THE CORRUPTION OF CONSTITUTIONAL CONSERVATISM

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The Supreme Court’s decision to constitutionalize a right to same-sex marriage in Obergefell v. Hodges was no surprise, for the Justices had already declined to review several lower court decisions that put such a right into effect. The Obergefell dissents raised the obvious objections: the majority was amending rather than interpreting the Constitution, undermining democratic governance, and conducting an unprecedented social experiment whose long-term consequences were unknowable. Justice Alito went further:

I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irreparable corruption of our legal culture’s conception of constitutional interpretation.
The corruption, in other words, extends beyond the willingness of five Justices to embrace the latest *cause célèbre*. It also runs deep in academia, where our legal culture is transmitted to the next generation, and it is spreading even to some of the academy’s most prominent originalists.

In recent decades academic originalists have resisted this corruption, insisting that judges should respect the original meaning of the written Constitution. Originalist scholarship arose in opposition to the “living Constitution,” the meaning of which evolves to serve the current political views of judges. Until recently, advocates on both sides thought that living constitutionalism and originalism are irreconcilable.

In a series of articles and books—most notably, *Living Originalism* (2011)—Yale’s Jack Balkin has tried to marry these interpretive approaches. He concedes to originalists that the semantic content of the Constitution’s words must be respected, but insists that the document is primarily a plan of government that should adapt to changing moral sentiments. So long as the text does not *expressly and unambiguously* rule out a desired reading, judges are free to give the Constitution whatever meaning they favor. In his view, originalism thus embraces living constitutionalism.

Balkin’s argument relies on some novel wordplay. Interpreting and construing legal texts are now turned into different things. Interpretation no longer includes decisions about which of the multiple linguistic possibilities reflects what the enactors meant. Thus, for example, what he calls interpretation cannot specify whether the term “domestic Violence” in the Constitution refers to riots or to wife-beating. That choice is made through what he calls “construction” (the substantive form of “construe”), a process whose only constraint is that the chosen meaning must be one that the
words in the text “can bear.”

Constructors should consult history, Balkin says, but only to fashion rhetoric that connects “our present political aspirations and commitments with the aspirations and commitments of previous generations, including not only the adopting generation but all that succeed it.” Balkin treats history as a “resource” that can provide rhetorical ammunition, not as a “command.” If the words of a provision are even slightly vague or ambiguous, the best construction will be the one that best fits the constructor’s vision of the most desirable Constitution.

Balkin maintains that traditional originalism mistakenly conflates a provision’s original meaning with its enactors’ “expected applications.” Originalists, of course, do 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 protect writings posted on the internet. Genuine originalism, however, requires that both the text and the purpose of any provision, as originally understood, should constrain its application. However difficult it may sometimes be to ascertain the exact original meaning of specific constitutional provisions, originalism denies that newly attractive purposes may displace those of the enactors.

Unsurprisingly, Balkin’s constructions consistently produce results agreeable to the leftist political views that dominate the legal academy. What is surprising is that his theory has been widely accepted as a form of originalism, and has even begun to persuade originalists that the Constitution’s original purposes need not constrain its interpretation. A striking example can be found in the writings of Steven Calabresi, a prominent academic originalist who helped found the Federalist Society and went on to clerk for Robert Bork and Antonin Scalia.
In “Originalism and Sex Discrimination” (2011), Calabresi contends that the original meaning of the 14th Amendment forbids discrimination based on sex, contrary to a strong consensus among originalists and nonoriginalists alike. He concedes that the Amendment’s text and legislative history indicate that it was not meant to invalidate laws treating men and women differently. In his view, however, this is merely an example of an irrelevant “expected application.” The purpose of the 14th Amendment was to outlaw “caste systems,” he thinks, and we can now recognize that laws that treat the sexes differently reduce women to the status of an oppressed caste.

Rejecting the enacting generation’s views about the limited scope of the 14th Amendment is typical living constitutionalism. Calabresi does, however, offer a separate and seemingly more originalist argument. He notes that the 19th Amendment—which guarantees women the right to vote—nullified the one form of sex discrimination specifically approved by the text of the 14th Amendment (which penalized States that denied the franchise to any group of law-abiding adult males). Extending the right to vote to any group, he claims, automatically conveys other political rights, including the right to hold public office, and all the civil rights protected by the 14th Amendment as well.

Although this argument has a formal resemblance to originalism, Calabresi provides no evidence that granting the right to vote was ever held to imply a wide range of other rights. Nor does he produce any evidence of a consensus view that the 19th Amendment was a package deal that included both the franchise and all the civil rights protected by the 14th Amendment. The enactors of the 19th Amendment had every reason to expect that women’s civil rights would expand as a result of the voting power it conferred. This is quite different from constitutionalizing that expansion.

Calabresi’s formally originalist argument about the 19th Amendment
implies that the 26th Amendment—which forbids voting-age qualifications higher than 18 years—carries with it the full range of political and civil rights for those who reach that age. It follows that the 26th Amendment must have reduced the constitutional age qualifications for various federal offices, including the presidency, to 18 years. Calabresi tries to avoid this conclusion by arguing that age is significantly different from sex. That is true enough, but it is also true that sex is significantly different from race. The enactors of the 14th and 19th Amendments did not share Calabresi’s views about what either of those constitutional provisions mean, any more than the enactors of the 26th Amendment adopted any principle that would permit an 18 year old President.

Calabresi’s twisted originalism leads him to say that “[t]he 19th Amendment, read together with the 14th Amendment, provides a legitimate basis for striking down almost all sex-discrimination laws.” In a 2015 essay, “Originalism and Same Sex Marriage,” Calabresi extends this conclusion to sexual-orientation discrimination. Reversing his previous position that the Constitution does not protect a right to sodomy, he now maintains that traditional marriage laws are the product of a caste system. The original meaning of the 14th Amendment, he claims, “ineluctably” leads to a constitutional right of same-sex couples to marry.

This supposedly ineluctable conclusion rests on a syllogism: laws discriminating on the basis of sex are unconstitutional; anti-miscegenation laws are an unconstitutional form of racial discrimination; 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.”

As a formal matter, however, traditional marriage laws did not
discriminate against men or women, whether homo- or heterosexual: everyone was free to marry a person of the opposite sex (and many homosexuals have done so). As a *formal* matter, moreover, anti-miscegenation statutes were not racially discriminatory. That is why the Supreme Court unanimously upheld such laws against an equal protection challenge, saying in *Pace v. Alabama* (1883) that “the offense against which this [statute] is aimed cannot be committed without involving the persons of both races in the same punishment.”

There is a sound originalist argument that anti-miscegenation laws are unconstitutional: *substantively* they were aimed at frustrating the one unquestioned purpose of the 14th Amendment, namely to dismantle the legal system of racial castes that existed even after the Civil War. Like every other actual caste system, that system perpetuated hereditary ruling and subordinate classes. Contrary to Calabresi’s metaphorical use of language, traditional marriage laws did not create any such system.

Calabresi’s “caste” metaphor allows him to read whatever he wants into the 14th Amendment, and then close his ears to originalist counterevidence: “[I] have yet to hear an exceedingly persuasive argument...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.” Using his method of discovering a right to same-sex marriage, the 14th Amendment can be constructed into a shield for polygamy (a practice he no longer thinks should be criminalized, but which he mistakenly thinks has already been legalized), polyamorous marriages, prostitution, incest (at least among adults), and a right to be treated as a man or a woman depending on how one feels—not to mention a right to be exempted from thousands of other laws that many people find oppressively discriminatory.
Declaring oneself unpersuaded by other people’s views is a familiar form of political discourse, but it is not originalism. Justice Alito was right to see that Obergefell was not just a mistaken decision, but a symptom of a serious disease. He was also right to point out the inevitable consequence:

If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.

Those who do not possess overwhelming political power and cultural influence will have no choice but to tolerate the Supreme Court’s constitutional constructions, however far-fetched they may be. Elected officials cannot overturn the Court’s constructions, and constitutional amendments are extremely easy to block. Even such amendments, moreover, can be constructed into almost anything the Justices like, as the Court has repeatedly demonstrated.

Originalism seeks to preserve the promise of a written Constitution, which is meant to bind both our elected and judicial rulers. Promoting living constitutionalism under the false flag of originalism is no doubt very clever. Such cleverness leads to academic success and influence over future generations of law students. It thereby also accelerates what Alito called “the deep and perhaps irremediable corruption of our legal culture’s conception of constitutional interpretation.”
