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William Eskridge on originalism and same-sex marriage

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In a recent SCOTUSblog symposium, Yale Law School Professor William Eskridge – probably the leading academic defender of same-sex marriage – offers an originalist justification for striking down laws banning same-sex marriage:

Upon reflection, I believe that Justice Kennedy's opinion in*Romer*[*v. Evans* (1996)] provides the constitutional starting point, one grounded in the text and original meaning of the Equal Protection Clause. *Romer* opened with a reminder that the Fourteenth Amendment's original meaning was to bar class or caste legislation, including laws that discriminate against minorities, "not to further a proper legislative end but to make them unequal to everyone else." Judge Jeffrey Sutton's thoughtful majority opinion in *DeBoer* invoked the original meaning of the Fourteenth Amendment but declined to engage with (or even acknowledge) *Romer's* articulation of that original meaning. In the marriage cases to be heard this Term, the Cato Institute (and other amici) will argue that original meaning strongly supports the equal protection challenges in these cases, a line of argument I wholeheartedly support.

Eskridge himself is not an originalist – at least not in the sense of believing that originalism generally trumps other modes of constitutional interpretation. Still, as Michael Ramsey notes, "[i]t says something about originalism's new place that the most prominent academic defender of same sex marriage makes the text's original meaning the centerpiece of his argument."

The class legislation argument that Eskridge endorses is similar to the originalist argument for a right to same-sex marriage recently articulated by leading conservative originalist scholar Steven

Calabresi, and (more tentatively) by Ramsey. I think there is a good deal of merit to the argument. As Steve Sanders explains in the same symposium, there is a lot of evidence suggesting that recent laws banning same-sex marriage were in large part motivated by hostility to gays and lesbians as a class. This was not the sole motive for their enactment, but it is unlikely that so many would have passed so quickly without it. On the other hand, laws limiting marriage to opposite-sex couples long predate the era when most people even realized that homosexuals are a distinct group (as opposed to being essentially heterosexual people somehow tempted into what was considered sinful or antisocial behavior).

Moreover, the class legislation argument also faces the usual difficulty of trying to distinguish between laws motivated by a desire to oppress and laws motivated by justifiable disapproval of a particular practice. Just as one man's terrorist is often another man's freedom fighter, so one man's oppressed class is often another man's object of legitimate moral disapproval. I am no advocate of moral relativism on such issues. I think we can distinguish between terrorists and freedom fighters, and also that moral criticisms of homosexuality are essentially baseless, for reasons well articulated by scholars like Andrew Koppelman and John Corvino. But the issue is not what I believe about the moral case against homosexuality, but rather how that case interacts with originalism, especially given that most people in 1868 likely believed that same-sex sexual relations were wrong and should even be illegal.

These possible objections to the class legislation argument are not insuperable. Michael Ramsey, among others, suggests some possible ways they can be overcome. But they do pose some problems.

Overall, I continue to believe that the better originalist argument for striking down laws forbidding same-sex marriage is that such laws amount to unconstituitonal sex discrimination. Unlike in the case of gays and lesbians, most informed observers in the 19th century clearly recognized that women are a distinct class, and that laws discriminating against could be challenged under Fourteenth Amendment. Most of them nonetheless believed that all or nearly all sex-discriminatory laws of that era were constitutional. But that conclusion was premised on

factual understandings about women's capabilities that have been superseded by later evidence. Similarly, nineteenth century (and later) support for laws restricting marriage on the basis of gender were also premised on factual assumptions that later evidence proves largely false. As nearly all originalists recognize, that methodology is entirely consistent with updating the application of its fixed principles in light of new factual information. Indeed, such updating is often not only permitted, but actually required by the theory. Otherwise, it will often be impossible to enforce the original meaning under conditions different from those envisioned by the generation that framed and ratified the relevant provision of the Constitution.

Be that as it may, it is no longer possible to claim that there is no serious originalist case for striking down laws banning same-sex marriage. Sixth Circuit Judge Jeffrey Sutton and other originalist defenders of those laws who ignore the arguments of Calabresi, Eskridge, and others, are unlikely to persuade informed observers who don't already agree with them.