp. 432-433.
[71] *Gitlow v. New York*, 268 U.S. 652 (1925): p. 665.

[72] Ibid, pp. 631-632.
[73] Ibid, p. 673.
[74] *Spence v. Washington*, 418 U.S. 405 (1974): p. 410.
[75] Ibid, pp. 410-411.
[76] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), 632-633. Perhaps the Court's acceptance of an open meaning of the American flag is tied directly to the lack of a clear, accepted idea of what the flag actually means. There is no individual or single group that has the power to establish its meaning.
[77] *Watts v. United State*s, 394 U.S. 705 (1969): p. 705.
[78] Ibid, p. 708.
[79] The sign said, "Say No to War in the Persian Gulf, Call Congress Now."
[80] Interestingly, Justice Stevens argued that commercial signs might have lesser communicative importance. *City of LaDue v. Gilleo*, 512 U.S. 43 (1994): p. 56.
[81] Ibid.
[82] Ibid. Emphasis in original.
[83] *County of Allegheny v. ACLU*, 492 U.S. 573 (1989): pp. 600-601.
[84] *Capital Square Review and Advisory Board v. Pinette*, 510 U.S. 1307 (1993): p. 765.
[85] Ibid, p. 777.
[86] Ibid, p. 780.
[87] Ibid.
[88] Ibid, pp. 792-793. Scalia noted that in order to be of much help, a sign clarifying the intent of the display would have had to be of sufficient size to make it accessible to passersby. He argued that such rules open up the possibility of allowing government to determine whether signs are large enough for citizens to see them. He noted, "Our Religion Clause jurisprudence is complex enough without the addition of this highly litigable feature." Ibid, p. 769.
[89] Ibid, p. 771.
[90] Ibid, p. 800.
[91] Ibid, pp. 801-802.
[92] Ibid, pp. 811-812.
[93] See Harry C. Boyte and Nancy N. Kari, *Building America: The Democratic Promise of Public Work*, Philadelphia: Temple University Press (1996).
[94] For an analysis of the relationship between these concepts, see Robert Jensen, "First Amendment Potluck," *Communication Law & Policy* 3 (Autumn 1998): pp. 563-588.
[95] John Milton, *Areopagitica* (Cambridge: Cambridge University Press, 1918): p. 58.
[96] Abrams, p. 22.
[97] The Court long has built on distinction between types of public-owned property in determining how much expressive activity is permitted on that property and the government's role in controlling that expressive activity. See Harry Kalven, Jr., "The Concept of the Public Forum: Cox v. Louisiana," *Supreme Court Review*, 1 (1965): pp. 1-32; and Robert C. Post, *Constitutional Domains: Democracy, Community, Management*, Cambridge, Mass.: Harvard University Press (1995).
[98] Cohen, "Freedom of Expression," *Philosophy & Public Affairs*, 22 (Summer 1993): pp. 207-263. Owen Fiss makes a similar argument in *Liberalism Divided*, Boulder, Colo.: Westview (1996): p. 49.
[99] *Roberts v. United States Jaycees*, 468 U.S. 609 (1984): p. 619.

[100] Roberts, pp. 618-620. See also Sunder, "Cultural Dissent," *Stanford Law Review* 54 (December 2001): p. 538.
[101] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000): p. 647.
[102] Daniel Farber, "Speaking in the First Person Plural: Expressive Associations and the First Amendment," *Minnesota Law Review*, 85 (June 2001): p. 1495.
[103] See Delgado.
[104] Peter Bachrach, *The Theory of Democratic Elitism: A Critique*, Boston: Little, Brown & Co. (1967): p. 2.