Texas Law Review
See Also

Response

Non-originalist Originalists: The Nineteenth Amendment and the Fourteenth Amendment's Anticaste Principle

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Steven G. Calabresi and Julia T. Rickert set out to change the way we think about the original meaning of the Fourteenth Amendment. They write in opposition to the seemingly well-settled opinions of jurists and commentators who argue (or concede) that the original meaning of the Fourteenth Amendment did not protect against gender discrimination.[1]

What is their evidence and line of thinking? It is both fairly straightforward and somewhat complex. The straightforward part of the argument is that the Fourteenth Amendment incorporates an anticaste principle.[2] Historians have usually taken the anticaste principle as meaning, in essence, that the Fourteenth Amendment prohibited imposition of racial caste,[3] though Calabresi and Rickert argue the Framers had other castes in mind as well (like feudalism).[4] The Nineteenth Amendment's grant of voting

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1. *See* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEXAS L. REV. 1, 1–2 (2011) (providing an overview of the counterarguments of Justices Ginsburg and Scalia and Professors Michael C. Dorf, Ward Farnsworth, and Reva B. Siegel on the Fourteenth Amendment's original meaning as it relates to gender discrimination). Citations to the counterarguments are available at *id.* at 1 nn.3–4, 2 nn.6–7.

2. *Id.* at 2.

3. *See id.* (characterizing the notion that the Fourteenth Amendment only bans racial discrimination as "received wisdom").

4. *See, e.g.*, *id.* at 6 ("The original meaning of the amendment is thus that it bars all systems of caste and of class-based laws, not just the Black Codes."); *id.* at 13 (observing that the Framers did not confine the reach of the Fourteenth Amendment to race discrimination).

rights to women, they contend, expands the Fourteenth Amendment's anticaste principle to include gender.[5] So far this is pretty straightforward and important—even if it is not all that different from what others, like Reva B. Siegel[6] and, to a lesser extent, my colleague Melissa Saunders,[7] have argued. If we read the Fourteenth Amendment in light of the Nineteenth Amendment, it is easy see how the Constitution prohibits gender discrimination. The Nineteenth Amendment explicitly prohibits overt gender discrimination in voting;[8] from there, it is not too much of a step to think that a prohibition of discrimination in that central area, voting, is a prohibition of gender discrimination in other areas too[9]—or so I would have thought.

I. Original Intended Application and Original Meaning

What is more complex is Calabresi and Rickert's reading of originalism as not limited to what the "Framers" of the Fourteenth Amendment intended. That is, the original meaning is not limited to the Framers' original expected applications.[10] Calabresi and Rickert argue that "[t]he original meaning of the Amendment is . . . that it bars all systems of caste and of class-based laws, not just the Black Codes."[11] Thus, there was a large principle at stake in the Amendment even though few people recognized it at the time.[12]

Many will be skeptical of how much we can call something *original intent* if few of the people at the time that the amendment was passed recognized the implications of the principle. I suppose for those who do not subscribe to the theory that the Fourteenth Amendment set us on the course toward a broader conception of freedom, there will be this response: we

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5. *Id.* at 14.

6. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1022–24, 1030–35 (2002) (questioning the accuracy of jurisprudence that assumes that the Fourteenth Amendment offered equal citizenship to women, and identifying jurisprudential gains made by nonracial groups under the Fourteenth Amendment).

7. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48 (1997) (arguing that the Equal Protection Clause forbids states' singling out of "any person or group of persons for special benefits or burdens without an adequate 'public purpose' justification").

8. U.S. CONST. amend. XIX.

9. Calabresi & Rickert, *supra* note 1, at 14.

10. *Id.* at 2.

11. *Id.* at 6.

12. Or, as Calabresi and Rickert explain:

> The same principle applies when members of Congress pass, and members of state legislatures ratify, constitutional amendments. The legal system and democracy itself cannot function unless the people writing in and commenting on proposed amendments or laws can have confidence that the content of the law is embodied in the objective social meaning of its text rather than in the unknowable intentions of those who voted for it.

Id. at 9. This is obviously correct; however, I think this argues only for a broader sense of what people at the time understood of an Amendment—not necessarily unforeseen implications of it.

should be bound more closely to the immediate principles—the original expectations of those who wrote and ratified the Fourteenth Amendment.

One answer is that Calabresi and Rickert are talking about *original meaning*[13] rather than *original intent* and that original meaning encompasses a broad principle. Original intent is focused more immediately on how people at the time thought the amendment would be applied. In fact, there is a rich literature on the difference between original intent and original meaning.[14] There is a dynamic interpretation at work here, obviously. Much of this dynamism is because of a subsequent constitutional amendment. As Calabresi and Rickert state, "The meaning is not static, and the adoption of the Nineteenth Amendment changed permanently the way courts ought to read the no-caste-discrimination rule of the Fourteenth Amendment."[15] This I find in tension with Calabresi and Rickert's statement that "originalists ought to begin and end all analysis with the original public meaning of constitutional texts."[16] One way of resolving this tension is to see that the original public meaning may not be coextensive with the Framers' original expected applications. Alternatively, maybe part of the explanation is that the Amendment's meaning turns upon our subsequent understanding of facts. As Calabresi and Rickert phrase this, "[W]e also are not bound by [the Framers'] unenacted factual beliefs about the capabilities of women. Laws are to be applied to known facts."[17] The scope of the Fourteenth Amendment's protection changes, apparently, as there are changing understandings of facts—like women and African-Americans are equal in human rights to white men—because the Amendment's original meaning invites such changes.

Calabresi and Rickert's dynamic vision of the Constitution's meaning runs at least distantly parallel to some other versions of originalism—like the idea popularized by H. Jefferson Powell in the 1980s that the Framers of the eighteenth-century Constitution believed that the Constitution should be

13. *See id.* at 3–4 (distinguishing between the "original meaning of a clause" and the Framers' expectations, and arguing for constitutional interpretation based on the former).

14. *See, e.g.*, Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009) (analyzing "the shift from the subjective intent of the constitution-makers to the 'original public meaning' of the Constitution's words").

15. Calabresi & Rickert, *supra* note 1, at 11. Calabresi has identified the potentially expanding protections of the anticaste principle of the Fourteenth Amendment before. *See* Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 669–70 (2009) (arguing that the Fourteenth Amendment protected the marital rights of African-Americans to marry white citizens).

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

17. *Id.* at 9. Still, I would have thought that robust originalists would require some sense of what either the Framers *or* the "public" (or both) thought about the scope of the Amendment. But since I am not a robust originalist, this is of not much concern to me.

"interpreted in accord with the expansive purposes outlined in its Preamble."[18]

II. How Does Calabresi and Rickert's Theory Work?

Turning now to the many moving parts in this article, I have a series of questions. Who are the Framers, enactors, or people present at the ratification whose meaning we need to divine? And what are we looking for in terms of original meaning? What is the relationship between language that is actually used in the Fourteenth Amendment and what we think of as meaning? Can the Fourteenth Amendment be read according to its aspirational meaning rather than to the narrow intent of the people who wrote it, the people who passed it in Congress, and the states that voted for it? These point to the difficulties with original meaning in the first place. Some people who were part of the debates when the Fourteenth Amendment was ratified construed it broadly and others narrowly. Whose meaning governs?[19] I am happy to have a reading of the Fourteenth Amendment that looks to the better angels of our nature and focuses on things like the anticaste principle, but this strikes me as a dynamism in interpretation that I usually associate with people other than originalists (hence the title of this brief Response).

And specific to Calabresi and Rickert's article, how does the Fourteenth Amendment relate to the Nineteenth Amendment? One way of testing just the importance of the Nineteenth Amendment to their argument is to ask the following question: if the Nineteenth Amendment had never been passed, would the Fourteenth Amendment prohibit gender discrimination? Perhaps the Nineteenth Amendment was necessary to show us just how broadly we should apply the anticaste principle.[20] But we could, perhaps, short circuit through the Fourteenth Amendment and merely argue that the original *meaning* of the Nineteenth Amendment is to prohibit gender discrimination, even beyond voting.

Moreover, I wonder who is the audience that Calabresi and Rickert are seeking to reach with their original meaning arguments. We may recall that *United States v. Virginia*[21] (*VMI*) prohibited gender discrimination whether or not anyone in 1867 thought that gender discrimination was prohibited by

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18. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 915 (1985); *cf.* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1239 (2007) ("[T]he Founders were 'original-understanding originalists.' This means that they anticipated that constitutional interpretation would be guided by the subjective intent of the ratifiers when such understanding was coherent and recoverable and, otherwise, by the Constitution's original public meaning.").

19. Calabresi & Rickert, *supra* note 1, at 4 ("[U]nderstanding the original public meaning depends on knowing what interpretive methods legislators and informed members of the public used to arrive at the meaning of the provision.").

20. *Id.* at 15 (concluding that the Fourteenth Amendment applies to "sex classifications").

21. 518 U.S. 515 (1996).

the Fourteenth Amendment.[22] Similarly, courts are not concerned with whether the original intent of the Fourteenth Amendment prohibited racial segregation in public schools, though for a few decades after the decision in *Brown v. Board of Education*,[23] a lot of constitutional scholars agonized over this question.[24]

III. A Constitutional Principle of Aspiration Rather than Original Application

To the extent that some judges are concerned about original meaning, I agree that we should be talking about what the Fourteenth Amendment aspired to achieve. The Reconstruction-era amendments were framed in the context of viciously proslavery constitutional doctrine that was overturned through the actions of active interpreters and makers of the Constitution via civil war.[25] In 1863, the soldiers on Cemetery Ridge in Gettysburg had more to say about how to interpret the nineteenth-century Constitution than Chief Justice Taney. The actions of our country made the new Constitution—both in words on paper and in how people thought about the Constitution.

There are reasons to be quite skeptical of narrow constructions of original meaning rather than the aspirational elements of the Fourteenth Amendment. People in the pre-Civil War era understood that the Constitution was not merely the words that had been written in 1787 and subsequently ratified (and then amended twelve times). The Constitution

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22. *See id.* at 519 (holding that the Virginia Military Institute's admission policy violated the Equal Protection Clause). The Court's opinion declines to evaluate intent arguments.

23. 347 U.S. 483 (1954).

24. *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 7 (1955) (describing a methodology for determining Congress's purpose with respect to whether to ban discrimination in public schools). As Michael J. Klarman has recently stated, "The original understanding of the Fourteenth Amendment plainly permitted school segregation." MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 26 (2004). That debate about the legitimacy of *Brown* was settled over time, in part through public opinion, though also in part through scholarship that rejected the importance of original intent as the basis for legitimacy. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) ("To guess their verdict upon the institution as it functions in the midtwentieth century supposes an imaginary hypothesis which grows more preposterous as it is sought to be made more vivid."). Nevertheless, there continued to be debates about the scope of the Fourteenth Amendment's power to prohibit *racial discrimination* for a long time. *See, e.g.*, Walter E. Dellinger, III, *School Segregation and Professor Avins History—A Defense of* Brown v. Board of Education, 38 MISS. L.J. 248, 248 (1967) (chastising an argument that the *Brown* rule was not the law); Ronald Turner, *Was "Separate but Equal" Constitutional? Borkian Originalism and* Brown, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 232 (1995) (arguing that the Fourteenth Amendment did not prohibit school segregation according to a "'pure' originalist analysis"). It was only when we decided based on the aspirational parts of the Fourteenth Amendment, rather than the narrow question of what was prohibited at the time, that we were able to accept that segregated schools were unconstitutional.

25. *See generally* Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003 (1999) (summarizing the political milieu surrounding the passage of the Reconstruction-era amendments).

was a set of political principles and patriotic sentiments to which our population subscribed and that held our country together. Our Constitution was a series of fundamental principles—as orators frequently told their audiences at public events in the pre-Civil War era—rather than a mere set of words.[26] Constitutional ideas extended far off of the written page—an insight we have only incompletely mined for understanding how the Constitution framed public debate and action throughout the nineteenth century. There is much that should be said about the idea of the Constitution. One example of this vibrant constitutional culture appeared in the address that artist Charles Fraser delivered in 1828 at the placement of a cornerstone of a building on the College of Charleston's campus.[27] Fraser explained the effect that education could have on supporting the Constitution and on breathing life into the values of the Constitution:

> The Constitution itself is an admirable effort of the human intellect. Foreigners travelling through our country, and observing the result of this great invisible agent in the uniform, peaceful, and harmonious operations of society, emphatically ask, where is your government? We might as emphatically reply, that it exists in the hearts and the minds of its citizens—that its energies are derived from public opinion—that a rational respect for the laws and institutions of our country, imparts to them that vital principle which pervades and regulates every part of the great republican system. . . .
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> If we would preserve the ark of our covenant in its original sanctity, let "Wisdom, and Judgment, and Understanding," be the lamps that burn before it.[28]

Fraser captured well the idea that the Constitution's ideals held our nation together.

Many people in the pre-Civil War era understood that the Constitution should be interpreted in light of the broad principles in which it was framed. Unitarian minister and leading antislavery advocate William Ellery Channing's 1819 oration on the ordination of Jared Sparks told of the interpretive methods employed by lawyers and likened it to modes of Biblical interpretation:

> We reason about the Bible precisely as civilians do about the constitution under which we live; who, you know, are accustomed to

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26. *See* Alfred L. Brophy, *The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina*, 89 N.C. L. REV. 1879, 1945–56 (2011) (collecting excerpts of graduation speeches that demonstrate this understanding).

27. Charles Fraser, Address at the College of Charleston (Jan. 12, 1828), *in* CHARLES FRASER, AN ADDRESS, DELIVERED BEFORE THE CITIZENS OF CHARLESTON, AND THE GRAND LODGE OF SOUTH-CAROLINA, AT THE LAYING OF THE CORNER STONE OF A NEW COLLEGE EDIFICE, WITH MASONIC CEREMONIES, ON THE 12TH JANUARY, 1828, at 1 (Charleston, J.S. Burges 1828).

28. *Id.* at 11-12.

> limit one provision of that venerable instrument by others, and to fix the precise import of its parts by inquiring into its general spirit, into the intentions of its authors, and into the prevalent feelings, impressions, and circumstances of the time when it was framed. Without these principles of interpretation, we frankly acknowledge that we cannot defend the divine authority of the Scriptures. Deny us this latitude, and we must abandon this book to its enemies.[29]

These are the kinds of sentiments to which Calabresi and Rickert appeal.

And the Fourteenth Amendment gives us a series of goals. I would say well beyond the anticaste principle is the principle of equal treatment, which lies at the center of the Fourteenth Amendment. It is in essence a secular version of Matthew 7:12 (the Golden Rule), a principle central to Western thought for millennia.[30]

IV. Looking to the Future: A Revival of Economic Regulation?

What are the implications of this? I suppose there is buried in here some thought that perhaps the Fourteenth Amendment includes more as-yet-unseen anticaste principles. Perhaps Calabresi and Rickert's original meaning as prohibiting anticaste legislation—whether it was the kind of caste that people at the time had in mind or not—might be applied to economic legislation. For as Calabresi and Rickert suggest in the context of defending *Loving v. Virginia*[31] on originalist grounds, other rights were articulated and protected in the Reconstruction era. Their statement that "[w]e think that liberty of contract was protected by the Civil Rights Act of 1866 and was also a privilege or immunity of state citizenship"[32] makes me wonder if someone will say that the anticaste principle protects freedom of contract.

But there is maybe a more immediate implication of this article. Calabresi and Rickert add important scholarly heft to the cause of reading the Fourteenth Amendment in light of subsequent amendments and for an expansive reading of the Amendment in general. For this, we should all be very thankful. Whether this will be persuasive to those who are committed to original intent is something that adherents to that mode of constitutional interpretation will have to answer. The rest of us have already accepted the

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29. William E. Channing, Unitarian Christianity: Discourse at the Ordination of the Rev. Jared Sparks: Baltimore, 1819 (1819), *in* THE WORKS OF WILLIAM E. CHANNING, D.D. 367, 369 (Bos., Am. Unitarian Ass'n 1890).

30. *See* Neil Duxbury, *Golden Rule Reasoning, Moral Judgment, and Law*, 84 NOTRE DAME L. REV. 1529, 1531 (2009) (recounting the origins of the Golden Rule, which can be "traced back long before Christianity"). For a discussion of how the Golden Rule is reflected in the Equal Protection Clause, see Alfred L. Brophy, *Overcoming at the University of Alabama*, 1 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 15, 29–30 (2011).

31. 388 U.S. 1 (1966).

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

judgment of history and politics that the Fourteenth Amendment is appropriately read as protecting against invidious gender discrimination.