The Meaning of Original Meaning

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INTRODUCTION

A familiar strategy for challenging originalism is to invoke a practice that was well accepted at the time a constitutional provision was adopted but that now seems indefensible. Critics often point out, for example, that ear-cropping and flogging were accepted punishments in the eighteenth century,[1] or that segregated schools were the norm at the time the Equal Protection Clause was enacted.[2] Originalists themselves confess faintheartedness[3] at the prospect that originalist principles would lead to the upholding of evidently unconstitutional practices. Such challenges and demurrals implicitly rely on the proposition that originalism is committed to the modern-day constitutionality of practices that were well established when the Constitution was adopted. This article contests that proposition; it argues to the contrary that original meaning, properly

1. *E.g.*, William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 327 (1986) ("[D]uring colonial times, pillorying, branding, and cropping and nailing of the ears were practiced in this country. Thus, if we were to turn blindly to history for answers to troubling constitutional questions, we would have to conclude that these practices would withstand challenge under the cruel and unusual clause of the eighth amendment."); Abner J. Mikva, *Judges on Judging—Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 980 (1990) ("[E]ven the most ardent hanging judge would find ear-cropping a cruel and unusual punishment today. Seeking out the 'original intent' of the First Congress is hardly a useful quest."); Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 446 n.43 (1994); Note, *The Eighth Amendment "Punishment" Clause After* Helling v. McKinney*: Four Terms, Two Standards, and a Search for Definition*, 44 DEPAUL L. REV. 215, 219 & n.28 (1994); David A.J. Richards, *Constitutional Interpretation, History, and the Death Penalty: A Book Review*, 71 CAL. L. REV. 1372, 1394 (1983) (reviewing RAOUL BERGER, DEATH PENALTIES (1982)) (argument that the death penalty is constitutional because the Framers did not intend to invalidate it "would require the Court today to uphold all punishments acceptable in 1791, including, presumably, branding the forehead, splitting noses, and cropping ears").

2. *E.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59, 65; Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1769 (1997); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2155 ("[T]he Constitution is not a static document frozen in time and constricted by the predilections of those who framed it. Were it otherwise, African-Americans would still be subjected to Jim Crow laws, segregated schools, and miscegenation statutes."); Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 HASTINGS CONST. L.Q. 599, 655-56 n.264 (1997); *cf.* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 951-52 & nn.11-13 (both originalist and nonoriginalist scholars are virtually unanimous in (wrongly) viewing decision in *Brown* as plainly inconsistent with the original intent of the Framers of the Fourteenth Amendment); Paul Horwitz, *The Past, Tense: The History of Crisis — and the Crisis of History — in Constitutional Theory*, 61 ALB. L. REV. 459, 466 (1997) (review essay of LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)) (suggesting that "the need to find a place for *Brown* within any acceptable theory still animates debates today, forcing originalists into scholarly contortions in an effort to show that the judgment will survive their doctrine").

3. The phrase is Justice Scalia's. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 841, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.")

understood, must contemplate the possibility that a traditional practice is unconstitutional, and more broadly that requiring fidelity to original practices is inconsistent with interpreting constitutional provisions to stand for principles.

Despite originalism's apparent problem in accounting for the evident invalidity of particular traditional practices, the doctrine's core notion—that the Constitution must be interpreted in accordance with its original meaning—is difficult to challenge. Some version of the position seems to follow from the very idea of a written constitution, which is designed "to be an anchor in the past."[4] Indeed, nonoriginalists tend to recognize the substantial force of the basic argument for originalism, and often emphasize the importance that they too accord to original meaning.[5]

At the same time, nonoriginalists argue that much of contemporary constitutional law cannot be explained or justified on an originalist analysis. The position has apparently been influential. A wide range of commentators now openly reject originalism,[6] and nonoriginalism may now be the "ascendant school of constitutional interpretation."[7]

For their part, originalists grudgingly acknowledge the force of the nonoriginalist challenges in particular cases, even to the point of accepting a deviation from their own originalist principles. Thus, Justice Antonin Scalia writes that originalism must "somehow come to terms with th[e] reality"[8] that no judge, however committed to originalism, would sustain branding or public lashing today, even if those practices were well accepted in 1791. The combination of originalism's basic force and its apparent vulnerability in the face of constitutionally suspect traditional practices results in an odd stalemate: each side of the originalism debate seems to acknowledge the theoretical power of originalism while rejecting, or shying away from, its supposed implications.[9]

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4. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 363 (1992).

5. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 237 (1980) ("The nonoriginalist treats the text and original history as presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking."); Dorf, *supra* note 2, at 1766; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1106 (1989) ("Pragmatic constitutionalism will only sometimes give history decisive weight, but that does not mean that history will be ignored in the remaining cases.").

6. *See, e.g.*, James E. Fleming, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849, 1856 (1997); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 412 (1997); David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 934-35 (1996); Brest, *supra* note 5; Dorf, *supra* note 2, at 1767 n.11; Farber, *supra* note 5, at 1104-06; Richards, *supra* note 1, at 1397-98.

7. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997). *See id.* at 57 (catuloguing commentators Scalia views as nonoriginalists); Note, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sexual Offenders*, 65 FORDHAM L. REV. 2611, 2623-24 n.86 (1997) (identifying Bickel, Dworkin, Ely, Sunstein, Black, Fleming, and Lessig as a sample of those commentators who, in opposition to originalists like Bork and Scalia, argue for "reading evolutionary intent into the Constitution"); Note, *Is Originalism "Political"?*, 1 TEX. REV. L. & POL. 149, 150 (1997) ("[T]he law professor elite generally assume that originalism is thoroughly discredited.").

8. Scalia, *supra* note 3, at 861.

9. *See id.* at 861 ("There is really no difference between the faint-hearted originalist and the moderate nonoriginalist .... [M]ost originalists are faint-hearted and most nonoriginalists are

The most explicit and persuasive articulation of the proposition that originalism entails fidelity to original practices appears in recent opinions and essays by Justice Scalia. Scalia has provided characteristically elegant and forceful arguments for the proposition and has relied on it in his opinions, thus making clear its implications in actual cases. In a remarkable series of dissents in three cases at the end of the 1995 Supreme Court term, Justice Scalia set out his version of originalism in some detail. Each of the cases presented high-profile and fundamental issues of constitutional law, and in each of them Scalia dissented from the Court's holding, relying on the view that practices that were well established at the time the Constitution was adopted must be constitutional today. With increasing vexation, Scalia protested that in failing to respect a well-established historical practice, the Court not only had reached the wrong result but had abandoned sound principles of constitutional interpretation altogether. "This is not the interpretation of a Constitution," Scalia wrote in *United States v. Virginia*,[10] "but the creation of one."[11] Scalia's exasperation reached its peak in the dissent in *Board of County Commissioners v. Umbehr*, which concluded, "[t]he Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."[12]

Justice Scalia elaborated the views set out in these opinions in lectures that were published last year under the title, *A Matter of Interpretation: Federal Courts and the Law*.[13] As with his previous influential reflections on legislative history,[14] executive power,[15] and retroactivity,[16] Justice Scalia has redirected the course of debate, and *A Matter of Interpretation* has already been the subject of significant scholarly attention. The centerpiece of the version of originalism that Scalia develops in the book and opinions is his view about the role of long-established traditional practices in constitutional interpretation. Scalia maintains that such practices are the primary determinant of the original meaning of constitutional provisions. The Constitution's broad provisions must be interpreted so as to uphold any practice that was well established at the time a provision was adopted and thereafter.[17] So, for example, Scalia contends that,

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moderate . . . which accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions.")

10. 116 S. Ct. 2264 (1996) [hereinafter *Virginia Military Institute*].

11. *Id.* at 2293 (Scalia, J., dissenting).

12. Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2373 (1996) (Scalia, J., dissenting).

13. SCALIA, *supra* note 7.

14. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 97 (1989) (Scalia, J., concurring in part and concurring in the judgment); United States v. Taylor, 487 U.S. 326, 344 (1988) (Scalia, J., concurring in part); Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 6 (D.C. Cir. 1985) (Scalia, J., concurring).

15. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

16. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Landgraf v. USI Film Prod., 511 U.S. 244, 286 (1994) (Scalia, J., concurring in the judgment); Kaiser Aluminum Co. v. Bonjorno, 494 U.S. 827, 855 (1994) (Scalia, J., concurring).

17. Scalia variously describes the practices to which constitutional interpretation owes fidelity. *See*

given the long national tradition of public male military colleges, the Equal Protection Clause cannot properly be interpreted to invalidate such institutions. Similarly, because the spoils system is a venerable national practice, the First Amendment cannot be interpreted to prohibit the termination of government contractors based on their political expression.

The view that original meaning entails the constitutionality of original practices has strong intuitive appeal. Indeed, as indicated above, it is a position that has been broadly, if implicitly, assumed by originalists and nonoriginalists alike. But the position is mistaken. We will suggest that a failure to distinguish between two different notions of meaning accounts for the position's wide currency. According to the first notion, the meaning of a term is roughly what a dictionary definition attempts to convey—the semantic or linguistic understanding necessary to use the term, as opposed to nonlinguistic facts about the objects or activities to which the term applies. In contrast, according to the second, looser notion, the meaning of a term incorporates the objects or activities to which the term is applied. 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.

The assumption that originalism entails the validity of original practices derives its plausibility from a failure to distinguish between the two notions of meaning. Once recognized, the distinction undermines the seemingly natural move from the necessity of interpreting the Constitution in accordance with how it was originally understood to the necessity of upholding practices originally understood to be constitutional. By taking the distinction on board and rejecting the assumption, originalism can readily deflect the challenges based on unacceptable original practices; as a consequence, however, it will not be tenable for originalism, in any case challenging an original practice, simply to rule out the possibility of the practice's invalidity.

The first Part of this article describes the view that originalism requires fidelity to original practices as set out in Justice Scalia's recent work. The second Part introduces the distinction between the two notions of meaning and uses the distinction to explain both the intuitive appeal and the ultimate flaw of the argument that original meaning entails the constitutionality of original practices. The third Part of the article considers whether there is a persuasive justification for requiring the preservation of original practices. The article

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Rutan v. Republican Party of Ill., 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting) (those that "bear endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic,"); *Virginia Military Institute*, 116 S. Ct. at 2292 (Scalia, J., dissenting) ("constant and unbroken"); *Umbehr*, 116 S. Ct. at 2363 (Scalia, J., dissenting) ("long and unbroken"). Note that the practices in question must be well accepted after as well as at the time a provision is adopted. If a practice did not survive the adoption of a provision, a natural inference would be that the provision was understood to reject the practice. For a further discussion of the identification of the relevant practices, see *infra* note 61. For convenience, we will call the relevant practices "original practices."

concludes that a requirement of fidelity to original meaning is inconsistent with the assumption that original practices are necessarily valid. Thus, while the view that original practices are necessarily constitutional is rooted in powerful arguments, the view is wrong: practices can genuinely constrain adjudication only if practices are not taken inevitably to be constitutional. Ultimately, it is not possible to be committed at once to a Constitution of principles and to the constitutionality of all original practices.

I. ORIGINALISM AS FIDELITY TO ORIGINAL PRACTICES

The seminal exposition of Justice Scalia's view that originalism requires fidelity to original practices came in a dissenting opinion in the 1990 case of *Rutan v. Republican Party of Illinois.*[18] In that case, the Court held that rejecting an applicant for public employment on the basis of political affiliation violates the free speech guarantee of the First Amendment. In his vigorous dissent, Justice Scalia wrote:

> [W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out.[19]

Thus, that political patronage in public hiring has been a well-established practice since the time the Bill of Rights was adopted was for Justice Scalia *dispositive* of the claim that the First Amendment forbids such conduct.

The full implications of Scalia's view emerged in the forceful dissents from three decisions during the last six weeks of the October 1995 Supreme Court term, *Romer v. Evans*,[20] *Virginia Military Institute*,[21] and *Board of County Commissioners v. Umbehr*.[22]

In *Romer*, Justice Scalia relied on historical practice in arguing for the constitutionality of an amendment to the Colorado constitution prohibiting the State or any of its political subdivisions from providing protections based on

18. 497 U.S. 62 (1990). *See Virginia Military Institute*, 116 S. Ct. at 2291 (Scalia, J. dissenting); *Umbehr*, 116 S. Ct. at 2361 (Scalia, J. dissenting).

19. *Rutan*, 497 U.S. at 95-96 (Scalia, J., dissenting).

20. 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting).

21. 116 S. Ct. at 2291 (Scalia, J., dissenting).

22. 116 S. Ct. at 2361 (Scalia, J., dissenting).

sexual orientation. Scalia noted that most states had criminalized homosexual conduct well into the twentieth century.[23] For that reason, he suggested, the Constitution should not be interpreted to forbid the criminalization of homosexual conduct, and *a fortiori* does not forbid states from disfavoring homosexual conduct in less serious ways.[24] Discussing *Bowers v. Hardwick*,[25] which he described as "the case most relevant to the issue before us today,"[26] Justice Scalia wrote:

> In *Bowers* . . . we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions.[27]

Scalia concluded that original practices dictate the result in *Bowers*, and that *Bowers* in turn dictates rejection of the challenge to Colorado's constitutional amendment. "The foregoing," he wrote, "suffices to establish what the Court's failure to cite any case remotely in point would lead one to suspect: No principle set forth in the Constitution, nor even any imagined by this Court in the past 200 years, prohibits what Colorado has done here."[28]

The following month, the Court decided in *Virginia Military Institute* that Virginia's maintenance of an all-male military college, the Virginia Military Institute, violated the Equal Protection Clause. In an ardent dissent, Justice Scalia criticized the Court for "ignor[ing] the history of our people . . . the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government."[29] His central argument was that the Equal Protection Clause cannot be interpreted in a way that is inconsistent with national traditions dating back to the provision's adoption. Such traditions in fact serve "as the primary determinant of what the Constitution means."[30] Citing his prior opinion in *Rutan*, Scalia pressed the view that "whatever abstract tests we may choose to devise, they cannot supersede—and ought indeed to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."[31]

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23. 116 S. Ct. at 1631 (Scalia, J., dissenting).
24. *Id.* at 1631-32 (Scalia, J., dissenting).
25. 478 U.S. 186 (1986).
26. 116 S. Ct. at 1631 (Scalia, J., dissenting).
27. *Id.* (Scalia, J., dissenting).
28. *Id.* at 1633 (Scalia, J., dissenting).
29. 116 S. Ct. at 2291 (Scalia, J., dissenting).
30. 116 S. Ct. at 2293 (Scalia, J., dissenting).
31. *Id.* at 2292 (Scalia, J., dissenting). The reference to "ambiguous" constitutional texts may signal a wrinkle in Scalia's view, which we critique below, *see infra* notes 97-101 and accompanying text. There are points in the opinions, if not the book, when Scalia seems to be looking to leave room for the possibility that a particular historical practice, though well accepted at the time the relevant constitu-

Perhaps the most striking exposition of Scalia's view about the role of historical practices in constitutional interpretation came later that same week in his dissent in *Umbehr* and *O'Hare Truck Service, Inc. v. City of Northlake*.[32] Unlike *Romer* and *Virginia Military Institute*, *Umbehr* neither involved a highly charged social issue nor required the Court to construe the famously controversial language of the Due Process and Equal Protection Clauses. *Umbehr* posed the relatively prosaic question of whether the government can terminate independent contractors because of their political expression. A separate line of precedent had established that public employees enjoy a measure of First Amendment protection from termination on the basis of their political views;[33] in *Umbehr*, the Court had to decide whether to apply the same standard to independent contractors. In a decision that surprised few observers, the Court held that independent contractors were entitled to the First Amendment protection afforded public employees. Justice Scalia prefaced his dissent as follows: "Taken together, today's decisions ... demonstrate why this Court's Constitution-making process can be called 'reasoned adjudication' only in the most formalistic sense."[34]

For Scalia, the proper analysis of the question presented in *Umbehr* began and ended with the observation that "[t]here can be no dispute that, like rewarding one's allies, the correlative act of refusing to reward one's opponents—and at bottom both of today's cases involve exactly that—is an American political tradition as old as the Republic."[35] Again drawing on the basic expression of his views in *Rutan*, Scalia insisted that the practices challenged by the independent contractors in *Umbehr* could not violate the First Amendment

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tional provision was adopted, can nevertheless be invalid on the ground that it is clearly inconsistent with the provision. The suggestion emerges principally in a footnote in his opinion in *Rutan*, 497 U.S. at 95 n.1 (Scalia, J., dissenting), concerning *Brown v. Board of Education*, 347 U.S. 483 (1954). *Brown* seems problematic for Scalia's version of original meaning because racially segregated public education was well established when the Civil War Amendments were enacted. In the footnote in *Rutan*, Scalia states that his view about the role of historical practices applies only in the case of "ambiguous" constitutional provisions. He then argues that *Brown* can be reconciled with his approach on the ground that the Thirteenth and Fourteenth Amendments "leave[ ] no room for doubt" about the invalidity of *de jure* racial segregation, notwithstanding its wide acceptance in 1868. Elsewhere in the opinions, Scalia occasionally without further explanation describes the provisions to which his theory applies as "ambiguous" constitutional provisions, *see Virginia Military Institute*, 116 S. Ct. at 2292 (Scalia, J., dissenting), or provisions that are not "explicit," *see Umbehr*, 116 S. Ct. at 2362 (Scalia, J., dissenting). As we explain more fully, *see infra* notes 97-101 and accompanying text, the position that historical practices must be taken to be constitutional only where the relevant provisions are "ambiguous" or not "explicit" is not tenable. In discussing Justice Scalia's views, we do not always repeat the possible proviso that the view is intended to apply only to "ambiguous" provisions.

32. 116 S. Ct. 2353 (1996).

33. *See, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Board of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

34. *Umbehr*, 116 S. Ct. at 2361-62 (Scalia, J., dissenting).

35. *Id.* at 2362 (Scalia, J. dissenting).

for the reason that they were well established when the Bill of Rights was adopted. The First Amendment, in other words, must be interpreted in a way that is consistent with all practices that were well established in 1791. In the process of laying out his position, Scalia posed a series of incredulous rhetorical questions:

> If that long and unbroken tradition of our people [of refusing to reward one's political opponents] does not decide these cases, then what does? The constitutional text is assuredly as susceptible of one meaning as of the other; in that circumstance, what constitutes a 'law abridging the freedom of speech' is either a matter of history or else it is a matter of opinion. . . . What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court, that enables them to discern that a practice which the text of the Constitution does not clearly proscribe, and which our people have regarded as constitutional for 200 years, is in fact unconstitutional?[36]

Later in the opinion, Justice Scalia provided the most succinct summary of his approach to original meaning: "I would separate the permissible from the impermissible on the basis of our Nation's traditions, which is what I believe sound constitutional adjudication requires."[37]

A Matter of Interpretation elaborates Scalia's argument for the constitutionality of original practices. Scalia begins the book by setting out a peculiar view of the appropriate role of the common law judge. Scalia sees the task of the common law judge as manipulating precedent to reach results that accord with the judge's personal notion of wise and good rules.[38] The book describes it as the proper and typical approach of the common law judge to ask, "What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?"[39] Scalia applauds the application of this model to the common law,[40] but rues its broader influence on the American legal culture.[41] The glorification of the great common law heroes in the American system of legal education leads American judges to incline strongly towards the result-oriented common law model.[42] That inclination is inappropriate, however, for the interpretation of legal texts—regulations, statutes, and the Constitution—which is the staple of most American courts.

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36. *Id.* at 2363 (Scalia, J., dissenting).

37. *Id.* at 2366 (Scalia, J., dissenting).

38. *See* SCALIA, *supra* note 7, at 4-9, 13.

39. *Id.* at 13.

40. *Id.* at 12 ("I am content to leave the common law, and the process of developing the common law, where it is. It has proven to be a good method of developing the law in many fields—and perhaps the very best method.").

41. *Id.* at 13-14.

42. *See id.* at 9 (describing the indelible "image of the great judge—the Holmes, the Cardozo—[] the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule . . . .").

In his discussion of statutory interpretation, Scalia restates his influential position that courts should be faithful to the meaning that the text would be generally understood to have rather than the actual intent of the legislators. Thus, the proper goal of interpretation is not to effectuate the subjective expectations of the legislators—legislative intent—but rather "the intent that a reasonable person would gather from the text of the law."[43] The reason for interpreting a legal text in accordance with its original meaning rather than the original intent of its drafters derives from fundamental principles of democracy: "[I]t is simply incompatible with democratic government," Scalia writes, "to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . That seems to me the essence of the famous American ideal . . . [a] government of laws, not of men."[44] A second justification is that without the objective grounding of original meaning, misguided or dishonest judges will be free to enact their own preferences into law under cover of divining the framers' intent.[45]

Scalia's views about the common law and about statutory interpretation are crucial to his position on constitutional interpretation. First, Scalia presents the common law model as one of only two alternative approaches to constitutional interpretation (the second being his originalist approach), and argues that the common law model has to be rejected since it leaves judges wholly unconstrained.[46] Thus, Scalia uses his position on common law adjudication to attempt to demonstrate the necessity of his version of originalism. Second, Scalia sees constitutional interpretation as merely a special variant of statutory interpretation. He thus emphasizes that the principles he has outlined for statutory interpretation apply with equal force to constitutional interpretation.[47] Constitutional interpretation presents a distinctive problem only because the "the usual principles are being applied to an unusual text."[48] Thus, consistent with his well-known views on statutory interpretation, Scalia believes that the Constitution should be interpreted in accordance with what the text would reasonably have been understood to express rather than what the Drafters or Ratifiers intended.

43. *Id.* at 17.

44. *Id.*

45. *See id.* at 17-18; *see also Virginia Military Institute*, 116 S. Ct. at 2291-92 (Scalia, J., dissenting).

46. SCALIA, *supra* note 7, at 44-47; *see also Umbehr*, 116 S. Ct. at 2362 (Scalia, J., dissenting) (interpretation of Free Speech Clause "is either a matter of history or else it is a matter of opinion"); *Rutan*, 497 U.S. at 95-96 (Scalia, J., dissenting) ("I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court." (footnote omitted)). Scalia elaborates this point in his article, *Originalism: The Lesser Evil*, *supra* note 3, at 863-64; *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 365 (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 256-59, 352 (1990).

47. SCALIA, *supra* note 7, at 37-38; *see also id.* at 40.

48. *Id.* at 37.

With respect to constitutional interpretation, Scalia perceives two main competing schools of thought: "[T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning."[49] Scalia portrays the originalist school as an embattled minority in a legal culture that overwhelmingly endorses interpreting the Constitution according to the "common-law way of making law."[50] The dominant and officially preferred model, Scalia asserts, is for judges to interpret the Constitution to implement their personal opinions about desirable policy.[51]

Since Scalia thinks that this result-oriented approach, which he identifies with common law adjudication, is the only alternative (aside from original intent) to his method of interpretation, the focus of the constitutional argument in *A Matter of Interpretation* is on the danger and illegitimacy of the "common law" model of an evolving, flexible, or "Living Constitution."[52] 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.

It is primarily in the second part of his book, in his response to the comments from other scholars, that Scalia lays out his distinctive version of original meaning. There, Scalia addresses whether a constitutional provision can be interpreted to ban practices that were well accepted at the time the provision was adopted. For example, Scalia takes up the question whether the Equal Protection Clause bans single-sex toilets and all-male assault units. He concludes that, since no one in 1868 would have considered equal protection to have precluded such practices, they are constitutional. "I answer [the question] on the basis of the 'time-dated' meaning of equal protection in 1868. Unisex toilets and women assault troops may be ideas whose time has come . . . but refusing to [require them] does not violate the Fourteenth Amendment, because that is not what 'equal protection of the laws' ever meant."[53]

Similarly, Scalia argues that "it is entirely clear that capital punishment, which was widely in use in 1791," does not violate the Constitution's prohibition of cruel and unusual punishments. Scalia thus interprets the Cruel and

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49. *Id.* at 38 (emphasis in original).

50. *Id.* at 40.

51. *See id.* at 38-39 ("[I]t is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then, like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.") (emphasis in original); *see also id.* at 40 ("The Constitution . . . even though a democratically adopted text, we formally treat like the common law.")

52. *Id.* at 38.

53. *Id.* at 149.

Unusual Punishments Clause by asking what was considered cruel in 1791; a practice such as the death penalty that was widespread (and thus presumably not considered cruel) in 1791 is for that reason not forbidden by the Eighth Amendment.[54] Scalia does not argue that the punishments employed in the eighteenth century constitute important evidence of the original meaning of the term "cruel," to be weighed along with other relevant evidence; rather, he finds the fact that the death penalty was widely accepted in 1791 and thereafter dispositive of the question whether the punishment is "cruel" within the meaning of the Constitution.

At the same time as he insists on the primacy of original practices in constitutional interpretation, Scalia recognizes that the provisions of the Constitution stand for principles, not for lists of impermissible practices. If a prohibition's reach were limited to those practices that were thought to fall within its terms at the time the prohibition was adopted, it would leave no room for reasoned adjudication of practices that arose thereafter. Thus, for example, if the full meaning of the Eighth Amendment were provided by the set of practices considered cruel and unusual in 1791, the provision could not be invoked to ban a newfangled punishment. Scalia notes that such a view would convert his theory into "a narrow and hidebound methodology that ascribes to the Constitution a listing of rights 'in highly particularistic, rule-like terms.' "[55] He maintains that "the Eighth Amendment is no mere 'concrete and dated rule' but rather *an abstract principle*."[56] Similarly, Scalia holds that the principle of freedom of speech embodied in the First Amendment necessarily embraces many forms of expression—"movies, radio, television, and computers, to mention only a few"[57]—that did not exist in 1791. Thus, the case of practices that arose after the Constitution was adopted leads Scalia to recognize that constitutional provisions stand for principles; the task of the court is not simply to determine whether the challenged practice was historically well established but to assess it for consistency with the relevant principle.

With this gloss, the view that emerges is that constitutional provisions enact principles, but that practices that were well established when the relevant provisions were adopted are necessarily constitutional. Scalia reconciles the view that constitutional provisions stand for abstract principles with the view

54. *Id.* at 145. In his discussion of the death penalty earlier in the book, Scalia relies on the fact that the Constitution explicitly contemplates the use of the death penalty. *Id.* at 46; *see infra* note 108. Scalia's response to his commentators makes clear that he considers the widespread use of the death penalty in 1791 itself a sufficient reason for concluding that the practice is constitutional; the textual reference to the death penalty is for Scalia "superfluous" with respect to the penalty's constitutionality. SCALIA, *supra* note 7, at 145. Indeed, Scalia indicates that the textual reference to the death penalty is significant for exactly the same reason as the penalty's widespread use: it shows that the penalty was not considered cruel in 1791, which is the ultimate basis for Scalia's conclusion that the penalty must be constitutional. *Id.* at 145-46.

55. *Id.* at 145.

56. *Id.* (emphasis added).

57. *Id.* at 140; *see also id.* ("The originalist must often seek to apply that earlier age's understanding of the various freedoms to new laws, and to new phenomena, that did not exist at the time.").

that all original practices are constitutional by maintaining that the principles must be constructed so as to be consistent with all such practices.[58] Cases involving original practices are governed by the same constitutional principles that control cases involving later-arising practices. In cases involving original practices, however, there is no need to discern the relevant principle and assess the practice's fidelity with it; it is known in advance that the principle is consistent with all such practices.[59] Scalia articulates this point clearly in *A Matter of Interpretation*. After explaining that the Cruel and Unusual Punishments Clause stands for an abstract principle rather than a set of prohibited punishments, Scalia insists that all original practices nevertheless will come out constitutional:

> What [the Eighth Amendment] abstracts, however, is 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. It means not . . . "whatever may be considered cruel from one generation to the next," but "what we consider cruel today." . . . It is, in other words, rooted in the moral perceptions *of the time*.
>
> On this analysis, it is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.[60]

Thus, *A Matter of Interpretation* and the opinions in *Rutan, Romer, Virginia Military Institute*, and *Umbehr* offer a particular originalist view of constitutional interpretation. On that view, the goal of interpretation is to ascertain the original meaning of the constitutional text—the meaning the text would have been understood to have at the time, as opposed to the actual intention of the Drafters or Ratifiers. That meaning, according to Justice Scalia, is determined by reference to practices that were well accepted when the text was adopted.[61]

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58. *See Virginia Military Institute*, 116 S. Ct. at 2292 (Scalia, J., dissenting) ("[W]hatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.").

59. *See Rutan*, 497 U.S. at 95-96 (Scalia, J., dissenting); *see also Virginia Military Institute*, 116 S. Ct. at 2292 (Scalia, J., dissenting); *Umbehr*, 116 S. Ct. at 2362 (Scalia, J., dissenting) (quoting *Rutan*).

60. SCALIA, *supra* note 7, at 145 (emphasis in original).

61. Scalia takes original practices to matter on the ground that they show how a constitutional term or provision was originally applied. *See, e.g., id.* at 145-46. Scalia thus assumes that a practice that was widespread and unchallenged before and after the enactment of a provision must have been generally considered constitutional. More specifically, if no one challenged a government practice that everyone knew about, it was probably considered not to fall within the scope of relevant constitutional prohibitions. Leaving aside the difficulty and manipulability of the determination whether a practice was sufficiently widespread and unchallenged, the assumption seems plausible (if perhaps disputable). For the purposes of this article, we accept the assumption that a well-established practice was generally considered not to fall within the scope of a constitutional prohibition. In his jurisprudence, Scalia also occasionally relies on the converse, and probably less plausible, assumption that if the federal

The provisions of the Constitution stand for principles; but the principles are derived primarily from original practices, and must be contoured so as to preserve all such practices. In cases involving challenges to those practices, the application of the theory is therefore completely straightforward: the challenge fails without even articulating the applicable principle because, whatever the principle, it necessarily supports upholding the practice. In other cases, challenged actions are measured against the principles derived from relevant original practices.

II. THE MEANING OF ORIGINAL MEANING

This Part deploys a distinction between two uses of the term "meaning" to diagnose the flaw in a seemingly natural line of argument leading to the proposition that constitutional interpretation must respect original practices. We first consider persuasive arguments for the view that the Constitution should be interpreted as it was originally understood. These arguments make it plausible to further conclude that a practice that was originally understood to be constitutional must be so. A range of counterexamples uncontroversially shows, however, that the conclusion cannot be correct as a general matter. Thus, the seemingly plausible line of argument must be defective. We argue that the defect stems from a failure to distinguish between two different notions that "meaning" is used to express. We go on to show that Justice Scalia's arguments do not establish even the more limited claim that original practices must be upheld in certain classes of cases. We leave to Part III the question of whether such a claim can otherwise be justified.

A. THE PLAUSIBILITY OF THE ARGUMENT THAT ORIGINAL PRACTICES MUST BE CONSTITUTIONAL

Scalia's basic argument for original meaning rests on firm ground. As Scalia has explained, the whole point of a statute, and especially a constitution, is to lay down rules that cannot be changed except by a formal legislative process.[62] Moreover, the justification for judicial review is undermined to the extent that the challenged action is reviewed for consistency with contemporary social values rather than those embodied in the Constitution.[63] Scalia captures the

government never took a particular type of action that it might have been expected to take, the type of action must have been widely considered not to fall within the scope of the affirmative grants of power to the federal government. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2369-75 (1997) (concluding based on survey of early Congresses that Congress did not historically attempt to impose responsibilities on state executive officers, and thus that such action was considered to be beyond the reach of federal power). In the case of government inaction, the term "practices" is somewhat awkward, but the basic issue remains the same. The term "applications," which we introduce below, *see infra* Part IIc, can be aptly used in cases of both action and inaction.

62. SCALIA, *supra* note 7, at 40.

63. BORK, *supra* note 47, at 143; Robert H. Bork, *The Inherent Illegitimacy of Noninterpretivism*, *in* POLITICS AND THE CONSTITUTION 111 (1990); Easterbrook, *supra* note 4, at 375 ("You cannot have a view that denies the power of the past to rule today's affairs yet asserts that Article III still binds. Judicial review depends on the belief that decisions taken long ago are authoritative.").

point succinctly: "The principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality."[64]

Scalia's further argument that the end of interpretation should be original meaning rather than original intent is also persuasive. The choice between original intent and original meaning is relevant only in cases in which the private intentions of the legislature diverge from the publicly understood meaning of the legislative text. Since words are generally chosen in order to implement legislative intent, intent and meaning largely overlap, which is one explanation for the surface appeal of intent-based views. The question proponents of an original intent view cannot satisfactorily answer is how, consistent with democracy, to justify following intent in those cases in which it diverges from meaning—those cases in which actual intent is not conveyed by the text that was voted on and published. Moreover, as Scalia notes, accepted judicial practice is more accurately described as a search for meaning than for intent.[65] Thus, Scalia makes a powerful case that the goal of originalist interpretation should be to determine how the text would have been understood by the public at the time of its enactment.

At this point, it begins to seem natural to conclude that originalism requires fidelity to practices that were originally understood to be constitutional. The argument has established that originalism requires the Constitution to be interpreted in accordance with how it would have been understood at the time; and it seems nearly a truism that interpreting in accordance with how the Constitution would have been understood requires following an understanding that a practice was constitutional. It would appear to follow that any practice that was well accepted at the time a constitutional provision was enacted must be consistent with the provision's original meaning. (As noted above,[66] Scalia assumes, and we accept for purposes of this article, that a practice that was well accepted when the Constitution was enacted and thereafter would have been historically understood to be consistent with the Constitution.)

Indeed, nonoriginalists typically accept the assumption that original meaning entails upholding original practices. As discussed above, they argue against originalism on that ground (among others), citing original practices such as ear-cropping that now seem obviously unconstitutional.[67] Relatedly, nonoriginalists argue that originalism is unable to account for landmark decisions such as *Brown v. Board of Education*[68] that reject original practices. These critiques

64. Scalia, *supra* note 3, at 854.

65. *See* SCALIA, *supra* note 7, at 17. Apart from Scalia's arguments, there are a number of additional powerful considerations that militate against an intent view, such as the theoretical and practical difficulties in identifying an actual subjective intent of the legislature as a whole. *See* Brest, *supra* note 5, at 224-28.

66. *See supra* note 61.

67. *See supra* notes 1-2 and accompanying text.

68. 347 U.S. 483 (1954).

presuppose that originalism is committed to the constitutionality of original practices.

Originalists maintain the same presupposition in responding to the critiques, even at the cost of ceding crucial ground in the debate. Thus, as noted, Justice Scalia "hasten[s] to confess that in a crunch I may prove a faint-hearted originalist" and strike down a statute imposing flogging as a punishment.[69] There would be no "crunch" were it not for the assumption that original practices must be consistent with the original meaning of the Constitution. Similarly, originalists do not pause to question the assumption even when, in the face of nonoriginalist criticisms, they must strain to reconcile their accounts of originalism with *Brown* and other settled decisions that seem inconsistent with original practices.[70]

B. COUNTEREXAMPLES

However natural the assumption that the original meaning of a provision—the way the provision would have been understood—is reflected in the practices that were well accepted at the time, it is apparent on even brief reflection that the assumption cannot hold as a categorical matter. There are numerous cases in which any tenable version of originalism would allow the rejection of a historically well-accepted practice. Consider, for example, cases in which objects or activities that did not fall within the scope of a constitutional provision now do so because the relevant facts have changed. Thus, in cases interpreting the scope of the Commerce Clause, few would dispute that a vast range of activities that previously did not fall under the term "commerce among the several states" now do so. At least a significant part of this expansion has come about because changes in the world—specifically in the nation's economy—have resulted in previously local activities' becoming interstate commerce. No plausible originalist theory would hold that an activity cannot be within the scope of Congress's power over interstate commerce simply because in 1789 it was not thought to be "commerce among the several states."[71]

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69. Scalia, *supra* note 3, at 864. Indeed, Justice Scalia avers that not even the most ardently originalist judge would uphold a flogging statute, and suggests that most originalists are "faint-hearted." *Id.* at 861-62. Thus, even when pushed to the extreme of having to accept what he considers a departure from originalist principles, Scalia does not retreat from the assumption that original meaning must be consistent with all well-accepted practices.

70. *See* Horwitz, *supra* note 2, at 465; *infra* notes 97-102 and accompanying text; *see generally* McConnell, *supra* note 2, at 1140 (arguing that result in *Brown* is consistent with original understanding of the Equal Protection Clause).

71. It might be objected that this kind of example does not demonstrate a change in outcome with respect to an original practice because the activities that now fall within the scope of the constitutional term—e.g., the growing of wheat for home consumption, *see* Wickard v. Filburn, 317 U.S. 111 (1942)—are not the same activities that previously were thought to fall outside the term. Rather, in light of their new relation to interstate commerce, they are best characterized as new activities that did not exist at the time of ratification. And, so the objection would run, there has been no change in the determination of whether any particular activity is within the scope of interstate commerce. Beyond the obvious artificiality in the objection's characterization of activities, the objection relies on slicing

In a different sort of case, the relevant facts remain unchanged but the society comes to believe that it was previously mistaken about those facts. Here too originalism would not require preservation of the original practice. Suppose, for example, that a statute is passed requiring people with "contagious diseases" to be quarantined before entering the United States.[72] At the time the statute is passed, psoriasis is believed to be contagious. If it is later discovered that it is not, few would consider it inconsistent with originalist principles to allow that people suffering from the disease are not subject to quarantine. Indeed, in such a case, fidelity to original meaning would appear to require *rejecting* the previously well-accepted practice of quarantining people with psoriasis (as well as any well-accepted practice of not quarantining people with diseases since discovered to be contagious).

Additional examples of both types of cases can easily be cited. The term "contract" is today applied to some agreements to which it would not have been applied in 1791—for example, certain agreements to which a married woman is a party[73]—and is not applied to other agreements that it would have been applied to in 1791—for example, certain agreements supported by past or moral consideration.[74] No tenable version of originalism would hold, however, that the Contract Clause covers all and only agreements that were considered "contracts" at the time. Similarly, the set of punishments that are unusual has changed since the Eighth Amendment was adopted. But again originalists would not insist that whether a punishment is "unusual" within the meaning of the Eighth Amendment depends on whether it was in 1791.

An obvious explanation might be proffered for why originalism would countenance a departure from original practices in these cases. In the Commerce Clause case, for example, the scope of the term "commerce among the several states" depends on facts about the national economy that have changed. And in a case such as the contagious-disease example, though the facts have not changed, our beliefs about the facts have in a way that makes it now seem clear that the original practice of quarantining people with psoriasis was not faithful to original meaning. An originalist thus might suggest that the examples merely serve to clarify that the directive to uphold original practices was never meant to apply to practices that were premised on facts that have changed or on outdated

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activities finely in a way that might prove more than originalist theories can accept. If the growing of wheat for home consumption is now a different activity merely because it has come, by virtue of changes in the national economy around it, to have a substantial effect on interstate commerce, then any original practice is susceptible to recharacterization based on its relationship to the rest of the world; for example, the operation of all-male colleges in 1996 might be characterized as a different activity from their operation in 1789 in light of changes in the legal, social, and professional status of women.

72. We choose here a statutory example for ease of illustration. As Scalia indicates, *see* SCALIA, *supra* note 7, at 37-38, the principles that apply to statutory interpretation apply also to constitutional interpretation; thus, framing the example as a constitutional rather than a statutory provision would not relevantly alter the analysis.

73. *See* RICHARD A. LORD, 4 WILLISTON ON CONTRACTS § 8:17, at 297 (4th ed. 1992) ("At common law, a married woman could not bind herself by contract.").

74. *See* LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 151-54 (4th ed. 1981).

beliefs.[75]

The point of the examples is not, however, that originalists would be hard pressed to reach the right results in these cases, nor that the cases pose a basic challenge to originalism. On the contrary, most originalists would not only share the consensus view about the results, but would maintain that those results are faithful to original meaning. The immediate point is that the mere existence of the examples has significant implications for the relation between original practices and original meaning. The examples show at a minimum that any argument purporting to demonstrate generally that original meaning entails the constitutionality of original practices cannot be valid. In particular, as detailed in the previous section, Scalia presents a powerful general argument for interpreting the Constitution according to the way it was originally understood, and the argument seems to lead naturally to the conclusion that original practices must be constitutional. In light of the examples, the considerations that Scalia presents in support of original meaning cannot constitute a general argument for the constitutionality of original practices.

Of course, there may be important differences between the above examples and other cases that require upholding original practices in the latter cases. An argument that originalism requires upholding original practices in certain cases, however, would have to be tailored to the relevant features of those cases, as opposed to an argument for upholding original practices in general. As it turns out, the examples serve not simply to illustrate a circumscribed exception to the claim that originalism requires fidelity to original practices; rather, they point toward a far broader problem with the claim. They do so by highlighting a critical distinction that has generally been overlooked in the originalism debate.

C. MEANING VERSUS APPLICATION

The examples show that there must be a flaw in the initially persuasive idea that fidelity to a text's original meaning requires fidelity to the practices that were originally understood to be consistent with the text. In order to grasp this flaw, it is necessary to distinguish between two different senses in which "meaning" is used.[76] First, there is the strict sense in which the meaning of a term is roughly that which a speaker must have in order to be able to use the

75. Of course, this explanation tends to put pressure on the view that originalism entails fidelity to original practices. Requiring fidelity to original practices only when the practices are not based on mistaken or outdated views is tantamount to requiring fidelity only to those practices that accurately reflect the underlying principles. But such a requirement, by giving priority to the principles behind the practices even at the cost of rejecting the practices, undermines the view that all original practices must be upheld. *See generally infra*, text accompanying notes 122-38.

76. We are concerned here only with textual meaning—the meaning of words or phrases. There are many other ways in which the term "meaning" (and its other grammatical forms) is used. For example, we think of the meaning, that is the implication, of *events*, as in the phrase "this means trouble." For purposes of statutory or constitutional interpretation, the relevant senses of "meaning" are those that relate to textual provisions or terms.

word competently.[77] This is the sense in which someone who has never encountered a word might ask what the word's meaning is. Dictionary definitions and paraphrases are simple attempts to specify meaning in this sense. This sense of meaning is strict in that it opposes the meaning of a word to the facts about the things to which the word applies. For example, knowing the meaning of the word "bachelor"—roughly unmarried man[78]—does not require knowing any number of facts about bachelors, for example that bachelors wear pants or that bachelors have birthdays. Because this sense is the strict one, we will refer to it simply as "meaning."

In another, less strict sense, what a term "means" includes the objects or activities to which a speaker or community of speakers actually applies the term.[79] We will refer to this sense as "applications." For example, someone might say, "to me, vacation means getting up whenever I feel like it." Or a teacher might say, "when I say literature, I don't mean Stephen King." Turning to the case of a community of speakers, it might be said that "for the British, dinner means meat and potatoes." The applications sense of "meaning" is used with respect to abstract as well as concrete terms, as in the phrases, "Love means never having to say you're sorry," or "Happiness used to mean a house in the suburbs; now it means a personal trainer and unlimited internet access."

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77. *See, e.g.*, MICHAEL DUMMETT, THE LOGICAL BASIS OF METAPHYSICS 83 (1991). For those well-versed in philosophy of language and mind, it may be useful to note that this way of characterizing meaning is designed so as not to assume any particular answer to the highly controversial question of what meaning consists in. There are many competing views on that question, for example, that the meaning of a term consists in a recognitional ability, a symbol in "mentalese," or an explicitly articulable definition. The characterization of meaning as what a speaker must have in order to use a term competently is neutral with respect to those views. (Additionally, the use of the noun "meaning" should not be taken to imply that meanings are particular entities or that meaning is atomistic.) Certainly nothing in the argument depends on the assumption that a competent speaker must be able explicitly to articulate the meaning of a term. Indeed, as a large body of work in philosophy and linguistics has shown, it is difficult to articulate precisely the meaning of even a seemingly straightforward term. *See* STEVEN PINKER, HOW THE MIND WORKS 12-13 (1997) (citing such examples as a bishop and a man who lives with his long-term companion and their child to argue that the apparently straightforward definition of "bachelor" as unmarried man does not fully capture our intuitions about who fits the category.) Rather, what shows that speakers are using a term with the same meaning is that, for example, they take the same considerations to count in favor of something's falling under the term and reject proposed analyses for similar reasons.

For a discussion of the Quinean position that meaning cannot be separated from substantive fact, see *infra* note 87.

78. We employ the convention of underlining the meaning of terms and provisions, as in the statement: "square" means a two-dimensional figure with four sides of equal length and four right angles.

79. It is ultimately the community's meaning that is relevant to legal interpretation, *see* Easterbrook, *supra* note 4, at 359-60 ("the meaning of a text lies in its interpretation by an interpretive community"); but for the sake of simplicity, we sometimes in this article talk in terms of a single speaker instead of a community of speakers. This avoids the complication that some idealization is necessary in order to talk about a community's application of a term when there is not complete consensus within the community. As noted above, *see supra* note 61, for purposes of this article we assume, with Justice Scalia, that well-established practices reflect a community's consensus about the application of the relevant constitutional provisions. Ultimately, however, the view that original practices should be upheld because they reflect the community consensus would have to address this complication.

An example from the law might be, "in 1791, the Sixth Amendment's guarantee of 'the assistance of counsel' meant the right to have a lawyer if one could afford it." As these examples illustrate, the applications sense less strictly opposes meaning and fact;[80] indeed, a claim about a term's applications is typically a claim about substantive views. The above examples communicate various speakers' or communities' substantive views—in the case of happiness, for example, about what makes people happy—rather than definitions of terms.

One way to see that meaning and applications must be different is to recognize that over time the meaning of a word can stay the same while the set of things to which it is applied changes.[81] For example, through advances in microscope technology, we could come to realize that organisms not previously recognized to be viruses were in fact viruses. Or, new viruses could evolve and come to be recognized as viruses. In either case, the things to which speakers applied the word "virus" could change while the word's meaning stayed the same. Similarly, people in the past sometimes applied "gold" to fool's gold, but that did not prevent them from meaning "gold"; rather, the meaning of "gold" has remained constant while its applications have changed.[82]

There is of course a close relation between meaning and application, which is one reason why they are sometimes conflated.[83] What things the speaker applies a word to depends on the meaning that the speaker employs. But meaning is only one determinant of the things to which the speaker would apply the word.[84] In addition to meaning, the speaker's substantive beliefs determine a

80. An indication that this sense of meaning is less strict is that it typically is not expressed by the noun form "meaning." Thus, it would be imprecise and unnatural to say, "the meaning of love is never having to say you're sorry."

81. The applications of a term are not the same as the things to which the term is correctly applied; rather the applications are the things to which the term is *actually* applied. Even an entire community of speakers could be mistaken in the application of a term, as for example when the term "gold" was widely applied to fool's gold. The meaning of a term and its application can come apart not only because of substantive views but also for another reason, which is discussed below. *See infra* note 84.

82. If meaning and application were equivalent, every shift in belief about what a term applies to would result in a change in the term's meaning. Thus, it was recently learned that, contrary to previous belief, mad cow disease is communicable to humans. But the meaning of "communicable to humans" did not change as a result of the discovery.

83. The distinction between meaning and application is frequently overlooked because of a tendency to consider only extremely simple examples. In the case of certain simple terms, such as technical terms with stipulative definitions, although disagreements about application can arise—for example because of differences in observation—by and large people will agree about the term's application. For most words, however, the set of things to which the word is actually applied is a manifestly inadequate account of meaning, since typically people who use a word with the same meaning will have some disagreement about what the word applies to.

84. At least on a traditional view of meaning, there are two ways in which application comes apart from meaning. First, application diverges from the reference of a term—the property or set of things to which the term correctly applies—because speakers can be wrong in their substantive views. Second, as Frege famously made clear, even the reference of a term does not capture its meaning (or, in Frege's terms, its "sense"); terms with the same reference can nonetheless mean something different, as in the case of "square shaped" and "diamond shaped" (which both pick out precisely the same objects), or

word's application. In other words, in applying a word, a speaker necessarily draws upon his or her beliefs about how things in fact are. This is easy to see in cases in which the question whether a term applies depends on issues that cannot be straightforwardly determined, for example by observation. Thus, there is an obvious gap between understanding what the word "contract" means and knowing whether a particular instrument is in fact a contract: the latter might depend, for example, on whether the plaintiff happened to see the newspaper advertisement, whether the advertisement constituted an offer, whether the plaintiff's request for a layaway plan was a counteroffer, and like issues. Even in cases in which application of a term seems straightforward, the speaker necessarily draws upon substantive beliefs. For example, just knowing the meaning of the term "chair" will not itself determine whether you will apply the term to a particular object; that will also depend on matters of substantive belief, such as whether you believe that the object is intended for sitting. (Consider, for example, coming across a structure in the woods of possibly natural origin that looks as if it could be a chair.) Meaning alone can never determine how a word will be applied.[85]

The beliefs that, along with meaning, determine application can range along a spectrum from the very concrete to the highly theoretical. For example, we can both use "bachelor" to mean unmarried man, yet disagree about whether John is a bachelor, either at the concrete end of the spectrum—because you simply happen not to know that John was married last weekend—or, more theoretically—because you have a view about marriage and divorce laws according to which John's marriage is invalid.

In fact, people could not use language to disagree if the meaning of a word were the same as the things to which it is applied. In order for two people to use language to have a disagreement, they must mean the same thing by the relevant words. Otherwise, there is merely a parody of disagreement. If you use the word "suspenders" in the British sense to mean device for holding up socks, and I use it in the American sense to mean device for holding up trousers, and you say

"11" and "the smallest prime number greater than ten." For further discussion, see the vast philosophical literature on the sense-reference distinction, *e.g.*, GOTTLOB FREGE, TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 56-78 (Max Black trans., 1952); FREGE: TRADITION AND INFLUENCE (Crispin Wright ed. 1986).

85. This pedestrian feature of meaning—that it does not incorporate any number of facts about the world—should not be confused with ambiguity or indeterminacy. A text is ambiguous if there are two different strict meanings that could plausibly be attributed to it, or, more loosely, if it is not clear what its strict meaning is; a text's application to a particular case is indeterminate if there is no answer (even given all the relevant facts) to the question whether the case falls under the text's meaning. The sentence "John married Susan" is ambiguous between the reading on which John is the groom and the reading on which John is the presiding official. Ambiguities concerning such matters as whether terms fall within the scope of a particular clause are a familiar source of difficulty in statutory interpretation. Examples of indeterminacy are provided by sentences employing vague terms, such as "the wall is pink" or "this is a heap of sand." (To say that a text was ambiguous or indeterminate merely because it did not determine its own application would rob the notions of ambiguity and indeterminacy of their content, since every text would be ambiguous or indeterminate.)

that this is a pair of suspenders and I say it is not, we are not having a substantive disagreement but a linguistic misunderstanding. There is nothing to discuss: we can simply use "suspenders1" to mean device for holding up socks and "suspenders2" to mean device for holding up trousers, and then agree that the device in question is a pair of suspenders1 and not a pair of suspenders2.

But people do use language to have substantive disputes. Suppose one astronomer claims that a celestial object detected by telescope is a comet and another claims it is not. If what a person meant by a word were simply the things to which he applied the word, then, since one applies the word to the celestial object and the other does not, the two astronomers would mean different things by the word "comet." In that case, when one said the object was a comet and the other denied that it was, they would simply be talking past each other. The disagreement, however, is plainly not a mere misunderstanding about the use of words akin to that of the suspenders example; it could not be resolved by stipulating definitions of "comet1" and "comet2." Rather, the astronomers have a substantive disagreement. The source of the disagreement could be anything from a dispute about very specific facts—for example, one astronomer could have misread the dial of an instrument—to a dispute about a very general theory—for example, one astronomer could have a radical theory that a certain wavelength of light indicates the presence of chemical elements not found in comets.

Turning to a familiar example in the law, judges frequently disagree about whether to describe particular conduct as "negligent." That does not imply, however, that they are having a suspenders-style misunderstanding about the meaning of "negligence"; rather, they understand the word "negligence" in the same way but disagree about its application in the particular case, for example because they have a substantive disagreement about whether certain conduct is reasonable.[86]

Thus, disagreement over whether a term applies in a particular case can be, and generally is, a substantive disagreement, rather than a misunderstanding about the word's meaning, because what a word is applied to depends not only on meaning but also on substantive views. Conflating the meaning of a word with its applications makes it impossible to see that differences in the application of a word, either over time or at a particular time, may occur not

86. In fact, using language not only to disagree, but even to agree, would generally be impossible if meaning and application were the same. Using words to agree, as much as to disagree, requires shared meaning. But if what a person means by a word is what he would apply it to, then two people cannot mean the same thing by a word unless they would apply it to exactly the same things. Except in the unusual (and likely uninteresting) case in which people apply a word identically in all circumstances, even when two people both applied a word to an object, they would not be agreeing. If meaning were the same as application, the fact that the two people (by hypothesis) had some differences in the set of objects to which they apply the word would imply that they were using the word with different meanings. For example, two people who said the Sistine Chapel is "beautiful" would not thereby be agreeing since any two people will have some differences in the set of things they consider "beautiful."

because of differences in meaning, but because of differences in substantive views.[87]

In sum, distinguishing between meaning and application reveals that application may not be a reliable guide to meaning. There may be an extremely difficult substantive step from the meaning of a term to its application in a particular case. For example, someone who understands the meaning of the term "the smallest prime number greater than one million" may nevertheless incorrectly apply the term because of theoretical error or imperfect calculation.[88]

D. THE MEANING-APPLICATION DISTINCTION AND THE ORIGINALISM DEBATE

With the meaning-application distinction in mind, it is now useful to return to the issue of fidelity to original practices, and the originalism debate in general. As described above, Scalia advances a persuasive argument that the Constitution should be interpreted in accordance with the way it was understood by the society at the time it was drafted. Since practices that are "open, widespread, and unchallenged" are presumably understood by the society to be consistent

87. It would be a mistake for those who hold that preserving original meaning requires preserving applications to take comfort in the Quinean position that there are no facts about meaning distinct from facts about the world. Quine's view is precisely that *nothing* is true by virtue of meaning alone, not even such seemingly "analytic" truths as that a bachelor is an unmarried man; for Quine, the truth of any proposition is always subject to challenge by empirical investigation. *See* Willard Van Orman Quine, *Two Dogmas of Empiricism*, *in* FROM A LOGICAL POINT OF VIEW 20, 42-43 (3d rev. ed. 1980). Thus, Quine's view would actually present the most extreme challenge to the idea that original meaning entails fidelity to original applications; on his view, every case would be like the example of the contagious-disease statute—any putative application of a term would be subject to revision on the basis of further investigation. Moreover, the important differences between on the one hand, using a word with different meaning and, on the other hand, having a substantive disagreement provide reasons for rejecting the Quinean view. For example, though people who disagree over the application of a term because of a substantive dispute may not be able to agree on a precise articulation of the word's meaning, they are able to engage in a substantive dispute because they take the same considerations to count in determining whether something falls under the term. Similarly, related phenomena such as speakers' agreement on the initial plausibility of proposed analyses of terms and their ability to recognize when analyses fail are best explained by positing shared, though not superficially accessible, knowledge of rules of meaning. *See* Georges Rey, *The Unavailability of What We Mean: A Reply to Quine, Fodor and LePore*, 46 GRAZER PHILOSOPHISCHE STUDIEN 61, 82-90 (1993).

88. Note that identifying applications with meaning tends to lead toward relativist views. If what a community meant by a term were not distinguished from how it applied the term, it could not be the case that an application of the term was wrong. If Einstein's discoveries necessarily changed the meaning of the relevant terms, Einstein did not show that Newton's claims were not universally correct, but merely changed the subject. Similarly, modern meteorological science would not be able to dispute the claims of a culture that believed rain dances precipitate rainstorms, because the science would not have terms that meant the same as those of the culture. More generally, if meaning and application were not distinguished, one culture could not coherently assert that the views of another culture were wrong. To the extent that one culture applied a term differently from another, the term would have to mean something different in the two cultures. There would be no disagreement but only the use of terms with different meanings.

with the Constitution,[89] it is easy to conclude that the original understanding, and thus the correct interpretation, of the Constitution must be such as to uphold those practices. But as we saw, certain examples, such as the contagious-disease statute, show that that conclusion does not hold generally. The distinction between meaning and application reveals the flaw in the apparently plausible line of argument leading to the requirement of fidelity to original practices. The distinction also helps explain the reach of Scalia's arguments for interpreting the Constitution in accordance with its original meaning: the arguments are persuasive so long as meaning is taken in the strict sense, but they do not establish the critical claim that original practices are necessarily constitutional.

Putting the distinction in familiar terms in the context of constitutional interpretation, the strict meaning of a constitutional provision is a rule, and its applications are the practices that the society would take to be covered by it. For example, the strict meaning of the Free Speech Clause is a principle prohibiting certain restrictions of expression, and the Clause's applications include government actions—for example, censorship of a magazine article on the basis of its criticism of government policy or a court-ordered prior restraint on the publication of an alleged libel—that are generally taken to be prohibited by the provision. As discussed above, Scalia recognizes that the original meaning of a constitutional provision is a rule or principle, not a set of practices. He thus uses "original meaning" in the strict sense, rather than the applications sense. At the same time, however, Scalia maintains that to fail to preserve the original applications of a constitutional provision is to illegitimately change the Constitution, because original practices reveal the original meaning of the relevant provisions and therefore must be constitutional.[90] Thus, in *Romer*, Scalia reasons that because the criminalization of homosexual conduct dates back to the founding, the Court's holding in *Bowers* that the Constitution does not prohibit such criminal laws "is unassailable, except by those who think the Constitution changes to suit current fashions."[91]

The flaw in the line of argument for fidelity to original practices is that original applications do not reliably reveal original meaning. In light of the distinction, it cannot be assumed that the practices that were understood at the time to be consistent with a constitutional provision perfectly reflect the provision's original meaning. Thus, in the contagious-disease case, it would be a mistake to assume that the practice of quarantining people with psoriasis accurately indicates the original meaning of "contagious." Meaning can be

89. *See supra* note 61.

90. As noted above, Scalia takes original practices to matter on the ground that they manifest the contemporaneous application of relevant constitutional provisions. *See supra* note 61.

91. Romer v. Evans 116 S. Ct. 1620, 1631 (1996) (Scalia, J., dissenting). *A Matter of Interpretation* provides a striking example of equating a change in the application of a constitutional provision with a change in the Constitution. *See* SCALIA, *supra* note 7, at 45-46 (referring to "the philosophy which says that the Constitution changes[—]that the very act which it once prohibited it now permits, and which it once permitted it now forbids.").

reconstructed from application only if we know what substantive beliefs were relied on in applying the term or provision.

As Scalia argues, the point of the Constitution is to enact rules that cannot be changed without extraordinary procedures. If a court departs from the meaning of a constitutional provision, it is changing the rules. Indeed, that is so even if the court happens to arrive at an outcome that is consistent with the original application of the provision by relying on a principle that is inconsistent with the original meaning. The legitimacy of judicial review thus depends in the first instance on courts' applying the law in accordance with its original meaning. This argument is compelling if original meaning is understood in the strict sense. A court that departs from original meaning in the strict sense is substituting a different rule rather than interpreting.

In cases in which there has been a change in the strict meaning of a word found in the Constitution, it is uncontroversial that the court cannot legitimately give effect to the new or evolved meaning. Words can develop new meanings for any of a number of reasons—such as historical accident, the contributions of popular writers, the influence of foreign languages, or confusion with similar words[92]—that are completely arbitrary with respect to constitutional interpretation. For example, the word "counterfeit" previously meant genuine,[93] and "manufactured" previously meant handmade.[94] Suppose a constitutional or statutory provision using one of these words had been adopted when the word had its previous meaning. There is no tenable argument that the vagaries that resulted in the shift in meaning would justify interpreting the provision in accordance with the present meaning of the word.[95]

In sum, the political theory arguments that the court must interpret the Constitution in accordance with its original meaning are persuasive when meaning is understood in the strict sense. In contrast, basic political theory considerations do not establish that courts must adhere to the original applications of constitutional provisions. As the contagious-disease statute and related examples show, it can be justified to depart from original applications. Thus, it is not possible to maintain that the legitimacy of a decision depends on its fidelity to original applications. At any rate, what political theory suggests may not legitimately be changed are the constitutional or statutory *rules*. Since the applications of a rule can change while the rule remains the same (because of

92. *See* BILL BRYSON, THE MOTHER TONGUE: ENGLISH & HOW IT GOT THAT WAY 78-80 (1990) (cataloguing and analyzing various changes in meaning).

93. *Id.* at 77.

94. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 796 (1981 ed.)

95. The examples of "counterfeit" and "manufacture" involve dramatic shifts in meaning, but the point is no less valid for cases in which meaning shifts only slightly. The reason for not interpreting in accordance with the changed meaning in the case of "counterfeit" or "manufactured" the degree of the change; rather, the reason is that a word's acquisition of a changed meaning in the strict sense—however large or small the change—provides no justification for changing the strict meaning of the constitutional provision. *See* Ash Sheep Co. v United States, 252 U.S. 159, 168-69 (1920) (consulting old dictionaries and concluding that the original meaning of the statutory term "cattle" covered sheep).

changes in views about the relevant facts), holding the rules constant does not require holding the applications constant.

The distinction between meaning and application also helps clarify the role of history in originalist interpretation. Consider again Justice Scalia's discussion of the issue presented in *Umbehr*. In arguing that the free speech guarantee of the First Amendment does not prohibit the government from terminating independent contractors because of their political expression, Scalia asserted: "the constitutional text is assuredly as susceptible of one meaning as of the other; in that circumstance, what constitutes a 'law abridging the freedom of speech' is either a matter of history or else it is a matter of opinion."[96]

The claim here is that when a text is susceptible of two meanings, history must determine the correct interpretation. Otherwise the interpretation is simply a "matter of opinion," i.e., it is left to the unconstrained preferences of judges. This claim is persuasive if "meaning" is used in the strict sense. A text, such as "John married Susan," that is susceptible of two meanings in the strict sense (John was either the groom or the presiding official) can only be disambiguated by consulting the original context. In the passage from *Umbehr*, however, Scalia is using "meaning" in the applications sense when he claims that the language of the free speech guarantee is susceptible of two meanings. The two meanings in question are that political patronage is prohibited with respect to independent contractors and that it is not. These outcomes are possible applications, not possible meanings in the strict sense, of the words of the Free Speech Clause. But in the applications sense, every text is susceptible of multiple meanings, because whether a text applies in a particular case cannot be determined without knowledge of the facts. Thus, whether the contagious-disease statute requires a person with psoriasis to be quarantined cannot be determined from the words of the statute alone. This is not because the words have two possible strict meanings, but because the outcome depends on whether psoriasis is in fact contagious. We could say that the statutory text is susceptible of two meanings in the applications sense, but that way of putting things should not lead us to think that the resolution of the issue lies in history rather than in the facts about contagion.

Although the position that original meaning requires fidelity to original practices cannot be true as a categorical matter, it still could be argued that the position holds in certain classes of cases. A footnote in Justice Scalia's opinion in *Rutan* in fact suggests a possible way in which he might seek to distinguish cases in which original practices must be upheld from cases in which they need not be. Addressing *Brown*, Scalia argues that it is not necessary to uphold the constitutionality of the original practice of maintaining racially segregated public schools:

> I argue for the role of tradition in giving content only to *ambiguous* constitutional text .... In my view the Fourteenth Amendment's requirement of

96. *Umbehr*, 116 S. Ct. at 2363 (Scalia, J., dissenting).

> 'equal protection of the laws,' combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.[97]

The qualification suggested by the footnote would be that the requirement of fidelity to original practices does not apply in the case of "unambiguous" texts. This possible gloss is nowhere described in *A Matter of Interpretation*, and the only actual discussion of it in the cases comes in the footnote in *Rutan*.[98] It is thus unclear whether Scalia intends the gloss to be an integral part of his theory; perhaps the footnote is best understood as simply an attempt to address the challenge to his approach posed by *Brown*. In any event, it is worth briefly examining the reasons why the gloss is not tenable. It is difficult to understand how the gloss would operate and difficult to see how it could be justified.

The gloss contemplates that the first step in the interpretation of a provision is a determination whether the provision is sufficiently clear that original practices need not be consulted. An immediate problem is determining the notion of clarity on which the gloss relies. What exactly must be clear in order for original practices to be irrelevant and what considerations are to be taken into account in determining whether it is clear? The term "ambiguous" might be taken to suggest that what must be clear is what the strict meaning of the text is, as opposed to how it should be applied to the particular case.[99] But that would not distinguish *Brown* from cases in which Scalia insists that original practices must be upheld. The constitutional language that governed *Brown*[100]—the "equal protection of the laws"—was also at issue in *Virginia Military Institute*, which Scalia presented as a prime example of a case in which the original practice must be upheld. And the Free Speech and Cruel and Unusual Punishments Clauses are no more ambiguous with respect to strict meaning than the Equal Protection Clause. Scalia nowhere suggests that the constitutional phrases "freedom of speech," "cruel and unusual punishments," or "equal protection

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97. *Rutan*, 497 U.S. at 95 n.1 (Scalia, J., dissenting) (emphasis added). Justice Scalia also suggests, as an alternative basis for reconciling *Brown* with his view, that the practice of maintaining segregated schools was not in fact sufficiently unchallenged to be owed fidelity. *Id.*

98. In *Virginia Military Institute*, Scalia, without further explanation, describes the provisions to which his theory applies as "ambiguous." 116 S. Ct. at 2292. To similar effect are the references in *Umbehr* to provisions that are not "explicit," 116 S. Ct. at 2362, and practices that are "not clearly proscribe[d]," *id.* at 2363. The text to which the *Rutan* footnote is appended refers to "a practice not *expressly* prohibited by the text of the Bill of Rights." 497 U.S. at 95 (emphasis added).

99. *See* supra note 85 and accompanying text.

100. As indicated, *see supra* text accompanying note 97, the footnote in *Rutan* also cites the Thirteenth Amendment's prohibition of slavery to support the suggestion that the Constitution unambiguously dictates the result in *Brown*, thereby making it unnecessary to take into account the (arguably contradictory) original practice. Scalia does not elaborate, but the implication might be that the Thirteenth Amendment somehow serves to clarify the *application* of the Fourteenth Amendment to school segregation, rather than resolving some ambiguity with respect to the strict meaning of the Fourteenth Amendment. We address immediately below the suggestion that the ambiguity in question is a lack of clarity not with respect to the provision's strict meaning but rather with respect to the provision's application to a particular case.

of the laws" could be parsed in different ways, or that it is otherwise unclear what their strict meanings are.

It seems therefore that what must be clear in order to make it unnecessary to uphold original practices is how the relevant provision should be *applied* to the particular case. It cannot be, however, that the relevant "ambiguous" cases are those in which, given the strict meaning alone, there are multiple possible applications. As noted above, every provision is "ambiguous" in that sense since strict meaning does not alone determine applications.[101] Thus, the "ambiguous" cases must be cases in which, even after additional considerations are taken into account, it remains uncertain how to apply the strict meaning of a provision to the facts. It is highly problematic, however, which additional considerations the gloss contemplates.

As we point out in Part III, the standard way to determine the application of a constitutional rule—of a provision's original strict meaning—is by taking into account the best contemporary understanding of the facts. For example, to determine whether the rule that people with contagious diseases be quarantined covers people with psoriasis, a court generally would rely on the best scientific evidence concerning the contagiousness of psoriasis. The gloss cannot allow, however, that we are to take into account contemporary views in determining whether a text's application is clear. That would completely undermine the basic position: it would have the consequence that when contemporary views indicated that a government action came within the meaning of a constitutional prohibition, the action would be unconstitutional, regardless of whether it had been an original practice. For example, if contemporary views indicated that public male military schools were a denial of equal protection or that capital

101. Scalia's use of the phrase "expressly prohibited" in the text to which the *Brown* gloss is appended might suggest a different understanding of the relevant notion of clarity. "Express" is normally contrasted with "implied"; but the idea cannot be that original practices must be upheld only when the constitutional prohibition is implied. In *Rutan* itself, for example, the claim that the First Amendment prohibited restricting the speech of government employees was not a claim that the prohibition was *implied*. Rather, the argument was that the political patronage practices in question were laws "abridging the freedom of speech" and were thus expressly prohibited by the First Amendment. Certainly, the Equal Protection Clause's prohibition of racially segregated schools is no more express than the Free Speech Clause's claimed prohibition of political patronage practices. Similarly, if, as the Court held in *Virginia Military Institute*, the Equal Protection Clause prohibits public male military schools, it does so not by implication but by expressly prohibiting unequal treatment of persons.

The idea might be rather that only if a provision very specifically refers to the challenged action is it not required that original practices be upheld. Problems here would include how specifically a prohibition would have to be spelled out and what would justify such categorically different treatment for actions that are seemingly covered by a general prohibition but are not described with sufficient specificity. Since the Eighth Amendment's prohibition of cruel and unusual punishments is evidently not a specific enough prohibition of, say, flogging, to avoid the requirement that original practices be upheld, the necessary level of specificity would have to be very high. In that case, leaving aside theoretical difficulties, the qualification to the theory would exempt very few cases from the requirement of fidelity to original practices, and thus would not be of great significance. Finally, it is not easy to see how the line would be drawn so as to put *Brown* and the contagious-disease example on one side and all the cases in which Scalia would require upholding original practices on the other.

punishment was cruel and unusual, those institutions would be unconstitutional, notwithstanding the long national tradition of maintaining them.

The gloss is made no more tenable by positing that it is *historical* views that are to be taken into account in determining whether the text is sufficiently clear. Since the point of the gloss is to carve out a class of cases in which the court need not consult original practices, the evidence of historical views would have to be something other than original practices, for example, contemporaneous essays or accounts of legislative debates; otherwise, the gloss would collapse into the nonsensical suggestion that original practices should be taken into account to determine whether a provision's application is sufficiently clear to make resort to original practices unnecessary. But it would severely undercut the general view presented in the book and opinions for the gloss to contemplate that consideration of historical evidence other than original practices be the first step—and in the cases where that evidence provides a clear answer, the last step—in every case. On Scalia's version of originalism, original practices are, at a minimum, an extremely authoritative source of original meaning, and other than the possible exception for cases involving "unambiguous" provisions, are per se constitutional. If original practices are such compelling evidence of original meaning, it is difficult to see how it could be justified to ignore them (indeed, to strike them down without additional inquiry) on the basis of other historical evidence. And, conversely, if there is a reliable kind of evidence of original meaning other than original practices, it is difficult to justify setting that evidence aside whenever it is less than definitive, rather than taking it into account along with original practices. Finally, the gloss would fail to produce the correct results in the Commerce Clause, contagious-disease statute, and similar examples. As those examples suggest, and as we argue further in Part III, questions about the proper application of the Constitution's original meaning cannot in general be resolved simply on the basis of historical views about how the Constitution would apply in particular cases.

Thus, the suggestion that the general rule of fidelity to original practices can be salvaged by building in an exception for "unambiguous" provisions does not withstand scrutiny. That does not show, of course, that there is not a sound justification for a requirement of fidelity to original practices in at least certain kinds of cases. The next Part analyzes the possible justifications for such a position.

III. ORIGINAL MEANING AND ORIGINAL PRACTICES

Having clarified the distinction between meaning and application, it is now possible to set aside any confusion over the use of the word "meaning" and address directly the possible arguments for preserving original practices. We first introduce the two possible kinds of reasons for fidelity to original practices. After examining why neither kind of reason justifies preserving original practices in the contagious-disease example, we consider value-laden terms such as "cruel" or "equal," the application of which depends on judgments about, for

example, political morality. We conclude that value-laden terms do not present a special case for fidelity to original practices. Most definitively, if constitutional provisions are to stand for principles, it must be possible to reject particular practices. Finally, we discuss the relation between common law adjudication and constitutional interpretation as constrained by original practices.

A. TWO POSSIBLE JUSTIFICATIONS FOR RESPECTING ORIGINAL PRACTICES

As a general matter, there are two possible justifications for requiring fidelity to original applications, corresponding to the two determinants of applications. The application of a term, as discussed above, depends both on its meaning and on substantive beliefs about the subject matter. Consequently, the application of a term can change either because of a change in substantive views about the subject matter (e.g., it is discovered that a particular organism is not in fact a virus),[102] or because of a change in the term's meaning in the strict sense (e.g., "suspenders" comes to lose the meaning of a device for holding up trousers and comes to take on the British meaning of a device for holding up socks). An attempt to justify fidelity to original applications therefore could argue that original applications should be upheld either in order to respect historical substantive views or in order to respect original meaning in the strict sense.[103]

The first approach argues that original substantive views must be respected. In other words, whether a case falls within the meaning of a provision should be determined in accordance with original substantive views. We will call this a "substantive views" approach. Thus, in the case of the Cruel and Unusual Punishments Clause, this approach would argue that, though the original meaning of the Eighth Amendment was that cruel and unusual punishments were prohibited, courts should decide cases in accordance with historical rather than modern views about what punishments are cruel. We will call this a "substantive views" approach.

The second approach accepts the view that only original meaning in the strict sense must be respected, but claims that, for the term or type of term in question, respecting original meaning requires preserving the original applications. Again considering the Cruel and Unusual Punishments Clause, this approach would argue that the original meaning of the prohibition of "cruel and unusual punishments" was not that cruel and unusual punishments were prohibited, but rather a different meaning that ensures that the original applications were all correct. We will call this a "strict meaning" approach. This approach

102. Changes in the facts, such as those that have resulted in changes in the application of the Commerce Clause, are included in this category; such changes affect applications by effecting a change in peoples' *views* about the facts.

103. An argument for respecting original applications could be a combination of the two lines of argument discussed in the text. For analytical purposes, since each line of argument must stand on its own merits, the two lines can be evaluated separately.

can either present evidence in a case-by-case manner on the original meaning of the particular term, or can provide general reasons why the original meaning of a whole class of terms—for example, value-laden terms—must be such that original applications are correct.

In Part IIIB below, we analyze the two possible justifications in the case of the Cruel and Unusual Punishments Clause and value-laden terms generally, concluding that neither of the justifications is any more plausible for value-laden terms than for other terms. In the first analysis, however, it is useful to identify the specific hurdles each approach would encounter in the contagious-disease example, where we know at the outset that fidelity to original practices would give rise to the incorrect outcome. Consideration of how the two approaches play out in this example serves to identify what features make it implausible to require fidelity to original applications and thus what kinds of considerations might serve to justify such a requirement in other kinds of cases.

1. Fidelity to Original Substantive Views

The first line of argument begins with the plausible claim that "contagious disease" has always meant the same thing, but that our views about whether psoriasis is spread by contact have changed. According to this argument, although psoriasis is not now believed to be contagious, the statute should be interpreted to require quarantine of people with psoriasis (and not of people with contagious diseases not historically known to be communicable) because the term "contagious disease" should be applied in accordance with historical substantive views.

We have seen that the powerful political theory arguments for originalism are persuasive for meaning in the strict sense but not for applications. Once the original meaning of a provision has been determined, it is difficult to justify failing to determine how that meaning applies to the present case in accordance with the best understanding of the facts. For example, suppose that, contrary to the hypothesis under consideration, the statutory text meant that quarantining is required for people with diseases generally *considered* communicable at the time the statute was adopted. In that case, the fact that psoriasis is now known not to be contagious would be irrelevant; it does not follow, however, that modern substantive views should be ignored. The application of this alternative text would be determined in accordance with the best *current* understanding of whether, at the time the statute was passed, psoriasis was generally believed to be contagious. Since truly respecting original meaning requires bringing to bear all available knowledge, and since modern and original substantive beliefs can differ, respecting original meaning may be inconsistent with respecting original substantive views.

Given the initial hypothesis that the original meaning of the statute was that quarantine was required only for communicable diseases, there is no compelling reason for holding that quarantine is required for a noncommunicable disease that people previously thought to be communicable. The drafters did not either

simply list diseases for which quarantine was to be required or use language that meant generally considered to be communicable at the time of passage of this statute. It is understandable that they did not since it makes sense to care more about, and be more sure of, one's view that quarantine should be required only for communicable diseases than about one's specific beliefs about which diseases are communicable. The substantive views approach nevertheless maintains that the original views about which diseases were contagious should also be respected. Respecting original substantive views is, however, not consistent with respecting original meaning, since respecting those views would require quarantining people with psoriasis and not quarantining people with diseases not historically known to be communicable. Thus, fidelity to substantive views comes at the cost of fidelity to original meaning.

In light of the political theory reasons for respecting original meaning, it seems unwarranted to respect the historical belief that psoriasis was contagious (or the historical concern with quarantining people with psoriasis), which by hypothesis was not encompassed in the original meaning, at the cost of the concern with quarantining (all and only) people with communicable diseases, which was encompassed in the statute's original meaning. In sum, the provisions's original meaning determines what question the court must answer in applying the provision in a particular case, but once the original meaning has been determined, there is no justification for ignoring available knowledge. At that point, the court is confronted with the same kind of application of law to fact that it regularly resolves, and that it resolves in accordance with all available knowledge (subject to applicable rules of evidence and procedure).[104]

2. Fidelity to Original Strict Meaning

A premise of the strict meaning approach is that the meaning of "contagious disease" has changed. An immediate problem is that, since substantive views as well as meaning affect the application of a term, the mere fact that the application of the term has changed does not show that the meaning has

104. It would not be helpful to argue in response that originalism is akin to a rule of evidence or procedure that for policy reasons—here the importance of respecting original values—restricts what the court will consider in applying the law. First, the argument would beg the question: the inquiry at issue is into the possible justifications for applying the original meaning in accordance with historical substantive views not incorporated in that meaning. More fundamentally, the argument would misapprehend the standard way in which interpretation effectuates original values (a point that the meaning-application distinction helps clarify). It is in the determination of meaning in the strict sense that the court is called on to decide which original values are embodied in constitutional rules. Once meaning has been determined, implementing the original values generally entails consulting the best available understanding of all the relevant facts. In the contagious-disease statute, for example, the reasons for respecting original meaning do not apply to the concern with quarantining people with psoriasis. Holding that people with psoriasis must be quarantined would sacrifice the original value expressed in the text's strict meaning in the service of a different historical value not expressed in the text. The question is not whether to respect original values but rather how to determine which original values to respect (the ones expressed in the text) and how best to respect them (by applying them in accordance with the best available understanding of the relevant facts).

changed. Without evidence of some other kind—evidence, for example, that the considerations that were historically considered to be relevant to whether something is a "contagious disease" have changed—the most plausible conclusion is that the change in application of the term is explained by a change in substantive views about the communicability of psoriasis.

The more important problem is that the argument must establish not merely that the meaning of "contagious disease" has changed, but that its original meaning was such that the original applications were correct. One possibility for making this showing would be simply to present evidence—for example, of what contemporaneous medical literature counted as relevant to the issue of whether a disease was "contagious"—that "contagious" originally had a particular meaning according to which the relevant original applications happened to be correct. Such evidence would establish at most, however, that the original applications of a particular term were in fact correct at a particular point in history; it would not even begin to establish a more general claim that, for some class of terms, original applications should be upheld. In order to support the more general claim, it would be necessary to show that, for a certain class of terms, there is something special about the relation of meaning to application.

A crude version of such an argument would attempt to show that terms of a certain kind have meanings that explicitly incorporate historical applications, such as generally considered to be contagious at the time this statute is passed. (We will use the phrase "historically grounded meaning" as a shorthand for this type of meaning.) The claim would have to be not merely the truism that the term was originally applied to things then generally considered contagious, but that the term's meaning in the strict sense actually included such an explicit, second-order reference to the consensus at a particular time. (To think that a term means generally considered to be contagious just because it is applied to those diseases generally so considered would be to ignore the difference between meaning and application.) This approach attempts to ensure that original applications are respected by building them directly into meaning. The central problem for this approach lies in the difficulty of establishing that an entire class of terms have or had such crude, historically grounded meanings.[105]

It is highly improbable that the evidence would show that "contagious disease" is one of a class of terms that had a historically grounded meaning. The kind of evidence that would support a historically grounded meaning is evidence that speakers counted the fact of consensus as the primary consideration bearing on the term's application. For example, evidence that people looked to

105. It also is worth noting that even if a term had such a historically grounded meaning, it would not follow that original applications would necessarily be correct. Since people can be wrong about what it is that their contemporaries generally believe, the original applications of a term with a historically grounded meaning can be inconsistent with the term's original meaning. Historians might establish, for example, that there is a difference between the set of diseases that people at a particular time thought their contemporaries considered contagious and the set of diseases that people at that time actually considered contagious.

polls to determine whether a disease was "contagious" would support a historically grounded meaning. Conversely, evidence that people did not rely on polls and the like or knowingly maintained minority positions would tend to undermine the hypothesis of a historically grounded meaning.

Moreover, if the approach is not merely to show that particular terms have historically grounded meanings, but to establish a general claim about a whole class of terms, it will have to present general reasons that apply across the class. The argument can not possibly be that writers of statutes always use terms with historically grounded meanings. Nor is there anything about the contagious-disease statute that would make it implausible to employ a term without a historically grounded meaning. On the contrary, it is plausible that a statute would have required quarantine for communicable diseases, as opposed to diseases then thought to be communicable.

The more subtle version of the approach would not claim that the original meaning of "contagious" was a second-order one that explicitly referred to historical consensus. Rather, the version would argue that "contagious" had a meaning that, like its current meaning, was first-order and at the same time was such that the original applications were correct. The claim might be that "contagious disease" originally meant, say, a disease that is either communicable or is characterized by scaly, reddish patches. Psoriasis then would fall under the original meaning of the statutory term "contagious disease," even though psoriasis is not a communicable disease. If the subtle version is not to rely on case-by-case presentation of evidence, the version must demonstrate that some feature of the meanings of the type of term in question has the consequence that the community as a whole cannot misapply the term and thus that all applications will necessarily be correct. Establishing this relation between meaning and application is the greatest obstacle for the subtle version because the version does not adopt the strategy of attempting to build applications into meaning. The idea might be, for example, that people do not make mistakes in the application of this type of term or that, in the realm in question, correctness is determined by consensus. In the case of "contagious," it is not surprising that no such idea is plausible. We will consider the case of value-laden terms below.

Yet another problem for the subtle version is that there is a difficulty in finding a plausible meaning for "contagious disease," given the constraint that all the original applications must come out correct. It may be that original applications can come out correct only by interpreting "contagious disease" to stand for a gerrymandered concept such as the disjunctive one suggested above, a concept for which we do not even have a contemporary term. In that case, the cost of ensuring that all original applications come out correct is interpreting the statute to embody a value that is difficult to make intelligible—for example, quarantining, in addition to persons who have certain contagious diseases, persons who have certain noncontagious diseases. In many cases, it is more plausible (and less patronizing) to attribute to the members of another society an incorrect belief than to interpret them as caring about something unintelligible.

Moreover, as we will explain below, at least in interpreting the broad, abstract provisions of the Constitution, a related drawback to attributing gerrymandered meanings is that it gives rise to unprincipled interpretations.

B. THE CASE OF VALUE-LADEN CONSTITUTIONAL PROVISIONS

In the contagious-disease case, the implausibility that original applications should be preserved was clear in advance. Having identified the difficulties the two possible justifications encounter in the contagious-disease case, we can now take up the question whether cases involving the interpretation of value-laden terms are different from the contagious-disease case in ways that provide a justification for fidelity to original practices. We begin with the approach that urges respect for historical substantive views, and then proceed to the somewhat more complicated case of the strict meaning approach.

1. The Substantive Views Approach

The contagious-disease example illustrated the general principle that a court takes account of the best available understanding of the facts in determining whether something falls under a statutory or constitutional rule. This principle reflects not a rejection of historical values, but an implementation of the historical values that are embodied in the strict meaning of the relevant provisions. The issue now becomes whether there is a reason for adhering to a different principle in the case of value-laden political or ethical terms.[106]

In the contagious-disease example, it seems straightforward that the term "contagious" should be applied in accordance with contemporary substantive views because the change in views rests on progress in science. Few would dispute that in determining whether a case falls within a particular category, a court would properly rely on the best contemporary scientific knowledge. It might, in contrast, be argued that, in applying political or ethical terms, a court should follow historical substantive views about whether the facts of a case fall within the relevant category. According to this argument, courts should not rely on the best contemporary understanding of what is cruel because beliefs about what is cruel are different in nature from beliefs about what diseases are contagious. The underlying idea might be expressed by saying that questions that involve values (for example, about what punishments are cruel), in contrast to other kinds of questions (for example, about what diseases are contagious), are inherently disputable matters of judgment; answers to such questions are not subject to being demonstrated to the satisfaction of all reasonable people. Relatedly, it might be suggested, there is no reason to expect progress in beliefs

106. Since the value-laden terms that are most relevant in legal interpretation tend to be political and ethical (rather than, for example, aesthetic), the discussion will sometimes refer simply to "political or ethical terms," even though not all political and ethical terms are value-laden (e.g., "supermajority").

about political or ethical as opposed to scientific matters.[107] The argument would conclude that we should therefore be cautious in substituting our beliefs about political and ethical matters for historical ones.

It is important first to note that the argument cannot be simply that the beliefs of the society contemporaneous to the founding should be followed because the purpose of the Constitution is to enshrine those beliefs. As we have seen, the political theory arguments for originalism support preserving views that were expressed in the strict meaning of the Constitution, not historical views in general. The hypothesis under consideration is precisely that "cruel" meant cruel, not something like what people in 1791 consider cruel, and thus that the Constitution embodied the view that cruel punishments should not be permitted, but not contemporaneous beliefs about which punishments are cruel.[108] And, as examples such as flogging and ear-cropping show, respecting the view that cruel punishments should not be permitted is inconsistent with respecting contemporaneous beliefs about which punishments are cruel.[109] The question at issue is precisely whether there is a persuasive justification for following historical views that were not expressed in the strict meaning. The bare fact that, at the time a constitutional provision was adopted, people held certain views about what fell under a constitutional term does not advance the argument. (In any event, an argument that all original beliefs should be followed would prove too much since it would apply in every case, including, for example, the contagious-disease case.)

It might be suggested that the constitutional scheme must have envisaged the preservation of the contemporaneous society's specific moral and political beliefs—for example, about which punishments are cruel—on the ground that any other hypothesis would undermine the force of the abstract clauses of the Constitution. It is understandable, however, that a society would choose not to

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107. Justice Scalia makes a somewhat different argument in discussing a hypothetical statute that forbids the hunting of "endangered species." Scalia suggests that the reason that the term "endangered species" might legitimately change in application, in contrast to the term "cruel punishments," is that the former term "clearly connotes a category that changes from decade to decade. . . . '[M]oral principles,' most of us think, are permanent." SCALIA, *supra* note 7, at 146. This suggestion cannot account for the contagious-disease example because the term "contagious disease" falls on the same side of the proposed line as the term "cruel punishments." We would expect that the things that fall under either term would not change over time (though we might well expect that society's *beliefs* about what falls under either term would change). Thus, as Scalia points out, "Americans in 1791 surely thought that what was cruel was cruel," *id.*, but they just as surely thought that what was contagious was contagious. Moreover, in both cases, these convictions certainly could have coexisted with a recognition that the society's view might not be infallible, and that future society might come to a different view.

108. The death penalty may be considered a special case inasmuch as it is specifically mentioned in the text of the Constitution. As Scalia points out, however, the particular import of the textual reference to the death penalty is that it provides especially strong evidence that the penalty was not considered cruel at the time the Eighth Amendment was adopted. *See supra* note 54.

109. For simplicity, and because it is not disputed that the Constitution does not require fidelity to the original applications of the term "unusual," we at times omit mention of the "unusual" requirement of the Eighth Amendment.

embed all its specific moral beliefs, as opposed to its more abstract principles, in a constitution. The principle of no cruel punishments may have been equally or more important to society in 1791 than the belief that flogging was not cruel (and a society may recognize that embedding the more specific beliefs may be in tension with preserving the abstract values). In addition, a society may be more confident in the correctness of its abstract values than in their precise applications to particular circumstances. For example, our society is perhaps more sure of the general principles relating to not killing and relieving suffering than of their application to such issues as assisted suicide, or of the principle of freedom of speech than of its application to flag-burning.

Moreover, the distinction between scientific beliefs and other beliefs more susceptible of public demonstration, on the one hand, and beliefs that are inherently controversial, on the other hand, cuts across the distinction between the application of scientific terms and the application of political or ethical terms. Scientific beliefs and other beliefs more susceptible of public demonstration affect the application of political and ethical terms. For example, the Court in *Brown* relied on scientific evidence—then-recent psychological studies—in finding that segregated schools were not equal.[110] Similarly, in the case of "cruel," it is certainly conceivable that psychological or neurological studies could show, for example, that certain punishments cause more pain or anguish than was previously understood.

A more basic point is that beliefs do not fall neatly into camps of those susceptible to conclusive demonstration and to progress and those that are not. A belief that may seem particularly well established may come to be rejected, and advances may occur in areas in which they are least expected. To the extent that we can categorize questions according to how susceptible they are to being answered in a definitive way, the divisions do not necessarily correspond well to the distinction between value-laden and scientific beliefs. Views in the social sciences, including disciplines such as economics and psychology on which the law heavily relies, often are not subject to definitive demonstration; and even apparently fundamental and well-established views in medicine and physics have been overturned. We are more sure of some of our ethical views—for example, that slavery is wrong—than we are of scientific beliefs. Indeed, *Brown* may be best understood as resting on changed ethical understandings—for example, of what constitutes equality—rather than on developments in the psychology of education.[111]

In any event, it is difficult to see why the degree to which beliefs are susceptible to demonstration or to progress should make a fundamental differ-

110. Brown v. Board of Educ., 347 U.S. 483, 494-95 & n.11 (1954).

111. As scholars have noted, even if psychological studies showed minorities received an equally good education in segregated schools, segregation would likely still be unconstitutional. *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 566 (1991); Herbert L. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-33 (1959).

ence 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. Of course, courts should be cautious in making determinations about inherently disputable matters, but the fact that a matter is inherently disputable has no tendency to favor *historical* beliefs over other beliefs. Similarly, a lack of certainty that we are making progress is a weak argument for following earlier views that we now believe, if only provisionally, to be incorrect.[112] The law regularly addresses issues that are not susceptible of being determined with absolute certainty; rather than abandoning any attempt to address them and addressing different issues instead, the law in other contexts has developed tools—such as expert witnesses and burdens of proof—for attempting to answer them as well as possible. As in other situations in the law, a lack of certainty does not justify adhering to views that on the society's best understanding are incorrect (and are not part of the strict meaning of the relevant legal provisions).

A different tack for defending the substantive views approach might be to argue that judges should not be permitted to make difficult substantive determinations about the best contemporary understanding of political and ethical questions because they will in practice be unconstrained. In the case of the contagious-disease statute, science's definitive answer to the question of whether a particular disease is contagious provides a reliable constraint on judges. In contrast, because of the lack of conclusive resolutions, judges may be inadequately constrained in resolving questions that depend on judgments about matters of political morality, such as whether a search is reasonable. We can set aside the tricky question of whether ethical and political issues are any different in this respect from issues that are undoubtedly appropriate for judges to decide.[113] The argument must be that asking judges to decide whether a search is reasonable will provide no genuine constraint; whether deliberately or unwittingly, it will be too easy for judges to impose their personal preferences while ostensibly following a process of principled adjudication. It is not plausible, however, that the need for real constraints supports fidelity to original practices over all alternative constraints: judges could, for example, be required to respect

112. Furthermore, maintaining that there is no progress in political and ethical matters is in some tension with our having different political and ethical views from previous societies. If there is compelling contemporary thinking that points in a different direction from historical views, then there is, by that very fact, at least some reason to believe that the current view represents progress. Thus, to the extent that the legal system recognizes that the best understanding of an ethical matter is different from the prior view, the legal system cannot simultaneously assume that there is *no* reason to think there has been progress.

113. One standard attempt to distinguish ethical and political issues from other issues is to claim that judges, by virtue of their insulation from democratic processes and majority views, are poorly positioned to decide such questions. Interestingly, Justice Scalia gives precisely the opposite reason, suggesting that if judges are not constrained by original practices, they will implement the will of the majority: "If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that." SCALIA, *supra* note 7, at 47; *see also id.* at 149.

contemporary practices, or to maximize the economic efficiency of the society.[114] There is no reason to think that, in comparison to such alternatives, a requirement of fidelity to original practices is an especially effective protection against judges' imposing their personal preferences. On the contrary, in light of the difficulty of determining what historical practices were, whether they were sufficiently unchallenged,[115] and so on, the requirement leaves ample room for judicial maneuvering.

It would be circular, moreover, to contend that it is originalist concerns that favor the constraint of original practices over other possible constraints. The question at issue is whether there is a justification for fidelity to original practices and, in particular, whether the need for constraints on judicial discretion provides such a justification. In any event, the contention that fidelity to original practices is justified by the need to constrain judicial discretion is in tension with originalist motivations. The idea behind originalism—that the Constitution should be interpreted in a particular way because the point of the Constitution is to protect certain rules from change—supports imposing the type and degree of constraint on judges that are dictated by the original meaning of the Constitution, not simply whatever constraint leaves the least discretion. According to an original meaning view, as opposed to an original intent view, the issue is not what constraints the Framers intended (which might perhaps point toward original practices) but what constraints were expressed in the Constitution. On the present hypothesis, according to which the strict meaning of the constitutional term "cruel" is cruel, the political theory reasons for following strict original meaning suggest that the constitutional scheme requires judges to determine what is cruel, rather than what was thought in 1791 to be cruel.

Finally, the argument might be raised that, not only are the answers to political and ethical questions not subject to definitive demonstration, there are no better or worse answers to such questions. On this claim, there would be no justification for following current views. The attacks on the project of interpretation from ethical relativist and related radical standpoints cut too coarsely to be

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114. Justice Scalia's jurisprudence provides additional examples of available constraints on judges other than the requirement of fidelity to original practices. Thus, for example, in the consolidated cases of *Stanford v. Kentucky* and *Wilkins v. Missouri*, 492 U.S. 361 (1989), Justice Scalia's plurality opinion surveyed the states' legislative treatment of capital punishment for juvenile offenders in an attempt to ascertain whether executing 16- and 17-year-old offenders was "contrary to evolving standards of decency" so as to violate the Eighth Amendment. *Id.* at 370-71. At the same time, the opinion explicitly recognized and rejected other proffered indicia of national standards, such as public opinion polls and the positions of professional associations. *Id.* at 377. Similarly, Scalia's celebrated footnote in *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989), sets out a principle for determining how to characterize putative liberty interests for purposes of substantive due process analysis. The significance of these methods is not their particular merits; rather the point is that by providing examples of alternative constraints on judicial discretion, they undercut the claim that a requirement of fidelity to original practices is necessary in order to constrain judges.

115. *See, e.g.*, Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (suggesting that the practice of maintaining racially segregated schools did not have a sufficient "tradition of unchallenged validity.")

of much use here (and certainly are not associated with Justice Scalia).[116] Without addressing all the problems with such a line of argument, it is worth noting that both sides to the originalist debate, and indeed the Constitution, must presuppose that there are better and worse answers to questions of ethics and political morality.[117] If there were no better or worse answers, arguments of political morality for or against originalism would have no force. Not only would there be no way to justify originalism or any other approach to interpretation, it would not matter whether a court had a justification for its method of interpretation or the result in a case, whether constitutional values were respected, or whether people were treated unequally or cruelly. Thus, relativist ideas have no tendency to justify fidelity to original practices; rather, they undermine the possibility of providing justifications at all.

2. The Strict Meaning Approach

Having analyzed the failings of the substantive views approach in the case of value-laden terms, the question now becomes whether the strict meaning approach is plausible in the case of such terms. To recapitulate, the approach accepts the view that it is strict original meaning originalism must preserve. It then goes on, however, to claim that the meaning of political and ethical terms is such that original applications are correct. The crude version would hold that ethical and political terms in the Constitution had historically grounded meanings; for example, "cruel" meant what people in 1791 consider cruel. The problem for this version of the approach is the implausibility that the terms actually had second-order, historically grounded meanings. The more subtle version would hold that political and ethical terms were originally understood to stand for concepts somewhat different from our current ones such that the original applications were all correct. For example, the claim would be that in 1791 people understood "cruel" to stand for a concept somewhat different from our concept *cruel*, a concept for which we have no contemporary word. For purposes of the following discussion, we can call it "cruel*." The view would be that the word "cruel" has changed in meaning from cruel* to cruel, and thus that fidelity to original meaning requires continued application of cruel*. The major difficulty for the subtle version is establishing that something about the terms in question entails that their applications cannot come apart from their meanings, thereby eliminating the need to present evidence that the applications in fact were all correct.

116. It is unsurprising that relativist arguments might seem superficially to support fidelity to original practices. As noted above, failing to separate applications from meaning tends to lead to relativism. In fact, however, a sophisticated objectivist has reason to be cautious about requiring future adherence to currently fashionable political and ethical views, particularly highly specific ones. On an objectivist view, since there are better and worse answers to questions of political morality and ethics, it is possible, and a matter of serious concern, for a prevailing view to be mistaken. In contrast, if there are no better or worse answers, there is no reason not to impose the views one prefers.

117. *See* Easterbrook, *supra* note 4, at 380 ("In the end, the power to countermand the decisions of other governmental actors and punish those who disagree depends on a theory of meaning that supposes the possibility of right answers.").

The crude version of the strict meaning approach is easily dismissed. The argument would have to be that apparently value-laden political and ethical terms such as "cruel" were generally understood in 1791 to have non-value-laden[118] meanings such as what people in 1791 consider cruel. (The argument cannot be that the Framers *intended* "cruel" to be so interpreted; on an original meaning view, the Framers' intentions, to the extent that they are not expressed, are irrelevant.[119]) The crude version is no more plausible as an account of the meaning of political and ethical terms than it is as an account of the meaning of other terms. First, for people to have used the word "cruel" to mean what people consider cruel implies that the people had an independent, first-order concept *cruel*. Presumably, they would have had a word for this concept, i.e., a word meaning cruel, not what people consider cruel. In that case, however, the society would have had an ethical term without a historically grounded meaning. It therefore would not be possible to argue that all political and ethical terms had historically grounded meanings. If, on the other hand, the society had no word for the first-order concept cruel, the implausibilities quickly multiply: people understood the concept of cruelty, considered some things cruel and others not, and had a word for what people consider cruel, but lacked a word for cruel itself. The claim, moreover, would have to be the same for every political and ethical term. Second, if political and ethical terms had historically grounded meanings, people would have determined whether such terms were applicable by consulting polls or other indications of what people generally believed; similarly, it would have been unintelligible for a person to make a political or ethical claim knowing that nearly everyone disagreed. It is highly implausible that political and ethical terms ever were used in such ways.[120]

The subtle version of the strict meaning approach attributes an initially more plausible meaning to the term "cruel" but soon runs into implausibilities of its own. The subtle version holds that "cruel" used to stand for an abstract ethical concept, cruel*, different from cruel, the concept that the term currently expresses. The idea is that we can attempt to understand that concept by examin-

118. A term with a historically grounded meaning is non-value-laden since whether it applies to a particular activity depends not on values but on the empirical facts of what people believed.

119. *See supra* note 65 and accompanying text.

120. Moreover, if "cruel" had such a historically grounded meaning, there would be a problem in applying the Cruel and Unusual Punishments Clause to new government practices. A new government practice such as, for example, chemical castration of sex offenders, was not considered cruel in 1791; it had not yet been invented. It might be suggested that the meaning of "cruel" is given by what people in 1791 would have considered cruel had they encountered it. If the suggestion is that the relevant consideration is literally the reaction that people in 1791 would have had were they confronted with a new practice, the problem is that their reaction would have depended on how much of the modern situation they had absorbed. And it is unclear what degree of relevance should be assigned to reactions after varying degrees of acculturation. If the suggestion is that the relevant consideration is not literally what people would have considered cruel but what principle they were following in applying the term "cruel," then the suggestion is tantamount to the subtle rather than the crude version of the historically grounded view, which is untenable for the reasons laid out in the immediately following discussion.

ing the set of practices considered "cruel" (i.e., cruel*) in 1791. Once we come to understand cruel*, the argument continues, we can apply it to new practices not contemplated in 1791. The crucial claim is that cruel* was such that all well-accepted applications of "cruel" were correct. Moreover, if the approach is to show that original applications are per se correct (rather than presenting evidence about the meaning of "cruel" and every other like term), it must maintain that this claim holds because of some feature of ethical and political terms generally.

The first problem is that the premise that the meaning of "cruel" has changed seems to rest on an assumption that is undermined by the distinction between meaning and application. The only reason for thinking the meaning of "cruel" has changed is that its application has changed. (Scalia does not seek to investigate whether "cruel" previously meant something different by, for example, looking at contemporaneous essays to see what they counted for and against something's being cruel.) Since the application of a word can change while its meaning is constant, a change in application is not reliable evidence of a change in meaning. Knowing that society's views about ethical matters have not remained the same over the last two hundred years, we would expect changes in the application of the term "cruel," even if its meaning had remained the same.

Second, and relatedly, even assuming the meaning of "cruel" has changed, original practices are not the only or the best evidence of original meaning. As noted, a person can know the meaning of a term without being particularly skilled at identifying what falls under it, and even a person who does have such a skill can make mistakes in exercising it. The best evidence of a term's strict meaning is not the things to which speakers actually apply it, but the considerations they take to count in determining whether the term applies. Such evidence reveals meaning undistorted by the prism of substantive beliefs. The evidence can be found in contemporaneous discussions—for example, in newspapers, essays, and political speeches. In the case of value-laden terms, applications are an especially poor guide to meaning because the application of such terms is more likely than the application of other terms to be influenced by external considerations such as bias and self-interest. Thus, there is at least one reason why the argument that preserving original meaning requires preserving applications is *less* plausible with respect to value-laden terms.

Third, in the absence of reliable evidence that "cruel" meant cruel*, cruel is a better interpretation because it is more plausible, other things being equal, that the Constitution would address cruelty rather than cruelty*—a value we do not understand. One consideration that counts in favor of or against an interpretation is how intelligible it makes the objects of interpretation. Cruel* is, by hypothesis, a concept that we do not understand, and for which we do not even have a word. Thus, at least in the absence of evidence pointing one way or the other, that an interpretation reads the Constitution to prohibit cruel rather than cruel* punishments counts in favor of the interpretation. According to such an

interpretation, Americans in 1791 cared about the same thing we care about—whether punishments are cruel—but had a different substantive view about whether particular tortures, such as ear-cropping, were cruel (which is explainable in light of their circumstances and other beliefs). Interpreting "cruel" as cruel thus requires us to hold that Americans held particular beliefs that we now have come to believe are mistaken. Interpreting it as cruel*, however, requires us to hold that Americans had a different ethical value from us, the avoidance of cruelty*. In the absence of persuasive supporting evidence, we should be wary of such an implausible (and patronizing) interpretation.

Fourth, the claim that for the type of terms in question all well-accepted original applications are correct is no more plausible in the case of value-laden terms than in the case of non-value-laden terms. In order for the claim to hold, it has to be the case that the community as a whole will not apply the terms incorrectly. This could be true either because mistakes are extremely unlikely in the area in question, or because in that area community agreement constitutes correctness. Political and ethical terms are unlikely candidates on both scores. First, it is not the case that mistakes are particularly unlikely with respect to issues of ethics or political morality: such issues, or at least many of them, are not straightforward; moreover, factors such as self-interest and bias are more likely to have a distorting effect on judgments about such issues. Second, except on relativist views,[121] the fact that a community holds a particular political or ethical view does not alone make the view correct.

A proponent of fidelity to original practices might raise a final argument that, despite all the implausibilities of the crude and subtle versions, the original meaning of the broad clauses of the Constitution—the principles for which those clauses stand—must be such that all original practices are constitutional. The principles must make the practices constitutional because the principles are derived from the practices. Rather than reiterating the implausibilities of the strict meaning approach, it is worth pausing here to address this argument directly; the response will lead, in the next section, to a definitive argument against the view that original practices must be preserved.

The immediate response is that, even leaving aside the possibility of evidence other than practices, attempting to extrapolate the original meaning of a term from original practices does not justify respecting all the practices. As discussed above, Scalia espouses the view that the abstract principles for which the broad clauses of the Constitution stand must be consistent with all original practices because the principles are derived from the practices. "[S]uch traditions," Scalia insists "are themselves the stuff out of which the Court's principles are to be formed. When it appears that the latest [rule] devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us."[122] Thus, in the case of the Eighth Amendment, after

121. *See supra* notes 116-17 and accompanying text.

122. Rutan v. Republican Party of Ill., 497 U.S. 62, 96 (1990) (Scalia, J., dissenting).

insisting that the provision stands for an abstract principle, Scalia continues: "What it abstracts, however, is 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."[123] Since the prohibition of those punishments that a particular society happened to think were cruel is not an abstract principle, Scalia must mean that judges are to extrapolate from the contemporaneous society's particular applications to the principle that lies behind them. Scalia concludes that this relation between practices and principles has the consequence that the practices are necessarily consistent with the principles.

As familiar efforts in other fields to derive principles from practices illustrate, however, it is not necessary that all practices ultimately be upheld in order for the principles to be genuinely derived from the practices.[124] A famous example within political theory is John Rawls's project of finding principles of justice through the method of "reflective equilibrium."[125] The method goes back and forth between our considered moral judgments about specific cases—in effect moral practices—and our sense of the acceptability of putative principles. Reflective equilibrium comes at the point where any further fidelity to practices can only be achieved at too great a cost in the acceptability of principles. In explaining the method, Rawls himself notes its similarity to the method used in linguistics to derive principles from the linguistic practices—the actual performance—of speakers of a language.[126] In deriving such principles, linguists balance candidate principles' consistency with all the data against their plausibility and explanatory power. Some linguistic practices may have to be rejected as mistakes in order to derive the principles that best capture the linguistic competence of the speakers.[127] In general, research in empirical science follows such a method of going back and forth between data and hypotheses about scientific laws. Since the data may reflect the interference of other phenomena and artifacts of the experimental procedure, a method that requires hypotheses to fit the data points perfectly will be less successful at capturing unified underlying structures than a method that entertains hypotheses that reject or only approximately fit some data points in order to achieve a smooth curve. In other words, finding the correct hypothesis requires balancing considerations such as explanatory power and intuitive plausibility against respecting all the data.

Closer to home, a similar model of deriving principles from practices is normal in common law reasoning. A common law judge attempts to decide a new case by deriving principles from past decisions (and from hypothetical cases that have clear answers[128]). The judge may sometimes be justified in

123. SCALIA, *supra* note 7, at 145.

124. *See generally* RONALD DWORKIN, LAW'S EMPIRE 65-73 (1986).

125. *See* JOHN RAWLS, A THEORY OF JUSTICE 20, 48-51 (1971).

126. *Id.* at 49.

127. *See* NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 3 (1965).

128. *See generally* Susan L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 OXFORD J. LEG. STUD. 221 (1990) (discussing the role of hypothetical cases in legal reasoning).

setting aside a precedent as mistaken because it is inconsistent with the only candidate principle that is both consistent with the other relevant precedents and acceptable on other, broader grounds, for example, that the principle turns on relevant differences and accords with established principles in related areas of the law.[129]

In sum, examples from other fields illustrate that deriving the principles that underlie a body of data does not entail preserving all the data. Thus, a requirement that consitutional principles be derived from original practices would not imply that original practices must be upheld. More fundamentally, we argue in the next section that, to the contrary, a commitment to a Constitution of principles necessarily implies the possibility that some original practices will not be upheld.

C. THE CONFLICT BETWEEN FIDELITY TO PRACTICES AND A CONSTITUTION OF PRINCIPLES

The preceding discussion critiqued the two general rationales for fidelity to original practices, arguing that fidelity to original meaning does not in general justify fidelity to original practices and that applying original meaning in accordance with original substantive views is not justified. In practice, of course, it may often be difficult to separate the principles that constitute the original meaning of constitutional provisions from substantive views and other factors such as bias that influenced the application of the principles. But in any event—and this is the crucial point—if we are to derive principles from practices, it must be possible to reject some practices.

The point is now not simply that there is a flaw in the claim that, because the Constitution's abstract principles must be derived from original practices, they are necessarily consistent with all original practices. That point emerged above in the discussion of examples from other contexts that showed that, even assuming original practices to be the only evidence of original meaning, practices can guide the derivation of principles without its being necessary that all practices be upheld. The problem at hand is more fundamental: not only is a requirement of fidelity to all practices not necessary, it cannot be reconciled with maintaining a Constitution of principles.

The argument begins from the recognition that principles cannot be abstracted or derived from practices alone. Of course, given a set of practices, it is always possible to find a rule that is consistent with all of them, as long as anything counts as a rule. The problem, in fact, is that there are too many

129. As noted, *see supra* notes 38-42 and accompanying text, Scalia relies on a questionable view of common law reasoning, describing it as if judges are not truly constrained by precedent but merely go through the motions of making distinctions to reach the rules they think would be good policy. Perhaps an unexamined assumption that practices cannot provide *any* constraint on decisionmaking unless it is required that all practices be upheld lies behind both Scalia's view of the common law and his view of constitutional interpretation. *See infra* text accompanying notes 133-36.

candidates: as long as consistency with all practices is the only condition of eligibility for being a rule, there is not one but an unlimited number of rules for any set of practices. In a case involving a newly invented practice, it is always possible to find a rule consistent with all past practices that would support any result in the present case. Since the practice at issue is newly invented, it is easy to construct a rule based on differences, however apparently irrelevant, that distinguish the new practice from past practices. For example, in a case concerning the constitutionality of chemical castration, a rule that would be consistent with original practices and would invalidate the practice could be constructed along the following lines: punishments may not be imposed if they either were considered cruel and unusual in 1791 or rely on chemical treatments. Consistency with a set of practices thus does not alone place any constraint on the decision of a case involving a newly invented practice. Plainly for any new practice, it is always possible to find two rules that would dictate opposite results, yet are both fully consistent with the set of practices.[130]

If practices are to exert any constraint on decisionmaking, it therefore must be possible to reject some candidate principles on the ground that the distinctions they make are irrelevant. This in turn requires some criteria for determining which differences are relevant—in other words, for determining which rules are eligible candidates, from the point of view of political morality, for principles. Once such criteria are adopted, it is always possible that, for a given set of practices, there is no rule that is both fully consistent and principled. That is, there is no guarantee that there will be any candidate principle that simultaneously is eligible and precisely captures which punishments were considered permissible and impermissible in 1791. (This conclusion is unsurprising since original practices are not an infallible guide to original meaning—to the principles held by the contemporaneous society.)

It is not possible to maintain neutrality with respect to candidate principles and at the same time to hold that a set of practices determines, or even constrains, the decision of future cases. The fact that a punishment causes more pain than another is relevant; that it uses chemicals or occurs on Tuesday generally is not. That is because, on our best understanding of what considerations are relevant to the permissibility of punishments, causing pain matters but occurring on Tuesday generally does not.[131]

It would miss the point to suggest that we should evaluate candidate principles by looking to the practices themselves to ascertain what differences were relevant to the contemporaneous society. The point is precisely that we cannot

130. Indeed, the point applies not just to newly invented practices, but to any case at all since every case is factually different in many ways from past cases. The point is thus the familiar one that if any difference constitutes a valid distinction, precedents have no force.

131. Indeed, much of Scalia's work stands eloquently for the ideas that principles must constrain decisionmaking and that the judge can and must determine which distinctions are relevant. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); *see also Virginia Military Institute*, 116 S. Ct. at 2308 (Scalia, J., dissenting).

interpret a set of practices without standards for identifying relevant and irrelevant differences. Consider, for example, the question whether Americans in 1791 took cruelty or cruelty* to be relevant to the permissibility of punishments. The standards necessary to answer that question cannot be gleaned from the historical practices themselves because the standards are a prerequisite to interpreting the practices.

This straightforward argument shows only that there is no guarantee that historical practices will perfectly match an acceptable principle. It might be objected that this theoretical difficulty is untroublesome if in most cases there is likely to be an acceptable principle that is consistent with all original practices. The argument also is somewhat simplistic in its assumption that there is a threshold of principledness below which a rule is ineligible and above which it is suitable. There is a more sophisticated and fundamental form of the argument that answers the potential objection. The need for standards of relevance is really a need for considerations that favor one candidate principle over another, not a need for a minimum threshold. As we have seen, there are indefinitely many competing rules that are consistent with any set of practices. Unless there are criteria that rank some rules above others, practices cannot constrain the decision of future cases. In other words, standards of relevance make it possible for practices to constrain the decision of future cases not merely by ruling out some candidate principles but by making it possible to adjudicate among potentially acceptable candidates.[132]

The necessity for adhering to some criteria independent of practices fatally weakens the case for preserving all traditional practices. There is always a possibility that a principle consistent with most, but not all, practices would rank above every principle consistent with all practices. For that reason, there is no justification for considering only candidate principles that are consistent with *all* historical practices. We know that practices are at best fallible evidence of the practitioners' principles since, quite apart from the effect of factors such as self-interest, the practitioners' attempts to apply the principles are only as reliable as their substantive views. If the standards that favor some candidate principles over others are valid, it must be appropriate at some point to allow some degree of infidelity to practices in order to attain greater adherence to important principle. There is no justification for maintaining that any loss—however slight—in fidelity to original practices can never be outweighed by any gain—however large—in worthiness of principles.

In sum, original practices can be no more than important but fallible evidence of the original meaning of the Constitution. If practices are genuinely to guide the decision of future cases—if they are to serve as principled constraints, rather than as the basis for result-oriented, unprincipled distinctions—then the inter-

132. Even given some threshold standard of eligibility, the problem is not only that there may be no eligible rule but that there may be several and that they may cut in different directions with respect to the decision of future cases.

preter cannot maintain neutrality among principles. Rather, the interpreter must adhere to standards independent of practices for evaluating the relevance of proposed distinctions. Adhering to such standards entails the possibility that the candidate principle that best captures original meaning, taking into account both the standards and the practices, is one that is not consistent with some practices. It is thus not possible to maintain a commitment to a Constitution of principles while guaranteeing the constitutionality of original practices.

In retrospect, the difficulties Justice Scalia's theory encounters with the relation between practices and principles may be linked to his justification of the theory as the sole alternative to unconstrained common law style adjudication.[133] Such a justification sits awkwardly with Scalia's theory of originalism. According to Scalia, common law adjudication is unconstrained because the question of whether precedents are distinguishable is a sham. A skilled judge is not one who is better at determining how the present case should be resolved under the past precedents, but one who is better at manipulating precedents to reach whatever result the judge believes is desirable.[134] But because the question of whether a precedent is distinguishable is the question of whether the precedent controls the present case, Scalia's view is that there are no principled answers as to how a case should be decided in the light of precedent. It is on this basis that Scalia defends his view that the Constitution or any statute must be interpreted in accordance with originalism. The irony is that Scalia's originalism gives a determinative role to traditional practices, and traditional practices are, in the relevant respect, in precisely the same position as precedents. The view that the decision of cases in accordance with stare decisis amounts to judicial legislation thus turns out to undermine Scalia's originalism.[135]

This problem is somewhat obscured by Scalia's apparent assumption that past practices can decide cases directly, without any need to determine what principles lie behind them—and thus without encountering any questions of distinguishability.[136] (Determining whether past practices are distinguishable is just determining whether the principles behind the practices cover the present case.) But of course, questions of distinguishability cannot be avoided: since any new case is different from any previous case in infinitely many ways, past practices, like past cases, control the present case only to the extent that they are relevantly similar to the present facts. Thus, a judge applying Scalia's method is not freed from the necessity of determining whether the past practices are distinguishable from the present case.

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133. *See supra* notes 38-42, 46-52 and accompanying text.

134. *See* SCALIA, *supra* note 7, at 6-8.

135. It might be suggested that Scalia's concern with common law style adjudication is not that there is no principled way of judging relevant similarities with past precedents, but that as a matter of practical realities nothing constrains judges from substituting their opinions under the guise of making principled distinctions. But this concern would apply to Scalia's originalism as well.

136. *See supra* notes 58-61 and accompanying text.

The point is perhaps more obvious in cases involving newly invented practices, but it applies in every case. In a case involving what is apparently a traditional practice, the judge must determine whether the particular practice, which is different in infinitely many ways from past instances of the practice, is relevantly similar. It would beg the question to say that that determination need not be made because a case involved a traditional practice (since whether the particular practice is correctly characterized as an instance of the traditional practice depends on whether it is relevantly similar.) Thus, originalism faces a version of the challenge of supplying principled resolutions that Scalia thinks common law adjudication cannot meet. If precedents cannot constrain judges, practices cannot do so either. In contrast, once it is recognized that precedents and practices can genuinely constrain, it is no longer possible to insist on upholding all original practices; the same recognition, however, makes it possible to see that there is no need to do so in order to avoid unconstrained judicial discretion.

CONCLUSION

Deriving principles from practices requires the possibility of rejecting practices. It follows that a requirement that all original practices be upheld cannot be squared with a commitment to a Constitution of principles. Once we are committed to interpreting the grand, general clauses of the Constitution as standing for abstract principles, original practices will have an important role as evidence of the principles, but they cannot be inviolate.

It might be suggested that this final conclusion is much ado about little, because in the end it envisions only a minor qualification of the view that all original practices must be taken to be constitutional. The difference between that view and the view advanced in this article, according to such a suggestion, comes down to upholding almost all, rather than all, practices. Such a suggestion would miss the import of the analysis.

First, it is a mistake to frame the issue as all versus nearly all practices. As a practical matter, the practices that stand a realistic chance of being invalidated are likely to be the ones that are the subject of challenges in actual cases. Most practices that were well accepted when the Constitution was adopted are well accepted today and not realistically subject to challenge, so the issue of rejecting them does not come before the courts. Moreover, important and difficult constitutional cases challenging government practices are precisely the cases in which the challenged practices are most likely to be susceptible to rejection. Consequently, the difference between respecting all original practices and nearly all has critical practical significance.

Second, recognizing the possibility that any particular original practice may be unconstitutional has a basic impact on judicial method in every case. If all practices must be upheld, a challenge to an original practice fails immediately. If some practices may be rejected, the court must undertake the task of gleaning principles from practices in order to determine whether the challenge succeeds. Thus, for example, in *Virginia Military Institute* and *Umbehr*, acknowledging

the possibility of rejecting practices means that the Court cannot simply rest on the existence of an original practice but instead must do the work of determining whether the challenged action is consistent with the principles behind the body of original practices.

Third, recognizing the possibility of rejecting some practices has the sound theoretical implication that interpreting the Constitution in accordance with its original meaning entails a consistent process of deciding cases in accordance with principle. Requiring fidelity to original practices leads to an approach in cases involving challenges to such practices that is principled in form only. The challenge simply fails; the principle that supposedly guides the decision of the case has been crafted to guarantee the failure of the challenge. In contrast, in other cases Justice Scalia's prescribed approach is for the Court to determine the abstract principle that lies behind the original practices and to apply that principle to the challenged action.[137] On the contrary view, principles play the same guiding role in every case; there is no possibility of deciding the case simply on the basis of the existence of an original practice.

Giving principles the same role in cases involving both original and later-arising practices is appropriate for the reason, among others, that the relevant distinction between original and later-arising practices cannot be drawn in advance of determining the principles. Every challenged government action is different from past practices in indefinitely many ways; whether an action is *relevantly* different depends on the principles being applied. This does not mean that, in practice, every case will turn on difficult theoretical questions of interpretation. In the run of cases, the application of the original meaning to the facts of the case is likely to be straightforward because whatever the exact contours of the relevant principles, how the principles would apply on the particular facts may be obvious.

Depending on the difficulty of the case, the court may look to relevant original practices, as well as other historical evidence, in determining whether the challenged action is consistent with the applicable constitutional principles. The goal of the inquiry is to determine what principle lies behind those practices, just as, on Scalia's view, the court would do in the case of later-arising practices.[138] This process is analogous to the method of courts applying precedent in, for example, cases of statutory interpretation. Precedents constrain the decision of later cases, notwithstanding that any particular precedent is susceptible to being overruled or distinguished. In the same way, practices

137. *See, e.g.*, Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (where there is no well-established historical practice, the validity of a search is to be judged by balancing Fourth Amendment interests against government interests).

138. *See* Scalia, *supra* note 3, at 856-57 (suggesting that the difficulty of discerning original meaning is originalism's "greatest defect"; "it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.").

provide a genuine constraint, even if some may be rejected.[139] Of course, determining the principles behind the practices does not necessarily resolve the case before the court because the court still must apply the principles to the facts of the case. That, however, is an inevitable feature of principled adjudication: practices determine principles, but they cannot themselves decide cases.

139. Indeed, even on Scalia's view a practice may be distinguished: a judge can find that the well-accepted traditional practice is not the same as the government action under consideration, thus allowing the judge to invalidate the new action.