



Conservative Legal Thought in its Current Context

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Today the Supreme Court can fairly be described as a “conservative” court, in the sense that six of its nine justices reflect (to varying degrees) the ideas and instincts of conservative legal thinkers over the past few decades. But what are those ideas and instincts? Before delving into that, it is noteworthy that this is not the first time the Supreme Court has been described—usually by its detractors—as conservative. That is how FDR and others described the Supreme Court in the early years of the New Deal, when the Supreme Court declared a number of major pieces of legislation unconstitutional, leading FDR to threaten to “pack” the Court with new justices.

So too a few decades earlier, amid the Court’s similar rulings against various state-level progressive laws—especially in *Lochner v. New York* (1905), a case involving bakery regulations. Even a century earlier, the Supreme Court’s first great era, under the leadership of the “Great Chief Justice” John Marshall, was denounced by many Jeffersonians as an effort to entrench the Federalists’ political agenda.

Today’s conservative legal movement began as a response to the Warren Court and its aftermath. In the 1960s and 1970s, the Supreme Court’s progressive majority announced a string of decisions striking down various state laws on the basis of constitutional theories far afield from the Constitution’s specific text. These cases, beginning under Chief Justice Earl Warren’s leadership, included *Griswold v. Connecticut* (1965) (on a right to contraceptives), *Roe v. Wade* (1973) (on a right to abortion), and *Miranda v. Arizona* (1966) (on rights of criminal suspects).

The forerunner of modern conservative legal thought was Alexander Bickel, a prominent Yale law professor who rocketed to fame by defending the Court's desegregation decisions in his first book, *The Least Dangerous Branch* (1962), only to become one of the Court's most vociferous critics in later books like *The Supreme Court and the Idea of Progress* (1970).

Bickel was not what we now call an "originalist." Indeed, he was skeptical that judges could easily ascertain the original meaning of the Constitution's words with any meaningful precision. But his writings were soon followed by other conservative legal thinkers who rooted their own arguments more directly in the Constitution's words, such as Justice William Rehnquist and Professor Raoul Berger.

After the US Bicentennial celebrations of 1976, a new wave of conservative legal thinking, rooted in the Founding Fathers' ideas, soon emerged. It could be seen in the writings of law professors (and future judges or justices) such as Antonin Scalia and Robert Bork. It could also be seen in the creation of law student clubs that eventually became the Federalist Society. And President Ronald Reagan's Justice Department under Attorney General Edwin Meese III became a national advocate for the new jurisprudence of founders' "original intent" too.

As Judge Bork and others began to write about original intent in the 1980s, the first wave of scholarly criticism emerged. Some, like Paul Brest in "The Misconceived Quest for the Original Understanding" and Jack N. Rakove in *Original Meanings*, argued that originalism was unworkable. Others, like H. Jefferson Powell in "The Original Understanding of Original

Intent,” argued that the founding generation did not want subsequent eras’ judges to be bound by original intent.

Conservative legal thinkers responded on both grounds. From the late 1980s to the 2010s, their methods became much more precise; their bodies of scholarship became voluminous. This era is best exemplified by Professor Michael W. McConnell’s landmark article, “The Originalist Case for *Brown v. Board of Education*” (1995), which defended *Brown*’s desegregation decision not on its original terms (which were decidedly non-originalist) but with an originalist argument tied directly to the 14th Amendment’s words as originally understood in the 1860s.

But perhaps the most important articles in the early days of modern originalism were Justice Scalia’s essays in the late 1980s, especially “Originalism: The Lesser Evil” (1988) and “The Rule of Law as a Law of Rules” (1989). In these and other essays (and in his judicial opinions), Justice Scalia argued that originalism was the best judicial methodology for a constitutional republic in which judges were not supposed to “legislate from the bench,” as the saying went.

Scalia’s role in the conservative legal movement cannot be overstated—and neither can the eventual success of that movement. Originalism and “textualism,” the extension of originalist methods from the Constitution to statutes, was first prominent among only a small minority of judges and scholars, but now it is far and away the predominant mode of legal analysis. Even nonconservatives generally find themselves framing their legal arguments in terms of the Constitution’s or statutes’ original meanings. As Justice Elena Kagan said not long after

President Barack Obama appointed her to the Court, “I think we’re all textualists now.”¹

The Supreme Court’s recent decisions largely support such a claim. In some cases, such as *District of Columbia v. Heller* (2008), originalism has been used in support of claimed constitutional rights. (In that case, it was claims of an individual’s right to possess handguns under the Second Amendment.) In other cases, such as *Dobbs v. Jackson Women’s Health Organization* (2022) and *Students for Fair Admissions v. Harvard* (2023), originalist analysis resulted in the overturning of old non-originalist precedents. (Those cases involved precedents on abortion and race-based affirmative action, respectively.)

In the past 15 to 20 years, however, some of the most interesting arguments have been among varieties of originalists. Some modern conservatives and libertarians reject the original “judicial restraint” instincts that once were integral to conservative legal thought, urging judges not to err on the side of self-restraint. Other intra-conservative debates reflect new disagreements between conservative scholars, who focus on American cultural and political traditions, and libertarians, who put little or no weight on such considerations.

Finally, given the Supreme Court’s recent shift away from the Warren Court’s version of judicial activism, the Court’s reconsideration of Warren Court precedents has energized intellectual debates about the proper role of judicial precedent itself.

Conservative judges and lawyers have long varied in how they mix their originalism with

stare decisis (deference to precedents). Decades ago, Justices Scalia and Clarence Thomas disagreed in their senses of precedent: Justice Thomas has generally accorded minimal weight to precedent, while Justice Scalia accorded at least somewhat more weight to it. Today all the Court's conservative justices have written at some point to explain their general sense of precedent's role in judicial decision-making. This is itself somewhat ironic, since many of the Warren Court precedents now under scrutiny were written by justices who gave little or no weight to precedent themselves.

In teaching the history of conservative legal thought, it is helpful to pan back to much longer timelines to remind students of how their perceptions of a given judicial methodology might have produced much different political outcomes in different eras. In the early 1900s, during the *Lochner* era, progressives denounced the Court for being judicial activists with far too little judicial restraint. By the 1970s, political conservatives were launching the same attack against the Warren Court and its successors. Today progressives are criticizing the Roberts Court in similar terms. Without oversimplifying each era, educators can teach these historical cycles to help broaden students' horizons and their minds too.

1 Elena Kagan, "The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes," interview by John Manning, Harvard Law School, November 25, 2015, <https://www.youtube.com/watch?v=dpEtszFT0Tg&t=28s>.