
Metasemantics and legal interpretation

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It can be particularly satisfying when a philosophical dispute is approached from an unexpected direction to fruitful effect. It solidifies the sense that the debate is genuine and affords opportunity for potentially useful connections among disparate areas of theoretical concern. My focus here is on a controversy surrounding the Cruel and Unusual Punishment Clause of the Eighth Amendment to the US Constitution: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

There is a familiar disagreement between Justice Antonin Scalia of the US Supreme Court and the late Ronald Dworkin over whether the Eighth Amendment could be plausibly interpreted so as to prohibit capital punishment.¹ The dispute gives voice to a deep divergence in approach to statutory interpretation. My aim is to explore this divergence by paying particularly close attention to its metasemantic background. Recasting the Scalia–Dworkin dispute in metasemantic terms will help bring it into sharper focus and point to the general direction in which a resolution lies. To anticipate a little, the metasemantic themes to be explored here favor Dworkin’s position over Scalia’s. Neither one explicitly attends to the metasemantic underpinnings of their differences, but a metasemantic reconstruction offers a fuller view of the issue that divides them and vindicates the Dworkinian side. Or so I will argue.

The first thing I need to do is introduce the general topic of metasemantics.² To understand what the theoretical purview of metasemantics is, it is most useful to contrast it with semantics. We could describe semantics as the study of the significance of linguistic expressions,

¹ See A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997), R. Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, 2006), and Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011).

² Also sometimes referred to as ‘foundational semantics’.

but this will not do to distinguish it from metasemantics. Somewhat more helpfully we could say that semantics studies the significance of expressions in an effort to explain how the significance of simple expressions yields significance for complex expressions in which the simple ones partake. More helpfully still, if it is agreed that the significance of whole sentences is adequately captured by the sentences' truth conditions, we could say that semantics studies in the first instance how the significance of simple expressions contributes to the truth conditions of sentences in which the simple expressions partake.³

Against this brief characterization of semantics we can now say that metasemantics is concerned with how expressions become endowed with their semantic significance in the first place. While semantics targets the *what* of semantic endowment, metasemantics targets the *how*. Someone says 'He is a spy' pointing at a particular individual. What was said is true just in case the demonstrated individual is indeed a spy. So the demonstrative pronoun 'he' as employed on that occasion apparently contributes the demonstrated individual to truth conditions. Given that a demonstrative pronoun contributes a particular individual to the truth conditions of a sentence in which it partakes on a given occasion of use (semantics), how is it that the pronoun on that occasion of use comes to stand for *that* particular individual as its distinctive contribution to truth conditions (metasemantics)? Or given that the name 'Aristotle' contributes Aristotle to the truth conditions of 'Aristotle was fond of dogs' (semantics), how is it that the name comes to stand for *Aristotle* as opposed to anyone else or no one at all (metasemantics)? Or, given that the term 'gold' contributes gold to the truth conditions of 'Gold is a compound of earth, water, fire, and air' (semantics), how is it that it stands for *gold* as opposed to anything else or nothing (metasemantics)?

My concern is with metasemantics, which is obviously beholden to semantics, as the above examples illustrate, but I will stay clear of semantic details and proceed as if the general framework for semantic theory is more or less settled. I will also stay clear of such pressing metasemantic issues as how to think of the determinants for semantic endowment in light of such metaphysically 'exotic' semantic values as higher-order functions.⁴

³ While this conception of semantics is challenged by information-based approaches such as Discourse Representation Theory, it is still the dominant trend and will be assumed in everything that follows.

⁴ See O. Simchen, "Token-Reflexivity," *Journal of Philosophy* 110 (2013), 173–93, for some preliminary discussion of such questions.

Finally, I will stay clear of controversies surrounding the semantics–pragmatics distinction.⁵

In recent work I have begun to articulate a contrast between two strands within metasemantics.⁶ The first, associated with such figures as Donald Davidson and David Lewis among others, is the interpretationist strand.⁷ On this way of looking at things, the fact that an expression has the semantic endowment it has is determined by conditions surrounding the expression's interpretive consumption. Take 'Gold is a compound' as spoken by an ancient Greek. What makes it the case that 'gold' thus spoken applies to whatever it applies to? The interpretationist might say that if we consider 'Gold is a compound' in the worldly circumstances of the speaking, including the speaker's attitudes (themselves shaped by considerations of interpretability) and other sentences the speaker would endorse, the best overall interpretation that balances worldly fit with speaker rationality assigns gold to the speaker's 'gold'. Or the interpretationist might insist that the best interpretation to achieve this balance renders 'gold' a term for anything superficially similar enough to gold. Either way, the expression's semantic endowment on this way of looking at things is *constituted* by the expression's interpretability – by conditions surrounding its post-production assessment. What it is to have such-and-such a significance is to be interpretable as having it, subject to certain constraints.

The second strand within metasemantics is what I call 'productivism'. It is associated with the theoretical efforts of Keith Donnellan, Michael Devitt, Jerry Fodor, David Kaplan, Saul Kripke, and Hilary Putnam, among others. On this way of looking at things the fact that an expression has its semantic endowment is determined by conditions surrounding the expression's production or employment. Consider again the use

⁵ But for some recent work on the relevance of pragmatics to matters of statutory interpretation, see A. Marmor, "Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech," in A. Marmor and S. Soames (eds.), *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011), 80–104.

⁶ See O. Simchen, *Necessary Intentionality: A Study in the Metaphysics of Aboutness* (Oxford University Press, 2012); Simchen, "Token-Reflexivity"; and Simchen, "Semantic Endowment," available at: <http://faculty.acts.ubc.ca/osimchen/publications/SE.pdf>.

⁷ This nomenclature is rather entrenched in metasemantics but is somewhat unfortunate in the present context due to its unmistakable lexical affinity to 'interpretivism,' the label for the jurisprudential position advocated by Dworkin. As I will argue, Dworkin's position is best construed as not espousing metasemantic interpretationism. I will prefix 'metasemantic' to 'interpretationist' to minimize ambiguity whenever confusion might otherwise ensue.

of 'gold' by the ancient Greek. A productivist would typically claim that what makes it the case that the term stands for whatever it stands for is determined by the term's etiology given the worldly circumstances of its production, which most likely include the presence of gold in the environment together with certain of the speaker's attitudes (themselves understood as mental states or events). Whether or not we are permitted within our overall metasemantic explanation to appeal to speakers' attitudes, in particular to speakers' referential intentions, is an issue that appears to divide the productivist camp, with Devitt and Fodor (together with the early Hartry Field) on the negative side, and Donnellan, Kaplan, Kripke, and Putnam on the positive side.⁸ Either way, matters of interpretability are understood here as falling within the epistemology of understanding and do not play a direct constitutive role in the expression becoming endowed with its particular significance. This is in contrast with the interpretationist insistence that such matters do indeed make it the case that an expression is endowed with its significance, and that they do play a direct constitutive role in the facts of semantic endowment.

In other work I offered an analogy from the metaphysics of artifacts to help make vivid the contrast between the two approaches.⁹ The parallel to an expression's endowment with semantic significance is an artifact's endowment with a purpose (*telos*). How is it that a given item comes to possess the particular purpose of enabling elevated seating, say? We may contrast two approaches to this metateleological question. Metateleological interpretationism proclaims such endowment to be constituted by the item's interpretability. An overall story that purports to rationalize chair-involving behavior of chair users, given their circumstances and their various mental states and episodes (themselves subject to considerations of interpretability) would assign the purpose of enabling elevated seating to the item in question. It is this that makes it the case that the item has the said purpose on such a view. Metateleological productivism, on the other hand, would make the item's endowment with the purpose of enabling elevated seating determined by conditions surrounding the item's production. Such an approach would typically appeal to the intentions accompanying the production. If we assume that nothing

⁸ The typology is somewhat controversial. For example, Devitt vehemently denies that Kripkean metasemantics, at least as it is presented in S. Kripke, *Naming and Necessity* (Cambridge, MA: Harvard University Press, 1980), is intention-based. I will not attempt to settle the issue here.

⁹ Simchen, "Token-Reflexivity."

can have the purpose of enabling elevated seating without being regarded as having it by an audience, then the intentions accompanying the item's production might well include the intention that the thing produced be regarded in the relevant way. But such regardability does not enter *directly* into making it the case that the item has the purpose it has, according to metateleological productivism. Rather, being regarded as enabling elevated seating is something intended by the producer or producers in bestowing the said purpose upon the thing produced. Similarly in the case of metasemantic productivism, if we think that an expression cannot have its particular semantic significance without being regarded as having it by an audience, then intentions accompanying the expression's production or employment might well include the intention that the expression be regarded as having the significance in question by an audience. But this regardability is not presumed to enter *directly* into making it the case that the item means what it does. It only enters indirectly via the intention of the expression's producer or employer.

In my other work on the topic I also offered considerations that favor productivism over interpretationism. Most recently I have argued that interpretationism cannot secure singular referential determinacy even under strong Lewisian assumptions about the interpretation of predicates.¹⁰ I argued that for all that the Lewisian can secure metasemantically, if I say 'This is a nice piece of fruit' attending to an apple in my hand in otherwise perfectly mundane circumstances, I might in fact be referring to a number or a planet light years away. I will not rehearse these considerations here and will merely note that productivism does not fall prey to such threats of referential indeterminacy because of the productivist insistence that endowment with significance, and more specifically referential contact with our surroundings, is explanatorily prior to sentential truth or falsity. On the metasemantic interpretationist picture, on the other hand, it is posterior.

Now, it is only to be expected that the aforementioned divide within metasemantics will have implications for matters of interpretation, and more specifically for matters of statutory interpretation. I believe that it certainly has, and that these implications are somewhat underappreciated. I aim to flesh some of them out. The controversy surrounding the proper interpretation of the Eighth Amendment of the US Constitution can be viewed as a test case. Success in bringing metasemantic considerations to bear on statutory interpretation in this

¹⁰ See Simchen, "Semantic Endowment."

particular case will give us reason for cautious optimism regarding the fruitfulness of such an approach in future cases as well.

Textualism regarding statutory interpretation commonly holds that a text produced in the past and presently legally binding has a certain semantic content just in case the said content is assigned to it under an interpretation that the original producers of the text would endorse.¹¹ Call a text produced in the past and presently legally binding a *legal text*. The right-hand side of the ‘just in case’ claim contains an elliptical subjunctive – ‘had the text’s producers interpreted the text, they would endorse an interpretation that assigns said content to it’ – so the assumption slightly more perspicuously becomes:

(COMMONLY) For any legal text *T* and content *C*, *T* has *C* if and only if for some interpretation *I*, *I* assigns *C* to *T* and is such that had *T*’s original producers interpreted *T*, they would endorse *I* as *T*’s interpretation.

(COMMONLY) does not allude to how the text’s producers *in fact* interpreted the text, and does not take *that* to be the determining factor in the text’s semantic endowment, in the interest of generality. While in some cases the producers of a legal text also engage in interpreting the text produced, there is generally no reason to suppose that producers of a text need engage in interpreting it, just as there is generally no reason to suppose that in saying something we need to engage in interpreting the product of our speech. The ground of a legal text having its particular semantic endowment according to (COMMONLY) is how the text’s producers *would* interpret it.

There are a couple of things to notice about (COMMONLY) right from the start. The first is a broadly diagnostic point. It is safe to assume that (COMMONLY) figures as part of the textualist effort to discern

¹¹ Here is but one instance, taken from Scalia’s dissent in *Board of Ed. of Kiryas Joel v. Grumet*, 512 US 687 (1994):

[T]he Founding Fathers would be astonished to find that the Establishment Clause – which they designed “to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters,” *Zorach v. Clauson*, 343 US 306, 319 (1952) (Black, J., dissenting) – has been employed to prohibit characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect.

The dissent is from the court’s endorsement of an interpretation of the First Amendment that by Scalia’s lights the text’s producers would not endorse.

the overall legal content of a legal text.¹² But if so, the textualist adherence to the principle is best construed as tacitly committing to an interpretationist metasemantics. For why else would the text's interpretability by its producers have any relevance to the text's overall legal content? The textualist aims to recover the semantic significance of a legal text. Surely it is the text's endowment with semantic significance that is for the textualist of primary concern and is determinative of the text's overall legal content. Why else would the textualist even bother qua interpreter to consider how the text's producers would understand it? The most plausible story is that the way in which the text's producers would understand the text is being taken by (COMMONLY)'s adherent as constitutive of the text being endowed with its particular semantic significance. The other option here is to say that the text's interpretability is being taken as a mere sign or marker for the text's endowment with its particular semantic significance. But this seems dubious. The interpretability of a text by its producers is not the sort of thing we would normally appeal to as *evidence* for the text meaning what it does. Epistemologically speaking, the text's interpretability by its original producers is not on a surer footing than the text's endowment with its particular semantic significance. So for the textualist adherent of (COMMONLY) to consider interpretability by the text's producers as a mere sign for semantic endowment is otiose. Much more plausible is the thought that for such a textualist what it is for the text to be endowed with its semantic significance *just is* for it to be interpretable (by its producers) in the relevant way. The relation between the text's interpretability and the text's semantic endowment is thus constitutive rather than evidential according to the most obvious rendering of the textualist endorsement of (COMMONLY).

The point just made is put forward in a diagnostic spirit, which is to say that it is not meant to rule out the sheer possibility of a textualist adherence to (COMMONLY) without a tacit commitment to metasemantic interpretationism. But an interesting question that can be raised about (COMMONLY) is why such a principle of statutory interpretation should be minimally intuitively appealing to the textualist in the first place. And the

¹² Our focus is on the semantic content of a legal text under the assumption that it is a determining factor in the text's overall legal content. No further implication is intended regarding the overall determinants of legal content. For an extended discussion of the relation between semantic content and legal content, see M. Greenberg, "How Facts Make Law," *Legal Theory* 10 (2004), 157–98.

present diagnostic suggestion is that the intuitive appeal of (COMMONLY) dovetails a tacit commitment to metasemantic interpretationism.

A second thing to notice about (COMMONLY) is the inclusion of a subjunctive idiom when alluding to the text's interpretability by its producers, the 'had it been the case that *P*, it would be the case that *Q*' construction. Here we point out that interpretability is a dispositional property. Whether dispositions in general admit of subjunctive analyses is a matter of intense debate and a burgeoning literature in contemporary metaphysics.¹³ But setting aside the need to take a stand on the general metaphysical question of the availability of such analyses, it is undeniable that the idea of explaining dispositions subjunctively is *prima facie* appealing and commonsensically well entrenched. And it is this intuitive appeal that lies behind (COMMONLY)'s inclusion of the schematic subjunctive conditional 'had *T*'s original producers interpreted *T*, they would endorse *I* as *T*'s interpretation'. In short, endorsement of (COMMONLY) is best seen as saddling its textualist adherent with a certain metasemantic baggage – interpretationism – and a certain metaphysical baggage – the subjunctive construal of interpretability. Such commitments are perhaps not inevitable. But at least we can say that without a metasemantic interpretationist background (COMMONLY) seems far less appealing as a principle of statutory interpretation. Moreover, for the textualist adherent of (COMMONLY) to insist that interpretability (by the text's producers) bears only an evidential relation to the text's original semantic endowment seems especially unattractive insofar as the text's interpretability seems no more epistemologically secure than the endowment for which it is claimed to provide evidential support.

Scalia is easily read as committed to some version of (COMMONLY):

I will consult the writings of some men who happened to be delegates to the Constitutional Convention – Hamilton's and Madison's writings in *The Federalist*, for example . . . because their writings, like those of other intelligent and informed people of the time, display *how the text of the Constitution was originally understood*.¹⁴

I agree with the distinction that Professor Dworkin draws . . . between what he calls 'semantic intention' and the concrete expectations of

¹³ See D. Lewis, "Finkish Dispositions," *Philosophical Quarterly* 47 (1997), 143–58, M. Fara, "Dispositions and Habituals," *Noûs* 39 (2005), 43–82, and D. Manley and R. Wasserman, "On Linking Dispositions and Conditionals," *Mind* 117 (2008), 59–84.

¹⁴ Scalia, *A Matter of Interpretation*, 38, emphasis added.

lawgivers. It is indeed the former rather than the latter that I follow. *I would prefer the term ‘import’ to ‘semantic intention’ – because that puts the focus where I believe it should be, upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean.*¹⁵

The key point in these and related passages is the focus on how the text would be understood – potential semantic uptake. It is this that constitutes for Scalia the text’s original meaning. In the background is Scalia’s concern to distinguish his version of textualism – originalism – from the position in statutory interpretation known as intentionalism. According to intentionalism, whether or not the Cruel and Unusual Punishment Clause prohibits capital punishment is determined by, among other factors, whether or not the Framers intended that it prohibit capital punishment. As stated, the position does not require that the Framers’ intentions be the sole ground for the Eighth Amendment having its legal content, but what else might be needed here need not concern us any further. As a doctrine of statutory interpretation, intentionalism focuses on intentions of a particular kind: the intentions of lawmakers to shape the law in a particular direction. Call these *legal intentions*. According to this doctrine, the goal of interpreting a constitutional provision, let us say, is to recover the Framers’ legal intentions. The words employed by the Framers provide a clue, but only a clue, to those legal intentions. Suppose we had direct independent access to those intentions by going back in time and hooking telepathically into the Framers’ collective mind without the intermediary of their choice of words. Then it would be the Framers’ legal intentions that bind future generations regardless of their eventual choice of words. The question of what the occurrence of ‘cruel’ in the Eighth Amendment applies to may be considered as well, but only as a means for summoning evidence in establishing the legal intentions of its producers. In short, on the view in question the relation between the semantic significance of ‘cruel’ and what is a dominant determinant in overall legal content, which is in the first instance the Framers’ legal intentions, is itself merely evidential.

Textualism, on the other hand, has it that whether or not the Eighth Amendment prohibits capital punishment is determined by, among other factors, whether or not the occurrence of ‘cruel’ therein applies, by dint of its semantic significance, to capital punishment. As before in the case of intentionalism, we note that in this case too textualism as

¹⁵ Ibid., 144, emphasis added.

formulated does not require that the semantic content of the relevant occurrence of 'cruel' be the sole factor in determining the legal content of the Cruel and Unusual Punishment Clause. And as before, what else might be needed here lies beyond our present concerns.¹⁶ So Scalia subscribes to a form of textualism in opposition to intentionalism, but also in opposition to what he regards as the undemocratic idea of a Living Constitution whereby non-elected officials – judges – act as legislators. Whatever his differences from Scalia may be, Dworkin subscribes to a form of textualism as well. Here are some relevant passages from Dworkin:

textual interpretation is nevertheless an essential part of any broader program of constitutional interpretation because what those who made the Constitution actually said is always at least an important ingredient in any genuinely interpretive constitutional argument.¹⁷

We have a constitutional text. We do not disagree about which inscriptions comprise that text; nobody argues about which series of letters and spaces make it up. Of course, identifying a canonical series of letters and spaces is only the beginning of interpretation. For there remains the problem of what any particular portion of that series means.¹⁸

Given their shared broad allegiance to textualism, it might be expected that Dworkin's disagreement with Scalia over the correct interpretation of the Cruel and Unusual Punishment Clause can be reconstructed by considering (COMMONLY) as a point of departure, focusing, in particular, on what should count as a proper instance of (COMMONLY)'s embedded subjunctive conditional.

I will now attempt a reconstruction of the dispute that takes Scalia's allegiance to (COMMONLY) as a starting point. I will proceed in two stages. At first I will consider whether a Dworkinian principle of statutory interpretation can be seen as only a mild departure from (COMMONLY), a departure that still assumes an interpretationist meta-semantics in the background. Doing so will pave the way for a superior account of the dispute, one whereby Scalia subscribes to (COMMONLY) with its attendant commitment to metasemantic interpretationism while Dworkin subscribes to a different principle of statutory interpretation altogether, one not accompanied by a tacit commitment to metasemantic interpretationism but accompanied by a tacit commitment to productivism instead.

¹⁶ See n. 12 above.

¹⁷ Dworkin, *Justice in Robes*, 118.

¹⁸ *Ibid.*, 120.

It can be plausibly maintained that Scalia endorses

- (†) Had the original producers of ‘cruel’ interpreted it, they would endorse interpretation *Int* that assigns *M* to it,

where *M* is a property that fails to apply to capital punishment. And it might be maintained, correlatively, that Dworkin denies (†) and endorses (‡) instead:

- (‡) Had the original producers of ‘cruel’ interpreted it, they would endorse interpretation *Int** that assigns *M** to it,

where *M** is a property that applies to capital punishment. And presumably Scalia would deny (‡) in turn. (†) and (‡) are thus understood as instances of the following clause embedded in (COMMONLY):

- (EMBEDDED) For some interpretation *I*, *I* assigns *C* to *T* and is such that had *T*’s original producers interpreted *T*, they would endorse *I* as *T*’s interpretation.

To assess the present construal of the dispute we need to delve deeper into (†) and (‡). We do this against the background of the standard Lewis–Stalnaker semantics for subjunctive conditionals. Finessing irrelevant details, on the standard semantics claims of the form shared by (†) and (‡) – schematized as $P \square \rightarrow Q$ or $P > Q$ – are true if and only if at all the worlds closest to the actual one at which the antecedent holds, the consequent holds as well. Let the measure of closeness or similarity among worlds be informed by the Framers’ actual moral opinions at the time of drafting the Eighth Amendment.¹⁹ According to Scalia’s position, at all such worlds at which the Framers interpret the Cruel and Unusual Punishment Clause, they assign an interpretation to the clause that excludes capital punishment, given the moral opinions they happen to have. (This is under the assumption that the Framers would endorse an interpretation of ‘cruel’ that is consonant with their actual moral opinions about cruelty – an assumption we will revisit later.) So much for Scalia’s endorsement of (†). How about the denial of (‡)? *M* fails to apply to capital punishment while *M** applies to it, so *M* and

¹⁹ In general, the standard of similarity among worlds is something that gets negotiated among participants in the conversation. Here we are assuming that worlds at which the Framers’ moral opinions vary from their actual ones are considered irrelevant for the assessment of whether or not (†) is true.

M^* are distinct, and so Int and Int^* are distinct. Inasmuch as the Framers would endorse a univocal interpretation of ‘cruel’, the denial of (‡) follows from the affirmation of (†).

The situation with Dworkin according to the present construal is slightly more complicated. First, Dworkin might not wish to quarrel with Scalia’s endorsement of (†). Perhaps the historical facts surrounding the text’s actual composition provide ample evidence to ground the determination that at all the closest worlds to the actual one at which the Framers interpret ‘cruel’, and where closeness is under fixity in the Framers’ actual moral beliefs at the time of drafting the text, they endorse an interpretation that assigns M to ‘cruel’. But if Dworkin does not wish to quarrel with Scalia’s endorsement of (†), then he should not quarrel with the rejection of (‡) either, at least insofar as the Framers would not equivocate on the interpretation of ‘cruel’. In other words, given the endorsement of (†), there will be at least one such world at which they do not endorse an interpretation that assigns M^* to ‘cruel’, where M^* includes capital punishment. So on the standard semantics (‡) will turn out to be false. And yet were we not supposed to be mooting the idea of Dworkin endorsing (‡) rather than rejecting it?

The answer is that the Dworkinian position is better construed as treating (‡) as elliptical for:

- (‡′) Had the original producers of ‘cruel’ interpreted it, *and had they been best informed about being cruel*, they would endorse interpretation Int^* that assigns M^* to it.

And it is (‡′) that Dworkin is better read as endorsing – this against the background of a moral argument to the effect that property M^* , which includes capital punishment, is the property of being cruel. The consequence drawn is that at all the worlds closest to the actual one at which the Framers interpret the Cruel and Unusual Punishment Clause *and are also informed by the best account of cruelty*, they assign an interpretation that renders capital punishment cruel. (This is under the assumption that they would endorse an interpretation of ‘cruel’ that is consonant with the best account of cruelty, which, as in the case of the parallel assumption behind Scalia’s endorsement of (†), we will revisit later.) We also note that endorsement of (‡′) is perfectly compatible with rejection of (‡).²⁰

²⁰ A well-known feature of such conditionals is that, in contrast to material conditionals, strengthening of the antecedent fails for them: $P \wedge R > Q$ is *not* entailed by $P > Q$.

And we note, finally, that ($\#'$) is not plausibly an instance of (EMBEDDED) but rather an instance of:

(EMBEDDED') For some interpretation I , I assigns C to T and is such that had T 's original producers interpreted T and were best informed about C , they would endorse I as T 's interpretation.

So on the present construal of the dispute, while Scalia endorses (COMMONLY) as a principle of statutory interpretation, Dworkin endorses a slight variant:

(COMMONLY') For any legal text T and content C , T has C if and only if for some interpretation I , I assigns C to T and is such that had T 's original producers interpreted T and were best informed about C , they would endorse I as T 's interpretation.

Two comments are in order. First, we imagine that what it is to be "best informed about C " varies according to the semantic details, but for our purposes we construe this as being best informed about a property. And to be best informed about a property in the relevant sense is to have the best understanding of what it is for something to bear the property in question. Second, the way ($\#'$) is meant to be an instance of (EMBEDDED') is against the background of the moral argument alluded to above that identifies M^* with being cruel. It is this moral argument that secures the identification of being best informed about M^* with being best informed about being cruel.

There are at least two grounds on which Scalia could oppose Dworkin's position as outlined here, one concerning cruelty and the other concerning statutory interpretation. As for the first, Scalia might have little sympathy for ($\#'$) if he supposes as a matter of his considered moral opinion that capital punishment (by lethal injection, say) is not a cruel punishment.²¹ So he might deny that under the best theory of cruelty death by lethal injection is cruel. And so, insofar as M^* applies to capital punishment, he would deny ($\#'$). On other hand, on the side of statutory interpretation, Scalia would most likely consider (COMMONLY') as not true to the calling of textualism. For (COMMONLY'), with its talk of being best informed about the subject matter of the text, might smack of a future-looking

²¹ Such an attitude is manifested, for example, in certain passages in Scalia's concurring opinion in the Supreme Court's decision to deny review in the Texas death penalty case *Callins v. Collins*, 510 US 1141 (1994).

orientation, a living constitutionalism whereby each generation will see itself as bound by what it perceives as the final verdict on the relevant subject matter. This would appear to defeat the textualist quest after original meaning in the course of determining overall legal content.

To repeat, the present construal of the dispute over the correct interpretation of the Cruel and Unusual Punishment Clause has Scalia endorse (COMMONLY) as a principle for statutory interpretation while having Dworkin endorse (COMMONLY'). Accordingly, Scalia endorses (†) and rejects (‡), while Dworkin endorses (‡'). Whether or not Dworkin endorses (†) and rejects (‡) as well is uncertain. That Scalia endorses (‡') is unlikely. What is clear, however, is that endorsing (‡') is compatible with rejecting (‡). What Scalia and Dworkin disagree about most basically according to this portrayal is which principle of statutory interpretation is correct, (COMMONLY) or (COMMONLY'). The implications for the correct interpretation of 'cruel' can be seen through the following choice: are we to ask how the Framers would interpret the term in light of their actual moral opinions about cruelty, or are we to ask how they would interpret 'cruel' had they been best informed about cruelty? For Scalia it is the first option we should be pursuing. For Dworkin, according to the present reconstruction, it is the second option.

This construal seems to accord well with Scalia's own perception of his disagreement with Dworkin over the proper interpretation of the Cruel and Unusual Punishment Clause:

['Cruel'] means not (as Professor Dworkin would have it) "whatever may be considered cruel from one generation to the next," but "what we consider cruel today"; otherwise, it would be no protection against the moral perceptions of a future, more brutal, generation. It is, in other words, rooted in the moral perceptions *of the time*.²²

Under one reading of this and related passages Scalia appears to be advocating an implausible *semantic* thesis: that the meaning of 'cruel' has the term apply to whatever speakers regard as falling under 'cruel' without any external check provided by the range of phenomena to which the term purportedly applies. As a semantic proposal such phenomenism about 'cruel' is fanciful, whatever the merits of phenomenism about moral properties might be within the metaphysics of value. In other words, even if phenomenism about cruelty is correct, and to be cruel really is to be regarded in a certain way and nothing more, the suggestion that as a matter

²² Scalia, *A Matter of Interpretation*, 145.

of its meaning the application conditions for ‘cruel’ are given by ‘whatever we now regard as falling under “cruel”’ is spurious.

A better reading of this and related passages, however, has Scalia subscribe to (COMMONLY) and its implications, and oppose (COMMONLY’) and *its* implications. On this better reading, Scalia’s textualism is committed to the interpretationist metasemantic notion that whatever ‘cruel’ means in the mouth of the Framers is constituted by how the Framers would interpret it in light of their moral beliefs. Here no appeal need be made to the questionable semantic thesis about ‘cruel’. For all the position has to offer, it could still be the case that the significance of ‘cruel’ in the mouth of Framers turns out to be cruelty pure and simple, simply because the interpretation that the Framers would assign to ‘cruel’ is just that – cruelty per se – and cruelty does happen to apply to capital punishment. (Here we are imagining that the Framers’ interpretation of ‘cruel’ somehow tracks cruelty per se while bypassing their moral opinions.) Or it might be, as Scalia contends, that the significance of ‘cruel’ in the mouth of the Framers is some property *M* that excludes capital punishment. A full defense of the latter option would require Scalia to provide some backing for the assumption that the Framers would endorse an interpretation of ‘cruel’ that coheres with their moral opinions. But there is no further need for Scalia to subscribe to the implausible semantic thesis that the Eighth Amendment’s ‘cruel’ applies as a matter of its semantic significance to whatever the Framers regarded as falling under ‘cruel’ without any further constraint provided by the phenomena.

It is tempting to oppose Scalia’s position on statutory interpretation by pointing out that the semantics of ‘cruel’ as it occurs in the Eighth Amendment does not bear a descriptive reduction to ‘whatever we (the Framers) regard as falling under “cruel”’. As a semantic proposal such a reduction seems questionable at best and runs afoul of well-known difficulties.²³ It might then be said that the significance of ‘cruel’ is just

²³ There has been a vast literature in the philosophy of language over the past forty years targeting such descriptive reductions in general. Most of the relevant discussion can be traced back to the seminal contributions of K. Donnellan, “Proper Names and Identifying Descriptions,” *Synthese* 21 (1970), 335–58. See Kripke, *Naming and Necessity*, and H. Putnam, “The Meaning of ‘Meaning,’” in *Mind, Language and Reality: Philosophical Papers*, vol. II (Cambridge University Press, 1975), 215–71. In the case that interests us a proposed distinctly semantic connection between ‘cruel’ and ‘whatever we (the Framers) regard as falling under “cruel”’ would have to meet at least the following challenges. In the relevant context the sentence ‘To be cruel is not to be whatever we [the Framers] regard as

the property of being cruel, end of story, which puts the lie to Scalia's position on semantic grounds. But a more interesting and nuanced rendering of the Scalia–Dworkin dispute shifts its ground away from such semantic matters. The better account has Scalia endorse an interpretation of 'cruel' that assigns a certain property *M* to it that excludes capital punishment – semantic exotica aside – and has Dworkin endorse another interpretation that assigns a different property *M** to it that includes capital punishment. My present claim is that we can identify a deep source for the disagreement between Scalia and Dworkin over the correct interpretation of the Cruel and Unusual Punishment Clause by attending to the metasemantic backdrop.

In the previous section we attributed to Scalia an endorsement of (COMMONLY) and attributed to Dworkin an endorsement of (COMMONLY'). Both endorsements are best understood under a tacit commitment to an interpretationist metasemantics. Both principles render the text's original endowment as constituted by its interpretability by the text's producers. It is time to make good on the early promise of shifting the ground of the Scalia–Dworkin dispute to metasemantics. On this final construal of the controversy, Scalia is still seen as committed to (COMMONLY) as a principle of statutory interpretation, with the attendant tacit commitment to an interpretationist metasemantics. But Dworkin is now seen as committed to something else entirely, a principle best appreciated through its comparison with (COMMONLY):

- (COMMONLY) For any legal text *T* and content *C*, *T* has *C* if and only if for some interpretation *I*, *I* assigns *C* to *T* and is such that had *T*'s original producers interpreted *T*, they would endorse *I* as *T*'s interpretation.
- (PREFERABLY) For any legal text *T* and content *C*, *T* has *C* if and only if for some interpretation *I*, *I* assigns *C* to *T* and gets *T*'s original semantic endowment right.

My claim is that Dworkin's opposition to Scalia is most intelligibly rendered as an endorsement of some version of (PREFERABLY). But before turning to establish this claim, let me ponder the alternative principle in more detail.

falling under "cruel" does not seem (a) necessarily false, (b) a priori false, or (c) contradictory. I believe these challenges cannot be met adequately despite the undeniable ingenuity that has gone into well-known efforts to meet them ever since the original challenges were set. Arguing the point here would take us too far afield.

The most noticeable feature of (PREFERABLY) is that it does not subjunctivize on the text's original producers (the Framers) interpreting the text. It makes a direct and seemingly flat-footed appeal to the recovery of the text's original semantic endowment as a condition of the text's correct interpretation. By not appealing to how the text's original producers would interpret the text as an indirect way of recovering what the text originally meant and thus means, (PREFERABLY) is a much simpler principle. It dispenses with potentially distracting subjunctive 'noise'. When we reconstructed the Scalia–Dworkin dispute under the auspices of (COMMONLY) and (COMMONLY') above, we noted a background assumption to the effect that the Framers would endorse an interpretation of 'cruel' that is consonant with their moral opinions as to what is cruel. For Scalia the relevant consonance is with the Framers' actual opinions at the time of drafting the Eighth Amendment. For the reconstruction of Dworkin's position under (COMMONLY') the relevant consonance is with the Framers' opinions as to what is cruel as informed by the best account of cruelty. Let us now reconsider these assumptions, starting with Scalia. His view has it that the following is the case:

- (†) Had the original producers of 'cruel' interpreted it, they would endorse interpretation *Int* that assigns *M* to it,

where *M* is a property that does not apply to capital punishment. (†) is true if and only if at all the closest worlds to the actual one at which the Framers interpret 'cruel', they endorse an interpretation that assigns *M* to it. And we assumed that the intended Scalian measure of closeness or similarity among worlds includes fixity in the Framers' actual moral opinions. But now it seems fair to ask how we are supposed to go about justifying the claim that the Framers would endorse whatever interpretation coheres with their moral opinions at the time of the text's production. Let us grant for a moment the metasemantic interpretationist point that how they would interpret the text is constitutive of the text having meant what it did. And let us grant the originalist point that the text having meant what it did is what it means now. It is still not obvious without further argument that the Framers would endorse an interpretation of 'cruel' that tracks the moral opinions they happened to have. Perhaps they would endorse an interpretation that is more inclusive than what their moral opinions allow, since they were future-looking Enlightenment men of moral progress. Or perhaps they would endorse a more restrictive interpretation than their moral opinions allow due to some shared concern about moral squeamishness. Whatever the case

may be – and setting aside the fact that the latter alternative seems far-fetched – it is at least not obvious that consonance with moral opinions is determinative of how the Framers would be inclined to interpret a piece of moral terminology issued from their own pen or mouth. An adherent of (COMMONLY) owes us a defense of the implicated consonance.

Moving on to the Dworkinian position under the reconstruction in terms of (COMMONLY') above, the following is assumed to be the case:

- (‡') Had the original producers of 'cruel' interpreted it, *and had they been best informed about being cruel*, they would endorse interpretation Int^* that assigns M^* to it,

where M^* is a property that does apply to capital punishment. (‡') is true if and only if at all the closest worlds to the actual one at which the Framers interpret 'cruel' and are best informed about cruelty, they endorse an interpretation that assigns M^* to it. But again it seems only fair to ask how we are to go about justifying the claim that at all the relevant worlds the Framers would interpret 'cruel' in a way that is consonant with what is cruel under the best theory of the matter. One can surely be informed by the best theory of cruelty while endorsing an interpretation of 'cruel' that is not compatible with the theory, for a variety of reasons. An argument is needed to convince us that we may safely ignore such possibilities in the present context.

Such challenges are not special to this area and are in fact endemic to subjunctive analyses. They are forced upon us by the tacit commitment incurred by endorsement of (COMMONLY) or (COMMONLY') to the metasemantic interpretationist idea that interpretability is constitutive of semantic endowment, together with the subjunctive treatment of interpretability. And even if there are workable alternatives to the latter, the move from (COMMONLY) and (COMMONLY') to (PREFERABLY) dispenses with the need to seek them for the purpose at hand.

(PREFERABLY) makes no reference to interpretability as the route to a legal text's original endowment with significance. It incorporates the text's original semantic endowment directly into the text having the legal content that it has. Of course even the metasemantic interpretationist can endorse the letter of (PREFERABLY) as formulated here – with the understanding that the original semantic endowment of the text is constituted by the text's interpretability. But only the metasemantic productivist can reap the genuine benefits of (PREFERABLY) over the other principles of statutory interpretation we have been considering.

In the context of a recent polemic with legal positivism Dworkin writes: “I have argued for many years that in many circumstances moral facts figure among the basic truth conditions of propositions of law.”²⁴ Armed with (PREFERABLY) we can now appreciate the import of this remark with respect to the Cruel and Unusual Punishment Clause of the Eighth Amendment. In Dworkin we read the following:

The Eighth Amendment of the Constitution forbids ‘cruel’ and unusual punishment. Does that mean punishments that the authors thought were cruel or (what probably comes to the same thing) punishments that were cruel by the popular opinion of their day? Or does it mean punishments that are in fact – according to the correct standards for deciding such matters – cruel?²⁵

We have to choose between an abstract, principled, moral reading on the one hand – that the authors meant to prohibit punishments that are in fact cruel as well as unusual... and a concrete, dated reading on the other – that they meant to say that punishments widely thought cruel as well as unusual at the time they spoke... are prohibited.²⁶

And in a footnote Dworkin adds that the preferred alternative to Scalia’s reading is “one that translates the Eighth Amendment as referring to punishments that really are cruel.” Dworkin concludes: “If we are trying to make best sense of the Framers speaking as they did in the context in which they spoke, we should conclude that they intended to lay down abstract, not dated, commands and prohibitions.”²⁷ This talk of the Framers’ intentions should not be mistaken for the intentionalist idea that the task at hand is to uncover their legal intentions, their intentions to shape the law in a particular direction. Such an intentionalist reading would conflict with the textualist strand in Dworkin’s position noted earlier. Rather, the intentions in questions are the intentions that figure in saying what we say: “We must begin, in my view, by asking what – on the best evidence available – the authors of the text in question intended to say.”²⁸ And what they intended to say is to prohibit punishments that are cruel, pure and simple.

As consumers of the text we need not ask ourselves what the text’s producers would subsume under ‘cruel’ given their actual moral opinions. Nor, for that matter, do we need to appeal to what they would subsume under ‘cruel’ had they been armed with the best theory of cruelty. Both of these options are under the auspices of the metasemantic interpretationist

²⁴ Dworkin, *Justice in Robes*, 225.

²⁵ *Ibid.*, 120.

²⁶ *Ibid.*, 121.

²⁷ *Ibid.*, 121–2.

²⁸ *Ibid.*, 120.

idea that what the Framers meant then, and so what their words mean now, is constituted by how they would interpret it. As consumers of the text, what we need to ask ourselves is far more direct. The move from (COMMONLY') to (PREFERABLY) beckons us to consider directly the semantic endowment that was in fact created when the Eighth Amendment was drafted.

Compare the task of interpreting 'cruel' in the Eighth Amendment to the task of interpreting 'gold' in a hypothetical (albeit fanciful) late eighteenth-century injunction for members of the House to display a gold ring if married. Plausibly in the latter case we would interpret the injunction as requiring members of the House today to display a ring that is really gold. And in determining whether a given ring is gold we would be aided by our best account of the matter. Asking what the producers of the injunction would regard as gold in light of their metallurgical beliefs seems irrelevant. And asking what the producers of the injunction would regard as gold had they been best informed about gold seems gratuitous and circuitous. What we should be asking is what material the producers of the injunction intended to be talking about. They intended to be talking about gold.

Next consider 'fine' or 'punishment' as they actually occur in the Eighth Amendment. Here, too, we ask ourselves, given the original conditions of production of the Bill of Rights, what the Framers intended to be talking about. It is this that is determinative of what those words meant, and so what those words mean. So when considering a given act and whether it falls under 'punishment' as specified in the document, we need to ask ourselves whether the act really does qualify as a punishment – without quotation marks around 'punishment'. Similarly in our case, we should be asking ourselves whether capital punishment really is cruel, because what the Framers intended to talk about was the property of being cruel. We ask ourselves, under the auspices of metasemantic productivism, what semantic endowment the relevant occurrence of 'cruel' from the pen of the Framers possesses. And the most likely answer is that the Eighth Amendment's 'cruel' just meant – and so just means – being cruel.

Let us not pretend that metasemantic productivism does not face its own special challenges. The productivist at the very least owes us an explanation *qua* metasemanticist of how it is possible to talk about something through a substantial dose of ignorance about it – by no means a trivial task. But the apparent difficulty of such a challenge should not distract us from the natural thing to say about statutory

interpretation, which is that correctness of interpretation is measured by whether it gets the original semantic endowment of the text right. And the revisionary rendering of the text's semantic endowment in terms of its interpretability is uncalled for. The legal interpreter does not owe us qua consumer of legal texts a worked out metasemantics. But from a metasemantic perspective, the relative simplicity of (PREFERABLY) over (COMMONLY), coupled with the unmistakable attractiveness of productivism, clearly tips the balance in favor of (PREFERABLY) as a principle of statutory interpretation.²⁹

And so, finally, 'cruel' in the Eighth Amendment means the property of being cruel. An interpretation of the Cruel and Unusual Punishment Clause under (PREFERABLY) is correct insofar as it recovers what the Framers meant to be talking about, which is cruelty. But what is cruelty? To answer *this* question plausibly requires direct engagement in moral reasoning, doing the best we can in this regard. We have before us but one instance in which, as Dworkin put it, "moral facts figure among the basic truth conditions of propositions of law."³⁰ It certainly does fall upon the Dworkinian interpreter of the Bill of Rights to discern what the relevant moral facts are. This should no more occasion concern about the undemocratic nature of unelected officials becoming legislators than does the fact that judges use their powers of reasoning to interpret the terms 'fine' or 'punishment' and determine whether they, too, apply in a given case.

²⁹ Considerations of space preclude me from entering into a discussion of the distinct metasemantic advantages of productivism over interpretationism. For my own views on the topic, see Simchen, "Token-Reflexivity," and Simchen, "Semantic Endowment."

³⁰ Dworkin, *Justice in Robes*, 225.