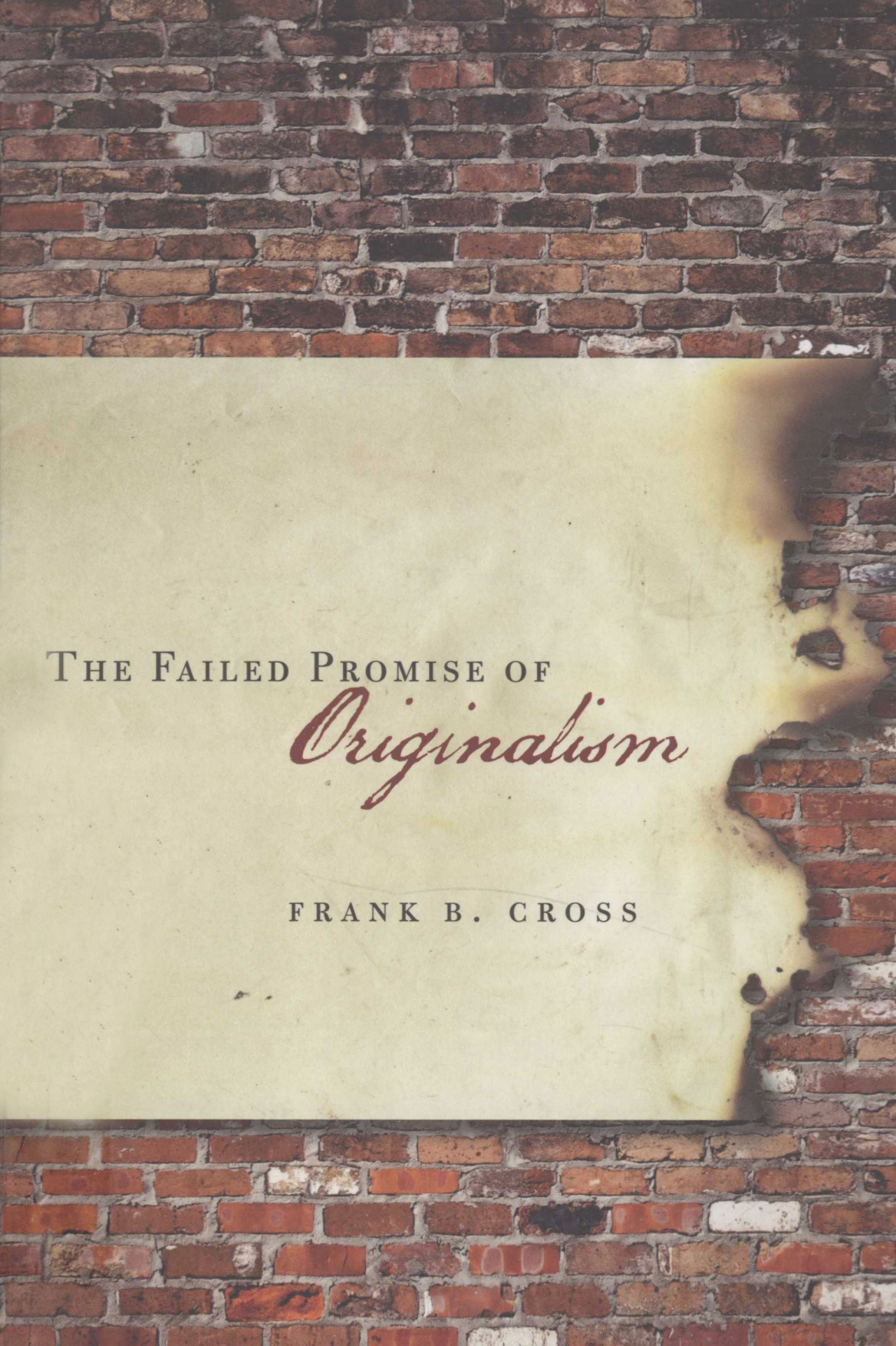
THE FAILED PROMISE OF
Originalism
FRANK B. CROSS

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ONE

The Undeniable Appeal of Originalism

Originalism, the theory that the Constitution should be interpreted according to the meaning or intent of the drafters, has great appeal to Americans. At one time closely associated with the conservative movement, originalism is now commonly held as an important, if not the exclusive, device for interpreting the Constitution. This has not been our historic practice. Over thirty years ago, Munzer and Nickel (1977, 1029) wrote that "one does not have to dig very deeply into the literature of American constitutional law to suspect that many constitutional provisions do not mean today what their framers thought they meant." Yet originalism still has great appeal.

A large number of Americans say they believe that Supreme Court justices should interpret the Constitution solely based on the original intentions of its authors (Greene 2009c, 695–696). In the legal academy, the amount of ink devoted to originalist theory is enormous. The revival of originalism is evident at the Court level. One quick survey found that in 1987 analysis of history figured in only 7 percent of the constitutional cases,

but by the 2007 term historical analysis was involved in nearly 35 percent of the opinions (Sutton 2009). While still representing a minority of cases, the trend line appears strong.

There was a time when originalism was considered "dead" and "trounced by many academic critics" (Barnett 1999, 611). One of today's leading originalists declared that if "ever a theory had a stake driven through its heart, it seems to be originalism" (Barnett 2004, 90). The theory was "rebooted," though, and surged in popularity. Conservative academics developed new and more persuasive theories for reliance on originalism. The approach has seen much greater attention in law schools in recent years (Ryan 2006). At the court, some claim that "the originalists have prevailed" (Smith 2004, 234).

Originalism has now gone beyond its conservative "base," and conservative bête noire Ronald Dworkin proclaimed some time ago that everyone should be an originalist (though his application of the theory differed dramatically from that of other originalists). One often hears the claim that we are all originalists now. Indeed, in her 2010 hearings on her Supreme Court nomination, Elena Kagan reported that "we are all originalists." Research reveals a dramatic increase in recent years in law review articles focused on originalism and in the use of certain originalist sources by the Supreme Court (Ginsburg 2010).

While originalism long had severe critics in the academy, especially among liberals, this seems to be changing. In addition to Dworkin, Yale's Jack Balkin has come out for originalist interpretation (Balkin 2009), and other leading liberal scholars go along, at least to a degree. The position is not universal, as a number of law professors reject originalism, with a recent article calling it "bunk" (Berman 2009). However, most concede that originalist interpretation is at least sometimes useful, and many argue that it should serve as the primary basis for constitutional interpretation. The theory is certainly in the contemporary debate over proper interpretation.

The discussion over the use of originalism has largely focused on theoretical debates, sometimes delving into great linguistic detail. This book does not focus on the theory of originalism, on which countless articles and books have been written. Rather, I focus on the practice of originalism and how that informs us of the value of the approach. Some understanding of underlying theory of originalism is important, though, to evaluate the

practice. The theoretical argument for originalism obviously has a profound appeal.

The appeal of originalism may be viewed as a sign of respect to the constitutional framers. Madison, Jefferson, Hamilton, and others are held in very high regard today. Ron Chernow (2010) has observed: "In the American imagination, the founding era shimmers as the golden age of political discourse, a time when philosopher-kings strode the public stage, dispensing wisdom with gentle civility."

Americans may treat the founders as giants or saints who created for us the Constitution that formed the backbone of our nation. There has been an "almost religious adoration" of the framers (Miller 1969, 181). Accordingly, some among the public suggest that the Constitution should be interpreted according to the founders' intent for it. The Constitution becomes our secular idol and the founders the prophets.

This simple theory is tantamount to ancestor worship and is hard to justify. Today's originalists commonly reject the approach. Originalism is "not driven by fawning celebration of historical figures" (Whittington 1999, 157). The Constitution and its framers certainly were flawed. The acceptance of slavery is the most prominent example of the framers' shortcomings, but there are others as well. The lack of rights for women is another major example of where the framers' views appear somewhat embarrassing in retrospect. And originalism is not limited to the original framers but would also extend to the later amendments to the Constitution.

Comments at the time suggest that individual framers were not themselves so enamored with the wisdom of other framers. Jefferson said that Hamilton's practice was "a tissue of machinations against the liberty of the country," while Hamilton said Jefferson was not "mindful of truth" but a "contemptible hypocrite." Hamilton said of John Adams that he was "more mad than I ever thought him and I shall soon be led to say as wicked as he is mad." Of course, Adams said that Hamilton was "devoid of every moral principle." It does not sound as if they had great trust in the judgment of their fellow framers.

Nor was it clear that the framers themselves favored an originalist interpretation for their Constitution. Some research into the period suggested that the framers did not expect that future interpreters of the Constitution would rely on the framers' purposes and expectations (Powell 1985), though

these findings are contested. The framers carefully debated the language of the Constitution and clearly thought that the text, rather than their particular intentions, should govern. Madison wrote in *The Federalist* No. 14:

> Is it not the glory of the people of America that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?

Such textualism, though, can be considered a form of originalism. Our leading framers do not seem to embrace originalism. The most compelling evidence of this seems to come from James Madison himself. He was originally convinced that the Constitution did not authorize a national bank but later changed his mind, in light of legislative precedent and his appreciation of the value provided by the bank to the nation (Dewey 1971). In this, Madison plainly embraced a "living Constitution." Of course, this critique applies strongest to reliance on original intent, and today's originalists have a different approach, as will be explained in the following pages.

Had the framers wanted originalism to be the standard, they could have said so explicitly. At the very least, they could have provided a record that made the original intent as clear as possible. They did none of this. Madison took notes during the Constitutional Convention but did not make them public, as would be expected if he thought they should have authority. Records of the ratification debates on the Constitution are also quite incomplete.

At the time of the Constitution's creation, it appears that the standards for legal interpretation did not rest centrally on the intent of a law's creators. Hans Baade's historical analysis suggests that it was the "universal practice" of courts at the time to look only at the text of an act and "never" resort to the "debates which preceded it" (1991, 1010).

The worship of the framers cannot supply the basis for originalist interpretation, though one suspects that it influences many of today's originalist impulses. The framers were great men in many ways but certainly not beyond reproach, and they realized this. A greater justification is required for originalist interpretation.

There is a very cynical position on the appeal of originalism. Jamal Greene attributes its appeal to its simplicity, its catering to populist suspicion of legal elites, and cultural nationalism (2009c). This surely explains some of its appeal to the general public, as originalism is easy to understand and the public is intermittently nationalist and populist. Post and Siegel (2006, 527) suggest that originalism is "so powerfully appealing because conservatives have succeeded in fusing contemporary political concerns with authoritative constitutional narrative" that is "driven by a politics of restoration, which encourages citizens to protect traditional forms of life they fear are threatened."

These motives doubtless underlie some of the public support for originalism. Alternatively, originalism may simply appeal to a "populist taste for simple answers to complex questions" (Berman 2009, 8). One cannot fairly expect the broad general public to appreciate nuances of legal theory. To prevail in the academy and in court, however, originalism needs a stronger basis. Various academic originalists have provided this basis, relying on more robust justifications for originalism.

A stronger case for originalism is simply that reliance on originalism is required for legal decisionmaking. The Constitution, like other legal materials, is a text. When interpreting another legal text, such as a statute, it is typical to use the meanings of its words at the time of its enactment. Many judges look beyond the words of the statute to the legislative history, to attempt to discern the intentions of those who drafted and passed it.

This is considered simple legal fidelity (Solum 2008). The interpretation of any legal material relies on its text. Balkin (2007) argues that fidelity to the Constitution as law must mean fidelity to the words of the text. The words govern. But the meaning of words is impossible to discern outside their "linguistic and social contexts" (Brest 1980, 207). Originalism provides this context. A text is generally interpreted according to the meaning of its words at the time they were expressed. A legal text remains binding until it is repealed or amended. The constitutional text is that of the framing era, as amended. The framers adopted a written constitution, in contrast to England's more amorphous judicially constructed constitution. This was at least in part in furtherance of a desire for stability of interpretation. The drafters believed that the judiciary could not be trusted without a clear governing text (Whittington 1999). The drafters chose their words

carefully, trying to anticipate future circumstances, so that they could last (Gillman 1997).

The change in a word's meaning over time should not alter the interpretation of its earlier meaning. When a law continues in force over time, so does the original meaning of its words. If a nineteenth-century novelist referred to a person as "gay," meaning cheery and pleasant, that character should not now be considered to be attracted to the same sex simply because the meaning of the word has evolved. Similarly, a statute retains its original meaning until it is repealed or amended. The word *counterfeit* once meant authentic, and the word *awful* once meant great, but we would not change the meaning of an old statute because those words have transformed their meaning. James Madison noted that the "meaning of the words" contained in the Constitution might change, but the meaning of the Constitution itself should not (Whittington 1999, 58).

Justice Holmes dissented from this vision when he wrote: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used" (*Town v. Eisner* 1918, 425). Even originalists recognize that the circumstances are relevant to the correct application of a word, but they would maintain that the word keeps its fundamental meaning.

The Constitution refers to guaranteeing every state a "republican" form of government. This is appropriately interpreted, according to the original meaning, to mean representative government, not government by today's Republican Party (Balkin 2007). The constitutional reference to "domestic violence" is not speaking of spousal abuse but of internal insurrection (Solum 2008). There are plenty of other examples of this phenomenon.

Originalism simply calls for the legal text to be interpreted according to its then contemporary meaning, which is a standard approach to legal or other forms of textual analysis. The process of interpretation arguably calls for nothing else. The framers apparently believed that the Constitution "should be construed to have the meaning attributed to it by some group of persons at the time it was drafted and adopted" (Clinton 1987, 1206). James Madison said that the "true meaning" of the Constitution was that "given by the nation at the time of its ratification" (Dewey 1971, 39).

For a leading current originalist, Randy Barnett, the "intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials" (2009, 660). If so, constitutional interpretation becomes a question of fact, not one of indeterminate values. Some originalists would maintain that theirs is "the only way to ensure that the Constitution is really law" (Sunstein 2005, 54). Richard Posner (2000, 591) suggests that the "only good reason for originalism is pragmatic and has to do with wanting to curtail judicial discretion."

This is a "rule of law" justification. Without originalism, we have the rule of men and women, specifically the rule of Supreme Court justices. Strictly speaking, judge-created law does not violate the rule of law. The common law is characterized by such judicial discretion, and it is not generally considered contrary to the rule of law. But Justice Scalia suggests that the discretion of the common law is less lawlike than ruling by more rigid tests and that such discretion is inappropriate in the constitutional context. There is no constitutional or other legal authority for justices to create whatever law they desire.

Ultimately, the case for originalism thus appears to be that of the rule of law (Griffin 2008). The constitutional text is the law. If judges do not follow its meaning, they are promoting a rule of judges rather than a rule of law. Only the original meaning, in this view, produces truly lawful decision-making. Bevier (1996) suggests that nonoriginalism is a corruption of the rule of law itself. The rule of law basis for originalism does not make claims about the normative legitimacy of the law, though. Although rule of law is presumably better than no rule of law, its value depends on the legitimacy of the substantive law that it is enforcing. To strengthen its hand, originalism has turned to democracy as a justification for its constitutional law.

Originalism has been considered necessary for true democracy of popular sovereignty (Whittington 1999). The American people exercised democracy to create a Constitution, and its commands should be given effect. This is the basis for the Constitution's legitimacy (Farber 1989). The Constitution was ratified through a democratic process (though democracy of the time was surely imperfect), and it had no force until this time of ratification. Democracy implies that democratic actions that become the law remain effective until legally repealed. Originalism is said to be the

only means of interpretation that is faithful to what the people democratically agreed on (Whittington 1999). Allowing unelected justices to alter that popularly agreed-on meaning is to make the justices sovereign, not the people.

The Constitution can be altered through a democratic process of constitutional amendment. Amendment is challenged as a democratic process for constitutional change because as few as thirteen states can block such an amendment, no matter how small their relative population might be. While amendment is difficult and requires more than a simple majority, such supermajority requirements may be democratically beneficial (McGinnis & Rappaport 2007). Any other method of alteration of the original meaning arguably undermines democracy because it denies people the democratic right to make rules (such as the requirements for constitutional amendment) that will be applied in the future.

Originalism could be viewed in tension with democracy. It appears to exalt, in some cases, the ideas of those who died hundreds of years ago over current individuals (the "dead hand" problem). There is little theoretical reason to assume that contemporary Americans necessarily consent to all the terms drawn up in the eighteenth century. Richard Posner (1990, 138) argued that to be "ruled by the dead hand of the past is not self-government in any sense." The nature of American constitutional governance sometimes prevents current majorities from effecting their preferences on policies, demanding the difficult process of constitutional amendment for change. Earl Maltz, a defender of originalism, described democracy as "the most popular defense" for the practice but also the "easiest to dismiss" (1987b, 776–777). The Constitution itself has various antimajoritarian aspects, not least the procedures for its own amendment.

Given the acceptance of a Constitution, though, this criticism of originalism is incomplete. In practice, rejecting originalism permits the originally enacted meaning of the Constitution to be altered by some other entity. In today's system, the judiciary, particularly the Supreme Court, decides matters of constitutionality. The Court, though, is not accountable to the electorate but was made independent of the people. Any judicial changes to the original meaning, therefore, lack a democratic imprimatur. Moreover, permitting judicial modification of the Constitution arguably disrupts the separation of powers conceived at the time of ratification. A

set historical meaning with possible amendments could be considered more democratic than one set by judges. This conforms to the belief that "officials charted with *interpreting or enforcing* the law should not usurp the authority of those charged with *making* it" (Bassham 1992, 93).

Perhaps the fundamental appeal of originalism is the fear that "if judges don't follow the original understandings, they will be free to do whatever they want" (Strauss 2008, 973). A central concern of originalism "is that judges be constrained by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless" (Smith 1989, 106). The "best response" to judicial discretion is to "lash judges to the solid mast of history" (Whittington 2004, 599).

Authorizing Supreme Court justices to "do whatever they want" is generally regarded as an undesirable thing. It gives them a governmental power contrary to their role that is difficult to justify. Such authorization appears to create rule by "philosopher-kings" unconstrained by electoral accountability. Moreover, it surely undermines stability and other values of an effective legal system if the justices may alter the content of controlling law at their whims. The prevention of this practice is considered crucial to the rule of law and a central justification for originalism.

From this position, the actual intent of the framers themselves about originalist interpretation is not relevant. The framers might have actively opposed originalism, but that would not refute the contention that the rule of law requires an originalist interpretive practice. It is commonly recognized that the framers' desire that their personal intent be followed does not necessarily dictate our method of interpretation (Bassham 1992). Correspondingly, their desire that their personal intent *not* be followed should not dictate our decisions. If we believe that the rule of law or democracy requires originalism, it scarcely matters that the framers modestly rejected the approach. If the original understanding were unwise or even deemed morally wrong, originalism says that is nonetheless the law, to be applied until it is changed.

A related defense of originalism is that of fairness and neutrality (Maltz 1987). Since the early twentieth century at least, Americans have been somewhat skeptical of the Supreme Court and its motivations. The justices sometimes appeared more as politicians, making rulings driven by their ideological preferences rather than by the law. Because the justices have life

tenure and cannot be held accountable in elections, and because constitutional decisions cannot be overridden by elected officials, Supreme Court decisionmaking has intermittently frustrated many Americans. Judges seemed to have overstepped their proper bounds and assumed inappropriate political power. A modern survey of historical analysis at the Court has suggested that it has checked the excesses of both ideologies (Richards 1997).

Reliance on originalism would professedly control such judicial activism. Justices would defend limits to government power but defend only the rights that the framers identified in the Constitution. New rights would not be established out of penumbras. This view applies only to the Bill of Rights, however. It is plausible that originalism in the interpretation of the Articles could produce more activist decisionmaking, such as holding that the Commerce Clause does not authorize certain federal actions, making them unconstitutional. This potentially could radically alter federal government action.

Even with respect to the Bill of Rights, the Ninth Amendment provides an open-ended text that could encourage an originalist to expand the individual rights protected by the Constitution in a fashion that could be labeled as activist. The argument for restraint commonly presumes that the fundamental content of originalism is in fact restraintist, without providing much support. The better case is that originalism preserves the rule of law, whether activist or restraintist. To the degree that this produces undesirable results, it is for the people to change them through democracy.

Some surely defend originalism for nonneutral grounds, though, believing that it will produce their desired conservative results. In this theory, originalism was not successful because of its objectivity or certainty but because of its purported conservatism. Some viewed liberal jurisprudence as "a form of corruption that has degraded the wisdom and virtue found in the Constitution's original conception" (Levin 2004, 109). Rather than truly defending originalism, though, this position simply uses the theory as a convenient instrument for ideological objectives.

The Reagan administration pushed for originalism specifically to counter the Warren Court's liberal decisions. These decisions were viewed as pursuing a liberal agenda independent of what the Constitution truly dictated. The theory was "politically attractive" because it "implied conservative policy results as opposed to the prior wave of liberal Supreme Court

decisions" (O'Neill 2005, 9). At this time, originalism became a vehicle for the mobilization of conservatives (Post & Siegel 2006). This conservative originalism, though, collapsed back into the case against "judicial activism." The conservative critics objected that the Warren Court had gone too far in protecting rights.

Originalism's early conservative following resulted from a desire for judicial restraint. Raoul Berger, perhaps the ur-originalist, complained that the Court was usurping power by failing to follow the original understanding (1983). Conservatives opposed Warren Court decisions invalidating statutes as judicial activism and contended that originalism would not have justified such decisions. For Ed Meese, "a jurisprudence of original intent was essential to judicial restraint" (Greene 2009b, 680). He "understood originalism as a way to limit the reach of constitutional adjudication" (O'Neill 2005, 157). Originalism, for example, arguably provided no basis for reproductive rights of the sort found in *Roe v. Wade*. According to Rush Limbaugh, the "only antidote" to "judicial activism is the conservative judicial philosophy known as originalism." This is also the originalism of Robert Bork.

Some of the most prominent contemporary originalists, however, reject judicial restraint as an argument for originalism. Earl Maltz (1994) suggested that originalism was not necessarily consistent with more judicial restraint. They may criticize judicial "passivism" for failing to strike down legislation that violates the Constitution (Whittington 1999). Randy Barnett believes that originalism should be used assertively to limit the federal government's legislative actions. For these leading originalists, originalism may be a tool for aggressive judicial activism in order to return the interpretation of the Constitution to its roots. Many of today's originalists commonly believe that the power of the federal government has far outstripped its constitutional bounds.

Reagan-era originalism was motivated in part by the Supreme Court's expanded recognition of individual rights and invalidation of democratic action (O'Neill 2005). Many of today's leading originalists, though, urge more expanded recognition of individual rights and invalidation of democratic action. Randy Barnett, for example, urges greater judicial activism in support of individual liberty, in direct opposition to the originalist philosophies of Bork and Scalia (Barnett 2005). His originalism is said to be