

IS ORIGINALISM TOO CONSERVATIVE?

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Originalism as an approach to constitutional theory and constitutional interpretation is often associated with conservative politics.¹ This is no surprise given the history of modern originalist theory and constitutional politics. Although originalist arguments have a long pedigree, self-conscious originalism in its modern form largely arose as a response to the liberal constitutional decisions of the Warren and Burger Courts.² Judges and scholars turned to history to explain why they thought that the Supreme Court had not only gotten the constitutional law wrong, but had also acted illegitimately in making its rulings.³ These kinds of critiques culminated in the Reagan administration, the creation of the Federalist Society, and the mobilization of a conservative legal movement that embraced originalism as a core commitment.⁴ As a result, many conservatives embrace originalist arguments, and the public often associates originalism with conservatives.

The more troubling issue is not whether the public associates originalism with conservatives or conservative politics, but whether originalism is a rationalization for conservatism. Is originalism a principled theory of constitutional interpretation, or is it merely a cover for reaching politically conservative results in court? Is originalism theoretically compelling inde-

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1. See, e.g., James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 311–14 (1991) (linking originalist constitutional interpretation to political conservatism); Robert Post & Reva Siegal, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006).

2. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y. 599, 599 (2004).

3. See *id.* at 599–600.

4. See JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); Whittington, *supra* note 2, at 603–04.

pendent of its connection to conservative politics, or is originalism simply a means to the end of achieving a set of constitutional doctrines that conservative politicians and interest groups prefer? Might originalism be justifiable independent of any reference or commitment to conservative constitutional law outcomes? Might it appeal to political liberals? Or must one already have committed to conservative politics to find any value in constitutional originalism?

This Essay argues that originalism is a principled theory of constitutional interpretation and not merely a rationalization for conservatism. The association of conservative politics with originalism is not accidental, however, and conservatives are generally more likely than liberals to find originalism a normatively attractive approach to constitutional interpretation. This Essay considers the ways in which originalism both intersects with and diverges from conservatism. In doing so, it will consider originalism from two different perspectives that raise somewhat different issues. Part I will focus on originalism as a method of constitutional interpretation. Part II will focus on originalism as a political theory of judicial review and constitutional authority.

Before pursuing this inquiry, there are some issues worth mentioning but beyond the scope of this Essay. First, this Essay will not delve into the question of what originalism is. It will treat originalism with a broad brush, and not make fine distinctions among different schools of originalist thought. For present purposes of this Essay, the aim is to be catholic in this discussion of originalism, and any more particular points about originalism should be clear in context.⁵ Second, this Essay will bracket the question of whether individual judges or particular political actors are, in fact, principled or consistent adherents to originalism.⁶ It is an interesting empirical question whether a judge adheres to any principled theories of either constitutional interpretation or the judicial role, let alone whether a judge adheres to originalism in particular.⁷ Scholars have long investi-

5. The author does, however, have his own views about how to think about originalism. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

6. Some scholars have argued that originalism's proponents are hypocritical in their methodology. See, e.g., Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239 (2009); Post & Siegal, *supra* note 1.

7. See RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 330–31 (1997) (distinguishing Justice Scalia's approach from the morally

gated, and struggled to answer, that empirical question.⁸ Ultimately, however, the results of such an investigation would not help answer the question addressed herein. There is little doubt that originalism can be used to rationalize and legitimate conservative results; many other forms of constitutional argument and theorizing can also do so. But asserting such a general contention about the theory on the basis of some examples of flawed practice is no more compelling than arguing that “doctrinalism is a rationalization for conservatism” on the basis of examples of bad doctrinal arguments made in the service of reaching conservative results. Judicial practice is not the best guide for understanding the concepts, principles, and commitments of a constitutional theory.

I. ORIGINALISM AS AN INTERPRETIVE METHOD

Originalism is a theory about interpretive method and argumentation for constitutional texts. In its various guises, originalism seeks to provide a framework of principles to guide judges and other constitutional interpreters in interpreting the constitutional text. Originalism tells us something about how

and economically motivated approaches often employed by political conservatives, and noting instances where he has deviated from traditional originalism); THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 199–283* (2004) (concluding that the Rehnquist Court’s decisions pushed a conservative political agenda under the veil of originalism); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 7 (2006) (concluding that Justice Scalia is not a true originalist based in part on his deviation from the methodology in several important cases); Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 466 (2001) (hypothesizing that judges will reach outcomes that align with their personal biases regardless of the methodology they employ to justify their decision).

8. See, e.g., John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245 (1996) (analyzing the use of “intentionalism” in the decisionmaking of two ideologically disparate Justices—Rehnquist, a proponent, and Brennan, an opponent—to determine whether this methodology is exclusive to either ideology); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC’Y REV. 113 (2002) (suggesting that although conservative litigants often raise originalist arguments and proponents of originalism are often conservative, conservative justices are not always swayed by originalism in practice); Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality*, 8 MIDWEST J. POL. SCI. 22 (1964) (concluding on the basis of his voting record that Justice Frankfurter, supposedly renowned for his commitment to “judicial restraint,” was far more likely to defer to state regulatory actions that were in line with his political leanings than those that were not).

best to understand the constitutional rules that control government. It indicates how obscure constitutional provisions should be clarified, and what kinds of arguments and evidence are appropriate to use in determining what a piece of text means.

To what degree does originalism as a method of constitutional interpretation intersect with conservatism? Most notably, can we expect the Constitution, when interpreted in accord with originalist theory, to generate consistently politically “conservative” results? One might worry that originalism as an interpretive method is just a conservative stalking horse if one would expect the method to mechanically generate conservative outcomes on contested points of constitutional law. At the very least, distinguishing conservatism from originalism would be difficult if they were expected to produce equivalent results.

There are good reasons to think that the overlap between conservatism and originalism is not perfect. Although the two do intersect, they can be teased apart, and originalism can be discussed, justified, and evaluated on its own terms. To see that separation, it makes sense to think about the ways in which conservatism might diverge from an originalist constitution, and the ways in which an originalist constitution might diverge from conservatism.

“Conservatism” itself is quite various. The label is not always clearly used.⁹ What political program is one talking about? What ideological movement is one talking about? What kinds of commitments are one talking about when one discusses conservatism, and what kinds of implications of originalism does one think it should be supporting? There are substantial ideological differences among contemporary conservative judges and Justices such as Clarence Thomas, Antonin Scalia, William Rehnquist, Richard Posner, and John Roberts. Likewise, there are also significant differences among conservative legal scholars such as Richard Epstein, Randy Barnett, Robert George, Steven Calabresi, John Yoo, Hadley Arkes, and Adrian Vermeule. Conservatism in politics embraces a spectrum of ideologies, ranging from libertarians to religious conservatives to national security hawks to business conservatives to neoconservatives. Conservatism as an intellectual movement is multifaceted. Because of this diversity, originalism as a method of

9. *See, e.g.*, DEBATING THE AMERICAN CONSERVATIVE MOVEMENT: 1945 TO THE PRESENT (Donald T. Critchlow & Nancy MacLean eds., 2009).

constitutional interpretation is unlikely to produce results that simultaneously satisfy all conservatives.

For many conservatives, originalism is an inadequate and unsatisfactory approach to constitutional jurisprudence. Although many conservative legal scholars have at least rhetorically embraced some form of originalism since the Reagan years, several alternative jurisprudential philosophies are more consistent with conservative politics and produce more conservative results.¹⁰ Libertarian-oriented natural rights theories, pragmatic law-and-economic theories, moralistic natural law theories, and Burkean doctrinal theories could displace the emphasis on originalism and provide an alternative jurisprudential framework for rationalizing and legitimating conservative judging. It is simply a failure of imagination to think that originalism is the theory most conducive to generating conservative outcomes or uniquely situated to providing justifications for conservative legal results. Other jurisprudential theories could provide a better fit with the substantive preferences of particular factions within the conservative movement.

The meaning of conservatism varies both over time and within contemporary political discourse. To the extent that conservatism might be reduced to a set of specific policy goals, legislative programs, or ideological commitments, it is a moving target. The platforms of the Republican Party, and the policies favored by the more conservative members of Congress, have varied substantially over the past half century.¹¹ Although one might like to believe that certain eternal truths have guided conservative leaders over the decades, and that those truths can be found in the text of the Constitution, in reality bedrock conservative commitments have evolved over time.¹² In particular, if one takes a long view and considers conservative

10. See, e.g., William P. Marshall, *The Judicial Nomination Wars*, 39 U. RICH. L. REV. 819, 827–32 (2005) (discussing how recent Justices have used alternatives to originalism, such as textualism, judicial minimalism, appeals to morality, *stare decisis*, and “constitutional culture” to reach conservative results)

11. See, e.g., DAVID KAROL, *PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT* (2009) (describing how American political party positions evolved over the latter half of the twentieth century).

12. See, e.g., PATRICK ALLITT, *THE CONSERVATIVES: IDEAS AND PERSONALITIES THROUGHOUT AMERICAN HISTORY* (2009) (describing the variety of and contest over conservative ideas throughout American history); JOHN GERRING, *PARTY IDEOLOGIES IN AMERICA, 1828–1996* (1998) (describing how political party ideologies have been remade over the course of American history).

thought and political practice over an extended period (since the late nineteenth century, for example), one would be hard-pressed to conclude that conservatives adhere to a set of fixed policy preferences that endure. There are continuities to be sure, but there are also discontinuities.

Although conservative views vary over time, originalism takes as its premise that the original meaning of the Constitution is relatively fixed, and is committed to identifying an unchanging, historically grounded understanding of the text of the Constitution. Such a fixed approach to constitutional jurisprudence will always be at odds with the vagaries of the political process and the shifting fortunes of particular political positions. There are, without question, theoretical and practical difficulties with originalism, but the originalist enterprise is fundamentally committed to discerning the fixed meaning of the Constitution. Given the constant flux of politics, originalism proves to be an awkward and inadequate vehicle for rationalizing conservative policy results.¹³

That the Constitution was simply written for other purposes further exacerbates the problem. It is highly unlikely that any modern political or ideological movement will find that its policy preferences overlap perfectly with the particular set of commitments, rules and principles embedded in a two-hundred-year-old document. Both modern liberals and conservatives have certain commitments that overlap with the Constitution, but neither can lay claim to all that the Constitution fundamentally attempts to accomplish. Both are likely to stretch and strain the Constitution because it was written in a different era

13. Robert Post and Reva Siegel raise an interesting alternative perspective. They suggest that originalism in practice reconciles the "fixed text" with the changing conservative political program through a to-be-expected process of hermeneutically filtering historical materials. Conservatives circa 2010 read the historical record and see what they expect to see, even if conservatives circa 1950 would have come to a different conclusion (laying liberals circa 2010 completely aside). Post & Siegel, *supra* note 1, at 557–64. Post and Siegel are explicitly concerned with the behavior of conservative political leaders and judges, who might be under practical pressures to find ways to reconcile their philosophical and political commitments. *See id.* If one thinks that this kind of phenomenon has political and sociological roots, then the ultimate issue is not about originalism but about constitutionalism and judging. If one thinks this phenomenon has theoretical and hermeneutical roots, then the issue is about originalist theory as such and whether interpreters of historical texts are in principle capable of being understood beyond their own contexts. For further discussion, see WHITTINGTON, *supra* note 5, at 88–109.

and is based on different political objectives than those that concern modern liberals and conservatives.

The tensions between conservative political commitments and originalism as a method of constitutional interpretation create certain temptations and pressures for conservatives. To the extent that originalism is a principled theory of interpretation and not merely a rationalization for conservatism, political actors will sometimes view originalism as an obstruction and look for ways around it. One of those temptations is to deviate from originalism and to devise various strategies for determining when one does not have to adhere to original meaning. Is it sometimes acceptable to embrace values and commitments other than original meaning, whether those other commitments include adherence to precedent and *stare decisis*, or to pragmatic concerns and policies that are regarded as particularly valuable?¹⁴ Is it acceptable to set aside the results of originalist constitutional interpretation in the name of, or to supplement originalist arguments with, values drawn from outside the Constitution? In Justice Scalia's words, does one become a "faint-hearted originalist" when originalism gets in the way of a policy or political goal that seems particularly desirable?¹⁵ The temptation for government officials to deviate from constitutional constraints is always present. The temptation to deviate from originalism as a method of constitutional interpretation is just a particular manifestation of that general phenomenon. Conservative officials are not immune from this temptation, and originalist theorizing necessarily should be concerned with the problem of deviation.¹⁶

14. The question of how originalism and precedent interact is the subject of a lively debate among originalist scholars. See, e.g., Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006) (examining occasions when the court overturned precedent in favor of originalist first principles); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (arguing that original constitutional meaning should trump precedent); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 447-72 (2006) (arguing that a theory of precedent is embedded in the Article III judicial power).

15. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

16. This suggests, for example, that integrating a theory of *stare decisis* into originalist theory is ultimately important. The more undeveloped escape hatches that are left within the theory, the easier it is to conclude that deviation from originalist argument is driven by conservative political commitments rather than a broader principled theory of interpretation and adjudication.

Alternatively, originalists might be tempted to skew the results of their historical-interpretive inquiries and make the historical arguments produce answers that comport with their current political and policy preferences. Rather than reaching interpretive results that one does not like and finding reasons for laying them aside, one might strain to reach interpretive results that one finds more agreeable in the first place. One can then still claim to be engaging in the originalist enterprise and adhering to the dictates of the originalist Constitution.

The first temptation—to deviate from originalism—is the more difficult challenge for originalists. A fully elaborated theory of judicial review and adjudication might indicate that originalism should govern as a method of constitutional interpretation, but that interpretation itself is subsumed within and qualified by other tasks that the courts must perform. Identifying when, if ever, courts are authorized to ignore the discoverable historical meaning of the Constitution is one of the central dividing points of contemporary constitutional theory.¹⁷ The second temptation—to skew original meaning—does not raise such difficult challenges.

Both temptations, however, can serve as a reminder. There is often a strong instinct toward constitutional perfectionism. One hopes to find her own political aspirations embodied in the terms of the Constitution. If one cannot discover them easily, then she might be tempted to find ways to interpret the text to reconcile it with her cherished beliefs or to find reasons to deviate from constitutional theory in order to salvage political commitments. No one likes to think that the Constitution, properly interpreted and applied, does not authorize the policies that she considers desirable or proscribe the actions that she thinks reprehensible. A “perfect” Constitution would overlap seamlessly with one’s present political commitments and avoid the necessity of tragic choices or the experience of imposed constraints.¹⁸

17. See, e.g., GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION 1–6 (2009) (arguing in favor of employing modern context in place of traditional understandings). Cf. Barnett, *supra* note 7, at 7 (criticizing Justice Scalia for deviating from the original public meaning of the Constitution, and concluding that Justice Thomas is the only consistently originalist Justice).

18. See Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, in INTEGRITY AND CONSCIENCE 218, 218–21 (Ian Shapiro & Robert Adams eds., 1998); Keith E. Whittington, *Constitutional Constraints in*

The Constitution is not perfect. No one should expect the Constitution, properly interpreted, to align itself perfectly with the momentary concerns and commitments of a political movement.¹⁹ Good-faith constitutional interpretation sometimes produces results that seem unfortunate, inconvenient, or even undesirable.²⁰ Originalism as a method of constitutional interpretation cannot be expected always to produce constitutional law or applications of constitutional law that win plaudits from conservative political actors. Originalism demands fidelity to the written Constitution as it was understood by those who adopted it, and nothing more. Originalist constitutional interpretation does not make constitutional law any more attractive to conservatives (or liberals) than the underlying constitutional provisions in their historical context. If the relevant set of constitutional provisions authorizes government power or fails to protect individual rights (or vice versa) in ways that conservatives find problematic, originalist constitutional interpretation can only elaborate what the constitutional text currently requires. If the originalist Constitution should be supplemented through constitutional construction or altered through constitutional amendment, then those are separate tasks that might be considered.²¹

Moreover, no one should expect the Constitution always to answer questions of contemporary political concern. One should be prepared for the possibility that the terms of the Constitution will remain obscure or indeterminate despite the best interpretive efforts, and that the Constitution's applicability to the most intriguing and divisive issues will remain uncertain. One should also be prepared for the possibility that the originalist Constitution simply does not address, or is not always directly relevant to, public policy issues that seem fundamental today. As a method of constitutional interpretation, originalism should be concerned with clarifying and elaborat-

Politics, in *THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM* 221, 222–23 (Steven Kautz et al. eds., 2009).

19. See Mark A. Graber, *Our (Im)Perfect Constitution*, 51 *REV. POL.* 86, 89 (1989); Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353, 353 (1981).

20. On the challenge of faithful constitutional interpretation and undesirable constitutional outcomes, see MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

21. On constitutional construction, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL CONSTRUCTION* (1999); WHITTINGTON, *supra* note 5, at 1–16, 195–212.

ing the discoverable meaning of the Constitution. When the discoverable meaning of the Constitution falls short of resolving a particular question, the options for political action do not come to an end. Recognizing that the Constitution does not resolve every question, however, is the starting point for recognizing the need to develop answers to political questions and to make constitutional choices for the future.

II. ORIGINALISM AS A POLITICAL THEORY

Originalism can also operate as a political theory about judicial review and constitutionalism. Originalism as a method of constitutional interpretation focuses on how to interpret the text of a constitution so as to make the language more transparent and to understand the meaning implicit in the text. Originalism as a political theory, by contrast, is concerned with such questions as how courts should exercise the power of judicial review, why contemporary political actors should be bound by the historical meaning of the constitutional text, what the rationale for a constitution is, and how that rationale relates to problems of interpretation, enforcement, and legitimacy.

Originalism has a different set of connections to conservatism as a political theory than it does as a method of constitutional interpretation. As a political theory, the concern is not about whether originalism tends to produce conservative results in judicial cases so much as it is about whether originalism implies or embraces an understanding of judicial review and constitutionalism that aligns with conservative philosophical ideals and is at odds with liberal ideals. Insofar as it does align with conservative ideals in this way, originalism is a rationalization for conservatism, not at the level of individual cases, but at the level of governing ideology. Liberals might be uncomfortable with originalism not only because they are skeptical about whether it functions as a principled method of constitutional interpretation, but also because they are unwilling to accept its fundamental tenets about American constitutionalism and its institutions. Even laying aside disagreements about judicial doctrine and case outcomes, many political liberals are likely to balk at the philosophical foundations of original-

ism, while many conservatives will likely find those foundations to be compatible with their broader philosophical beliefs.²²

There are a variety of normative theories associated with originalism. Perhaps the most prominent—and the one that this author favors—is grounded in a theory of popular sovereignty and democratic lawmaking.²³ Both the authority of the courts to exercise the power of judicial review and the justification for respecting the original meaning of the constitutional text can be rooted in an argument about popular sovereignty. One should be an originalist because the Constitution was authorized by democratically elected delegates who had legitimate authority to ratify the constitutional text. The legalized Constitution seeks to maintain and enforce the rules and standards that those ratifiers originally established, until the constitutional text is appropriately and deliberately amended.²⁴ The most authoritative constitutional choices—those that create binding rules in the fundamental law—are democratically enacted through the process of textual adoption and revision, and originalism is committed to preserving those choices intact.²⁵

In a sense, this theoretical orientation is fairly radical. Originalism puts a priority on a certain vision of democracy, and it puts a priority on this particular text, the text of the Constitution. This means, for example, that it is possible for a new set of lawmakers (or a new generation of “We the People”) to write a new text that dramatically departs from the old. From an originalist perspective, nothing is wrong with new expressions of constitutional lawmaking by the people, and in some circumstances they should perhaps be welcomed.²⁶ If the foundational commitment is to democracy and the constitutional commitments that democratic legislators make, then originalism suggests a rather different philosophical orientation to thinking

22. Robert Post, *Theories of Constitutional Interpretation*, in *LAW AND THE ORDER OF CULTURE* (Robert Post ed., 1991).

23. See WHITTINGTON, *supra* note 5, at 127–59.

24. See Keith E. Whittington, *Let’s Call the Whole Thing Off?*, 22 *CONST. COMMENT.* 365, 372–74 (2005) (book review).

25. See *id.*

26. The implication here is not that simple majorities should be able to do anything they please. Any normative theory of democracy has to grapple with the important issues of who constitutes “the people” and under what conditions they can legitimately act. Of course, the wisdom of the people’s actions is always a separate question from their authority to act.

about constitutional democracies than, for example, Burkean or natural rights theories. This orientation also means that the text can trump precedent and tradition that have built up over time, which can have some radical consequences when text and tradition have diverged. For many critics, it is the potentially radical qualities of originalism, rather than its conservative qualities, that are the cause for the greatest caution. For many, an approach to constitutionalism that enforces what the people understood a constitutional rule to mean when they adopted it has the potential to disrupt too many political projects. To them, a constitutional vision that promises to conserve the status quo, whatever the status quo might be, seems more soothing.²⁷

In another sense, originalism can have certain conservative tendencies. Originalism is backward looking, in that judges and other constitutional interpreters think historically, referring to the past, to the popular delegates who ratified the constitutional text. Originalism is also outward-looking. Instead of guiding judges to look to their own personal philosophies to determine the right thing to do in particular circumstances, originalism requires that they consider what the Framers believed was the right constitutional rule to govern that particular circumstance. Originalism asks the judge to implement the constitutional rule that she believes was adopted by others rather than the one that she thinks would be substantively correct for the occasion. For present day interpreters, originalism emphasizes the rule-following aspect of constitutionalism, rather than its rule-making aspect. When an originalist court undertakes an action, it does not appeal to the substantive “correctness” of its decision. Rather, it appeals to being a faithful follower of the established rules and to the authority of the initial process of constitutional lawmaking.²⁸

Some are simply philosophically disinclined to adopt such a perspective on democracy, constitutionalism, and judicial review. There are forms of “liberal originalism” that promise to reach results that will be attractive to many political liberals,

27. For example, Professor Stephen Griffin argues in favor of a “developmental theory” that emphasizes the ways in which modern constitutional practice reflects adaptations over time. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (2008).

28. On the relationship between theories of interpretation and theories of legal authority, see Post, *supra* note 22.

but for many on the left the philosophical foundations of originalism will remain an obstacle to embracing originalism.²⁹ Those philosophical foundations will seem simultaneously too radical and too conservative. Originalism is too committed to the democratically enacted constitutional text and too oriented to preserving decisions made in the past. For those who like judges to have more flexibility to make decisions about what constitutional rules should govern today and in the future, originalism will always seem too confining. For them, originalism will always seem too “conservative.”

29. Jack Balkin has been the most explicit proponent of a form of liberal originalism. See, e.g., Jack M. Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020*, at 11 (Jack M. Balkin & Reva B. Siegel eds., 2009).