

..... GARRETT EPPS .....

# WRONG AND DANGEROUS

..... TEN .....

★ RIGHT-WING MYTHS ★

..... ABOUT OUR CONSTITUTION .....



...are domestic Tranquillity, and our Posterity, We ordain and establish this Constitution for the United States of America.

Article 1.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, seven Years and a Day, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a certain Term, and three fifths of all other Persons. The actual Enumeration shall be made within three

# **Wrong and Dangerous**

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## ***Ten Right-Wing Myths about Our Constitution***

GARRETT EPPS

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This book is for all my students—young and old; left and right; past, present, and future. Have fun storming the castle!

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A little patience, and we shall see the reign of witches pass over, their spells dissolve, and the people, recovering their true sight, restore their government to its true principles.

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—Thomas Jefferson, 1798

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# Introduction: Stealing the Constitution

In October 2012 I spent a full day in a windowless church basement in Northern Virginia, as a student at a seminar on “The Substance and Meaning of the Constitution.” My day job is constitutional scholar. I have spent the last twenty years studying the text and history of the Constitution, and teaching students about the ways in which courts have applied our fundamental law to the practical problems of our society. But I have to confess I knew nothing about the history I learned in my Constitution school.

The “truth” about the Constitution is this: God wrote it. He handed it down to Moses, who applied it to govern the people of Israel. This divine law was carried from ancient Israel to Northern Europe after the Assyrian Conquest in 720 BCE by the famous “lost tribes” of Israel. After much wandering these chosen people settled in the British Isles, where they took the name “Anglo-Saxon.” They ruled their medieval kingdom by the law of Moses, but its purity was lost after the Norman Conquest in 1066 CE. The Founding Fathers of the new United States, inspired by the Lord of Hosts, wrote the Constitution to restore His Anglo-Saxon kingdom.

Since it is God’s will that Americans live like medieval Saxons, it shouldn’t surprise anyone that virtually all of modern American life and government is unconstitutional: Social Security, the Federal Reserve, the Environmental Protection Agency, the Civil Rights Act of 1964, hate crime laws—illegal inventions of a people who have been led astray by false prophets. The trouble began with the Civil War, a needless conflict in which the wrong side won. Slaves were happy and carefree in slavery. Racism was caused by pushy Northern abolitionists. State governments are not required to observe the Bill of Rights. The very idea of separation between church and state is a pernicious myth; the First Amendment’s religion clauses establish “nondenominational” Christianity as “the religion of America.”

The seminar I attended was organized by the National Center for Constitutional Studies, nestled securely in the metropolis of Malta, Idaho (2010 Census population: 177, 98 percent of them white). The center is the brainchild of the late W. Cleon Skousen, a former Salt Lake City police chief (he once raided the mayor’s regular poker game) and FBI agent.

Students paid \$50 each for the seminar. They received a carefully prepared workbook with fill-in-the-blank questions such as “Events since 1913 have demonstrated that the original *intent* of the Founders in setting up the Senate as a legislative guardian has been largely emasculated by the Seventeenth Amendment.” Students also had the chance to buy the Center’s expensively produced textbook, *The Making of America: The Substance and Meaning of the Constitution*, which explains Skousen’s ideas in greater detail. The long section on slavery in this textbook has been amended since the 1980s, when the Center attempted to persuade California to adopt it as an official high school textbook. They abandoned the attempt after news reports alerted people that the book referred to black children as “picaninnies.” Now it carefully indicates where the word once appeared by the use of brackets: “If [negro children] ran naked it was generally from choice, and when the white boys had put on shoes and go away to school they were likely to envy the freedom of their colored playmates.”



The instructor was Lester Pearce, an Arizona justice of the peace. Pearce is the brother of former Arizona state senator Russell Pearce, author of Arizona's notorious anti-immigrant law, SB 1070. Lester tended to wander off into discussions of how he refuses to comply with court rules requiring him to allow defendants in his court to speak Spanish. Arizona's "open carry" weapons laws, which permit citizens to strap pistols to their hips and stroll downtown, would, he predicted, save Arizona when the United Nations sent its blue-helmet troops into the state to enforce bogus "human-rights" laws. Pearce admitted that much of what he does in Justice Court doesn't exactly follow the law laid down by higher courts, whose decisions he is technically supposed to follow. But those court decisions are just other judges' opinions, he said. He doesn't really need to pay attention; he has his own views. Pearce got rapt attention from the fifty people in the audience, although one boy near the back spent his time on a detailed sketch of an assault rifle.

My ordeal would have little importance if the seminar I attended were an isolated gathering of cranks. Many of the myths Pearce was purveying have floated around in the American unconscious for years. I used to run across them in the hills and hollows of rural Oregon back in the heyday of the militia movement. But the NCCS "school" is actually part of a growing movement. Every weekend NCCS instructors fly around the country to teach the glories of the Anglo-Saxon Constitution. The *Washington Post* estimated in 2009 that the Center sponsored as many as 180 classes around the country, not counting the one-day public events conducted by NCCS on patriotic holidays. The session I attended was sponsored by local Tea Party groups and by the county Republican committee.

The NCCS is far from the only source of far-right mythology about the Constitution. Turn on any AM radio talk station, or Fox News Channel, or C-SPAN. The far-right myth of the Constitution is being systematically mainstreamed.

Americans today are frightened and disoriented. Since 2000, our society has been through a series of shocks: the misfire and ham-fisted resolution of the 2000 presidential election; the September 11 attacks; the disastrous war in Iraq; the erosion of civil liberties at home; the economic collapse of 2008; the cynical bailout of America's richest banks and corporations; unemployment and widespread foreclosures for ordinary Americans.

What has gone wrong?

In the midst of uncertainty, people are turning to the Constitution for tools to deal with crisis. The Constitution is what makes Americans who we are. All federal and state officials—from the president to state JPs like Lester Pearce—swear an oath to support and defend it. Americans hope that the document will show them the way out of the dangerous thicket we find ourselves in. The Far Right—the toxic coalition of Fox News talking heads, radio hosts, angry "patriot" groups, and power-hungry Tea Party politicians—is feeding them mythology and lies.

Take the rise of NCCS: The Center's crazed ideology leapt into national prominence when Glenn Beck began touting its "educational" programs on his TV show and his online "Beck University." Civic groups, school districts, and even some city governments across the country have been persuaded to sponsor daylong seminars by the "nonpartisan" NCCS; its speakers are visiting high schools to distribute pocket copies of the Constitution. NCCS is mounting a major drive to have its materials adopted as official curriculum in schools around the country—roughly the equivalent of requiring the Book of Genesis as a biology textbook. Skousen's massive "guide" to the Constitution, *The Making of America: The Substance and Meaning of the Constitution*, has ranked as high as No. 1 in the past year on Amazon's list of best-selling titles on the Constitution.

NCCS is far from alone in peddling far-right constitutional mythology as fact. A broad, energetic campaign is underway to do for our understanding of the Constitution what the Right has done

global warming and evolution—that is, to wipe out the facts and substitute a partisan myth.

We've all heard conservative orators denouncing the Affordable Care Act, the new health insurance law. They claim it's unconstitutional to require taxpayers either to buy health insurance or to pay a tax penalty. To most constitutional lawyers, that position would have seemed radical only a few years ago. But by comparisons with some of the new claims conservatives are advancing, it's positively timid.

In fact, it's difficult to understate how extreme this emerging right-wing picture of the Constitution is. Popular authors Thomas Woods Jr. and Kevin Gutzman, in their book *Who Killed the Constitution?*, argue that racial segregation in schools was perfectly constitutional, and that *Brown v. Board of Education*, which struck down the Southern "separate but equal" school system, was illegitimate. Newly elected Senator Mike Lee of Utah has endorsed state "nullification" of the health care law—a doctrine that until now was associated with Southern racist resistance to desegregation. Representative Ron Paul demands that "we end all the unconstitutional federal departments including the Department of Energy, Education, Agriculture, Commerce, Health and Human Services, Homeland Security, and Labor."<sup>2</sup> Fox News Channel commentator Andrew Napolitano attacks Democrats for supporting "federal child labor laws, the Clean Air Act, the EPA, and the Department of Transportation . . . none of them is even arguably authorized by the Constitution."<sup>3</sup>

At the beginning of the 112th Congress, far-right Republican Representative Michele Bachmann set up a "Constitution school" for new members of Congress. She invited Napolitano to lecture to the students. Justice Antonin Scalia (in other contexts a stickler for the separation of powers) also agreed to join Bachmann's faculty.

Scalia's injudicious involvement with House Republicans underscores another disturbing fact: Conservative federal judges are increasingly adopting the rhetoric and ideas of the hard Right; in the process, they are casting aside the traditional ethics of judging that required them to at least appear nonpartisan. Scalia, in fact, is an old duck-hunting partner of former vice president Dick Cheney. At his public appearances, he sounds more and more like a conservative politician and less and less like a mere judge. Citizens who resent the Court's clumsy intervention in the 2000 election should "get over it," he once said.<sup>4</sup> He managed to find himself in South Carolina on the eve of the 2012 Republican primary, and told citizens offended by the damage the *Citizens United* decision has done to politics that all they have to do is "turn off the TV."<sup>5</sup>

Scalia is the soul of modesty compared to his fellow conservative, Clarence Thomas. Thomas tells conservative audiences that he and his wife Virginia—a Tea Party activist who was outspoken against the health care law—"believe the same things," and that his liberal critics are trying to undermine the Supreme Court by even questioning his impartiality.<sup>6</sup> Both Scalia and Thomas have spoken to secret conferences of far-right fat-cat donors. Thomas has accepted an all-expense-paid trip to address a Koch brothers conference, and has accepted lavish gifts from far-right Texas millionaire Harlan Crow, a funder of "Swiftboat Veterans for Truth" in the 2004 election cycle. Thomas and Scalia appeared as guests at a dinner hosted by two corporate law firms—on the same day that the justices had met in secret to decide whether to hear those firms' challenge to overturn the Patient Protection and Affordable Care Act.

Justice Samuel A. Alito has been a speaker at fundraising events for the virulently right-wing *American Spectator*. Until the rise of the conservative Court, any of these activities would have been considered a shocking violation of a judge's duty to refrain from political activity and to refrain from any behavior that would raise questions about his or her objectivity. Increasingly, they are the norm for justices who no longer hide their partisan views.

It's easy to understand why conservative politicians and judges are trying to align their political

program with a strained reading of the Constitution: it's the only way they can achieve their political goals. Senate Republican leader Mitch McConnell recently demanded a balanced-budget amendment to the Constitution, designed to cripple the federal government, because, he said, "We've tried persuasion. We've tried negotiations. We've tried elections. Nothing has worked."<sup>7</sup> Conservative politicians like to claim that America is a center-right country, but in fact, people want the good things an energetic government can do. Social Security and Medicare; environmental protection; consumer safety regulation—all these things are popular. The people, those idiots, keep voting for programs they like.

The people must be stopped.

So the Right is seeking to win by changing the rules. A growing number of conservative lawmakers and commentators claim that the "original intent" of the Constitution's framers and the views of the right wing of the Republican Party are one and the same. Progressive, democratically enacted policies and choices are unconstitutional. In their radical new reading, the Constitution does not set down the rules for running a government, but instead decides all questions of policy. If something is not mentioned in the Constitution, it's unconstitutional. "Nowhere in the Constitution do we read the words, 'the government shall provide for health care,'" complains Representative Virginia Foxx (R-NC). "In fact, the words 'health care' are nowhere in the Constitution." Senator Tom Coburn (R-OK) echoes the wrong-headed argument.<sup>8</sup> Yes, "health care" doesn't appear in the constitution, but the Right's astonishment at this is entirely pretended. The words "Centers for Disease Control," "cancer research," "space program," "American flag," and "interstate highway system" are also missing. That's because the men who wrote the Constitution had never heard those words; beyond that, it's because they spent their time laying out a system of government, and left the question of what *policies* that government would follow to future generations. That's what they would have called self-governance.

Today's "constitutionalists" aren't even content to distort the words of the Constitution. They want to amend it in many places to subvert the system it has created. The Right is determined to write the federal marriage amendment into the Constitution, making it impossible for any state to allow same-sex marriage. A human life amendment is also on their wish list. Many Tea Party groups are demanding a new constitutional convention to strip Congress of its current powers. House majority leader Eric Cantor supports a constitutional amendment to permit the state legislatures to repeal federal laws. Most Republicans support a "balanced-budget" amendment that would permanently cripple our ability to finance an adequate federal budget.

Why has the Right done such a good job of projecting its invented "Constitution"? The past decade has done much to shake the public's faith in our institutions. Under President George W. Bush, the federal government began to conduct surveillance, eavesdrop on private conversations, intercept email, and imprison foreigners and citizens in military prisons. It was Bush, not liberals, who most aggressively created an overreaching federal government. Bush lied to the public about the threat from Iraq and bungled the war he started. Finally, his economic policies wrecked the economy, and when the structure began to fail, his government made sure the suffering would fall only on ordinary people.

Economic inequality, which has been on the rise since the 1980s, has gone into overdrive with the recession that began in 2008. The bank and corporate bailouts of that year have been one of the most corrosive events in American history: they crystallize perfectly the ordinary person's sense that the system is rigged against them and in favor of the wealthy elite. Because of the timing of the bailouts—just before the inauguration of a new administration—Barack Obama has become identified in the public mind with bailouts and banks as well. At the same time, the pace of social change has

disoriented ordinary Americans. The Far Right has come up with a proposed solution to the problem: it wants to abolish the twentieth century.

One unifying theme of the diverse Tea Party groups is their opposition to immigration; their fear of foreigners has been worsened, I think, by the election of an American president with black skin and a foreign-sounding name. And the president has failed to put forward an alternative economic or social vision that would offer confidence and hope to those hit hardest by the recession.

Truly, the center in America has not held. As Ian Millhiser of the Center for American Progress has explained,<sup>9</sup> the failure of the Bush administration discredited the conservative elites. Traditional pro-business Republicans now carry the stain of the bailout; the “neo-conservatives” who staffed the Bush foreign policy and defense apparatus were the architects of the war in Iraq. America has always had a strain of conservatism that was thoughtful, grounded in history, and respectful of tradition. As a progressive, I often disagree with these conservatives about the nature of democracy, the wisdom of economic regulation, the proper extent of the Commerce Power, and the proper role of equality. But I seldom thought—as I do more and more often today—that when engaging conservative arguments I was talking to people who simply did not live on the same planet as the rest of us.

Since 2008, lunatics have taken over the conservative asylum. The traditional conservatives have found themselves talking to the air—witness the defeat of a conservative figure like Utah senator Robert Bennett by Tea Party darling Mike Lee. Dozens of the new Tea Party Caucus House Members showed they were perfectly willing to risk worldwide economic collapse by allowing the United States to default on its debt. Republican presidential candidate Rick Perry attacked Republican Fed chairman—and former Bush staffer—Ben Bernanke as “almost treasonous” for his efforts to prevent a double-dip recession.<sup>10</sup> In the absence of sane, experienced leadership, what is called “movement conservatism” has been hijacked by a distinctly motley crew of far-right mouthpieces.

The NCCS, for example, clearly springs out of a certain kind of conservative religious politics. It blends those with the old-style Cold War ultraconservatism of groups like the John Birch Society, which regarded all postwar American history as the triumph of Communist treason. (The society's founder, Robert Welch, once called Dwight Eisenhower “a conscious, dedicated agent of the Communist conspiracy.”)

But note the legend about Anglo-Saxons and the Ten Lost Tribes. That doesn't come from ordinary Christian conservatism, or from Mormon fundamentalism. It ought to set off a warning announcement: “You are now entering deepest Crazy Town.” The Anglo-Saxon legend is the remnant of a movement called “British Israelism,” which arose in the nineteenth century to argue that the people of Britain, not the world's Jews, were the “chosen people” of the Christian Bible. “Israelism” arose at the same time as the burgeoning of the worldwide British Empire. Not surprisingly, the idea that white Britons were God's chosen people made it okay for them to rule nonwhite people around the world: that was the divine plan.

But it also was a strong justification for virulent anti-Semitism. Jews, in the “Israelite” literature weren't actually descended from the Hebrews of the Old Testament; they were fraudulent interlopers. Some “Israelists” claimed they were actually “Khazars,” descendants of a Turkic people whose ruling elite converted to Judaism in the eighth century BCE. Things got worse when “Israelism,” as documented by scholar Michael Barkun in his book *Religion and the Racist Right: The Origins of the Christian Identity Movement*,<sup>11</sup> jumped across the Atlantic in the twentieth century and became the basis of a white-supremacist brand of “Christianity”—the “Identity religion”—headquartered in the Pacific Northwest. “Identity” Christianity is an inspiration behind violent vigilante groups like the Aryan Nation and the Hutaree Militia.

The Cold War–era Far Right contributes the idea of a domestic “enemy,” which is very powerful in the “constitutionalist” movement. American society spent more than two generations in a deadly competition with the Communist world. The American Right during that time convinced itself that the American government and society had been infiltrated—like the fictional Santa Mira, California, in Don Siegel’s film *Invasion of the Body Snatchers*—by an alien force, in this case a Fifth Column of Communists and “sympathizers.” The end of the Cold War left a lot of the Far Right bereft. Who was the enemy now?

Well, turns out it’s Democrats. Michele Bachmann once called for an investigation of Congress to determine which members are “anti-American.” “We have a lot of domestic enemies, enemies of the Constitution,” Representative Paul Broun (R-GA) said on the floor of the House not long ago. “The House is overrun with domestic enemies of the Constitution and the Senate’s full of a bunch of them also.”<sup>12</sup> Representative Allen West recently said, “I believe there’s about 78 to 81 members of the Democrat Party who are members of the Communist Party. . . . It’s called the Congressional Progressive Caucus.”<sup>13</sup> In the new post–Cold War world of paranoia, it doesn’t take much—support for Medicare, maybe—to qualify as a dangerous traitor.

Mixed in with the John Birch and white-supremacist strains of conservatism is a persistent nostalgia for the Confederate States of America. Since the day after Appomattox, voices in our society have been insisting that the South, not the North, had it right all along. The Civil War, in their revisionist history, had nothing to do with slavery and everything to do with the meddling North’s hatred of the noble, agrarian South. Slavery, in this version, wasn’t such a big deal. (Note the echoes of this argument in *The Making of America*.) It might have been slightly regrettable, but generous Southerners would have ended it voluntarily in just a generation or two, or three, or at least sometime when they felt like it. The war was really about “states’ rights,” and the refusal of the Yankee juggernaut to respect the “original intent” of the Constitution.

Abraham Lincoln, in this retelling, was a tyrant who wrecked the Constitution out of vindictive hatred for the South. “The sum of Lincoln’s constitutionalism seems to have been ‘whatever I favor is constitutional,’” writes far-right historian Kevin R. C. Gutzman in *The Politically Incorrect Guide to the Constitution*. Gutzman also insists that the South was fighting for government “of the people, by the people, for the people.”<sup>14</sup>

This “slavery nostalgia” wing of the Right is the source of the current vogue for state “nullification” of federal law. They claim that “nullification” is the handiwork of Thomas Jefferson and James Madison, whose Virginia and Kentucky Resolutions protested the Alien and Sedition Acts of 1798. They have misread and misrepresented those resolutions. But in any case, the 1798 idea of “nullification” was a good deal less radical than the current version being peddled to red-state legislatures; at any rate, the original version has been dead since the Andrew Jackson administration. Today’s “nullifiers” find their true intellectual inspiration in the Southern “massive resistance” movement against *Brown v. Board of Education*. That “nullification” was the brainchild of a few segregationist ideologues and inspired school closings and racial violence across the South during the 1950s. The roots of this strain of contemporary far-right discourse, like those of the “Ten Lost Tribes” idea, lie directly in white supremacy and racism.

These echoes of the Cold War and of racism are not the only notes in the cacophony of conservative ideas clamoring for acceptance. Equally important are the ideas of the Christian right. For generations, fundamentalist Christians have believed that America is “their” country, founded and designed as a “Christian nation.” (By that term, most of them mean a “Protestant Christian” nation.) The Christian right’s in-house “historian,” David Barton, is the spokesman for this brand of constitution

mythology. Barton, who has no training in history, has produced a flood of books designed to demonstrate that the Founding Fathers were devout Christians who intended the new nation to be run by and for believers. We'll look in more detail at some of his claims later. The important point for now is that his half-baked views are taken with utter seriousness by Republican politicians. The Bush campaign in 2004 sent him on a tour of small American towns, where he explained to groups of Protestant pastors that the "original intent" of the Founding Fathers was for churches to be heavily involved in politics. In the current election cycle, he has advised both former House Speaker Newt Gingrich and Representative Michele Bachmann.<sup>15</sup>

Bachmann herself, a graduate of Oral Roberts Law School (now Regent Law School, owned by the religious broadcaster Pat Robertson), is a product of this Christian-right tradition. (She briefly suggested that Barton join the "faculty" of her "school" for new members of Congress.) Fundamentalists and conservative evangelicals have in the past generation spawned an entire universe of Christian schools, colleges, law schools, and think-tanks to spread their version of history within a movement that has become almost completely sealed off from any competing vision of American history and law. Much of its history is distorted or invented, but in the airless world of the Christian right, it is protected from serious challenge.

Another strand of the current conservative brand of "constitutionalism" comes from the libertarian philosophy that has sprung up since World War II. Libertarians argue that the very existence of government and the state is unnecessary and immoral. Their ideas stem from the work of Austrian economists Ludwig von Mises and F. A. Hayek, who argued that an active government leads inevitably to the loss of personal freedom.

Mingling with the "Austrian economics" school of libertarianism is the homegrown strain popularized by novelist Ayn Rand during the 1950s in novels like *The Fountainhead* and *Atlas Shrugged*. Rand was more a moralist than an economist; in her view of the world, all human progress is the result of individual human beings pursuing their own individual self-interest. Cooperative endeavor of any kind—"collectivism"—is wrong-headed and immoral. The claims of human sympathy—such ideas as community responsibility and altruism—are not just blather; they are dangerous tools used by the weak to batten on the strong. Taxation in and of itself is robbery of property that strong individuals have assembled for themselves. The only valid moral principle is that each individual should provide for him- or herself and leave others free to do so, or to starve. (This is one of the scattered voices cheering last winter when a news reporter at a Republican presidential debate asked Ron Paul whether uninsured patients should be allowed to bleed to death in emergency rooms.)

To a libertarian, any government program is suspicious, and any program to help citizens with problems like old-age pensions, health care, childhood nutrition, or racial discrimination is a profound social affront. To them, a properly run society would have almost no public sector. It would be instead what the libertarians call a "night watchman" state—probably only a military to protect the nation from foreign threats and a law enforcement apparatus to protect private property against theft.

A number of legal scholars in the past twenty years have begun to advance the idea that the Constitution is really a libertarian document, or if it isn't it should be. The current argument against the federal health care statute comes from libertarian ideas. In their analysis, government programs—even ones that benefit the whole society—are *by definition* trespasses against "liberty," which means solely the right to stand or fall completely on one's own. (The idea that the opposition comes from the "individual mandate" is a smokescreen; no matter what kind of health care statute Congress passes, the arguments would be the same.)

Sincere libertarians, like Ron Paul, have a certain goofy charm. Many of them are quite sincere

about wanting to think through the implications of their economic ideas and apply them consistently. But there are three problems with the role of libertarianism in the current debate.

First, with its radical individualism, its contempt for community, and its prejudice against government, libertarianism is a relatively new school of thought. Founded in the twentieth century, it has absolutely nothing to do with the ideas behind the U.S. Constitution. Libertarians embrace mythology when they claim that Washington, Madison, Franklin, or any of the other Founders “intended” to write Hayek’s ideas into a document created in 1787. Eighteenth-century “small-republicans like the Founders believed strongly in concepts that today’s libertarians hate: community service, economic equality, the common good. Governments in the Founding period frequently intervened in the marketplace in ways that would give Hayek and von Mises fits.

The Constitution doesn’t require eighteenth-century-style economics; it would certainly *permit* the people to enact a libertarian system if they chose, but there is no reasonable case that it *forbids* them to choose other systems, including one like the current one in which government regulates the economy in the interest of health and safety and provides help for citizens needing it. Yet increasingly, that “original intent” argument is the claim that some “constitutionalists” are making. As a matter of history and text, it’s as silly as Barton’s claims about a “Christian nation,” or Skousen’s about the Ten Lost Tribes.

Second, for all the invocations of “liberty,” a true “night watchman state” is one most of us wouldn’t want to live in. A huge industrial society without economic regulation, protections for workers against danger and exploitation, or environmental controls would be worse than unlivable—it would collapse fairly quickly into chaos. Most of us would experience very little “liberty” without laws to protect the weak against the strong, or provide emergency assistance for victims of storms, floods, fires, and earthquakes.

Third, the deployment of libertarian ideas by the contemporary Far Right is deceptive. “Liberty” in a truly all-encompassing sense is not what the Far Right is after. The government they envision retains sweeping power over our lives—to direct our spiritual development, to control not only whom we marry but also how we behave in our bedrooms, to dictate our choices about premarital sex, abortion, and contraception. If their ideas triumph, we risk finding ourselves in what we might call “authoritarian libertarianism,” a world in which government is forbidden to help us find health care but free to regulate our family and sexual lives, to “suggest” prayers, and to tell us what we can and can’t say. And, of course, much of the Republican Right is strongly behind new legal provisions allowing military and national-security agencies to jail Americans without charge or trial.

As you can see, the Far Right’s ideas about the Constitution aren’t historically accurate, workable, or even coherent. One thing holds them together—the desire, more or less explicit, to repeal the entire twentieth century. At first glance, it’s an appealing idea: wars, totalitarianism, the rise of nuclear weapons—what’s to love about the last century? But it turns out those aren’t the things the Right objects to. Instead, one conception brings together the libertarian intellectuals, traditionalists, right-wing Christian, and Tea Partiers: an absolute hatred of the Progressive Era of American politics.

Most Americans don’t see the world in highly politicized, ideological terms. To them, it may seem confusing that the Right focuses so much fury on an era in American life that is seldom discussed today. But focus they do. *How Progressives Rewrote the Constitution* is the title of an influential treatise by Richard Epstein, the most influential scholarly proponent of a libertarian reading of the Constitution.<sup>16</sup> At a far less exalted intellectual level, Texas governor Rick Perry warns darkly that “since the dawn of the so-called Progressive movement over a century ago, liberals have used every tool at their disposal—including, notably, the Supreme Court—to wage a gradual war on the

Constitution and the American way of life, with very little effective opposition from conservatives. Tea Party activists sell T-shirts emblazoned ~~1913. WORST. YEAR. EVER.~~ That's because the people—those idiots!—amended the Constitution in 1913 to allow a progressive income tax and direct election of senators. Congress also created the Federal Reserve Bank System. And Woodrow Wilson became president. “It was truly a pernicious time for freedom,” writes Andrew Napolitano.<sup>18</sup> Everything since 1913 has been a combination of conspiracy and man-made disaster.

It's a curious idea, because among other things, wiping out the past hundred years means wiping out what is called the American Century. Since 1913, the United States has (1) become the greatest economic power on earth; (2) built a standard of living never equaled anywhere, at any time; (3) expanded democracy and citizenship to forbid racial and sex discrimination; (4) rallied the free peoples of the globe to defeat Nazism; (5) blunted the threat of Communism without war; (6) sparked an era of technological progress that included the first manned expedition to the moon and the transformative creation of the personal computer and the Internet; and (7) flowered culturally with great literature, art, cinema, and music that are now read, seen, watched, and heard with admiration everywhere in the world.

So what went so all-fired wrong in 1913? The true horror is that the idea of popular democracy, and the election of senators, finally became the dominant ideal of American politics. The year is a symbol of the modernization of our country and our system. Sleepy economic backwaters began to join in the national system. The federal government began to protect working people and consumers from the excesses of monopoly capitalism. Women began to vote, and then to demand equal rights in the home and outside of it. Racial minorities rejected their second-class status. New religious groups created greater religious and cultural pluralism. New immigration streams transformed America demographically, powering industrial growth.

Change happened. And much of it was good. But the new Far Right wants all of it gone. “I want my country back” is a common cry from the Tea Party ranks. The country they want “back,” however, is one that never existed, where God-fearing, gun-toting families prospered without government assistance, and god-like businessmen ran their empires with no worry about labor unions, environmental protection, or human equality. That today's “constitutionalists” want to bring it “back” is a devastating comment on their underlying values.

The Right's ideas are not particularly good ones, and they aren't particularly coherent, but they are being trumpeted far and wide—in the halls of Congress, on the presidential campaign trail, on talk radio and right-wing TV. The Right is richly funded, with its own TV network, Fox News Channel; its own global daily, the *Wall Street Journal*; its own dedicated New York publisher, Henry Regnery & Co.; its own Minister of Information, Rush Limbaugh; its own magazines like the *Weekly Standard*; think-tanks like the Heritage Foundation and the Cato Institute; and even a book club. Right-wing millionaires and foundations have deeply penetrated American universities as well, endowing chairs in specific elements of economic and political thought that usually seem to go to academic spokesmen for the Right.

And all that is simply the apparatus of the economic-libertarian Right. In addition, the religious Right has also perfected an alternative communications system, operating through churches, church schools, Christian broadcast outlets, book publishers, and websites, in which its version of history and law need never encounter an outside challenge. This whole apparatus is what journalism scholar Kathleen Hall Jameson and Joseph N. Cappella have christened “the echo chamber.”<sup>19</sup> All in all, it's a formidable propaganda machine.

The progressive and mainstream side of the argument hasn't fought back as effectively as it could



Sometimes it seems that Democrats and progressives don't want to engage the constitutional argument. Barack Obama was at one time a constitutional law professor, but as president he has not been willing to call out his critics for the claims they make about the Constitution. Mainstream working journalists often seem uneducated about the Constitution, and repeat right-wing claims as if they were credible or even obviously true.

Some of the responsibility for this passive response lies with progressive and mainstream legal scholars like me. It isn't that we have failed to explain the Constitution; it's that we too seldom try. Some scholars from top schools hold forth with polysyllabic theories of hermeneutics, or earnest invocations of Jürgen Habermas and Jacques Derrida, that ordinary citizens can't fathom. It's brilliant stuff; I like reading it. And it's the surest route to academic distinction. As a result, many of the most brilliant just don't try to speak outside the academic ghetto. Scholars who write for a popular audience often bear an invisible mark of shame, as if we were not quite full-fledged professors.

In addition, some progressive scholars feel shame-faced about defending the Constitution. Our country has a complex and sometimes problematic history. The Constitution as written reflected many past injustices. How can we reconcile that history with a commitment to the Constitution?

Conservatives have an easy response to these historical problems: they deny they exist. They claim that the "Founding Fathers" (a term coined by, of all people, Warren G. Harding<sup>20</sup>) were infallible, that neither the Constitution nor American history contain any mistakes. Michele Bachmann insisted that the Founding Fathers were really trying to abolish slavery when they wrote the Constitution. When challenged on that allegation, the best she could do was to cite John Quincy Adams, who was a twenty-year-old Harvard student when the Convention met, never set foot in Philadelphia that summer, and only became an abolitionist after he left the presidency in 1829. But to her, it was inconceivable that the "Founding Fathers" could really have been wrong, or short-sighted, or too self-interested to see the injustice of slavery.

Progressive critics of the Constitution say that it was written in 1787 by rich white men, many of them slaveholders, to protect their own racial, sexual, and economic privilege. The only answer to that charge is this: True enough. But we don't live under the Constitution set up in 1787. Over 225 years the Constitution has been amended twenty-seven times. The first ten, of course, are the Bill of Rights, which restrain the federal government (and now the states) from violating individual rights. But many amendments after that have been designed to push American government and society in a progressive direction. The Thirteenth Amendment outlaws slavery in sweeping terms; the Fourteenth protects the civil rights and legal equality of citizens; the Fifteenth, Seventeenth, Twenty-Fourth, and Twenty-Sixth Amendments all expand the right to vote and protect it against state interference. The Sixteenth Amendment gives the federal government the power to enact a progressive income tax; the Seventeenth requires that the people, not legislators, choose United States senators.

The arrow of these amendments pushes one way—toward greater equality, greater democratic participation, and more effective power for the national government. Only one amendment ever passed has *limited* individual rights—the Eighteenth, which imposed Prohibition—and it was quickly repealed by the Twenty-First. The Constitution may have begun as a charter of privilege, but over the years, we the people have remade it into a document that, for all its flaws, embodies the progressive ideas of freedom, equality, national power, and self-government.

The Constitution—today's Constitution—belongs to all of us, and we should be glad to have it. It is the product of a long difficult, painful history, but it is no longer the flawed document written in 1787. It's time to take it back from those who are trying to steal it in plain sight. If we don't, the next time we need government—in the wake of a national disaster or a terrorist attack—we may find it has been

dismantled. Our democratic Humpty Dumpty has been 225 years in the making; if we let the wrecking crew break him, he may be hard to put back together.

That's the reason for this book. While the Right has been spreading its myths, those who know better have been silent. I've been a constitutional scholar for twenty years. During the year before my trip to right-wing "Constitution school," I had spent almost every day reading and rereading the Constitution for a scholarly study of its text—a study I still hope to publish someday.

But I realized in that church basement that we need a book like this one more than another university-press study. Walk into any bookstore anywhere in America, and you'll find titles like *Who Killed the Constitution?*; *The Politically Incorrect™ Guide to the Constitution*; *Nullification: How to Resist Federal Tyranny in the 21st Century*; *What Would the Founders Say?*; or *The Constitution in Exile*—all expounding the Far Right's seductive, simplistic, and hateful message. On the other side of the ideological divide, we have either long, earnest guides to the Constitution or, well, nothing.

There's a need for ordinary people to push back against the far-right assault on the Constitution—the drive to destroy the Constitution in the name of "saving" it. So I resolved to write something that nonlawyers could use to pick apart the claims of the mystics and charlatans. To that end, I began to read far-right books, articles, and speeches, and I noticed that certain claims—claims that are demonstrably false—come up over and over. I began to make notes about them, and eventually assembled a "top ten" list of falsehoods about the Constitution. The next section of this book is designed to provide the background information citizens need to understand that, no matter how emphatically these myths are shouted from the radio or the Internet, they are simply not true.

Here's a quick look at the claims we will discuss.

1. *Some people believe only in "original intent" and others believe in a "living Constitution"*. Conservatives claim that they know and follow the real "intention" or "meaning" of the Constitution, while progressive and even moderate justices (even, sometimes, conservative Republican Justice Anthony Kennedy) merely consult their personal views and then pretend to "find" them in the Constitution. It's a phony argument. As we will see, progressive constitutional thinkers now and throughout American history have tried to apply the Constitution as it was written, intended, and understood. Conservative claims to know the "original intent" or "original public meaning" of the Constitution are in essence a power play to establish the Right alone as the arbiter of the Constitution's meaning.
2. *The Founders wrote the Constitution to restrain Congress and limit its powers*. Conservatives also claim that the Constitution was set up to restrain the federal government. The Philadelphia framers, they say, were terrified of federal power and created walls to hold it back. This view of the Constitution is more or less made out of whole cloth. The Constitution was set up to create a strong, effective government. Subsequent amendments have strengthened, not weakened, the structure. Most of the framers in Philadelphia were actually terrified of the short-sightedness and parochialism of the *states*, and wanted a federal government strong enough to keep them from pulling the new nation apart.
3. *Congress has distorted the meaning of the Commerce Power and used it to pass patent and other unconstitutional laws*. If there's one part of the Constitution that the Right hates, it's the Commerce Power. They claim that Congress's power over "commerce with foreign nations, among the several states, and with the Indian tribes" has been "stretched" over the past century to cover things that have nothing to do with commerce. To support this claim, they have to distort both the history of the Constitution and the meaning of words. The Commerce Power was the

centerpiece of the Philadelphia Constitution, and is needed if the United States is to remain modern, first-world economy. Earlier judicial attempts to constrict it were disastrous. And the Right's real objection to contemporary Commerce Power doctrine is that it enables Congress to regulate . . . commerce.

4. *The Constitution does not provide for separation of church and state.* This idea, too, is far-right dogma. In their telling, "separation" was an invention of one man, Thomas Jefferson, and has nothing to do with the "original intent" of the Constitution and the First Amendment. They claim that the Founders actually wanted the state governments to involve themselves in the spiritual lives of the people, guiding and directing them in proper belief—even, possibly, establishing one religious denomination, or Christianity generally, as the official state religion. The federal government, meanwhile, was to support all Christian religions equally, while disadvantaging all others. As we will see, this is dangerous nonsense. Separation is an American idea that long predates Jefferson. It was clearly embodied in the First Amendment, then incorporated in the Fourteenth Amendment. It applies to the states as much as to the federal government. It is a key to our continued unity and success as a nation.
5. *Equality and self-government are "wholly foreign to the First Amendment."* Why do we have freedom of speech? Is it a building block for a free self-governing republic, or a special tool of social control for consolidated wealth? Since 1974, the Right has begun to insist that free speech is a kind of asset, a form of wealth. For that reason, they say, rich people, institutions, and corporations are entitled to dominate national discourse and drown out anyone who has less money. After the Court's 2009 decision in *Citizens United v. Federal Election Commission*, the Right has begun to transform American politics, cementing domination of the process by rich individuals and institutions. Reasonable efforts to make sure all voices are heard, the Right increasingly says, are automatically unconstitutional. The only purpose of the First Amendment is to allow the rich to dominate discourse. That idea is wrong, and it's dangerous.
6. *The Second Amendment was "intended" to make government "fear the people."* The Far Right now has a goal: complete abolition of any regulation or licensing of firearms, either by the federal government or the states. They claim that the "intent" of the Second Amendment was to equip ordinary citizens to intimidate and resist government power. This idea is of very recent vintage. The extent of gun rights has been a subject for discussion for more than a century, but no reputable thinker ever suggested that the Second Amendment was there to let disgruntled citizens shoot down government officials when they feel like it. In fact, the history of the early republic suggests that the Founders took the possibility of armed resistance to government very seriously—and wanted it suppressed. The extremists who took over gun-owner groups in the 1970s have a different agenda. Their view of civic life is of a constant war of all against all; as they push to make guns legal in bars, schools, airplanes, and churches, their vision poses a dire threat to the future of our society.
7. *The Tenth Amendment and state "sovereignty" allow states to "nullify" federal law.* The idea of "nullification" of federal law by state legislatures, as I said before, really stems from the racial resistance to the civil rights movement of the 1950s and 1960s. But today's radical Right likes to claim that the right to "nullify" federal law stems from the Tenth Amendment. They claim that the amendment "gives" states "rights" to resist federal "tyranny" and to protect their "sovereignty" against the federal government. But the idea that states have "rights," or that they are "sovereign" against the federal government, appears nowhere in the original Constitution. The Tenth Amendment certainly doesn't mention any of these concepts either; they were actual

enshrined in the Articles of Confederation. The Articles were the first American “constitution” — they were discarded in 1787 largely because they gave the states too much control over national matters. Conservatives like to insert words into the Tenth Amendment when no one is looking; by doing so, they are distorting history and undermining the entire structure of the Constitution.

8. *The Fourteenth Amendment was written solely to address the situation of freed slaves, and has no relevance today.* The Fourteenth Amendment, with its guarantees of due process and equal protection, is probably the most important single amendment to the Constitution. Its framers, for the first time in American history, wrote into the Constitution’s text the principle—originally stated in the Declaration of Independence—that human beings are created equal. Because it imposes the Bill of Rights on the state governments, it is the key to our democratic system. From areas from immigration to criminal justice to freedom of religion, its guarantees are ones we rely on every day. Enemies of equality have always hated it. The Right now claims that the Fourteenth Amendment really doesn’t mean much. It was passed to protect freed slaves, they say; since there aren’t any around today, it’s a dead letter. Thus it doesn’t provide any protection against sex discrimination, for example, or require states to observe the prohibition against established churches. The assault on the Fourteenth Amendment is a falsehood that endangers our basic freedoms and our right to self-government.
9. *Election of senators is unfair and harmful to the states.* The Right hates the Seventeenth Amendment, which states that the members of the Senate must be “elected by the people.” They would like to return to a system where the state legislative majority picked senators without a messy popular vote. They claim this system was cleaner than the current one; in fact, history shows precisely the opposite to be true. They also claim that popular election of senators has destroyed “states’ rights.” That claim, too, is demonstrably untrue. Like members of the House, senators continue to represent their states. Members of Congress help carry on the constant political bargaining between states and the federal government. What the Right hates about popular election is that it prevents state legislators from interfering directly in Congress. Instead of senators being responsible to those idiots, the voters.
10. *International law is a threat to the Constitution and must be kept out of American courts.* Like Justice of the Peace Pearce, who taught my “Constitution school,” the Far Right professes to be terrified that the insidious force of international law is reducing the United States from an independent nation to a servile satrapy of the United Nations—or, even worse, a province of the imagined Islamic Caliphate spreading across the globe. The idea that “Sharia law” is slowly taking control of our communities is ridiculous. Those who spread it are serving a destructive agenda of religious hatred. The larger idea behind this myth is that the United States can declare itself free of any obligations to other countries. In this version, the Constitution is supposed to exempt the United States from its role in the world system. That idea has no basis in history. It could undermine our entire economic system and even endanger the peace. The framers of the Constitution knew this, which is why they explicitly wrote into the Constitution a requirement that courts *must* consider international law.

Most of these claims—like the nonsense about the anti-federal “purpose” of the Constitution or the “true meaning” of the Tenth Amendment—are refuted simply by a careful reading of the Constitution’s text. What’s remarkable is how few people actually do this before proclaiming their opinions. Even most lawyers have never read the document straight through: in most law school constitutional law courses don’t even begin with the text. A lot of self-proclaimed experts on the

Constitution don't seem to have read it either. Herman Cain, for example, excoriated liberals for not knowing that the Constitution said "~~it is the right of the people to alter or abolish~~" government.<sup>21</sup> Cain was quoting the Declaration of Independence, which was written in 1776, not 1787, and is not the supreme law of the land.

The text of the Constitution is printed at the back of this book. As you go through the book, read the text and measure it against the absurd claims we hear every day. I think you'll be struck by one fact: the "policies" the Right claims to find in the Constitution—whether they are libertarian economics or Christian government—aren't there.

This book is designed to arm readers with the ammunition they need to combat mythology and deception wherever they encounter it. The Right is trying to steal the Constitution in plain sight. If we don't challenge the nonsense being spread about our form of government, we will find that it has been changed into something unrecognizable.

Ordinary Americans love the Constitution at least as much as far-right ideologues. It's our Constitution, too.

Before it's too late, we need to take it back.

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# THE TEN BIG MYTHS

## The Right Is “Originalist”; Everyone Else Is “Idiotic”

In a [2006 speech in Puerto Rico](#), Justice Antonin Scalia explained that only conservatives actually believe in the Constitution. Progressives, he said, believe in “the argument of flexibility,” which “goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that. The Constitution is not a living organism, it is a legal document. It says something and doesn’t say other things.”<sup>1</sup>

A year later, President [George W. Bush told the Federalist Society](#), “Advocates of a more active role for judges sometimes talk of a ‘living constitution.’ In practice, a living Constitution means whatever these activists want it to mean.”<sup>2</sup>

Originalism, writes scholar David Forte in *The Heritage Guide to the Constitution*, “implies that those who make, interpret, and enforce the law ought to be guided by the meaning of the U.S. Constitution—the supreme law of the land—as it was originally written.” Who could be against that? Nobody, Forte writes, except those who believe that the Constitution has “no fixed meaning.”<sup>3</sup>

The Right’s invented definition of a “living constitution” is useful because it lets right-wingers like Scalia pose as principled advocates and ridicule anyone who disagrees with his narrow ideas. Note that the idea is that the Constitution “says something, and doesn’t say other things”—in other words, those who don’t read it the way Scalia does must believe it says nothing at all.

In fact, the argument is a classic bait-and-switch. It begins with the claim that every part of the Constitution when adopted had a fixed, precise meaning. We must apply that meaning and only that meaning, or we are “changing” the Constitution. As Scalia said, everyone else is an idiot who makes it up—an unpatriotic elite deceiver.

“Fixed meaning” is the snapper here. Very often, the words themselves aren’t clear. (What, for example, is “due process of law,” or “cruel and unusual punishment,” or “unreasonable seizure”?) Then the Right explains that their *meaning* isn’t what’s written in the Constitution’s text; it is actually somewhere else. The words on the page have to be interpreted in a secret way that conservatives “know” because they have looked it up in the Big History Book. That’s true, as we’ll see, even when the non-originalist is suggesting that the words mean what they literally say. If we do not accept the Right’s claims about what the words “really” mean, we are “changing” what is written on the page by trying to “amend” it on the sly.

The popular myth of “original intent” rests on the notion that there is somehow a single “clear intent” hidden in each phrase of the Constitution. (The phrase “clear intent,” by the way, ought to serve as a warning that an attempt to pick your pocket is in progress.) That idea confuses the task of reading the Constitution with the work of a Protestant believer reading the Bible. Religious historian Jaroslav Pelikan sees the origins of American constitutional discourse in early Protestant theology. Luther and

the other Reformers believed that “Scripture had to be not interpreted but delivered from interpretations to speak for itself,” Pelikan writes. What mattered to Luther was “the original intent and *sensus literalis* [literal meaning]” of the words of the Bible.”<sup>4</sup>

A century ago, a group of American evangelical Christians published a set of essays on the Christian beliefs that was later published in book form as *The Fundamentals*. In large part, what can be called “fundamentalism” was a revolt against nineteenth-century “higher criticism”—scholarship that studied the Bible like any other literary or historical text. Rejecting this approach, fundamentalists argued that the Bible is the literal word of God; all parts of it are created directly by inspiration, the breath of God into the human soul. Not only the ideas but also the very words in which they were written flow directly from God. “The Bible is made up of writings, and these are composed of words. The words are inspired—God-breathed. Therefore is the Bible inspired—is God’s Word.”<sup>5</sup>

Every word has an eternal meaning; all the words fit together into one divine whole. This “true meaning, available only to the faithful, must be zealously guarded against corrupt worldly forces—the “higher critics”—seeking to contaminate it with modern, un-Christian ideas. “The higher criticism has been in the hands of men who disavow belief in God and Jesus Christ,” one *Fundamentals* author explained. “Therefore their theory is truly a revolutionary one.”<sup>6</sup>

“Originalist” political figures and talking heads have taken—sometimes without knowing it—the basic ideas straight from the fundamentalist canon. They treat the Constitution the way many fundamentalist Christians treat the Bible—as an infallible, inerrant, consistent, timeless document. In fact, the biblical view of the Constitution gives to our fundamental law a kind of scriptural shape. We have the Law (the 1787 Constitution) written by the Patriarchs (the “Founding Fathers”). We have (as Pelikan notes) the Ten Commandments (the Bill of Rights). And we even have a set of Epistles—*The Federalist*, written after the Constitutional Convention by James Madison (who was present every day of the Convention), Alexander Hamilton (who was a delegate but rarely attended), and John Jay (who wasn’t a delegate at all). These essays were written in haste in an effort to convince the voters of New York to back the new Constitution; often, as Pauline Maier notes in her history of the ratification of the Constitution, the authors did not have time to show them to each other. And they had relatively little to do with ratification except in some parts of New York.<sup>7</sup>

The Far Right, however, now insists these essays are divine writ. Anthony A. Peacock of Utah State University, writing in a Heritage Foundation pamphlet, treats the multiple authorship of *The Federalist* in almost the precise language that a fundamentalist would use for dealing with the multiple authors of the Bible: “Use of a single pseudonym suggested that *The Federalist* possessed uniformity of intent: that *The Federalist* was to be read as the work of one mind, not three, and was coherent throughout.”<sup>8</sup> Peacock adds, again in language that could have appeared in *The Fundamentals*, “The teaching of *The Federalist* was intended to be true for all times and all places.”<sup>9</sup>

The analogy goes further: “originalists” have an enemy just as the fundamentalists did. The “higher critics,” to fundamentalists, were devious elites who misunderstood and misrepresented the Bible because they were not true Christians. In much the same way, the supposed advocates of the “living Constitution” are smooth-talking, anti-American “elite” deceivers who want to replace the good old Constitution with their personal, foreign-influenced views.

But that’s one of the Right’s biggest lies. “We are all federalists, we are all republicans,” Thomas Jefferson said in his first inaugural address. And we are all “originalists.” Many constitutional interpreters like me, however, find the “original intent,” or “original meaning,” in, well, what the Constitution says. The only thing we know for sure that all the Founders “intended” was *to write the words of the Constitution*. Any principled interpretation has to start there.



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