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See Also

Response

Originalism at the Right Time?

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I. Introduction

In *Originalism and Sex Discrimination*, Steven G. Calabresi and Julia T. Rickert make an unconventional claim—that the Fourteenth Amendment, as it was originally understood, prevents the government from enforcing laws that discriminate on the basis of sex.[1] This argument seems to conflict with the views of Justice Scalia, the Prometheus of Originalism, who has said that "[n]obody thought [the Fourteenth Amendment] was directed against sex discrimination"[2] and Justice Ginsburg, the sage of modern-day gender equality, who wrote that "departing radically from the original understanding" of the Fourteenth Amendment is necessary to end classifications based on gender.[3] Calabresi and Rickert find that Justices Scalia and Ginsburg, and just about everyone else, "have failed to recognize two demonstrable things: first, that Section One of the Fourteenth Amendment was from its inception a ban on all systems of caste; and second,

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1. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEXAS L. REV. 1, 11 (2011).

2. Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME.COM (Sept. 22, 2010), http://www.time.com/time/nation/article/0,8599,2020667,00.html.

3. *See* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161 (arguing that a radical departure is required to tie the Equal Protection Clause to gender equality).

that the adoption of the Nineteenth Amendment in 1920 affected how we should read the Fourteenth Amendment's equality guarantee."[4]

In this Response, I will focus on the second contention only. I will assume for the purposes of my analysis that Calabresi and Rickert's historical analysis of the Fourteenth Amendment's "anticaste principle" is correct. Accordingly, I focus my attention on the latter, and in my estimation, more controversial claim: that the adoption of the Nineteenth Amendment in 1920—fifty-two years after the ratification of the Fourteenth Amendment—should affect the way the Fourteenth Amendment's equality guarantee was *originally* understood.

It is incontrovertible that subsequent amendments to the Constitution affect earlier provisions. For example, the Fourteenth Amendment placed limitations on Congress's ability to abrogate state sovereign immunity.[5] Also, to argue that the Nineteenth Amendment modifies the Fourteenth Amendment's limitation of the franchise to men is plain from the text.[6] To contend, as does Reva Siegel, that the Nineteenth Amendment represented a repudiation of married women's legal subordination to their husbands and contributed to a popular social movement toward gender equality[7] has normative appeal as a matter of popular constitutionalism. But, to argue as Calabresi and Rickert do, that the adoption of the Nineteenth Amendment should impact the original understanding of the Fourteenth Amendment, strikes me as somewhat anachronistic. Is this *originalism at the right time*?

I first briefly describe Calabresi and Rickert's originalist methodology. Second, I focus on their bifurcation of the fixed semantic content of the text

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4. Calabresi & Rickert, *supra* note 1, at 2 (footnote omitted). Calabresi made this argument in a much less well-developed format elsewhere. Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 694 (2009) ("When the Fourteenth Amendment is read holistically together with the Nineteenth Amendment, it is best understood as condemning most forms of sex discrimination as being class-based laws. It follows from this that no further extensions of the equality command of the Fourteenth Amendment beyond the prohibition of sex discrimination ought to be made unless a constitutional amendment has been passed or at least unless there is 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.").

5. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) ("[T]hrough the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.").

6. The text of Section Two of the Fourteenth Amendment only protects the right of men—and not women—to vote. U.S. CONST. amend. XIV, § 2 ("But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to *any of the male inhabitants* of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such *male citizens* shall bear to the whole number of male citizens twenty-one years of age in such State.") (emphasis added).

7. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 991–93 (2002).

of the Fourteenth Amendment and the fluid factual predicates underlying these provisions. Third, I query whether their approach constitutes originalism at the right time. Fourth, I compare Calabresi and Rickert's methodology to another, less conventional take on originalism—Jack Balkin's *Living Originalism*—and note the strong similarities. I close with an assessment of the present-day state of originalism and query what it means to be an originalist when "we are all originalists."[8]

II. Originalist Methodology

It is helpful first to sketch out Calabresi and Rickert's originalist road map. I will omit any treatment of their copious historical references to support their assertion that the text of the Fourteenth Amendment embodies an anticaste principle, as I have assumed for purposes of my analysis that they are accurate. First, the authors posit that their "thesis starts from the premise that originalists ought to begin and end all analysis with the original public meaning of constitutional texts."[9] Second, the text of the Fourteenth Amendment, as originally understood, "forb[ade] class-based legislation and any law that create[d] a system of caste."[10] Third, this "anticaste" original understanding was premised on the (now universally-acknowledged-to-be-mistaken) belief held by many of the Framers of the Fourteenth Amendment that "women were inherently unequal to men."[11]

Fourth—and this is the key step—"we also are not bound by [the Framers'] unenacted factual beliefs about the capabilities of women [in 1868]."[12] In other words, the text of "[l]aws are to be applied to known facts,"[13] not to the personal opinions of framers of the law. Additionally, we are not bound by the original expected application of enactors.[14]

Fifth, the underlying factual premise that many of the ratifiers of the Fourteenth Amendment held—that "women were inherently unequal to men"[15]—is mistaken. The falsity of this premise was constitutionalized by the Nineteenth Amendment, which definitively rejected this flawed rationale: "giving women the right to vote is a constitutional repudiation of the mistaken facts that the Framers of the Fourteenth Amendment relied upon

8. During her confirmation hearing, then-Solicitor General Elena Kagan remarked that "we are all originalists." *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) [hereinafter *Kagan Hearing*].

9. Calabresi & Rickert, *supra* note 1, at 4.

10. *Id.*

11. For a discussion of this belief and its absurdity, see *id*. at 52–53.

12. *Id.* at 9.

13. *Id.*

14. "[A]lthough the Framers' original expected applications of the constitutional text are worth knowing, they are not the last word on the Fourteenth Amendment's reach." *Id.* at 7.

15. *Id.* at 52.

when they formed their original expectation that Section One would not alter the legal condition of women."[16]

Sixth, if women now had the quintessential political right to vote—at the "apex of the hierarchy of rights"—they would necessarily possess the full extent of civil rights.[17] The authors argue that it would be "implausible to read the Fourteenth Amendment's equality guarantee as inapplicable to women, because a guarantee of political rights implicitly guarantees full civil rights."[18] In others words, the *greater* right of voting must include the *lesser* panoply of civil rights (and to be free from gender discrimination). Seventh, by synthesizing the Fourteenth and Nineteenth Amendments, the authors conclude that "[t]he Nineteenth Amendment . . . implicitly changed how the Fourteenth Amendment treats sex classifications" as a matter of original understanding.[19]

This reasoning places a new spin on "new originalism": since we are not bound by the factual premises of the enactors—distinguished from the enactor's original expected application—when such facts change, the original understanding of the Constitution also changes.

III. Text and Facts

The most important, and most underexplained, step in their methodology is the fourth. Calabresi and Rickert bifurcate the Fourteenth Amendment into two aspects: the text (an anticaste principle, assuming that one can be derived from the text) and the facts that give meaning to that text (whether gender-discriminatory laws create a caste). The former is fixed in time, the latter is not.

Calabresi and Rickert note that legislators today are not bound by the factual beliefs of the Framers about women's capabilities, and law is applied to known facts.[20] They remark that "[t]his should be uncontroversial."[21] They offer a hypothetical to illustrate this principle:

> [T]he legal definition of murder requires intent to kill, and if someone were to cause a deadly car accident while experiencing an entirely unexpected seizure, that person is not guilty of murder even if the framers of the law prohibiting murder happened to believe that seizures are a symptom of murderous intent.[22]

16. *Id.* at 12.

17. *See id.* at 11–12 (positing that provision of the right to vote to women would make it implausible to "deny them equal civil rights with men").

18. *Id.* at 67. This is akin to the statutory interpretation canon against absurdity.

19. *Id.* at 66.

20. *Id.* at 9.

21. *Id.* at 9 n.40.

22. *Id.*

This is not controversial. But it is also not an originalist argument. This approach sounds in the common law—a fluid jurisprudence characterized by its livingness.

Take, for example, another common-law doctrine from torts, negligence. In order to state a claim of negligence, one must establish that a duty of care existed.[23] Duty of care is a legal principle that has been in existence for at least four centuries.[24] But, the factual question of what constitutes a duty of care—or more precisely, the question of when a relationship between two parties gives rise to a duty of care—is based on the facts of the day in a common law court (unless it is defined by statute, in which case a modern-day legislature defined this ancient term). When this doctrine was created (nebulously evolving from time immemorial), a party only owed another party a duty of care if they were in privity.[25] This doctrine was based on the enactors' belief that liability should not extend beyond people who were connected through some sort of private relationship, in order to limit liability.[26] Today, such is not the case. Society (through judges, juries, and legislatures), reflecting on the evolution of our industrial, interrelated society, has abolished the privity requirement.[27]

Today, one could say that the creators of the duty-of-care principle were mistaken about requiring privity. Since laws are applied to known facts, not to the personal opinions of enactors of the law, this change occurred without disturbing the original notion of the duty of care. Changes in our society and the way we view relationships in a modern era mandate that actors removed from personal relationships should be held liable for wrongdoing. We do not disagree with the creators of the duty-of-care requirement—that is, the legal principle that remains—we simply believe that they were mistaken in their belief that privity must be found to establish a duty of care. To borrow from Calabresi and Rickert, "This should be uncontroversial."[28] This works just fine in the common-law context, and perhaps even in the statutory context.[29]

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23. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (2011) (defining the elements of negligence).

24. *See generally* Percy H. Winfield, *Duty in Tortious Negligence*, 34 COLUM. L. REV. 41, 44–58 (1934) (tracing the evolution of the principle of duty of care to cases that are more than four hundred years old).

25. *See id.* at 54–55 (identifying support for the proposition that tort liability would not result unless the parties were in privity).

26. *See id.* at 55 (recognizing the private relationships between parties in tort matters and the lack of distinction between parties in tort actions and parties in contract actions).

27. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916) (Cardozo, J.) ("Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.").

28. Calabresi & Rickert, *supra* note 1, at 9 n.40.

29. A book by a related Calabresi may be relevant. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing how statutes that later become

Judges and juries are expected to find facts based on how they see things—but this approach is not originalist. Where I demur is their characterization of this common-law approach as originalist.

To Calabresi and Rickert, the text of the Fourteenth Amendment is not living. The authors agree with most strands of "new originalism," in that the semantic content of the Fourteenth Amendment is fixed and immutable.[30] A leading example of "new originalism" is the theory of semantic originalism, which draws a distinction between interpretation—recognizing the original public meaning, or the "semantic content" of a text—and construction, which gives the text legal effect.[31] But they part company when they contend that the factual predicates (what constitutes a caste) that inform and update the text of the Constitution's original meaning are fluid and can change over time.

There seems to be a critical disconnect between these two propositions: if facts that emerge after a law is enacted change the text's original meaning, that meaning is no longer original; it is modern. Perhaps this difference is only one of semantics, or terminology. However, Calabresi and Rickert's reliance on the normative appeal and justifications for originalism is vitiated when their approach subtly amalgamates that which is original, and that which is modern, without a thorough explanation. This gap which is briefly alluded to in a single hypothetical in a footnote,[32] warrants more attention.

IV. Originalism at the Right Time

To ascertain the original public meaning of a text, one should consider how the provision was understood *at the time* of its enactment. This task requires the selection of the proper time in which to seek the text's semantic content. The linguistic content of the text can be informed by a host of things—including, but not limited to, its history, contemporary understandings of the text, legislative debates, individuals' statements, etc.[33] Though there seems to be one important chronological limitation, both logically and jurisprudentially: any such inquiry would have to be temporally

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inapplicable to historical circumstances affect law and how courts could reform statutes using a common law approach).

30. *See* Calabresi & Rickert, *supra* note 1, at 8 (arguing that legal texts have an objective social meaning). For a critique of the authors' narrow construction of original constitutional meaning, see Alfred L. Brophy, Response, *Non-originalist Originalists: The Nineteenth Amendment and the Fourteenth Amendment's Anticaste Principle*, 90 TEXAS L. REV. SEE ALSO 55, 59–61 (2011).

31. *See e.g.*, Lawrence B. Solum, *Semantic Originalism*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 p. 76–79 (discussing theories of constitutional construction). Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95, 96, 103 (2010).

32. Calabresi & Rickert, *supra* note 1, at 9 n.40. This is the murder hypothetical to which I referred earlier.

33. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (identifying an originalist methodology and sources for understanding the law, including the "records of the ratifying debates").

constrained, at the latest, by the date of the enactment of the law. That is, facts learned or developed after the law was enacted can do a lot of things, such as informing how we can apply that original meaning to present-day circumstances (the process of construction).[34]

But these changes cannot affect the original understanding of the law (the process of interpretation). How can events after the enactment of the law inform what the law meant in the past? Perhaps postenactment evidence can reflect what people thought contemporaneously: if I thought something on Friday, odds are that I thought the same thing on Thursday. But this evidence is not original evidence.

Originalism should be analyzed at the *right time*. I introduced the notion of "originalism at the right time" in the context of extending the right to keep and bear arms to the states through the Privileges or Immunities Clause of the Fourteenth Amendment in *McDonald v. City of Chicago*.[35] The *right time* refers to the correct temporal frame of reference. If we are considering the original understanding of the Equal Protection Clause of the Fourteenth Amendment, we look to 1868 as a starting point (and also consider the history that led to understandings prior to 1868). If we are considering the original understanding of the First Amendment as applied to the federal government, we look to 1791. If we are considering how the right of confrontation applies to the states, we look to 1868 (not just 1791).[36] This is the same for the Second Amendment as applied to the states—history starting with 1868 and going back to 1791 and earlier would be relevant.[37] But for the Second Amendment as applied to the federal government, we should look to the history of the right in 1791, and not later. The *Heller*[38] Court curiously looked to development of the right to keep and bear arms all

34. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (concluding that a thermal-imaging device aimed at a home from a public street constituted a "search" and violated the "degree of privacy against government that existed when the Fourth Amendment was adopted"); *cf.* United States v. Jones, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring in judgment) ("But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case.").

35. 130 S. Ct. 3020 (2010). For my discussion of "originalism at the right time," see Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, The Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 51–53 (2010) ("Originalism demands that the interpreter select the proper temporal location in which to seek the text's original public meaning.").

36. *See* David Bernstein, "*Incorporation," Originalism, and the Confrontation Clause*, VOLOKH CONSPIRACY (July 6, 2009, 10:14 PM), http://volokh.com/posts/1246932856.shtml ("When a right protected by the Bill of Rights is applied to the states via the 14th Amendment, it has to be the 1868 understanding of that right, not the 1791 understanding, that governs. (This likely has implications for other rights as well, including freedom of expression, *the right to bear arms*, and the right to not have private property taken for public use without just compensation.)" (emphasis added)).

37. *See* Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 196 (2010) (arguing that "the correct timeframe for analyzing the Fourteenth Amendment's substantive protections is the Reconstruction era").

38. District of Columbia v. Heller, 554 U.S. 570 (2008).

the way up to the antebellum era, as pointed out by Justice Stevens in dissent.[39]

The Supreme Court has indirectly rejected originalism at the right time in the limited context of incorporation. In *McDonald*, for the plurality, Justice Alito remarked that "the Court abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'"[40] In other words, even assuming the right to keep and bear arms meant one thing in 1791 and another thing in 1868 when the Fourteenth Amendment was ratified, the right as applied to the states will retain the meaning ascertained in 1791. To paraphrase Bob Marley, one right, one meaning—whether it is held against state governments or the federal government.

This argument makes a lot of sense from a prudential and pragmatic perspective for incorporated rights. It is a lot easier, and more fair, for "incorporated Bill of Rights protections . . . to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[41] But as an originalist matter, this approach is probably theoretically wrong—and employs originalism at the wrong time.

Indeed, originalism at the right time has been employed, almost intuitively, by originalists of all stripes. Notwithstanding and before the Court's admonition, many scholars have sought to identify the proper temporal location of originalist inquiries in 1868 rather than 1791 for incorporated rights,.[42]

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39. "[T]he Court dwells at length on four other sources: the 17th-century English Bill of Rights; Blackstone's Commentaries on the Laws of England; postenactment commentary on the Second Amendment; and post-Civil War legislative history." *Id.* at 662 (Stevens, J., dissenting). Justice Stevens continues, "The Court's fixation on the last two types of sources is particularly puzzling, since both have the same characteristics as postenactment legislative history, which is generally viewed as the least reliable source of authority for ascertaining the intent of any provision's drafters." *Id.* at 662 n.28.

40. *McDonald*, 130 S. Ct. at 3035 (citing Malloy v. Hogan, 378 U.S. 1, 10–11 (1964)).

41. *Id.* (internal quotation marks omitted).

42. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 408 (2010) ("Between 1791 and the Fourteenth Amendment's enactment in 1868, due process concepts evolved dramatically, through judicial decisions at the state and federal levels and through the invocation of due process concepts by both proslavery and abolitionist forces in the course of constitutional arguments over the expansion of slavery."); Alison LaCroix, *The Thick Edge of the Wedge*, SCOTUSBLOG (June 29, 2010, 12:29 PM), http://www.scotusblog.com/2010/06/the-thick-edge-of-the-wedge/ ("The second point concerns the Court's shifting interpretive baseline. Just when is the relevant 'original' moment for the justices? At least three possible moments suggest themselves as possibilities: (1) the Constitutional Convention; (2) the congressional debates over the Civil Rights Act of 1866 and the Fourteenth Amendment in 1868; or (3) the Court's own twentieth-century cases dealing with incorporation of the Bill of Rights against the states."); *see also* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PENN. L. REV. 459, 464 (2012) ("Much recent scholarship has suggested that

In any event, the concerns animating the Court's conclusion in the incorporation context do not apply to all other applications of originalism. In fact, Alito's objection would seem only to apply to the incorporation of rights through the Fourteenth Amendment.[43] Originalism at the right time, as applied to the Fourteenth and Nineteenth Amendments, would not result in a "watered-down" version of gender equality for the states as opposed to the federal government. The Court's pragmatic concerns in *McDonald* and *Malloy*[44]—two tiers of rights depending on the identity of the state actor—are nonexistent elsewhere. Originalism at the right time remains a valid methodology that constrains interpretive inquires to the proper timeframe.

V. Gender Equality at the Right Time

If you adopt a mode of originalism in the school of Justice Scalia—who Calabresi and Rickert purport to emulate[45]—originalism's right time would be constrained by the time of the law's enactment.[46] Calabresi and Rickert's approach perhaps could best be thought of as original-public-meaning originalism in name only, as the semantic content of the anticaste principle (assuming one exists) was not understood to cover gender discrimination in 1868—the authors concede this.[47] Their approach is not an application of original-expected-application originalism, as Calabresi and Rickert specifically disclaim that they are bound by the "Framers' original expected applications of the constitutional text."[48] Only by importing an air of egalitarian-modernity into the Fourteenth Amendment's original meaning can their anticaste principle encompass gender discrimination.

Further, the authors do not address what forms of modern-day legislation would violate the quasi-originalist anticaste principle. What about laws regulating abortion, criminalizing sodomy, or banning same-sex marriage?[49] Jack Balkin calls this lacuna the "elephant in the room."[50]

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originalist analyses of Bill of Rights provisions applied to the states via the Fourteenth Amendment should consider the original understanding as of 1868 in addition to that of 1791."). Volokh cites to the following articles that make similar observations: Akhil Reed Amar, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145 (2008); Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel*, The Militia and the Right to Arms, 12 WM. & MARY BILL RTS. J. 315 (2004); and Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655 (2008).

43. For more about this objection, see *supra* text accompanying note 40.

44. Malloy v. Hogan, 378 U.S. 1 (1964).

45. Calabresi & Rickert, *supra* note 1, at 4.

46. Amy Gutmann, *Preface* to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, at viii (Amy Gutmann ed., 1997) ("[J]udicial interpretation should be guided by the text and not by intentions or ideals external to it, and by the original meaning of the text, not by its evolving meaning *over time*." (emphasis added)).

47. Calabresi & Rickert, *supra* note 1, at 13.

48. *Id.* at 7.

49. Calabresi & Rickert *supra* note 1 at 99 ("we mean to express no shared opinion on the constitutionality of laws against abortion.").

50. http://balkin.blogspot.com/2011/12/originalism-and-sex-discrimination-or.html

Interpreting an anticaste principle from the text of the Fourteenth Amendment is just the tip of the iceberg. When starting with such a broad interpretation that encompasses post-enactment history, the process of construction—giving that text legal effect—will invariably do most of the heavy jurisprudential lifting.

In a way, Calabresi and Rickert view the anticaste principle of the Fourteenth Amendment similarly to the way the "cruel and unusual" text of the Eighth Amendment has been construed. When the Eighth Amendment was ratified, the principle that cruel and unusual punishment should be banned was written into the Constitution. That is clear from the semantic content of the text. At the time of its ratification, the enactors believed that such punishments as hanging[51] and flogging[52] were neither cruel nor unusual. Today, we know better, as "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[53] Two centuries later, we know as an advanced society that the Framers of the Eighth Amendment were wrong in their beliefs that such acts were not cruel and unusual. Because the Framers of the Eighth Amendment were simply mistaken in their facts, and because today we know that such practices are in fact cruel and unusual, the procedures are unconstitutional based on the original understanding of the Eighth Amendment, or so the argument would go.

Such an approach directly conflicts with how Justice Scalia has viewed the Eighth Amendment:

> What [the Eighth Amendment] abstracts, however, is not a moral principle of "cruelty" that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. It means not (as Professor Dworkin would have it) "whatever may be considered cruel from one generation to the next," but "what we consider cruel today [in 1791]"; otherwise, it would be no protection against the moral perceptions of a future, more brutal, generation. It is, in other words, rooted in the moral perceptions of *the time*.[54]

The moral perceptions "of the time" in which it was enacted in 1791—this is the essence of originalism at the right time.

The implications of this new flavor of originalism are not fully explored in the Calabresi and Rickert article. What other textual provisions of the Constitution can be modified based on corrected facts—consistent with originalism? Perhaps the Framers were mistaken about the factual premises

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51. Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 980 (1990).

52. *See* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 584 (1998) (noting Justice Scalia's misgivings with the originalist understanding of the Eighth Amendment as it relates to flogging).

53. Trop v. Dulles, 356 U.S. 86, 101 (1958).

54. ANTONIN SCALIA, *Response*, *in* SCALIA, *supra* note 466, at 129, 145.

underlying free speech, due process, unreasonable searches, the executive power, and other clauses. And we—as part of a more enlightened society[55]—should substitute our notions of what these facts objectively actually are. If this argument is made in terms of popular constitutionalism, or some related jurisprudence, I have no normative qualms. But to subsume this approach under the originalism umbrella raises even more questions. If Calabresi and Rickert's article purports to rely on originalism, it is not originalism at the right time. But it does strongly resemble what Jack Balkin describes as *living originalism*.

VI. Back to the Future of Originalism

In a significant new work, *Living Originalism*, Jack Balkin advances a method of constitutional construction that is both originalist and living constitutionalist; it is living originalist![56] Balkin's method "is faithful to the original meaning of the constitutional text and to its underlying purposes. It is also consistent with a basic law whose reach and application evolve over time, a basic law that leaves to each generation the task of how to implement the Constitution's words and principles."[57]

Balkin refers to his method of construction through two distinct, yet intertwined concepts, *text* and *principles*:.

> [E]ach generation of Americans can seek to persuade each other about how text and principle should apply to their circumstances, their problems, and their grievances. And because conditions are always changing, new problems are always arising and new forms of social conflict and grievance are always emerging, the process of argument and persuasion about how to apply the Constitution's text and principles is never-ending.[58]

Under Balkin's methodology, the word *original*—which connotes something, well, *original*—very quickly gives way to the other half of the title, *living*. Through the process of interpretation, Balkin determines what the fixed semantic content of the *text* was—this is the "originalism" aspect of living originalism. Next, Balkin looks to postenactment developments—from constitutional amendments to judicial precedents, social movements, and other grounds (like Calabresi and Rickert do)—in order to ascertain the *principles* that give the text its meaning in our modern society—this is the "living" aspect of living originalism.[59] Call his approach *common law construction*.

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55. Calabresi & Rickert, *supra* note 1, at 97.

56. JACK M. BALKIN, LIVING ORIGINALISM (2011). I only provide a brief sketch of Balkin's methodology in this short Response to provide a point of comparison to the approach taken by Calabresi and Rickert.

57. *Id.* at 3.

58. *Id.* at 10.

59. *Id.* at 15.

For Balkin, the *living* construction, rather than the *originalist* interpretation does most of the heavy jurisprudential lifting.[60] In many respects, living originalism is only originalist to the extent that it considers original matters, and living to the extent that it considers unoriginal, modern matters. Or to put it a different way, in terms of Balkin's "text and principle" approach, the interpretation of the semantic content of the text is original, but the construction and application of the principles are alive and well.

The text does not change absent Article V amendment, but the principles do. Balkin's living originalism is indeed not originalism at the right time—admittedly so. If you adopt a mode of living originalism, then the correct time for originalism is really any time that tells the story of the never-ending redemptive journey of our society.[61] To paraphrase the classic Journey song, "Don't stop, redeemin'." Because there is no one right time, it is perhaps more appropriately labeled as originalism *out of time*.[62]

Calabresi and Rickert's consideration of text and facts bears many similarities to Balkin's text and principle approach. They reject original expected applications. They maintain that the text of the Constitution and its semantic content do not change[63] absent Article V amendments.[64] Most importantly, they agree that the premises underlying the text—Calabresi and Rickert call them "facts,"[65] Balkin calls them "principles"[66]—do change with the times and affect how the text should be *originally* understood.

Where the trio parts company is how—and *when*—that change occurs. To Balkin, through the "work of political and social movements . . . each generation of Americans can seek to persuade each other about how text and principle should apply to their circumstances, their problems, and their grievances."[67] "While Article V amendment is necessary for changing these hardwired features of the Constitution, the interpretation, implementation, and application [i.e., construction] of vague and abstract terms like 'equal protection' can and do change through sustained political mobilization."[68]

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60. I thank Larry B. Solum for this concept.

61. *Id.* at 4.

62. In *Back to the Future*, the time-travelling plutonium-powered DeLorean had a license plate that read "OUTATIME." *Back to the Future* (NBC Universal 1985). This would be an appropriate vanity plate for Balkin's redemptive-living-originalism jurisprudence, which zips back and forth along our constitutional space–time continuum—from the past to the present and back to the future in the pursuit of life, liberty, and happiness. BALKIN, *supra* note 566, at 102.

63. *See supra* note 30 and accompanying text. For Balkin's position as to this proposition, see BALKIN, *supra* note 56, at 13.

64. *See* Calabresi & Rickert, *supra* note 1, at 97 (summarizing the argument that Article V amendments are required to protect groups from discrimination). For Balkin's position, see BALKIN, *supra* note 566, at 10.

65. Calabresi & Rickert, *supra* note 1, at 9.

66. *See, e.g.*, BALKIN, *supra* note 566, at 14 ("In some cases the constitutional text itself states a principle, like 'equal protection' or 'freedom of speech,' that we must flesh out by articulating subsidiary principles that explain it.").

67. *Id.* at 10.

68. *Id.* at 327.

In contrast, Calabresi would require an Article V amendment to constitutionalize a change in the factual predicates for a constitutional provision. In his view, "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."[69]

Rickert disagrees with her coauthor. Her view is closer to that of Team Jack; she believes "it is appropriate for the Supreme Court to unilaterally recognize new forbidden castes whenever it has before it unequivocal evidence that a group is being arbitrarily denied equal protection of the laws."[70] Rickert believes that while an "Article V amendment that protects a particular group's voting rights is the strongest evidence that a law discriminating on the basis of membership in that group is arbitrary . . . the existence of an Article V amendment protecting a group is [not necessarily] a prerequisite."[71] This is somewhat similar to Bruce Ackerman's theory of constitutional moments, which allows popular opinion to influence the "higher law" of constitutional politics and effectively amend the Constitution de facto in the absence of an Article V amendment.[72] That Calabresi and Rickert disagree on this fundamental point (almost in passing)—on one of the most important takeaways of the article jurisprudentially—deserves more scrutiny.

VII. "We are all originalists."

During then-Solicitor General Elena Kagan's confirmation hearing, in answering a question about her approach to constitutional interpretation, she said that in some cases, the Framers of the Constitution "laid down very specific rules," and in other cases, they "laid down broad principles."[73] Did this make her an originalist, she was asked? "[I]n that sense, we are all originalists," she answered.[74] Justice Kagan was quite astute. Today, scholars across the spectrum have turned to originalist methodologies to answer tough constitutional questions.[75] Justice Stevens's opinion in *Citizens*

69. Calabresi & Rickert, *supra* note 1, at 97.

70. *Id.*

71. *Id.*

72. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056–57 (1984).

73. *Kagan Hearing*, *supra* note 8, at 62.

74. *Id.*

75. For example, in *McDonald v. City of Chicago*, the Constitutional Accountability Center amicus brief—representing eight constitutional law professors from across the spectrum, including Jack Balkin, Randy Barnett, and even Steven Calabresi—signified a remarkable confluence of thought among leading scholars with various takes on the debate over originalism. *See generally* Brief of Constitutional Law Professors as *Amici Curiae* in Support of Petitioners, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521). For additional discussion of this consensus, see Blackman & Shapiro, *supra* note 35, at 89–90 & n.453.

United v. FEC[76] favorably cited Robert Bork to discern the true intent of the Framers with respect to free speech.[77] In *McDonald v. City of Chicago*, Justice Breyer cited a number of historians to channel the intent of the Framers of the Second Amendment.[78]

Recently, in a departure from her earlier remarks, even Justice Ginsburg has come out in favor of an originalist reading of the Fourteenth Amendment: "I have a different originalist view. I count myself as an originalist too . . . ."[79] Ginsburg starts with the premise that "[e]quality was the motivating idea" and equality "was what the Declaration of Independence started with but it couldn't come into the original Constitution because of the odious practice of slavery that was retained."[80] Ginsburg considers the full stretch of American history to supply meaning to the Constitution: "I think the genius of the United States has been from the original Constitution where 'we the people' were white property-owning men to what it has become today."[81] Today, the Constitution is "ever more embracive including Native Americans[,] . . . people who were once held in human bondage, women, [and] aliens who come to our shores. So 'we the people' has a marvelous diversity *which it lacked in the beginning*."[82]

Ginsburg's *Balkinized* history about the original understanding of the Fourteenth Amendment is out of time. It starts with the Declaration of Independence; journeys through the ratification of the Constitution, the Bill of Rights, and the Fourteenth Amendment itself; docks at Ellis Island; takes a tour of the women's rights movement that led to the Nineteenth Amendment; and marches along a path that she nobly forged in the 1960s and 1970s for gender equality; to the present day and beyond. What the original Constitution "lacked in the beginning," it has today through the lens of originalism. Such a theory unmoors originalism from things that are original by relying on occurrences that postdate the enactment of the law.

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76. 130 S. Ct. 876 (2010).

77. *Id.* at 929, 948–49 (Stevens, J., concurring in part and dissenting in part) ("This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society.").

78. *See McDonald*, 130 S. Ct. at 3136 (Breyer, J., dissenting) ("In sum, the Framers did not write the Second Amendment in order to protect a private right of armed self-defense."); *see also id.* at 3088, 3090 (Stevens, J., dissenting) ("I have yet to see a persuasive argument that the Framers of the Fourteenth Amendment thought otherwise.").

79. Ariane de Vogue, *Justice Ginsburg Speaks About Gender Equality*, ABC NEWS (Nov. 18, 2011, 1:15 PM), http://abcnews.go.com/blogs/politics/2011/11/justice-ginsburg-speaks-about-gender-equality/.

80. *Id.*

81. *Id.*

82. *Id.* (emphasis added).

What is originalism when everyone is an originalist in his or her own way—especially when some of the originalism is not at the right time? In future, more in-depth works, I aim to address just that question.