FORMS OF ORIGINALISM AND THE STUDY OF HISTORY

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I will discuss two different kinds of originalism and the demands they place on the discipline of history.

I was an eyewitness to the development of the first kind of originalism, which I will call Originalism Mark I. In the fall of 1977 at the Yale Law School, I was a first-year law student taking Constitutional Law I from Robert Bork. Bork was rejecting the gods of the city, bringing in new gods, and corrupting the young. He was creating Originalism Mark I, which we associate primarily with him and Antonin Scalia, and I was able to see either its beginning or middle stages first hand.

Originalism Mark I has several features that are fundamental to understanding it and to understanding the way it seeks to draw on historical knowledge. First, it began in the rejection of judicial subjectivity. That factor, more than any other, drove this form of originalism. The early originalists found it absurd that judges were making significant policy choices given the manner in which they are selected. They also found it impossible to explain what judges had been doing for the preceding twenty or thirty years unless the judges had been making choices that reflected their own views of desirable results and not general, impersonal legal principles.[1] I call the

* Professor of Law, University of Virginia. Thanks are due to the other participants on the Federalist Society National Student Symposium panel at which the oral version of this article was presented. This written version, while not simply an edited transcript of my remarks, is still fairly close to what I said in content, style, and depth of analysis.

As the last qualification indicates, the intellectual history presented here is rough and ready, but I hope enough for my very limited purposes. A deeper treatment of originalism and its place in late 20th century constitutional thought is found in G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002). Professor White deals specifically with originalism on pages 587-596.

1. This theme is strong in the article that probably qualifies as the founding document of contemporary originalism and that was, for a while in 1987, the most famous law review article ever written. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Its title suggests the theme, and in the first paragraph Bork complained that a lack of constitutional theory has led to a deplorable state of affairs in which the Constitution changes "as the personnel of the Supreme Court changes."

phenomenon against which the originalists reacted judicial subjectivity to emphasize the point that when there is judicial subjectivity the identity of the judges, and in particular the political and ideological views of the judges, matter enormously for the content of the law.[2]

The intuition, that judicial subjectivity was rampant and very bad, got Originalism Mark I going. Nothing more systematic or methodological lay behind it, and there was nothing in the original impulse that pointed specifically toward originalism.

Let me summarize briefly the case against judicial subjectivity. It comes in static and dynamic forms. The static form is that federal judges are selected indirectly and serve for life, which makes their tenure undemocratic (originalists are obsessed with unallocated federal judges even though most American judges are not federal and are not unallocated). If we believe that policy should reflect the electorate's view, such undemocratic process is inappropriate.

History is more ironic than any fiction can be, and one of the fine ironies here is that the principal example for the dynamic case against judicial subjectivity is the controversy over the nomination of Robert Bork. As Justice Scalia remarked in a related context, the American people love democracy, and if they discover that Supreme Court Justices are policymakers, they will demand that the making of Justices become more democratic, which is to say more political.[3] The results were on display in 1987.

In the development of Originalism Mark I, the natural question is why would a rejection of judicial subjectivity, and in particular of judicial subjectivity as practiced by the Warren and Burger Courts, lead someone to become an originalist? The answer must be

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Id. at 1. He explicitly identified the Warren Court as an exemplar of non-neutrality, maintaining that those who support its methods claim "for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat." *Id.* at 6. Coming down to cases, he named *Griswold v. Connecticut*, 381 U.S. 479 (1965), as demonstrating how the Court's method "does not protect the judge from the intrusion of his own values." *Id.* at 7. Almost 20 years later Justice Scalia began a discussion of originalism by treating it as the alternative to judicial subjectivity, saying that it would be hard to count "the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently think it desirable for it to mean." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

2. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1 (1990) (stating that a judge "must . . . choose between his version of justice and abiding by the American form of government" or else he "has begun to rule where a legislator should").

3. *See* Planned Parenthood of Pa. v. Casey, 505 U.S. 833, 998-1001 (1992) (Scalia, J., concurring in part; dissenting in part).

speculative, especially if the connection is not one of substance, but of historical accident (or not of logic, but of experience). Consider some of the Warren and Burger Courts' most controversial decisions, such as those concerning legislative apportionment, the death penalty, abortion, and sex discrimination.[4] All of the decisions represented striking departures from seemingly well-settled principles. Legislative malapportionment, like the death penalty, was as old as the Republic, and although both had been subject to much criticism, neither had been thought of as a constitutional problem.[5] In similar fashion, abortion had been a crime for many decades, and while that too had been controversial, it apparently had not occurred to anyone that the prohibition might be unconstitutional.[6]

Then, like a bolt from the blue the Supreme Court, in the course of little more than a decade, decided that there was something wrong with these long-standing practices. To a lawyer who thinks of the Constitution as analogous to a statute, which is to say as a legal document that reflects a still-authoritative political decision from some time in the past, such an about face is deeply suspect. And without lengthy pondering of methodological puzzles, many lawyers will respond to such a decision by stating that it contradicts the original intent. The idea that laws should be interpreted in accordance with the intent of those who wrote them was hardly an invention of critics of the Warren Court or of originalists. It was a standard, although controversial, lawyer's move, and a natural one to make under such circumstances.[7] It did not require a particularly nuanced or

4. *See* Roe v. Wade, 410 U.S. 113 (1973) (abortion); Furman v. Georgia, 408 U.S. 238 (1972) (death penalty); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives); Reynolds v. Sims, 377 U.S. 533 (1964) (legislative apportionment).

5. *See* U.S. CONST. amend. V (making an express reference to capital crimes); Baker v. Carr, 369 U.S. 186, 301-324 (1962) (Frankfurter, J., dissenting) (describing British and American history of non-equipopulous apportionment); RAOUL BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 39-41 (1982).

6. *See* Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1290 n.205 (1975). "At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion." *Casey*, 505 U.S. at 952 (Rehnquist, C.J., dissenting).

7. Richard Fallon begins a chapter in which he rejects originalism by attesting to its intuitive appeal: "When quizzed about the appropriate role of the Supreme Court in American government, most law students—and I would guess most interested citizens—tend almost reflexively to rely on a theory that has been labeled most recently as 'originalism.' In a sentence, originalism holds that the Supreme Court should interpret the Constitution to reflect the 'original understanding' of those who wrote and ratified relevant language." RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13 (2001) (footnote omitted).

sophisticated concept of original intent to say that there had been a departure from original intent when, after a century of practice to the contrary, the Supreme Court discovered that the Constitution severely constrains regulation of abortion.[8] As of 1973, complaining about departures from original intent seemed like shooting fish in a barrel.

None of this was lost on the judges who made those decisions, and their response to allegations of departure from the original intent provided a second important push of their critics in the direction of originalism. The normative power of the original intent was not an innovation of 1970, and neither was it news that a lot of what the Court was doing was out of step with that norm. Proponents of the new doctrines built into their rhetoric attacks on static understandings of the Constitution and revived the standard notion that it was a living document that had to be kept up with the times.[9] Their rhetoric was only casually, and not systematically, anti-originalist. It was about not letting the country remain mired in the past and not about problems with collective intent or indeterminacy in the historical record or the meaning of language changing over time.

But the enemy of my enemy is my friend, and if supporters of the Court's controversial doctrines were attacking the hidebound past, then there must have been something to be said for the hidebound past. If advocates of judicial subjectivity must struggle against the original intent in order to free the courts to do good, then opponents of judicial subjectivity must demand that courts adhere to the original intent so that they will do law.

One more factor helps account for the appeal of the original intent in the formation of Originalism Mark I. For the critics of the Warren and Burger Courts, the political positions commonly associated with the framers were congenial. The framers were in favor of limited government, federalism, and private property. They were not in favor of top-down social and cultural transformation. That sounded like a pretty good idea to the people who became Mark I originalists. It is probably also the reason the Federalist Society is called the Federalist Society, but since I am speaking here as an eyewitness, I will leave that question to those who eyewitnessed that founding.

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8. *See Roe*, 410 U.S. 113.

9. *See, e.g.*, William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, Address Before the American Bar Association (October 2, 1985) *in* AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES 607, 610 (Alpheus Thomas Mason & Donald Grier Stephenson, Jr., eds., 8th ed. 1987).

The factors just discussed yield a form of originalism that has much intuitive appeal, but that was not particularly well thought out. I do not intend the latter point as a criticism. One would not have expected it to be well thought out. Its originators were lawyers, lawyers turned law professors, lawyers turned judges, and lawyers turned law professors turned judges. They were dealing not with a theoretical question, but with a matter of contemporary controversy that demanded timely response in debate and sometimes action. Robert Bork soon found himself on the bench where, he has said, one does not accumulate additional intellectual capital.[10] Under the circumstances it is not surprising that the originalists entered into the debate *in media res* and made arguments that were often unsystematic and ad hoc.

A good example of the unsystematic and ad hoc nature of originalism Mark I concerns the relevance of judicial subjectivity, opposition to which I have suggested was the driving force of the movement. It is common to justify originalism on the grounds that it is the best way of controlling judicial subjectivity.[11] However, what is wrong with judicial subjectivity? Originalism is not going to answer that question, because opposition to judicial subjectivity drives originalism, and not the other way around. The argument for originalism from the rejection of judicial subjectivity is subject to two standard criticisms The two criticisms are inconsistent but quite common and have probably been advanced by the same person at different times. First, there are other ways to control judicial subjectivity, and second, there is no way to control judicial subjectivity. Whatever one makes of those issues, originalism became attached to anti-subjectivism in the debate over constitutional doctrine, even though the two have no intrinsic connection.

The rejection of judicial policymaking and an untheorized reach for earlier political decisions as the check on judicial policymaking combined result in Originalism Mark I. Originalism Mark I holds that judges engaged in judicial review must respect earlier political settlements as concretely as they can, without making those settlements so abstract as to be easily manipulable. If anything is Originalism Mark I, that is.

Originalism Mark I places serious demands on the study of history.

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10. BORK, *supra* note 2, at 72.

11. *See id.* at 2; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

To function, it needs formulations of earlier political decisions that are abstract enough to apply meaningfully to quite different and unforeseen circumstances but that are sufficiently concrete as not to amount to saying, just do the right thing. Those formulations must provide some constraint but not too much. That is a lot to ask. It may be impossible.[12]

If it is impossible to determine how the framers of the Constitution would have dealt with current issues, not only one form of originalism is in trouble, because the need to draw on history is not confined to originalism. Rather, its primary competitors share that need, because while they only begin with the Constitution, they do begin with it. A fine example is the work of another member of this panel, Larry Kramer. As I understand Kramer's position, he accords very strong normative force to historical practice.[13] He differs from originalists in that he does not cut off the inquiry at the point when a constitutional provision is ratified; rather, subsequent practice counts too.[14] Subsequent practice may have happened a long time ago. For example, one of Kramer's basic themes is the importance to our constitutional system of political parties.[15] The framers knew nothing of parties as we know them and mainly disliked the proto-parties with which they were familiar.[16] That hardly means that one can give normative force to a party-centered practice without knowing a lot about history. American political parties were largely invented by Martin van Buren, who, while not a framer, was a contemporary of the framers and not of us.[17] When James Madison, last of the Federal Convention, died, Martin van Buren was a politician mature enough

12. Justice Scalia certainly thinks that it is difficult. Originalism's "greatest defect, in my view, is the difficulty of applying it correctly. . . . [I]t is often exceedingly difficult to plumb the original understanding of an ancient text. . . . It is, in short, a task sometimes better suited to the historian than the lawyer." Scalia, *supra* note 1, at 856-857.

13. *See* Larry Kramer, *Fidelity to History – And Through It*, 65 FORDHAM L. REV. 1627 (1997).

14. *See id.* at 1641 ("My point is that the Founding (or any founding, for that matter) is merely a starting position . . . .").

15. "It was the replacement of traditional forms of politics with the new rituals of partisan elections that made constitutional democracy on a large scale functional." Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 274 (2000) (footnote omitted).

16. *See* Gerald Leonard, *Party As a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Political Parties*, 54 RUTGERS L. REV. 221, 227-234 (2001) (describing the origins and continuing effects in the early Republic of the Framers' anti-partyism).

17. *See generally, id. See also* JOHN H. ALDRICH, WHY PARTIES 107-114 (1995) (describing van Buren's design for what became the Democratic Party).

to be President of the United States. Following the principles laid down by the Little Magician would require an application to our time of decisions made while the country was still young.

Kramer is hardly alone in needing the kind of answers that the study of history may struggle to provide. Another prominent non-originalist, Richard Fallon, emphasizes that practice has normative force ultimately superior to the text of the Constitution and hence to its meaning, original or otherwise.[18] But practice extends through time, and some highly relevant precedents will be quite dated. For example, when the Senate in 1999 convened as a court of impeachment to try the President, the only practice directly on point was from 1868, the year in which the Fourteenth Amendment was ratified.[19] Applying the principles of the Johnson impeachment trial poses puzzles similar to those posed by applying the Privileges and Immunities Clause.

Originalism Mark I asks much of the study of history, as do other important normative theories of American constitutional interpretation. I want now to discuss another species of originalism, what I will call Originalism Mark II, the kind of originalism of which I am in favor and seek to practice.

Originalism Mark II, considered as originalism, is more modest than Originalism Mark I in that it makes originalism subordinate and derivative, rather than primary. Originalism Mark II can be summarized as follows: an authoritative text should be understood as of the time that the text was written instead of some other time, like the present.[20] One may think of Originalism Mark II as setting a single parameter, out of the many parameters that need to be set, in one's interpretive theory.

To understand what I mean by setting a parameter, and why I say that Originalism Mark II is a secondary and subordinate principle, consider the question of whether we should understand the

18. Fallon follows modern positivists in maintaining that the foundations of law lie "in social practices involving the acceptance of authority." Fallon, *supra* note 7, at 18. But some important practices are inconsistent with the text: "Once it is recognized that the Constitution's status as law depends on practices of acceptance, the claim that the written Constitution (as originally understood) is the only valid source of norms of constitutional interpretation loses all pretense of self-evident validity." *Id.* at 19 (footnote omitted).

19. For a discussion of President Johnson's impeachment, *see* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 140-54 (1999).

20. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

Constitution according to the original meaning of its text. For someone like me, the first step in answering that question is deciding whether, why, and how much the Constitution matters. As the work of Kramer and Fallon demonstrate, the authority of the written Constitution itself is a subject of controversy, and given the way our system operates, of legitimate controversy.[21] Those two theorists maintain that the written Constitution is a major, but not the ultimate, test of legal legitimacy in the American constitutional system. I answer that question differently, so on the great first question of Constitution-only or Constitution-plus, my parameter is set to Constitution-only.

Next, if one believes that a text is a legal authority, one has to know how to approach legal texts in general and this kind of text in particular. One needs to know how much to focus on the underlying purposes of the writers of concrete text and how much to seek meaning divorced from concrete purposes. One needs to know whether to be an intentionalist or a textualist. That is another parameter setting. Mine is textualist.

If the two settings are in place, then (and only then, in this sequence) does the question of originalism come up. It comes up because semantic meaning changes over time. As an example of the change of semantic meaning I will use a development in usage that I find annoying. A ratchet is, or at least used to be, a device that turns a wheel in only one direction.[22] One could use a lever to turn the ratchet clockwise, for example, and the wheel moved by the ratchet would move clockwise. One could then move the lever back counter-clockwise to prepare for another stroke and the wheel being moved by the ratchet would *not* move back counter-clockwise and undo what had just been done. Rather, on the backstroke the ratchet would not move the wheel at all. The whole point of a ratchet is that it causes the wheel on which it operates to move only in one direction. Ratchets are useful because they are one-way devices.

In the past few years the term "one-way ratchet," used to refer to things that move only in one direction as all ratchets do, has become increasingly common.[23] Perhaps the modifier was added in the

21. *See* Fallon, *supra* note 7; Kramer, *supra* note 3.

22. *See* THE AMERICAN HERITAGE COLLEGE DICTIONARY 1133 (3d ed. 2000) (defining a ratchet as "[a] mechanism . . . permitting motion in one direction only").

23. American constitutional law features a well-known metaphorical ratchet. In *Katzenbach v. Morgan*, 384 U.S. 641, 651-52 n.10 (1966), the Court indicated that although Congress under Section 5 of the Fourteenth Amendment could add to the

interests of those who did not know that ratchets are (or used to be) one-way devices.[24] If there are one-way ratchets, are there then two-way ratchets that allow the wheel to move back on the backstroke? [25]One would hope not, but perhaps there are now, because people have come to talk about "ratcheting up" and then "ratcheting back down," despite the fact that going up and then going back down is the very thing a ratchet is supposed to prevent. If this trend continues, in perhaps another twenty years a ratchet will not be a one-way device but simply a wheel, and to ratchet will be not to move in only one direction, but to move. The meaning formerly attached to the noun "ratchet" will attach to "one-way ratchet," and maybe a verb will develop "to one-way ratchet" that captures what used to be conveyed by "to ratchet."

Suppose this change takes place and in 2030 someone has to understand a text from 1970 that refers to a ratchet. In 1970, ratchets were one-way. In 2030, I assume, they will be two-way, except for the one-way ratchets. What should the reader in 2030 do with the 1970 text? Should it be given its semantic meaning as of 1970 or as of 2030? A Mark II originalist says 1970, which I suspect is most people's response.

An interpretive theory that is sensitive to semantic meaning change will have some questions for historians, because historians must also be sensitive to semantic meaning change. While my example about ratchets has little bearing on understanding American constitutional interpretation, there are words that have undergone meaning change that do have such a bearing. "Character" in the late 18th century frequently meant what we call "reputation."[26] If we read someone from 1788 explaining that the President will be careful not to

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protections established by the Court under Section 1, it could not reduce them. *Id.* at. This one-way congressional power, which could move up but not down, became known as the "*Morgan* ratchet" or the "ratchet theory" of Section 5. *See, e.g.*, Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 94 (referring to the ratchet theory).

24. On this issue law writers are part of the trend, now sometimes referring to the one-way ratchet of *Morgan*. The *Harvard Law Review* used that phrase in a recent review of the Supreme Court's term, *Leading Cases*, 109 HARV. L. REV. 111, 190 n.353 (1995). The phrase also appears outside the *Morgan* context, for example in the work of leading scholars such as my co-panelist Larry Kramer, *We the Court*, 115 HARV. L. REV. 4, 166 (2001), and William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 (2001).

25. I will spare the reader an explanation of the legitimate technical sense in which there are one-way and two-way ratchets, because that is not the sense employed in the references to one-way ratchets with which I am concerned.

26. *See* 3 OXFORD ENGLISH DICTIONARY 31 (2d ed. 1991) (definition 13 of "character," citing Steele).

nominate unworthy judges because of concern for his own character, we should not think that the author was attributing to Presidents a fear of associating with riff-raff lest one become riff-raff. Rather, that author would have been saying that Presidents would fear that by associating with riff-raff one would be thought riff-raff.

Hence a Mark II originalist would want to ask an historian of the founding a question such as the following: when you read a historical text, which words does one have to watch out for because they mean something different now? While some historians might answer that all words mean something different now, others would give a more focused and more useful response.

An historian could not answer a very important question that Mark II originalists must confront: what is the difference between change in semantic meaning and a change in the application of a term the meaning of which has not changed? This problem arises because disputes in which the concept of originalism is invoked frequently involve the authority of framing-era practices. A leading example is the death penalty, which was well-established when the Eighth and then the Fourteenth Amendments were adopted. Many originalists, especially Mark I originalists, regard those practices as dispositive of the constitutional question.[27] Many others, who may or may not properly be called non-originalists, believe that it is possible to accept the framers' principle that cruel and unusual punishments are forbidden without accepting their application of that principle.[28]

To address such problem, a Mark II originalist must know how it happened that someone in 2002 could say that the death penalty is cruel, although most people in 1791 would not have believed that. The semantic meaning of "cruel" might have changed, as the meaning of "character" changed. If that is the explanation, then the Mark II originalist will regard the new meaning as irrelevant. Another possible answer is that under an unchanged concept of cruelty, whether a practice is cruel depends on surrounding circumstances that have changed. Yet another is that neither the concept nor its correct application has changed, but that common opinion in 1791 was incorrect.

To sort out these distinctions and work with them Mark II

27. *See* BERGER, *supra* note 5.

28. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 269-270 (1972) (Brennan, J., concurring) (stating that application of ban on cruel and unusual punishments changes in accord with evolving standards of decency).

originalists need the help not only of historians but also of philosophers of language and philosophically sophisticated legal scholars like Michael Moore. Moore proposes a solution to many problems of this form.[29] Many of the crucial terms in the Constitution, he maintains, refer to moral reality. As a moral realist, Moore says both that the meaning of the terms refers to moral reality and that there is a moral reality to be referred to—so people using those terms are not in error as to whether the topic they address exists.[30] Neither the semantic meaning nor the content of moral reality has changed since 1791 or 1868 or whenever, but prevailing understanding of the unchanged reality may have improved, just as prevailing understanding of the unchanged reality that is the element gold has improved. Moore thus can consistently be a Mark II originalist who often disagrees with framing-era applications whenever he concludes that people at the time of the framing were wrong about moral reality.

I offer Moore's natural law theory of judging as an example, not necessarily as the correct solution. It rests on powerful but controversial theories of meaning and of morality. In addition, it must deal with legal concepts like direct tax, executive power, and commerce. Those concepts come from human convention and are not moral ideas, but they are certainly central to the Constitution. Moore's theory is an example of a possible answer to some of the questions raised by Originalism Mark II, an answer that depends more on philosophy of language than it does on history.

While the originalism parameter of Mark II is significant, its significance is relatively modest. At least, if one is a Constitution-only textualist, less turns on it than one may think. If one were a Constitution-only textualist but a non-originalist, he would adopt the semantic meaning that is currently, and not historically, prevalent. One would proceed as if the Constitution were written in English as it is used in 2002.

The results achieved by such a non-originalist would be different sometimes, but not often. For example the central problem of the commerce power analysis is whether the commerce power can be used to regulate manufacturing. Commerce was different from manufacturing in 1789, and it is different from manufacturing today.[31]

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29. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

30. *See* Michael S. Moore, *Moral Reality*, 1982 WIS. L. REV. 1061 (1982).

31. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114-16 (2001).

When we talk about e-commerce, we do not mean business-to-business manufacturing. We mean buying and selling over the worldwide web, just as in 1789, commerce including selling something by sending a letter from Boston, by sailing ship, to London. In the web of words, in its semantic meaning, commerce is still different from manufacturing.[32]

The originalism part of textualist Mark II originalism is likely to be of limited importance for a reason that is so basic that it is easy to forget: the English language has not changed much during the history of the United States. Reading the Constitution or the *Federalist Papers* or accounts of debates from the 1790s is not like reading Chaucer or even Shakespeare. Madison did not live in our time, but he did speak our language. Originalism, at least Mark II, is not that big a deal.

32. Moreover, some questions become easier if the Constitution is understood as if it were written in English circa 2002. An example is the Establishment Clause. When Americans today refer to established religions, they refer to arrangements in other countries. The United Kingdom has an established religion, one would say, as does Saudi Arabia. It is very difficult to imagine that anyone today who wanted to describe, not the Church of England, but the forms of aid to religion that come before American courts, would refer to it as religious establishment. The words are not used that way.