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Nelson Lund

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## LIVING ORIGINALISM: THE MAGICAL MYSTERY TOUR

By: Nelson Lund\*

Until very recently, same-sex marriage would have been regarded as a contradiction in terms. Today, questioning the merits of this novel institution is treated as rank bigotry, and the extraordinary rapidity of the change has been widely noted. Another recent development, perhaps not unrelated, has been the marriage of originalism and living constitutionalism.

As an academic theory, originalism arose to counter what was seen as lawless adventurism in the Warren and Burger Courts, displayed especially in opinions that invoked the Fourteenth Amendment without a meaningful effort to interpret its text or to show that the decisions had anything to do with the original purpose of the Amendment.<sup>1</sup> As an academic theory, living constitutionalism, or noninterpretivism, arose in defense of these decisions, which were seen as worthy innovations.<sup>2</sup> Advocates on both sides thought the two theories were irreconcilable. Originalists maintained that judges should respect the original meaning of the written Constitution, namely its text, read when necessary in light of its enactors' purposes.<sup>3</sup> Noninterpretivists insisted that the original meaning is often impossible to identify and frequently should not be controlling in any event.

Professor Jack M. Balkin's "living originalism" seeks to eliminate the opposition between these theories, and he is open about his agenda: "The notion that in order for liberals to believe in a living Constitution they have to reject originalism in all of its forms is the biggest canard ever foisted on them."<sup>4</sup> To adapt President Jefferson's

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\* University Professor, George Mason University School of Law.

1. See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–602 (2004).

2. See, e.g., Richard B. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 MICH. L. REV. 782 (1983).

3. Originalists debate how best to identify the purposes of the Constitution's enactors when the text is vague or ambiguous. By referring to original "purposes" in this essay, I mean to leave aside a variety of disputes about whether the focus should be on something called original intent or something called original public meaning, or whether some other term is more apt. My argument here is meant to be independent of the nuances of those debates, without conceding that originalism permits the imputation of purposes that were neither intended nor implied by the words that the enactors enacted.

4. Jack M. Balkin, *How Liberals Can Reclaim the Constitution*, WASH. POST (July 11, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/07/11/conservatives-have-been-winning-the-constitutional-debate-but-liberals-are-about-to-stage-a-comeback/> [<http://perma.cc/D8FB-E9DC>].

In truth, non-originalist liberals have foisted this putative canard on themselves through their efforts to discredit originalism. See, e.g., J. M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911 (1988); Paul Brest,

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famous statement in his First Inaugural Address,<sup>5</sup> Balkin exhorts us to agree that we are all originalists, we are all living constitutionalists. Perhaps he hopes to hasten the day when originalists meet the same fate as the Federalist Party. If so, he has already made substantial progress.

This essay begins with a brief summary of the core features of Balkin's theory. It then shows that one of his most prominent converts has abandoned originalism, mistakenly believing that Balkin has shown what originalism truly is.

#### LIVING ORIGINALISM IN BRIEF

As both its friends and adversaries have pointed out, originalism is an imperfect interpretive theory, even apart from its potential to be deployed incompetently or dishonestly. The original meaning of the Constitution is unclear in many respects, and some provisions have given rise to endlessly inconclusive debates. In addition, the original meaning of Article III's "judicial Power" entailed the somewhat flexible practice of *stare decisis*.<sup>6</sup> When mistaken or very dubious precedents began to accumulate, courts inevitably had to choose which to follow and which to distinguish or overrule. The Constitution provides no clear and precise rule for making these choices. Durable discrepancies between judicial doctrine and original meaning thus were virtually inevitable. Moreover, many choices involved in the interpretation of the text, and in applying *stare decisis*, were bound to reflect judgments more political than legal in nature.

The theory of the living constitution, or noninterpretivism, has its own weaknesses. The judicial behavior it approves often looks like raw political activism that amounts to "legislating from the bench." That may be attractive when the Constitution is changed in ways that noninterpretivists find appealing. But what happens when courts invent new rights or powers that the proponents of this theory dislike, or begin to cut back on non-originalist precedents that they like? Noninterpretivists have little choice except to: (1) selectively appeal to originalism; (2) accuse the courts of disrespect for precedents that were themselves the result of disrespect for precedent; or (3) make thinly veiled political attacks on the judges.

Now comes Jack Balkin, who offers to reconcile the parties and establish a durable marriage in which disagreements will be aired within

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*The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

5. "We are all Republicans, we are all Federalists." Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), [http://avalon.law.yale.edu/19th\\_century/jefinau1.asp](http://avalon.law.yale.edu/19th_century/jefinau1.asp) [<http://perma.cc/78AB-ETVQ>].

6. See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 809–25 (2009).

the framework of a common enterprise. Stated most concisely, he agrees with originalists that the semantic content of the Constitution's words (i.e., the linguistic meaning of those words in English) must be respected. With that one limitation, virtually all provisions of the Constitution can shift and develop in response to policy considerations of various kinds. In his view, this is permissible on originalist grounds because the text does not expressly forbid it and because the Constitution is above all a plan of government meant to operate indefinitely.<sup>7</sup> Thus, originalism *is* living constitutionalism.<sup>8</sup>

#### INTERPRETATION AND CONSTRUCTION

Consistent with a recently popular strain of constitutional theorizing, Balkin distinguishes between “interpretation” and “construction.”<sup>9</sup> At first, this may seem quite odd. The verbs “interpret” and “construe” are synonyms, and “construction” is the substantive form of “construe.” In the law, interpreting or construing a provision is not limited to identifying the bare semantic content of its words. It includes decisions about which one of multiple possible linguistic meanings most likely reflects what the lawgiver meant, especially when applying a legal provision to a particular set of facts. That meaning is what genuine originalism seeks, and it is also what courts almost always purport to find except when they regard themselves as confined by precedent.

So what's going on here? Happily for Balkin's project, “construction” is also the substantive form of “construct,” and constructing a provision suggests a great deal more latitude than construing it does. Accordingly, Balkin defines interpretation very narrowly as the ascertainment of the semantic content of words.<sup>10</sup> Constructing is the remainder of what used to be called interpreting or construing. And in construction, almost anything goes. The only real constraint, in Balkin's view, is that a construction must be one that the words of the text “can bear.”<sup>11</sup> So if a provision is vague or ambiguous, the best

7. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 21–34 (2011).

8. Balkin rightly notes that living constitutionalism mostly takes place in the political branches. See, e.g., *id.* at 283. I focus in this essay on the normative principles of judicial decision-making, without addressing questions raised by positive political science, such as why judges, legislators, and other officials behave as they in fact do behave.

9. For somewhat different discussions of the distinction, see KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 5–14 (1999); Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL'Y* 65 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013).

10. See BALKIN, *LIVING ORIGINALISM*, *supra* note 7, at 12–13.

11. *Id.* at 254, 267 (quoting Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 *CONST. COMMENT.* 383, 392 (2007)). Although Balkin counsels constructors to consult history, this is little more than a search for rhetorical ways to connect “our present political aspirations and commit-

construction will be what best fits the constructor's vision of what will give us the best Constitution, so long as it is within the realm of linguistic possibility.

The Constitution may contain a few provisions whose meaning can be identified through what Balkin calls interpretation, such as the minimum age of the President and the rules for representation in the Congress.<sup>12</sup> But Balkin himself subtly suggests that there may be no provisions absolutely immune from being constructed into something everyone today would regard as patently absurd. "Some kinds of changes—like the abolition of the Electoral College or altering the length of the president's term of office—cannot *easily* be achieved through construction; they require amendment."<sup>13</sup> Difficult it may be without a formal amendment, but a sufficiently clever constructor is likely to arise if urgent circumstances seem to demand the desired result.<sup>14</sup>

#### ORIGINAL MEANING AND ORIGINAL EXPECTATIONS

In Balkin's view, traditional originalism mistakenly conflates the original meaning of a provision with the way its enactors expected it to be applied.<sup>15</sup> Originalists, of course, need not reject every unforeseen application of the Constitution. Nobody maintains that the Navy must use only wooden sailing ships or that the Free Speech Clause does not apply to writings posted on the Internet. And sometimes the text of the Constitution may have implications that few of its enactors foresaw.<sup>16</sup> Genuine originalism, however, requires that the purpose of

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ments with the aspirations and commitments of previous generations, including not only the adopting generation but all that succeed it." *Id.* at 268; *see also id.* at 229 (asserting that history provides a resource, not a command).

12. *Id.* at 14, 230. As we shall see later in this essay, however, a living originalist could construct the Twenty-Sixth Amendment in a way that reduces the minimum age of the President from thirty-five to eighteen.

13. *Id.* at 282–83 (emphasis added).

14. Perhaps Balkin only means to say that an amendment would be required because the *easy* path of construction is foreclosed by the semantic meaning of the Constitution's words. If so, he underestimates the power of his own theory. The words of the Fourteenth Amendment, for example, can easily be constructed so as to abolish the Electoral College because of its unequal apportionment.

15. *See, e.g.,* BALKIN, *LIVING ORIGINALISM*, *supra* note 7, at 6–12.

16. One possible example involves Article III's grant of jurisdiction over cases "between a State and Citizens of another State." U.S. CONST. art. III, § 2. *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793), held that this provision authorized a suit by a citizen of South Carolina against the state of Georgia. That conclusion was consistent with the text and with considerable extrinsic evidence, although there is also evidence pointing in the other direction. *See, e.g.,* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, 16–20 (1985). The swift repudiation of *Chisholm* in the Eleventh Amendment does not by itself imply that the Court was mistaken. Nor does that repudiation imply that later Courts correctly expanded sovereign immunity well beyond what the text of the Eleventh Amendment requires. *See, e.g.,* *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890).

the provision *as it was originally understood* should constrain its application. If the enactors meant to leave specific laws or practices unaffected, a contradictory purpose may not be imputed to vague or ambiguous texts. Whatever difficulties and uncertainties may attend the originalist interpretive task—and there are many—newly attractive purposes may not be allowed to distort or displace those that the enactors sought to effect. The original purposes, moreover, include the limits on the extent to which the enactors meant to advance those purposes.

When discussing specific constitutional provisions, Balkin often creates a simulacrum of originalism by appealing to evidence of what the enactors' purposes actually were. His theory, however, does not require any such evidence, let alone the best evidence. The distinction he draws between interpretation and construction allows him to impute to the text any purpose he favors, so long as the words “can bear” the meaning he chooses.<sup>17</sup> One example is Balkin's argument that the original meaning of the Fourteenth Amendment protects a right to abortion.<sup>18</sup>

Abortion restrictions were commonplace in 1868, and Balkin offers no evidence that the words of the Fourteenth Amendment would have been understood to make those restrictions unconstitutional. Instead, he invokes selected passages from the legislative history to support his contention that the Fourteenth Amendment stands for a general principle of “equal citizenship.”<sup>19</sup> With this elastic principle in hand, Balkin argues that a right to abortion is necessary to vindicate women's right to equal citizenship.<sup>20</sup> The scope of that right turns out to be almost identical to the one generated through pure living constitutionalism in the *Roe/Casey* line of decisions.

Balkin's method can even more easily be used to establish a constitutional right not to be aborted. Unborn children are a vulnerable and politically powerless minority. Allowing them to be summarily killed deprives them of the “equal protection of the laws” in a much more obvious way than abortion restrictions deprive women (an electoral majority) of equal citizenship. It may be true, as Balkin maintains, that the words of the Fourteenth Amendment would not have been thought applicable to the unborn in 1868. So what? It is no less true that those words would not have been thought to create a right to abortion.

Balkin openly acknowledges that the purposes of the Fourteenth Amendment need not be those of its enactors: “[I]t follows from my [i.e., Balkin's] arguments that there could be other constitutional prin-

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17. See BALKIN, *LIVING ORIGINALISM*, *supra* note 7, at 254, 267.

18. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

19. See *id.* at 313–15.

20. See *id.* at 322–25.

ciples [i.e., other than “equal citizenship”] embodied by the Equal Protection Clause that no particular person living in 1868 intended but that we come to recognize through our country’s historical experience.”<sup>21</sup> The importance of this statement should not be underestimated, for it rejects an indispensable element of originalism. Now, just as the original expected applications of a constitutional provision do not limit its meaning, neither do the purposes of its enactors. *Nothing* limits the Constitution’s ongoing “construction” except the outer bounds of all the possible linguistic meanings of its words. Any meaning those words “can bear” suffices.

All laws, moreover, are unequal in the sense that they treat different classes of people differently—if nothing else, they have different effects on different people.<sup>22</sup> Thus, one can attack *any* law on the ground that it violates some imputed meaning that the words of the Equal Protection Clause “can bear.” As the abortion example shows, once one is free to impute to the Constitution purposes that conflict with those of its enactors, what is left of originalism is only the grin of the Cheshire Cat.

#### SEX DISCRIMINATION AND ORIGINALISM

As in his abortion argument, Balkin frequently finds legislative history that he can invoke in defense of whatever purpose he chooses to impute to the Constitution. This is particularly easy to do when constructing the Fourteenth Amendment. Just as the words of Section One “can bear” almost any meaning one wants to give them, its legislative history contains an extraordinary number of conflicting statements about its purpose, many of which are nearly as ambiguous or vague as the constitutional text itself.

Not surprisingly, Balkin’s own constructions consistently—indeed without exception so far as I have noticed—produce results agreeable to the dominant political views of the legal academy.<sup>23</sup> What is somewhat surprising is that Balkin’s theory has been widely accepted in the academy as a form of originalism.<sup>24</sup> More surprisingly, Balkin even seems to be persuading originalists themselves to relinquish the key principle that the original purposes of the Constitution constrain the interpretation or construction of its language.

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21. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 498 (2007).

22. Cf. BALKIN, *LIVING ORIGINALISM*, *supra* note 7, at 233–34 (advocating the construction of an equal protection disparate-impact doctrine).

23. Balkin does acknowledge that his theory permits the construction of some sort of Second Amendment private right to keep and bear arms, but he shrewdly leaves open the scope of any such right under what he would consider the “best construction.” *Id.* at 207, 271.

24. See, e.g., James E. Fleming, *The Inclusiveness of the New Originalism*, 82 FORDHAM L. REV. 433 (2013).

A striking example can be found in the writings of Professor Steven G. Calabresi, who is one of Balkin's converts.<sup>25</sup> A founder of the Federalist Society, Calabresi clerked for Judge Robert H. Bork and Justice Antonin Scalia. He was a special assistant to Attorney General Edwin Meese III and a speechwriter for Vice President Dan Quayle.<sup>26</sup> He went on to become one of the most frequently cited academic originalists of his generation.<sup>27</sup> If Calabresi now adheres to Balkin's theory, wedding bells are ringing pretty loudly for the union of originalism and living constitutionalism.

Consider Calabresi's discovery that the original meaning of the Fourteenth Amendment forbids discrimination based on sex.<sup>28</sup> This claim contradicted a near universal consensus among originalists and non-originalists alike. Calabresi acknowledges that both the text and the legislative history of the Fourteenth Amendment strongly indicate that it was not meant to invalidate laws treating men and women differently. In his view, however, this is merely an example of what he and Balkin call irrelevant "expected applications." The purpose of the Fourteenth Amendment was to outlaw "caste systems," and those who enacted the Amendment did not realize that women were an oppressed caste. Their mistake arose because they thought that women are not fitted by nature to be treated like men, but "[w]e now know more about women's capabilities than the Fourteenth Amendment's Framers knew."<sup>29</sup>

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25. See, e.g., Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009).

26. For additional biographical information, see Steven G. Calabresi & Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on Ollman v. Evans*, 80 U. CHI. L. REV. DIALOGUE 155, 159 (2013); Steven G. Calabresi & Justin Braga, *The Jurisprudence of Justice Antonin Scalia: A Response to Professor Bruce Allen Murphy and Professor Justin Driver* 2, 23, 25 (Nw. Law & Econ. Research Paper No. 15-05; Nw. Public Law Research Paper No. 15-10) (copy downloaded Feb. 28, 2015, on file with the *Texas A&M Law Review*), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2569336](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569336) [<http://perma.cc/9BP8-ZKES>].

27. For examples of Calabresi's pre-conversion views, see Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1085 (2005) ("There is simply no way to argue that the framers of the Fourteenth Amendment would have understood sodomy or abortion as a privilege or immunity."); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 312-13 (2005) (presenting "an argument as to why the Supreme Court ought to follow the text of the Constitution, as originally understood, rather than its own precedents, where there is clear conflict between the two" (emphasis added)); Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097 (2004) (arguing that unenumerated rights protected by the Fourteenth Amendment are limited to those that are deeply rooted in this nation's history and tradition, and concluding that there is no constitutional basis for a right to sodomy).

28. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

29. *Id.* at 9.



To the extent that Calabresi is opining that the opinions of the framers about the appropriate role of women in a healthy social order were misguided, this is typical noninterpretivism or living constitutionalism. To the extent that Calabresi thinks those framers were *factually* mistaken about women's capabilities, he is himself on very shaky factual grounds. The men who devised the old rules of coverture, for example, could not have thought that getting married somehow deprives women of the physical or mental capacity to own property or form contracts.

Nevertheless, Calabresi has a separate and seemingly more originalist argument. He begins by noting, quite correctly, that the Nineteenth Amendment nullified the one form of sex discrimination approved by the text of the Fourteenth Amendment.<sup>30</sup> Next, he claims that conferring the political right to vote on any group was understood to confer all the civil rights that are protected by Section One of the Fourteenth Amendment: “[P]olitical rights exist at the apex of a rights hierarchy, and a guarantee that they will not be denied on a particular basis creates a presumption that denying civil rights on that basis violates the Fourteenth Amendment.”<sup>31</sup> This argument, like some of Balkin's constructions, formally resembles originalism. Substantively, however, it does not.

First, Calabresi provides no evidence of a consensus that conferring the franchise on a group automatically carries with it all the civil rights protected by the Fourteenth Amendment. The enactors of the Nineteenth Amendment had every reason to expect that women's civil rights would expand as a result of the voting power they were given by its terms. This is quite different from *constitutionalizing* that expansion.

Second, from early times many states granted the franchise to aliens. This class is not protected by the Privileges or Immunities Clause, which Calabresi takes as the primary originalist source of protection for civil rights. He dismisses the relevance of this fact on the ground that jurisdictions that gave aliens the franchise “generally” also protected their civil rights.<sup>32</sup> It is hardly surprising that they would do so, but it does not follow that the one automatically implies the other. Even today, felons may vote in many jurisdictions but they do not enjoy the full range of civil rights.<sup>33</sup>

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30. See U.S. CONST. amend. XIV, § 2 (penalizing states that denied the franchise in federal elections to male inhabitants twenty-one years of age or older).

31. Calabresi & Rickert, *supra* note 28, at 76.

32. *Id.* at 83.

33. Felons, for example, are forbidden to possess firearms. 18 U.S.C. § 922(g)(1) (2013). As it happens, the Supreme Court has held that the right to keep and bear arms is protected by the Fourteenth Amendment and has also referred approvingly to firearms disabilities imposed on felons. *McDonald v. City of Chicago*, 561 U.S. 742, 786, 791 (2010).

Third, Calabresi's formally originalist argument about the Nineteenth Amendment implies that the Twenty-Sixth Amendment grants the full range of political and civil rights to everyone who is at least eighteen years old, which means that it altered the constitutional age qualifications for various federal offices.<sup>34</sup> He tries to avoid this conclusion by saying that "age is undeniably different from race and sex."<sup>35</sup> Well, sex is also undeniably different from race. If the Nineteenth Amendment automatically declares the differences irrelevant with respect to the civil rights protected by the Fourteenth Amendment, why does the Twenty-Sixth Amendment not do exactly the same thing with respect to age? Calabresi's answer is that age is different in ways that *he* considers significant, just as the enactors of the Fourteenth and Nineteenth Amendments thought sex was different from race in ways *they* thought significant. It is hard to tell whether Calabresi has lapsed into pure living constitutionalism or into what he regards as the mistake of confusing expected applications with original meaning.<sup>36</sup> But it is even harder to see a third alternative.

We are all guilty of lapses, and perhaps Calabresi inadvertently confused the appearance of originalism with its substance in making his Nineteenth Amendment argument. It turns out, however, that he has unmistakably abandoned originalism, perhaps unknowingly.

#### CONSTRUCTING NEW FORMS OF SEX DISCRIMINATION

Stated most concisely, Calabresi concludes that "[t]he Nineteenth Amendment, read together with the Fourteenth Amendment, provides a legitimate basis for striking down almost all sex-discrimination laws."<sup>37</sup> The use of the word "almost" here reminds us that he had spoken earlier of a "presumption" that particular forms of discrimination violate the Fourteenth Amendment.<sup>38</sup> What are the exceptions, we wonder, and how can the presumption be overcome?

Calabresi identifies one exception, namely laws against abortion.<sup>39</sup> Such laws obviously discriminate against women, the only class of people who can become pregnant. One can easily show that the Fourteenth and Nineteenth Amendments, as their texts and purposes were understood by the enactors, do not imply abortion rights. But that would involve what Calabresi thinks is a mistaken reliance on "original expectations."

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34. See Calabresi & Rickert, *supra* note 28, at 76–77 (asserting that the right to vote implies the right to hold political offices).

35. *Id.* at 98.

36. See *id.* The differences he identifies between age and race or sex may be relevant to Calabresi's pure living constitutionalist argument about "castes," but they are not relevant to his formally originalist argument about the Nineteenth Amendment.

37. *Id.* at 99.

38. *Id.* at 76 (quoted *supra* at text accompanying note 31).

39. *Id.* at 99.

Accordingly, he vaguely suggests that it is unclear when human life begins, with the apparent implication that the Constitution leaves abortion regulations to the discretion of legislatures.<sup>40</sup> But one could say much the same about many other laws that discriminate on the basis of sex. It is unclear whether there are good reasons for discriminating against men in child custody disputes, or in setting minimum drinking ages. It is also unclear whether there are good reasons for ignoring actuarial realities in setting social security benefits, or for ignoring physical differences between the sexes in setting rules for military service. The examples could be multiplied, and it is not an *originalist* answer to say, as Calabresi says in general about the capabilities of women, that “we” know more than the enactors of the Fourteenth Amendment knew. Like the rest of us, Calabresi has opinions that do not constitute knowledge. And once one assumes that the original purpose of a constitutional provision can be set aside because of what “we” merely believe, even the semblance of originalism will fade away.<sup>41</sup>

Calabresi might respond that drawing lines between permissible and impermissible forms of discrimination is unavoidable under any anti-discrimination rule. Judges and academic originalists therefore just have to do the best they can in applying such a rule to specific factual situations. Because all laws discriminate, that is obviously a valid point. But it cannot imply that the expectations of the enactors about applications that they would have *rejected* are irrelevant. Once one accepts that proposition, originalism is gone.

At first, Calabresi sought to keep himself within the confines of originalism by declaring that a constitutional amendment is a necessary precondition for recognizing that a previously unrecognized “caste” gets all the civil rights protected by the Fourteenth Amendment.<sup>42</sup> That implies that those who desire to enter into same-sex marriages will not have a constitutional right to do so until the Constitution is amended.

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40. *Id.* at 99–100.

41. It is fading before our eyes in Calabresi’s scholarship. See Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on the Tempting of America*, 13 *AVE MARIA L. REV.* 47, 55 (2015) (“Maybe a better case [than the one in Justice Douglas’s *Griswold* opinion] can be made for the outcomes in *Griswold*, *Eisenstadt*, and *Roe* relying on the Privileges or Immunities Clause, which should be disinterred.”).

42. See Calabresi & Rickert, *supra* note 28, at 97 (“[A] definitive showing that a law relegates a group to caste status—and is therefore a violation of Section One—is not easy to make and . . . ought *only* to be made where there is an Article V consensus of three-quarters of the states.” (emphasis added)). Elsewhere, Calabresi distinguishes between “a constitutional amendment” and “an Article V consensus of three-fourths of the states that something that used to be allowed has now come to be seen as a form of caste-based discrimination.” Calabresi & Fine, *supra* note 25, at 694. So much for the text of Article V.

Astoundingly, however, Calabresi now maintains that sexual orientation discrimination is a creature of caste and “that history and the original meaning of the Fourteenth Amendment *ineluctably* lead” to the conclusion that freedom to marry anyone without regard to their sex is guaranteed by the Constitution.<sup>43</sup> So much for his previous position on the need for a new constitutional amendment.<sup>44</sup>

In support of his supposedly ineluctable conclusion, Calabresi begins with a very long list of quotations demonstrating that “[t]he Ark [sic] of American history has egalitarian roots that go back to Seventeenth Century England and New England.”<sup>45</sup> No one could deny that equality has been an important concept in American history and law. But neither has any sane person ever maintained that every kind of equality is either desirable or possible, let alone required by law. His challenge is therefore to show that the Fourteenth Amendment requires the particular kind of equality achieved by legalizing same-sex marriage.

Calabresi’s “ineluctable” logic goes like this: Laws discriminating on the basis of sex are unconstitutional (as he argued in *Originalism and Sex Discrimination*<sup>46</sup>) and anti-miscegenation laws are unconstitutional (as he argued in a subsequent article<sup>47</sup>); ergo, traditional marriage laws are unconstitutional: “Same sex marriage laws allow a man to marry a woman but not another man. This is, again as a formal matter [i.e., as in the interracial marriage context], sex discrimination plain and simple.”<sup>48</sup>

This argument is a play on words, plain and simple. As a *formal* matter, traditional marriage laws do not discriminate against either men or women.<sup>49</sup> And as a *formal* matter, Jim Crow anti-miscegenation laws were not racially discriminatory. That is why a unanimous Supreme Court initially upheld those Jim Crow laws against an equal protection challenge, saying that “the offense against which this [stat-

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43. Steven G. Calabresi & Hannah Begley, *Originalism and Same Sex Marriage* 26–27 (Nw. Public Law Research Paper No. 14-51) (emphasis added) (copy downloaded Feb. 24, 2015, on file with the *Texas A&M Law Review*), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2509443](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509443) [<http://perma.cc/4SNS-HZW5>]. This essay first appeared on SSRN in October 2014, with an indication that it would not be published elsewhere. My citations refer to a revised version downloaded on February 24, 2015. Both versions are on file with the *Texas A&M Law Review*.

44. So much as well for Calabresi’s previous position on the constitutionality of anti-sodomy laws. See sources cited *supra* note 27.

45. Calabresi & Begley, *supra* note 43, at 23.

46. Calabresi & Rickert, *supra* note 28.

47. See Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393.

48. Calabresi & Begley, *supra* note 43, at 24.

49. Nor do these laws discriminate against homosexuals as a *formal* matter. Like heterosexuals, these individuals are free to marry a person of the opposite sex, and many have done so.

ute] is aimed cannot be committed without involving the persons of both races in the same punishment.”<sup>50</sup>

There is a sound originalist argument that anti-miscegenation laws are unconstitutional: *substantively* they were aimed at frustrating the one unquestioned purpose of the Fourteenth Amendment. That purpose was to help dismantle the system of racial oppression enforced by the Black Codes and later by Jim Crow. It is because of their role in maintaining this genuine caste system that these laws violated the Constitution. The main elements of the argument can be found in Calabresi’s article on interracial marriage.<sup>51</sup> But that brings us right back to the irrefutable proposition that the original purposes of the Fourteenth Amendment did not include the dismantling of whatever metaphorical caste system people in the twenty-first century may believe homosexuals—and perhaps other discrete classes—have been subjected to.<sup>52</sup> If Calabresi no longer thinks that a constitutional amendment is required to advance such newly popular purposes, he can construct the Fourteenth Amendment into whatever he wants it to be.

Could anything persuade Calabresi to recognize the constitutionality of traditional marriage laws? Apparently not: “[W]e have yet to hear an exceedingly persuasive argument which will survive skeptical scrutiny as to why gay marriage is more threatening to heterosexual marriage than is the current legal regime which allows for gay and heterosexual promiscuity, serial monogamy, polygamy, and easy, no-fault divorce.”<sup>53</sup> Calabresi elsewhere endorses laws against polygamy and incest because he personally thinks they are “just” and for “the general good of the whole,” though he now opposes criminal liability for polygamy because he believes that enforcement would be “arbitrary and capricious.”<sup>54</sup> These are declarations, not arguments. Using his own method of constructing a right to same-sex marriage, it would be child’s play to construct the Fourteenth Amendment into a shield for polygamy, prostitution, incest (at least among adults), polyamorous marriages, and a variety of other unorthodox sexual relation-

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50. *Pace v. Alabama*, 106 U.S. 583, 585 (1883).

51. Bizarrely, the article purports to reject “the use of *any* legislative history as a tool in statutory or constitutional interpretation” because it is “the semantic original public meaning of the enacted texts that should govern.” Calabresi & Matthews, *supra* note 47, at 1395, 1398 (emphasis added). If you can’t imagine how the semantic meaning of the Constitution’s words could possibly dictate the conclusion that anti-miscegenation laws are unconstitutional, you’re right. In fact, Calabresi’s article relies almost entirely on the legislative history of the Fourteenth Amendment.

52. Contrary to Calabresi’s fanciful suggestion, Calabresi & Begley, *supra* note 43, at 25–26, traditional marriage laws do not create a hereditary and oppressive ruling class like the examples mentioned in the legislative history of the Fourteenth Amendment, such as the Black Codes, European feudalism, and the Hindu castes.

53. *Id.* at 24–25. Until now, I had not heard that polygamy has already been legalized.

54. Calabresi & Matthews, *supra* note 47, at 1421; Calabresi & Begley, *supra* note 43, at 25.

ships. Not to mention the thousands of other laws that many people consider oppressively discriminatory and for which they have yet to hear what *they* consider “an exceedingly persuasive argument.” Declaring oneself unpersuaded by other people’s views about justice and the common good is a familiar form of political discourse, but it is not originalism.

Steven Calabresi has been fully liberated from originalism, and this new birth of freedom must be very enchanting. One might even celebrate Jack Balkin’s amazing success as a matchmaker by saying that originalism wins when everyone wants to speak its language. As one originalist puts it, “I would rather be co-opted than mocked.”<sup>55</sup> Perhaps a *living* originalist should be contrasted with losers who have been mocked and ostracized into social death. Whatever one’s reasons for accepting Balkin’s proposal to marry originalism and living constitutionalism, doing so leaves originalism itself in a condition akin to the legal death that married women experienced under the old rules of coverture. Quite a victory.

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55. Michael Ramsey, *More from Ed Whelan on Originalism and Same-Sex Marriage*, THE ORIGINALISM BLOG (Feb. 2, 2015, 10:18 PM), <http://originalismblog.typepad.com/the-originalism-blog/2015/02/more-from-ed-whelan-on-originalism-and-same-sex-marriagemichael-ramsey.html> [<http://perma.cc/EJT7-3JCM>].