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## NOTES

### ORIGINAL MEANING AND ITS LIMITS

Justice Scalia has prominently defended a version of originalism that demands adherence to the Constitution's original meaning and, moreover, construes the original meaning of value-laden language, such as "unreasonable" and "cruel," by reference to the applications it was commonly thought to have at the time of ratification.<sup>1</sup> This form of originalism is distinct from versions that place their weight on the original intent or expectations of a clause's authors or ratifiers rather than on the common meaning of the enacted text,<sup>2</sup> and seems to promise an escape from the objection encapsulated in Justice Scalia's remark that "[m]en may intend what they will; but it is only the laws that they enact which bind us."<sup>3</sup>

Although Justice Scalia advances a number of arguments in favor of his preferred method of interpretation, one argument is of primary importance.<sup>4</sup> This "basic argument" maintains that because the Con-

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<sup>1</sup> See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3 (Amy Gutman ed., 1997) [hereinafter Scalia, *Common-Law Courts*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

<sup>2</sup> See, e.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

<sup>3</sup> Scalia, *Common-Law Courts*, *supra* note 1, at 17; see also, e.g., Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255 (2002). Professor Kavanagh explains:

Law is not made in virtue of lawmakers discussing the matters to be legislated or hoping or aspiring to achieve certain aims. Nor is it determined by what the lawmaker would have directed, given a chance to do so. In order to be made into law, it must be endorsed by the law-making institutions on whose authority it is supposed to rest. . . . Thus, the content of an authoritative directive contained in the Constitution is confined to what the framers (namely, the authority which lends the directive its binding force) managed to say through the appropriate institutionalized form. In short: it must be contained in the text of the Constitution.

*Id.* at 275.

<sup>4</sup> Justice Scalia's other arguments for originalism may broadly be described as "policy" arguments. One is that nonoriginalist methods of interpreting constitutional rights fail to protect these rights when future generations hold them in low esteem, which obviates the benefits of constitutionalizing them. See Scalia, *Common-Law Courts*, *supra* note 1, at 43, 46–47. A second is that abandoning originalism is abandoning the rule of law because the possible nonoriginalist methods of interpreting the Constitution are so varied that there is no way to predict how nonoriginalist judges will rule. See *id.* at 44–46.

Originalism's opponents have advanced their own policy arguments. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 71–72 (2005) ("[A] fundamentalist [i.e., originalist] approach would radically alter constitutional law for the worse. Why should we adopt an approach that turns constitutional law into a far inferior version of what it is today?"); *id.* at 63–65 (listing consequences that would follow if the Supreme Court were to adopt originalism today); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 226, 238 (1980) (proposing that the relevant

stitution is a text, it should be interpreted according to its original meaning. It therefore should be interpreted to apply as it would generally have been understood to when it was ratified.

As critics of originalism have pointed out, there is a gap in the basic argument. It takes its first step on seemingly solid ground,<sup>5</sup> with the premise that Justice Brewer articulated as follows: “The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”<sup>6</sup> But the inference from this initial premise to Justice Scalia’s conclusion — that the Constitution should be interpreted to have the same applications it would have been given when ratified — is valid only if an additional premise is taken for granted: namely, that the original meaning of the Constitution’s text is coextensive with these original applications.<sup>7</sup> This additional premise is dubious.

Yet originalism’s critics may themselves fail to subject the notion of original meaning to sufficiently careful scrutiny. Typically, after pointing out that originalists have conflated the meanings of words with their applications, critics conclude either that judges interpreting the Constitution’s value-laden clauses should apply them according to the best contemporary understanding of, for example, which punishments are cruel, or that the use of value-laden terminology in the Constitution licenses judges to apply their own moral views to the cases that come before them. Without undertaking a careful inquiry into the nature of original meaning, however, it is unclear whether the methods of interpretation advocated by originalism’s critics are true to the Constitution’s meaning.

This Note attempts to undertake the needed inquiry into the original meaning of the Constitution’s value-laden language. Ultimately, it proposes that if the framers and ratifiers shared an understanding that

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question to ask when evaluating originalism is “[h]ow well, compared to possible alternatives, . . . the practice contribute[s] to the well-being of our society — or, more narrowly, to the ends of constitutional government” and concluding that nonoriginalist methods of interpretation better serve these ends).

<sup>5</sup> *But see* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252 n.252 (1987) (arguing that because the Constitution’s meaning exists only in the context of an interpretive practice, that meaning changes when the practice authorizes revised interpretations or when the interpretive norms of the practice change).

<sup>6</sup> *South Carolina v. United States*, 199 U.S. 437, 448 (1905); *see also* Stephen R. Munzer & James W. Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1042 (1977).

<sup>7</sup> *See, e.g.*, Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 579 (1998) (“Once he has rejected such an evolved meaning view, Scalia apparently takes his version of originalism to follow as a matter of course. He does not consider the possibility of a competing view that would require fidelity to original meaning without adopting his position on the relation between original meaning and original practices. So constructed, the argument does not need to explicate Scalia’s particular notion of original meaning.”).

they were using value-laden language to prescribe or proscribe certain practices, then, in an important sense, the Constitution's original meaning requires or prohibits these practices. This kind of original meaning cannot, however, define the outer reaches of the Constitution's value-laden clauses; it is necessarily more limited. If prescriptions or proscriptions of specific practices are part of the Constitution's original meaning, then they might be treated as binding precedents comparable to judicial precedents, serving as foundations for subsequent development of constitutional doctrine. This Note will suggest intuitively plausible reasons for treating this kind of original meaning as binding. Its primary aim, however, is not to mount a theoretically exhaustive normative defense of a favored method of constitutional interpretation, but rather to contribute clearer thinking about original meaning to the ongoing normative debate.

Part I lays out the "basic argument," focusing on the exemplar in Justice Scalia's defense of originalism. It then examines objections to this argument. Part II introduces the idea that the uses of words illuminate their meanings and examines four uses of "value words." Two uses that supply plausible theories of the meaning of value-laden constitutional language receive special attention: the "objectivist" use to invoke moral facts, and the "specifying" use, whereby a speaker identifies certain restrictions that she herself endorses. Part II notes serious doubts about whether objectivist uses of value words could provide any guidance in constitutional adjudication, but suggests that if the framers and ratifiers used value words to specify certain prohibitions or requirements, these specifying uses ground one kind of original constitutional meaning.

Parts III and IV subject this specifying use theory to closer scrutiny, probing its possible relevance for contemporary constitutional adjudication. Part III enlists the Eighth Amendment to illustrate how historical evidence that the framers and ratifiers made specifying uses of value words can establish paradigmatic cases that play much the same role as judicial precedents. Part IV employs the specifying use theory to criticize Justice Scalia's recurring argument that if a practice was generally considered constitutional at the time of ratification, then it is part of the Constitution's meaning that the practice is constitutional. Part V suggests that the kind of original meaning supported by the specifying use theory plausibly merits deference. Part VI concludes.

## I. THE BASIC ARGUMENT

### *A. The Basic Argument in Justice Scalia's Defense of Originalism*

Justice Scalia introduces his discussion of originalist constitutional interpretation by stating, flatly and simply: "What I look for in the

Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”<sup>8</sup> He then articulates a theory of what constitutes original meaning. Aided by Professor Ronald Dworkin’s “crucial distinction between what some officials intended to *say* in enacting the language they used, and what they intended — or expected or hoped — would be the *consequence* of their saying it,”<sup>9</sup> Justice Scalia clarifies that by “original meaning” he does not mean the drafters’ concrete expectations about the applications of the words and phrases they used.<sup>10</sup> Rather, in keeping with his general skepticism toward legislative intent,<sup>11</sup> Justice Scalia’s originalism privileges the original semantic “import” of the enacted words and phrases — that is, what the text would reasonably have been understood to mean at the time of its enactment.<sup>12</sup> When a legal text such as the Eighth Amendment invokes a moral principle — as, for example, the Eighth Amendment does with its use of “cruel” — Justice Scalia claims (contra Professor Dworkin) that it incorporates “not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel.”<sup>13</sup> Its meaning is therefore “rooted in the moral perceptions of *the time*.”<sup>14</sup>

This position may be distilled into the following more specific version of the basic argument: (1) A legal text should be interpreted according to its original meaning. (2) The original meaning of a value word in a legal text is coextensive with the applications it generally would have been given at the time the text was enacted. *Therefore*: (3) A value word in a legal text should be interpreted according to the applications it generally would have been given at the time of enactment.

### B. *Objections to the Basic Argument*

As Justice Scalia’s critics have pointed out, the weakness in this argument is its second premise. The essential problem with Justice Scalia’s view is neatly captured in Professor A.J. Ayer’s rejection of the view that “to call an action right, or a thing good, is to say that it is generally approved of.”<sup>15</sup> As Professor Ayer explains, it may be quite

<sup>8</sup> Scalia, *Common-Law Courts*, *supra* note 1, at 38.

<sup>9</sup> Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 1, at 115–16; *see also* RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 133–36 (1993).

<sup>10</sup> *See* Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION*, *supra* note 1, at 129, 144.

<sup>11</sup> *See* Scalia, *Common-Law Courts*, *supra* note 1, at 16–23.

<sup>12</sup> *See* Scalia, *supra* note 10, at 144.

<sup>13</sup> *Id.* at 145.

<sup>14</sup> *Id.*

<sup>15</sup> ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* 104 (Dover Publ’ns 1952) (1936).

proper to assert “that some actions which are generally approved of are not right, or that some things which are generally approved of are not good.”<sup>16</sup> This insight is implicit in Professor Dworkin’s critique of Justice Scalia, which poses a choice between two “clarifying” translations of the Eighth Amendment prohibition on cruel and unusual punishment. According to the first translation, “cruel and unusual” could be replaced by “punishments widely regarded as cruel and unusual at the date of this enactment.”<sup>17</sup> According to the second reading, the Eighth Amendment lays down “an abstract principle forbidding whatever punishments are in fact cruel and unusual.”<sup>18</sup> Dworkin maintains that the “dated” translation is “bizarre”:

It is near inconceivable that sophisticated eighteenth-century statesmen, who were familiar with the transparency of ordinary moral language, would have used “cruel” as shorthand for “what we now think cruel.” They knew how to be concrete when they intended to be: the various provisions for criminal and civil process in the Fourth, Fifth, Sixth, and Seventh Amendments do not speak of “fair” or “due” or “usual” procedures but lay down very concrete provisions. If they had intended a dated provision, they could and would have written an explicit one. Of course, we cannot imagine Madison or any of his contemporaries doing that: they wouldn’t think it appropriate to protect what they took to be a fundamental right in such terms. But that surely means that the dated translation would be a plain mistranslation.<sup>19</sup>

Other critics have launched similar attacks on the second premise in the basic originalist argument. Professors Mark Greenberg and Harry Litman usefully diagnose the appeal of the basic argument as deriving from its conflation of two notions of meaning. In the “strict” sense, a term’s meaning is “the semantic or linguistic understanding necessary to use the term” — the understanding that a speaker must command in order to make proper use of the term.<sup>20</sup> In the “less strict” sense, a term’s meaning “includes the objects or activities to which a speaker or community of speakers actually applies the term.”<sup>21</sup> According to Professors Greenberg and Litman:

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<sup>16</sup> *Id.*

<sup>17</sup> Dworkin, *supra* note 9, at 120 (internal quotation marks omitted).

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

<sup>19</sup> *Id.* at 121–22; see also DWORKIN, *supra* note 9, at 136; Greenberg & Litman, *supra* note 7, at 609. Although Professor Dworkin focuses his analysis on the framers’ intent rather than on original meaning, any disagreement between Professor Dworkin and Justice Scalia about the role of authorial intent in interpreting legal texts can be cordoned off from the issue of the “datedness” of original meaning: Dworkin’s argument about the framers’ intent must simply be translated into an argument about how the Eighth Amendment would reasonably have been understood in context.

<sup>20</sup> Greenberg & Litman, *supra* note 7, at 586–87.

<sup>21</sup> *Id.* at 587.

The first notion lies behind originalism's theoretical force; it is untenable that the meaning of the Constitution in the first sense could evolve. In sharp contrast, it is not only tenable but inevitable that changes occur over time in the class of things to which a constitutional provision is applied.<sup>22</sup>

In a similar vein, Professor Aileen Kavanagh argues:

Although [Justice Scalia] emphasizes that the proper object of constitutional interpretation should be the text of the Constitution itself, by understanding that text to include the practices to which it was originally applied, Scalia's interpretive approach in fact gives priority to the application-intentions which lie behind the text and are not contained in it.<sup>23</sup>

Originalism's critics may be divided into "objectivist" and "subjectivist" camps. According to the objectivists, value-laden terms in legal texts incorporate objective moral facts into the law. Professor Dworkin clearly falls within this category.<sup>24</sup> Professors Greenberg and Litman also appear to be objectivists: they contend that the adjudication of cases involving the application of value-laden terms is no exception to "the basic rule that a court should determine whether a case falls within the relevant legal category in accordance with the best available understanding of all the facts."<sup>25</sup>

According to the subjectivists, legal texts incorporating value-laden terms invite judges to implement their own views about how these value-laden terms ought to apply. For example, according to Professor Frederick Schauer, when legal texts employ value-laden vocabulary, the law they lay down is inherently incomplete: the use of such vocabulary is an authorization to interpreters of these texts to construct and apply moral and political theories in the relevant domain.<sup>26</sup> Similarly, Professor Kavanagh contends that "the intention which is manifested in the text [of the Eighth Amendment] itself is to prohibit cruel and unusual punishment. Since . . . no more specific intent is attributable to the framers, the courts are given discretion to forbid punishments they consider cruel."<sup>27</sup>

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<sup>22</sup> *Id.* at 573.

<sup>23</sup> Kavanagh, *supra* note 3, at 282; *see also id.* at 283 ("We may apply the term 'cruel' to practices which were not considered cruel at the time of the framing while the dictionary definition of the word remains the same."); Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 806 (1982) (arguing that "specific intention" theories of constitutional meaning "are implausible precisely because they ignore the distinction between the meaning of a rule (such as a constitutional provision) and the instances of its application").

<sup>24</sup> *See supra* p. 1283; *see also* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 127 (1996) (endorsing the view that "there really are objective and normative properties or facts in the universe," although cautioning against declaring this in language that "strives for metaphysical resonance").

<sup>25</sup> Greenberg & Litman, *supra* note 7, at 606.

<sup>26</sup> *See* Schauer, *supra* note 23, at 826-27.

<sup>27</sup> Kavanagh, *supra* note 3, at 283; *see also id.* at 283-85 & n.79.

Both groups of critics share a confidence that history has little to contribute to our understanding of the meaning of the Constitution's value-laden language. Yet, despite their scorn for the suspect argumentation deployed by Justice Scalia and others, originalism's critics may themselves be overly hasty in dismissing history's significance for the derivation of constitutional meaning. A more conscientious appraisal of originalism must proceed from an assessment of what constitutes original "meaning."

## II. ORIGINAL MEANINGS AS ORIGINAL USES

Inquiry into the nature of original meaning may be guided by the question of what the framers were *using* value words to *do*.<sup>28</sup> Words are the tools a constitutional draftsman uses to guide and limit future conduct. Just like other sorts of tools, words can do different things depending on how they are used. Thus, to understand the original meaning of the Constitution's value-laden clauses, one must look to how the framers and ratifiers used the value words contained therein. Although this general point may seem intangible in the abstract, an exploration of the variety of value words' uses and how they might plausibly apply to the Constitution demonstrates the usefulness of this approach.

### A. Four Uses of Value Words

One use of value words is to commend or condemn.<sup>29</sup> "A search pursuant to a warrant issued for probable cause is reasonable" is an example of a commending use of a value word, while "the death penalty is cruel" is an example of a condemning use. This "evaluative" use<sup>30</sup> is, as Professor R.M. Hare argues, the primary use for value words.<sup>31</sup> Nevertheless, the use of value words in legal rules or standards (including those in the Constitution) cannot be evaluative, because a legal rule or standard does not commend or condemn any particular act or set of acts. Instead, a legal rule or standard either prescribes or proscribes a whole set of acts that is defined by use of the value word itself.

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<sup>28</sup> See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 220 (G.E.M. Anscombe trans., 1953) ("Let the use of words teach you their meaning."); see also R.M. HARE, *THE LANGUAGE OF MORALS* 126 (1952) ("A full understanding of the logic of value-terms can only be achieved by continual and sensitive attention to the way we use them.")

<sup>29</sup> HARE, *supra* note 28, at 79.

<sup>30</sup> See *id.* at 111 (distinguishing descriptive and evaluative uses of words).

<sup>31</sup> See *id.* at 118–19 (arguing that the descriptive meaning of the word "good" is secondary to its evaluative meaning).

A second use of value words may be called the “quotation marks” use.<sup>32</sup> As Professor Hare explains, “[w]e are, in this use, not making a value-judgement ourselves, but alluding to the value-judgements of other people.”<sup>33</sup> For example, someone who does not care for Wagner’s (so-called) bombast might nevertheless note that *Die Walküre* is a “good Wagnerian opera.” In doing so, she would not be commending Wagner herself, but rather alluding to the judgments of those who appreciate Wagner. If there were evidence that the framers and ratifiers were making “quotation marks” uses of value words to allude to then-prevalent moral views, such evidence might provide support for originalism. However, the framing and ratification was a moral and political endeavor, and it seems unlikely that those involved would have regarded their use of value words as totally divorced from their own moral and political ideals.

More plausible is a third, “specifying” use of value words whereby the speaker identifies certain restrictions that she herself endorses. For example, a mother can tell her child to “be good while I’m gone” and thereby specify that the child should limit his activities to those that the mother has described as “good” in the past, while refraining from those that the mother has described as “bad.” Similarly, the framers and ratifiers may have used value words to specify certain restrictions that they themselves endorsed (and which also, incidentally, would likely have been endorsed by the moral views prevalent at the time).

A fourth use of value words, whereby the speaker invokes, or attempts to invoke, facts about values, may be called the “objectivist” use. The framers and ratifiers might have thought that there were simply facts that defined which searches are “unreasonable,” which bails or fines are “excessive,” which punishments are “cruel,” and so forth, and believed that by using value words in the Constitution they could give these facts legal force.

### *B. The Objectivist and Specifying Use Theories*

For the reasons offered above, it is unlikely that the framers and ratifiers were making evaluative or “quotation marks” uses of the value words in the Constitution. The objectivist and specifying uses, however, merit closer scrutiny.

These two uses are not necessarily incompatible. If the framers and ratifiers were attempting to incorporate moral facts into the law, and also shared an understanding that they were using value words in the Constitution to prohibit or require certain practices that had par-

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<sup>32</sup> This is Americanized nomenclature for what Professor Hare refers to as the “inverted-commas use.” See *id.* at 124–25.

<sup>33</sup> *Id.* at 124.

ticular salience for them, then they were making objectivist *and* specifying uses of these value words at the same time. Nevertheless, each use requires individual consideration.

According to what may be called “the objectivist use theory,” when the framers and ratifiers used value words they were attempting to give legal force to moral facts about what is reasonable, excessive, cruel, and so forth. Even if this theory is historically plausible, it may nevertheless offer little guidance in constitutional adjudication, for there are good reasons to doubt the existence of moral facts (that is, truths about what is right and wrong, good and bad, reasonable and unreasonable, and so on) that are comparable to mathematical, scientific, or historical facts.<sup>34</sup> One reason, forcefully advanced by Professor Ayer, is that it is hard to imagine what would make a moral fact true. Supposing, for example, that random unannounced searches without probable cause are unreasonable, how would the world be different if such searches were reasonable?<sup>35</sup> In addition, evolutionary psychology offers a causal explanation of our beliefs about morality that is indifferent to the possibility that these beliefs could be true or false; it demands only that our moral sense gave our distant ancestors a reproductive advantage.<sup>36</sup>

If the objectivist use theory is right but there are no moral facts, then the framers and ratifiers were trying to use language in a way that simply does not work: they were trying to incorporate into the law moral facts that do not exist. If this were all there were to the original

<sup>34</sup> Among philosophers, the view that there are moral facts is known as “cognitivism,” and the contrary view is known as “noncognitivism.” See STEPHEN DARWALL, *PHILOSOPHICAL ETHICS* 71–79 (1998). According to the noncognitivist, when a person uses a value word to commend or condemn, she is not stating a proposition that can properly be said to be true or false. Instead, she is expressing her own attitude toward what she is commending or condemning. A simple version of noncognitivism maintains that a statement such as “the death penalty is cruel” simply expresses the speaker’s own feelings of disapproval of the death penalty. See AYER, *supra* note 15, at 110. A more sophisticated version analyzes this statement as expressing a commitment to norms that prohibit the execution of criminals and prescribe blame for those who promote the execution of criminals. See ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 45–48 (1990).

<sup>35</sup> See AYER, *supra* note 15, at 106 (“[U]nless it is possible to provide some criterion by which one may decide between conflicting intuitions, a mere appeal to intuition is worthless as a test of a proposition’s validity. But in the case of moral judgements no such criterion can be given.”).

<sup>36</sup> See MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* xvii (2006) (“[W]e evolved a moral instinct, a capacity that naturally grows within each child, designed to generate rapid judgments about what is morally right or wrong based on an unconscious grammar of action. Part of this machinery was designed by the blind hand of Darwinian selection millions of years before our species evolved; other parts were added or upgraded over the evolutionary history of our species, and are unique both to humans and to our moral psychology.”); see also Sharon Street, *A Darwinian Dilemma for Realist Theories of Value*, 127 *PHIL. STUD.* 109, 109 (2006) (“[R]ealist theories of value prove unable to accommodate the fact that Darwinian forces have deeply influenced the content of human values.”).

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meanings of the Constitution's value words, then original meaning would not resolve any individual cases; it would simply provide an exoskeleton for a body of judge-made law. If the objectivist use theory is correct and there *are* moral facts, however, then the original meaning of the Constitution's value-laden clauses is as comprehensive as the relevant bodies of political morality.

This Note has no ambition to settle perennial debates about the nature of morality. It does, however, presume a position of skepticism toward the view that there are moral facts that the Constitution's value-laden language neatly incorporated into constitutional law.<sup>37</sup> Given this presumption that objective moral facts are not available to decide constitutional questions for us, the specifying use theory merits closer attention.

As a starting point for assessing the theory that the framers and ratifiers were making specifying uses of value words, consider the example of the mother telling her child to "be good while I'm gone." This use of language works because there is an understanding between the mother and the child, based on the mother's assessments of goodness and badness in the past, about which kinds of activities the mother means when she says "good" and which kinds she considers "bad." Although attempts to pin down the essence of such understandings raise difficult philosophical problems, their general nature is familiar to lawyers who have grasped the contractual notion of a "meeting of the minds." Recalling, for example, that his mother praised him when he read quietly and snacked on an apple, whereas microwaving crickets and devouring the chocolate cake in the refrigerator inspired an altogether different response, the child understands that his mother means for him to refrain from repeating the latter escapades.

It is worth entertaining the theory that the framers and ratifiers had a similar "meeting of the minds" — an understanding that there were certain paradigmatic unreasonable searches and seizures, cruel and unusual punishments, and so forth, and that if the framers and ratifiers were doing anything with the relevant constitutional provisions, they were prohibiting these. A foray into the Eighth Amendment's history and doctrine illustrates how historical data can evidence such specifying uses, supporting a kind of original meaning that can guide constitutional adjudication.

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<sup>37</sup> Another reason why one might doubt that the law incorporates moral facts is Professor Joseph Raz's argument that it follows from the law's essential authoritative nature that its content can be described in value-neutral terms and applied without resort to moral argument. See JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 37 (1979).

## III. AN ILLUSTRATION

A. *Historical Evidence of Specifying Uses*

Although the Eighth Amendment's history is not a simple one, theoretical inquiry into original meaning is better informed if it occasionally gets its hands dirty with history. A provision in England's 1689 Bill of Rights<sup>38</sup> provided the original language, which George Mason later transplanted into a "Declaration of Rights" incorporated in the Virginia Constitution.<sup>39</sup> Other states subsequently included the same clause in their own constitutions, and in 1791 it became the Eighth Amendment to the United States Constitution.<sup>40</sup>

According to one account of the English provision's history, Parliament did not have in mind any particular *methods* of punishment, but rather sought to proscribe sentences that departed from existing precedent or that were outside a particular court's jurisdiction to impose.<sup>41</sup> This account finds support in the preamble to the English Bill of Rights, which complains of "*illegal* and cruel punishments"<sup>42</sup> inflicted during the reign of James II.<sup>43</sup> Another piece of evidence is the contemporaneous invocation of the clause by Lords dissenting from the denial of a petition by one Titus Oates for release from judgment. Oates had been convicted of perjury for a hoax resulting in wrongful executions for treason and sentenced to a 2000 mark fine, life imprisonment, whippings, quarterly pillorying, and defrocking.<sup>44</sup> The dissenters objected that the King's Bench, as a temporal court, had no authority to divest Oates of his habit, and also that there was no precedent for imposing the punishments of whipping and life imprisonment for the crime of perjury.<sup>45</sup> They concluded that the punishment was therefore inconsistent with the Bill of Rights.<sup>46</sup>

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<sup>38</sup> An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. (Eng.) [hereinafter Bill of Rights].

<sup>39</sup> See Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted*": *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 859; see also Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 135-44 (2004). According to another account, Parliament was reacting to the gruesome methods of punishment, such as burning and quartering, that the infamous Judge Jeffreys had employed liberally during the notorious "Bloody Assizes." See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 87 (1998); Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1910). But see Granucci, *supra* note 39, at 853-56 (explaining the origin of this account but arguing that it is incorrect).

<sup>42</sup> Bill of Rights, *supra* note 38, at pmb1. (emphasis added).

<sup>43</sup> See SOURCES OF OUR LIBERTIES 246 (Richard L. Perry ed., 1959).

<sup>44</sup> See Granucci, *supra* note 39, at 857-58.

<sup>45</sup> See *id.* at 858-59.

<sup>46</sup> See *id.*; see also Claus, *supra* note 41, at 137-42 (describing other, similar cases).

The interaction between this English history and the American understanding of it when the Eighth Amendment was ratified has the potential to add further complexity. For example, according to Anthony Granucci, Americans at the time of the founding misinterpreted the English punishments clause as being concerned with particularly gruesome methods of punishment, perhaps because they were misled by an erroneous reading of Blackstone.<sup>47</sup> According to an account recently defended by Professor Laurence Claus, however, the American framers and ratifiers understood themselves simply to be incorporating the English provision, whatever its content, into American law.<sup>48</sup> Framed in terms of the specifying use theory, Professor Claus's account is that the framers and ratifiers were using the words "cruel and unusual" to proscribe those kinds of punishments that were prohibited by the English Bill of Rights. The framers of the English Bill of Rights were, in turn, specifying punishments that were irregular or inconsistent with precedent, like the sentence imposed on Titus Oates. If this account is right, then a prohibition on punishments that are irregular or inconsistent with precedent is part of the Eighth Amendment's original meaning.

### B. Specifying Uses as Precedents

The kind of original meaning supported by specifying uses can in turn inform constitutional adjudication, as is illustrated by Justice Douglas's concurring opinion in *Furman v. Georgia*.<sup>49</sup> *Furman* addressed the constitutionality of the death penalty as it was administered in the United States in 1972; in a per curiam opinion, the Supreme Court held that in three cases before it, the imposition of the death penalty under Georgia and Texas statutes was unconstitutional.<sup>50</sup> Justice Douglas's opinion faulted these statutes for leaving the decision between the death penalty and a lighter punishment to the discretion of the judge or jury.<sup>51</sup> In support of this objection, Justice Douglas appealed to evidence that the original English provision "was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory

<sup>47</sup> Granucci, *supra* note 39, at 860–65.

<sup>48</sup> See Claus, *supra* note 41, at 132–36. Other evidence suggests that the American framers and ratifiers were concerned not only with post-conviction sentences, but also with the use of torture to extract confessions. See Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 666 (2004).

<sup>49</sup> 408 U.S. 238 (1972) (per curiam).

<sup>50</sup> *Id.* at 239–40.

<sup>51</sup> *Id.* at 240 (Douglas, J., concurring). In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld Georgia's new sentencing procedures, which responded to *Furman* by cabining jury discretion. *Id.* at 206–07 (judgment of the Court and opinion of Justices Stewart, Powell, and Stevens).

penalties of a severe nature.”<sup>52</sup> Applying this historical lesson, he concluded that allowing judges and juries broad discretion to discriminate against minorities was unconstitutional:

[T]he words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is “cruel and unusual” to apply the death penalty — or any other penalty — selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.<sup>53</sup>

If Justice Douglas’s assessment of the history was right, then the specifying use theory suggests that he was not merely appealing to the original intent behind the “cruel and unusual punishments” clause. He was applying its original meaning.

The relevant point, of course, is not whether the history of the Eighth Amendment in fact supports Justice Douglas’s interpretation, which would prohibit irregular or discriminatory punishments, nor whether he was correct to conclude that the death penalty as it was applied in 1972 was inconsistent with such a prohibition. Indeed, it is important to observe that even if Justice Douglas’s assessment of the historical evidence was correct, this evidence did not necessitate his conclusion. The proscriptions on particular kinds of punishments contained in the original meaning of the “cruel and unusual punishments” clause served as precedents<sup>54</sup> that, like judicial precedents, could be read either broadly or narrowly.<sup>55</sup> A narrow reading of the precedents specified in the clause’s original meaning could have maintained that the Eighth Amendment proscribes only punishments that are unauthorized by law in one of the ways that Titus Oates’s punishment was: either because the official who assigns the punishment has no legal authority to assign punishments of that kind, or because the law does not provide for punishments of that kind for the relevant offense. On this narrow reading, the death penalty could be consistent with the Eighth Amendment whenever it is legally authorized, even when broad discretion permits arbitrary and discriminatory applications. Because the

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<sup>52</sup> *Furman*, 408 U.S. at 242 (Douglas, J., concurring). Justice Douglas cited Granucci’s article, *supra* note 39, without addressing his argument that the framers and ratifiers misapprehended the clause’s English history. See *Furman*, 408 U.S. at 242 & n.2 (Douglas, J., concurring). If Professor Claus’s assessment of the American history is correct, however, it vindicates reliance on the history of the English Bill of Rights.

<sup>53</sup> *Furman*, 408 U.S. at 245.

<sup>54</sup> Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 585–88 (2003) (suggesting that the ratifying debates could offer precedents that “liquidate” or “fix” the meanings of ambiguous constitutional provisions).

<sup>55</sup> See Fallon, *supra* note 5, at 1203 (noting that “the construction of theories of decided cases will inevitably be influenced by the belief and values of the individual constitutional interpreter,” such that “some judges and lawyers simply will ‘see’ or ‘read’ the cases differently”).

specifying uses of value words in the Constitution are, like judicial precedents, susceptible to broad or narrow readings, the kind of original meaning they support is necessarily elastic.

#### IV. ORIGINAL MEANING'S LIMITS

##### A. *Justice Scalia's Recurring Mistake*

The choice between broad and narrow interpretations of specifying uses is one reason that the kind of original meaning supported by the specifying use theory is less constraining than Justice Scalia's brand of originalism. Another reason follows from an important limitation that the specifying use theory places on the kind of meaning it supports: namely, that this meaning extends only so far as the framers' and ratifiers'<sup>56</sup> meeting of the minds. Plausibly, if such a meeting of minds existed at all, it extended only to a few paradigmatic examples of searches and seizures that were unreasonable, bails and fines that were excessive, punishments that were cruel and unusual, and so forth.

In this respect, the framing and ratification is different from the example of the mother and child. The deeper the relationship between two people and the richer their store of experiences interacting with one another over time, the easier it is for them to use just a few words to speak volumes. When a mother tells her child to "be good," her meaning is informed by the whole history of the child's upbringing. In contrast, the framers and ratifiers of the original Constitution and its amendments were large and diffuse groups of individuals. It is hard to imagine that the ties among them were sufficient to support anything more than very limited shared understandings about what they were doing with the Constitution's value-laden clauses. If this is right, then the guidance that specifying uses could potentially offer to courts is

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<sup>56</sup> To aid exposition of the main line of argument, this Note refers loosely to the "framers and ratifiers." Nevertheless, the question of which original actors matter is a stubborn problem for originalism. See DWORKIN, *supra* note 9, at 133. The original Constitution was drafted and proposed by the Philadelphia Convention and then ratified by state conventions. The Bill of Rights and all subsequent amendments with the exception of the Twenty-First (which was ratified by state conventions) were passed by at least two-thirds of each house of Congress and majorities in at least three-quarters of the state legislatures. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 64 n.9 (2d ed. 1988). What proportion of these people would have had to share an understanding about how they were using a value word in order for this understanding to endow the value word with a meaning that is entitled to deference? The answer is necessarily vague: the greater the consensus among the framers and ratifiers, the more deference that consensus merits. Evidence of deep disagreement undermines any claim to deference; evidence of a broad understanding supports it. If the historical record is insufficient to demonstrate any widespread consensus about specifying uses of value words in the Constitution, then so much the worse for originalism.

more limited — and, as a consequence, less constraining — than Justice Scalia’s originalism.

Significantly, it appears unlikely that the framers and ratifiers shared very many firm understandings about what they were *not* doing with their uses of value words. And even if they did share such understandings, it is open to doubt whether these understandings merit the same deference as understandings about what, affirmatively, they were doing with the value-laden language that they enacted into law.<sup>57</sup> This single general point calls into question a recurring pattern of argument in Justice Scalia’s originalist opinions, in which he reasons from the premise (1) that when a constitutional clause *C* was enacted, it would not have been thought to prohibit/require practice *P*, to the conclusion (2) that clause *C* does not prohibit/require practice *P*.

For example, in his dissenting opinion in *Roper v. Simmons*,<sup>58</sup> Justice Scalia asserted that the “threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment”<sup>59</sup> is whether it is one of the “modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.”<sup>60</sup> He then observed that “the evidence is unusually clear that the Eighth Amendment was not originally understood to prohibit capital punishment for sixteen- and seventeen-year-old offenders.”<sup>61</sup> The implication was clear: the majority had run afoul of “the original meaning of the Eighth Amendment”<sup>62</sup> in holding that an execution for a crime committed when the offender was seventeen years old was unconstitutional.<sup>63</sup> Other examples of this pattern of reasoning include Justice Scalia’s dissenting opinions in *Lawrence v. Texas*,<sup>64</sup> *Board of County Commissioners v. Umbehr*,<sup>65</sup> and *United States v. Virginia*.<sup>66</sup>

<sup>57</sup> See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1171 (1995) (arguing that, when interpreting constitutional provisions protecting rights, the framers’ and ratifiers’ intentions to forbid paradigmatic government abuses merit deference, but their intentions to permit government action do not merit similar deference).

<sup>58</sup> 125 S. Ct. 1183 (2005).

<sup>59</sup> *Id.* at 1218 (Scalia, J., dissenting).

<sup>60</sup> *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

<sup>61</sup> *Id.* (citing *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989)).

<sup>62</sup> *Id.* at 1217.

<sup>63</sup> Justice Scalia reserved the bulk of his dissent for his argument that the majority had misapplied its nonoriginalist test, but the outline of his originalist argument is nevertheless clear. *Cf.* Scalia, *Common-Law Courts*, *supra* note 1, at 40–41 (advancing an originalist critique of the Supreme Court’s “evolving standards of decency” test).

<sup>64</sup> 539 U.S. 558, 596 (2003) (Scalia, J., dissenting) (arguing that criminal sodomy prohibitions must be constitutional because they were prevalent at the time of the Fourteenth Amendment’s enactment).

<sup>65</sup> 518 U.S. 668, 688–89 (1996) (Scalia, J., dissenting) (arguing that the long history of patronage in American politics was inconsistent with the Court’s holding that the First Amendment protects independent government contractors from termination of at-will contracts in retaliation for criticism of public officials).

Within the framework of the specifying use theory, Justice Scalia's reasoning involves a non sequitur. If historical evidence shows that the framers and ratifiers did not understand themselves to be using the value words in a particular constitutional clause to prohibit or require a particular practice, then this evidence entails only that the kind of original meaning supported by specifying uses does not prohibit or require this practice. The fact remains that the value-laden clauses in the Constitution contain wholly general prohibitions on "unreasonable searches and seizures" and "cruel and unusual punishments" and a wholly general requirement of "due process."

The specifying use theory suggests that, as part of their original meaning, these clauses apply to those paradigmatic examples (if any) of unreasonable searches and seizures, cruel and unusual punishments, and due process that the framers and ratifiers understood them to require or prohibit. If, however, the framers and ratifiers had no shared understanding that they were *not* using value-laden language to specify a certain practice — if, for example, they had no shared understanding that they were *not* using the words "cruel and unusual" to prohibit execution for crimes committed when the offender was a minor — then, so far as the kind of original meaning supported by the specifying use theory goes, it is simply an open question how the general language of the clause applies to the practice.<sup>67</sup> To limit applications of value-laden constitutional provisions to cases in which there is historical evidence that the framers and ratifiers were making specifying uses of value words would be to privilege specifying uses over the common semantic or linguistic understandings of these value words; these common meanings are more general than references to just a few paradigmatic cases.

### B. *The Limited Reach of Specifying Uses*

It is helpful to juxtapose, on the one hand, the position that fidelity to the Constitution's original meaning requires that applications of its value-laden clauses must be limited to the framers' and ratifiers' specifying uses of value words with, on the other hand, Professor Dworkin's argument that if the framers had meant those clauses employing value words to have any concrete content, they would have spelled out this content with greater precision.<sup>68</sup> These positions are at

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<sup>66</sup> 518 U.S. 515, 568–69 (1996) (Scalia, J., dissenting) (arguing that the long tradition of all-male military colleges precluded the Court's holding that such colleges violated the Equal Protection Clause).

<sup>67</sup> A very different line of argument has led Professor Jed Rubenfeld to similar conclusions about the role history should play in constitutional interpretation. See Rubenfeld, *supra* note 57, at 1169–77.

<sup>68</sup> See *supra* p. 1283.

two opposite extremes, and both are mistaken. The example of the mother and child shows that, contrary to Professor Dworkin's assumption, uses of value words do sometimes have quite concrete content. Both the mother and the child understand the mother's command to forbid the child from microwaving crickets or devouring the chocolate cake in the refrigerator. Yet the meaning of the mother's command goes beyond any list of activities that the mother would be able to enumerate. Similarly, specifying uses of value words in the Constitution may account for part of the value-laden clauses' meaning, but they do not account for all of it. As a consequence, courts are left with the task of supplementing the kind of original meaning supported by specifying uses with a body of doctrine that implements the broad constitutional commands.<sup>69</sup>

The Supreme Court's approach to applying the Eighth Amendment offers an illustration of how, consistent with the specifying use theory, history can guide adjudication in some cases while leaving other cases open to novel doctrinal development. Justice Marshall's opinion in *Ford v. Wainwright*<sup>70</sup> offers a summary of this approach, which begins with an explanation that "[t]here is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."<sup>71</sup> Justice Marshall then invoked *Solem v. Helm*<sup>72</sup> for the proposition that "[a]lthough the framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection . . ."<sup>73</sup> He went on to explain:

[T]he Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789. Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the "evolving standards of decency that mark the progress of a maturing society." In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a par-

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<sup>69</sup> This vocabulary is borrowed from Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

<sup>70</sup> 477 U.S. 399 (1986).

<sup>71</sup> *Id.* at 405.

<sup>72</sup> 463 U.S. 277 (1983).

<sup>73</sup> *Ford*, 477 U.S. at 406 (omission in original) (quoting *Solem*, 463 U.S. at 286) (internal quotation marks omitted).

particular punishment comports with the fundamental human dignity that the Amendment protects.<sup>74</sup>

Thus, the Supreme Court has interpreted the Eighth Amendment's prohibition to extend at least to those kinds of punishment that its framers and ratifiers understood themselves to be proscribing. When addressing other kinds of punishment, however, the Court has sought guidance from contemporary values. This approach is consistent with the specifying use theory. A more conservative approach that tended to leave existing practices undisturbed would also be consistent with the specifying use theory, and might be justified by a conception of democracy that limits the proper role of the judiciary. The important point is that the kind of original meaning supported by the specifying use theory leaves a choice.

#### V. A TENTATIVE APPRAISAL

Earlier, the example of Justice Douglas's concurring opinion in *Furman* showed how the kind of meaning supported by specifying uses of value words can guide constitutional adjudication. The question remains whether judges should seek guidance from this kind of original meaning.

The choice among methods of constitutional interpretation is a moral and political choice that implicates the deepest and most basic questions about how government authority may legitimately be allocated and exercised.<sup>75</sup> A theoretically exhaustive normative defense of deference to specifying uses is beyond the scope of this Note. It is, however, intuitively plausible that if the framers and ratifiers were using the value words in the Constitution to specify certain practices that they meant to prohibit or require, their understandings should merit deference. To respect a constitution is to respect an agreement about what form a government will take, and about the scope and limits of its powers. Even if the full content of that agreement is not completely captured by writing on the page, it may nevertheless be entitled to respect.<sup>76</sup>

Although deference to specifying uses is a more modest kind of originalism than the version advocated by Justice Scalia, it is not so modest as to bypass the objections to which his originalism has been

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<sup>74</sup> *Id.* (citations omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). Justice Marshall appears to presume that the framers and ratifiers were primarily concerned with restricting methods of punishment, which might be incorrect. This presumption is, however, merely incidental to the structure of the approach he describes.

<sup>75</sup> See Kay, *supra* note 2, at 285–86.

<sup>76</sup> Cf. RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981) (“Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.”).

subjected. Most important is the objection that originalism's appeal derives from an equivocation between two notions of meaning. If the framers and ratifiers made specifying uses of value words, then their meeting of the minds about the practices that they meant to prohibit or require is arguably one kind of "meaning" of the Constitution's text. However, this kind of "meaning" is not identical to "meaning" in the sense of the linguistic or semantic understanding necessary to use a term. As originalism's critics have contended, the apparent decisiveness of the basic argument may trade on the latter sense of "meaning." Because there are different kinds of meaning, it is not enough to slam one's fist on the table and say that this is what the Constitution *means*. The relevant question is whether the kind of meaning captured by specifying uses of value words is *a* kind of meaning that might merit deference.

There are forceful reasons to doubt whether the kind of original meaning supported by specifying uses merits deference, including arguments that call into question reliance on original intent. For example, Professor Schauer criticizes "the intentional paradigm," under which "constitutional language exists only because we are unable to know the specific intentions . . . of the drafters," and argues that "[t]he text interposes itself between the intentions of the framers and the problems of the present, cutting off the range of permissible access and references to original intent."<sup>77</sup> In a similar vein, Professor Michael Moore argues against "pragmatic" modes of analyzing legal texts that attempt to discern the author's intent.<sup>78</sup> And Justice Scalia himself criticizes attempts to glean legislative intent from legislative history.<sup>79</sup> However, there arguably is value in understanding what those who gave certain forms of words the force of law were trying to accomplish: to the extent that the law is unclear, recourse to an understanding of its intended purposes helps produce applications that serve those purposes. Moreover, to deny that consultation of a legal text's history aids interpretation would break sharply from the Supreme Court's interpretive practices.<sup>80</sup>

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<sup>77</sup> Schauer, *supra* note 23, at 809.

<sup>78</sup> See Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 186–87 (1981) ("As utterances, statutes lack many of the non-linguistic, contextual features which constitute the foundation for a pragmatics analysis. Statutes are institutionalized utterances. Consequently, the richness of time and circumstance which the pragmatic approach embraces to interpret the intent of an ambiguous expression is eliminated by this institutionalized nature of statutes.").

<sup>79</sup> Scalia, *Common-Law Courts*, *supra* note 1, at 16–17.

<sup>80</sup> Consider, for example, the various opinions in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The majority and the dissenters disagreed sharply about the proper resolution of the case, but both consulted historical sources in order to interpret the unamended Constitution and the Eleventh Amendment.

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Beyond these general reasons for considering historical evidence of the framers' and ratifiers' intent, there is particular reason to pay attention to historical evidence that illuminates what the framers and ratifiers understood themselves to be doing with the handful of value words that carry such a great deal of constitutional weight. If the framers and ratifiers understood the Constitution's value words to specify certain practices that they intended to prohibit or require, then, in an important sense, these prohibitions and requirements are at the core of what the framers intended to *say*, rather than simply part of the consequences they intended to bring about.<sup>81</sup>

A thoroughgoing originalist might contend that once the specifying use theory opens the door to history, there is no good reason to shut it: if it is relevant to constitutional adjudication that the framers and ratifiers had certain practices in mind when they drafted the Constitution's value-laden clauses, it should also be relevant what they would have said about other practices had they been asked about them. Developing this position further, the thoroughgoing originalist might contend that when addressing the question of whether a constitutional clause *C* prohibits/requires a practice *P*, courts should inquire whether, if the framers and ratifiers knew that *C* would be applied to prohibit/require *P*, they would agree that "that's what we meant." If, for example, practice *P* was prevalent and generally unquestioned at the time clause *C* was enacted, then we might surmise that if the framers and ratifiers had been asked whether they meant to prohibit *P*, they likely would have responded, "no, that isn't what we meant at all." If this line of argument were right, it would vindicate the results Justice Scalia endorsed in cases like *Roper*, *Lawrence*, *Umbehr*, and *United States v. Virginia*, by means of a different mode of originalist reasoning.

The specifying use theorist cannot rely solely upon the familiar response that it is only the Constitution's text that binds us, and not the framers' and ratifiers' intent. For the specifying use theory itself urges that we should defer to the intent behind the Constitution's text when there is evidence that the framers and ratifiers understood themselves to be using value words to prohibit or require certain specific practices. Nor is it entirely satisfying to respond to the thoroughgoing originalist that original intent matters only insofar as it informs original meaning, because his argument has been framed in terms of what the framers and ratifiers "meant."

The better response is that evidence that the framers and ratifiers were making specifying uses of value words to prohibit or require certain practices is qualitatively different from evidence of what they

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<sup>81</sup> See *supra* p. 1282 and sources cited *supra* note 9.

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likely would have said about other practices — which they did not consider when they drafted and ratified the Constitution — if they had considered them. Suppose, for example, that the historical evidence tends to show that executions for crimes committed when the offender was a minor were not generally thought to be “cruel” in 1791, and therefore that the framers and ratifiers probably did not think such executions were cruel. From this evidence, we could infer that if the framers and ratifiers had been asked whether the Eighth Amendment prohibits such executions, they would have responded, “that isn’t what we meant.”<sup>82</sup> Nevertheless, we are not in the position of the child whose mother has admonished him to “be good”: the child’s incentive to avoid reprimand by successfully predicting how his mother will react to his every move has no parallel in the context of contemporary constitutional adjudication. Notwithstanding any protestations that the framers and ratifiers might have made given the chance, if the evidence in support of an originalist application of the Eighth Amendment ultimately amounts to nothing more than evidence of the framers’ and ratifiers’ moral views, then there is good reason to doubt whether we should defer to these moral views when we disagree with them. For evidence of the framers’ and ratifiers’ moral views on the propriety of executing an offender for a crime committed when he was a minor would not be evidence that an allowance for such executions is part of the agreement the framers and ratifiers enacted into law.

Evidence of specifying uses is different. It is not merely evidence that because the framers and ratifiers had certain moral views, they likely would have offered particular answers to questions about the Constitution’s applications if they had addressed them. Instead, it is evidence that the framers and ratifiers had certain specific practices squarely in mind when they enacted the Constitution’s text into law, and that they understood themselves to be using the Constitution’s value-laden language to prohibit or require these practices. Such evidence has good claim to our attention if we have any aspiration toward fidelity to what the framers and ratifiers were trying to say.

Although this Note presumes a skeptical stance toward the idea that value words can incorporate moral facts into the law, now that the argument for deference to specifying uses has been developed, it may be observed that this position has force even if one adheres to the view that objectivist uses of value words successfully incorporated

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<sup>82</sup> Consider Wittgenstein’s example of a request to show children a game, which suggests that a person’s license to say that he did or did not mean something by an utterance does not depend on whether it surfaced in his conscious reflections. WITTGENSTEIN, *supra* note 28, at 33 (“Someone says to me: ‘Shew the children a game.’ I teach them gaming with dice, and the other says ‘I didn’t mean that sort of game.’ Must the exclusion of the game with dice have come before his mind when he gave me the order?”).

moral facts into constitutional law. Even if one believes that application of the Constitution's value-laden clauses should involve direct consultation with the relevant moral facts, the doctrine of *stare decisis* nevertheless assigns precedent a vital function in our legal order. If specifying uses of value words establish paradigmatic cases as precedents that should play much the same role as judicial precedents in subsequent adjudication, they may play this role regardless of whether or not moral facts are the ultimate arbiters of the correct application of value-laden constitutional language.

## VI. CONCLUSION

If the Constitution's framers and ratifiers did indeed make specifying uses of value words, then these uses support a kind of original meaning that plausibly merits deference. Unlike Justice Scalia's originalism, the specifying use theory offers no promise of a comprehensive theory of how to interpret value-laden constitutional language. Much more modestly, it suggests that the framers' and ratifiers' shared understandings about what they were doing with the Constitution's value words provide early binding precedents, without prescribing the manner in which the Supreme Court should build on these precedents. Provided the Court leaves these cornerstones intact, it may remain true to the original meaning of the Constitution's value-laden language even as it relies on other modes of constitutional argument to build an edifice of constitutional doctrine upon their foundation.