

The Growth of Originalism

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The latest episode in the long-running struggle for control of the Constitution, and the political power that goes with it, is playing out in the federal courts in California. The contending philosophies are originalism, which holds that the Constitution should be read as it was originally understood by the framers and ratifiers, and the congeries of cultural and political theories proposed by academics and progressives, but not contemplated by the founders.

The immediate ground of the controversy today is California's Proposition 8, by which nearly 53 percent of the state's voters rejected gay marriage. Although most people would think that the very essence of law is that courts should carry out the understanding of those who voted for a law, the amazing fact is that, until recently, most law schools regarded that view as primitive and not worth discussing. On the Yale faculty of law in the 1960s and 1970s, I was alone in adhering to an originalist outlook. A visiting professor, not himself an originalist, suggested in the faculty lounge that my argument was worth rebuttal. He was told, however, that originalism was *passé* and not worth discussing.

Some of these professors were honest in this view, but others held disguised leftist views, both politically and culturally. Obviously, if there is no firm discipline in constitutional law, no result can be ruled out. The virtue of originalism is not that it delivers firm answers on every topic but that it

rules out the most outrageous decisions. Originalists could never have arrived at the result in *Roe v. Wade* or justified the drive for same-sex marriage.

It is difficult to say whether originalism or one of the alternatives is winning the debate. The answer to such questions is inevitably subjective, but it is clear that originalism has been gaining adherents and may be close to dominance in constitutional scholarship. One reason is the phenomenal success of the Federalist Society, primarily an organization of students with chapters in most law schools. Just as the non-originalists are said to be an uneasy alliance between nihilism and left-wing philosophy, so the federalists tend to be an alliance between Libertarians and conservatives. Also influential is the presence on the Supreme Court of four justices whose primary outlook is originalist.

In the end, however, the ultimate fate of originalism will depend upon the character of judges and professors. They have a constant temptation to yield to the allure of power to do good as they see the good rather than as the political branches to which we have entrusted the care of democracy see it.

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