

LECTURE

DELIVERED SEPTEMBER 11, 2014

No. 1260 | MARCH 11, 2015

The Heritage Guide to the Constitution, Second Edition: What Has Changed Over the Past Decade, and What Lies Ahead?

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Abstract: *The Heritage Guide to the Constitution, first released in 2005, brought together more than 100 of the nation's best legal experts to provide line-by-line examination of each clause of the Constitution and its contemporary meaning—the first such comprehensive commentary to appear in many decades. The Heritage Guide to the Constitution: Fully Revised Second Edition takes into account a decade of Supreme Court decisions and legal scholarship on such issues as gun rights, religious freedom, campaign finance, civil rights, and health care reform. The Founders' guiding principles remain unchanged, yet a number of Supreme Court decisions over the past decade remind us that those principles still require constant and spirited defense. What is needed today is a fusion of judicial originalism, scholarly originalism, and political originalism to advance the Founders' vision for our Constitution.*

EDWIN MEESE III: We are looking at several things today. First, in opening our deliberations this morning, I think we all remember that this is the anniversary of 9/11, the attack on the United States. Some of us are old enough to remember Pearl Harbor, but we all remember 9/11. I think in our own way we will not let this day go by without remembering the attack on the United States, but more particularly the heroic actions of so many of our fellow citizens that day.

Since that time, I think all of us have been devoted to continuing to make sure that we are doing what we can to preserve the United States, to preserve the freedoms that we have. Today, while the battles are still continuing against those who literally are taking up

KEY POINTS

- *The Heritage Guide to the Constitution, released in 2005, was the first comprehensive commentary on each clause of the Constitution to appear in many decades.*
- *In the past 10 years, there has been much new research and thinking on the theory of originalism, and the courts have been paying more attention to the Constitution as it was originally understood.*
- *The second, fully revised edition of the *Guide* addresses the latest developments in constitutional law.*
- *We have debated the Constitution from the very beginning; the American Revolution in many ways was a debate on and effort of constitutional reform.*
- *Today, Americans are once again debating the Constitution: discussing federalism, checks on power, and other aspects of our constitutional republic. Now we need a fusion of judicial originalism, scholarly originalism, and political originalism to advance the Founders' vision for our Constitution.*

This paper, in its entirety, can be found at <http://report.heritage.org/hl1260>

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arms against the freedoms found throughout the world, we continue to have those who are fighting them in our thoughts and prayers.

In these proceedings today, we recognize two beginnings. First is the launch of the second edition of *The Heritage Guide to the Constitution*,¹ but also it is the first in our 2014 Preserve the Constitution series. We started this as a way in which Heritage, and particularly the Center for Legal and Judicial Studies, pays attention to and talks about, and we hope provokes thinking about, the Constitution of the United States.

William Gladstone, who was a former prime minister of England, once said that it was the most magnificent document ever drafted. He was talking about this as a person who was the prime minister of a country that had an unwritten constitution. Our Constitution was the first of its kind to be written, to have an actual contract between the citizens and their government, and particularly to have a document which limited the power of government.

In most countries, you have a monarch or some other principal person to whom its officers and its military swear their allegiance. Our officials in this country and our military swear allegiance to the Constitution. We say that when we say the Pledge of Allegiance to the Flag. So the Constitution has a particularly important part in the lives of all of our citizens, and that is why we felt the necessity of reminding people and, particularly, seeking to have people have greater understanding of what the Constitution is all about and what it actually provides.

In *The Heritage Guide to the Constitution*, you find a most remarkable collection of scholarly work. Over a hundred people have contributed to explaining what the Constitution says, what it means, how it has been interpreted over the years, and how it is important to people today. The *Guide to the Constitution* is now used by a number of our Members of Congress, and it's a very hopeful sign that many of them boast that they have it on their desk as a frequent guide to their actions and what they do in representing the people in the legislative branch.

I wish that the same fidelity to the Constitution carried forward into the executive branch. On occasion, the understanding that is contained in *The Heritage Guide* would be very helpful to increase the fidelity to that particular document. As a matter

of fact, it should be useful also to those in the third branch of government, the judicial system.

It is also useful to citizens themselves. There have been a lot of books written about the Constitution, but I would suggest to you that *The Heritage Guide to the Constitution* is one that is particularly good in terms of making our Constitution understandable and readily available to everyone in the country to use as a guide, to use as a means of understanding the basic foundation—the written foundation—of the way in which our government should be operated.

So much has happened over the course of the last 10 years that we felt it necessary to have a new edition of *The Heritage Guide to the Constitution* to bring it up to date so it would be even more valuable to all of you who are likely to use it. We hope that it will continue to carry on what we at Heritage feel is very important: the understanding of and allegiance to the Constitution of the United States.

—*Edwin Meese III is Ronald Reagan Distinguished Fellow Emeritus at The Heritage Foundation and Honorary Chairman of the Editorial Advisory Board for The Heritage Guide to the Constitution.*

DAVID FORTE: The first time we did this project, it took two and a half years, so when Matt Spalding called me and said we need a revision, I said, “No problem.” That “no problem” took one and a half years of full-time work because so much has happened in the last 10 years. From the beginning, Mr. Meese was the George Washington of the project: He was the one who inspired it, shepherded it through Heritage, kept it on track, and to him we owe everything that has resulted.

Speaking of George Washington, there is a professor at Yale Law School, a brilliant man and iconoclastic fellow, Akhil Amar, and a few years ago he was suggesting a new method of interpretation of the Constitution: “What would George Washington do?” It is not a bad question. In fact, *The Heritage Guide to the Constitution* asks a slightly larger version of that question: “What would the Founders think?”

- What would the Founders think of a President who unilaterally changes the content of federal law? See the entry on the “Take Care Clause” by Sai Prakash.

1. David F. Forte and Matthew Spalding, eds., *The Heritage Guide to the Constitution: Fully Revised Second Edition*, Foreword by Edwin Meese III (Washington: Regnery Publishing, 2014).

- What would the Founders think of a President who engages military forces abroad without needing to seek the formal approval of Congress? See the entry on “Commander in Chief” by John Yoo and Michael D. Ramsey.
- What would the Founders think of a governmental agency that tells you what to do with your land because there may be surface moisture on part of it for part of the year? See the note on “Administrative Agencies” by Michael Uhlmann.
- What would the Founders think of a President who makes recess appointments while Congress is only in temporary adjournment? See the entry on “Recess Appointments” by Michael Carrier and Michael Rappaport.
- What would the Founders think of a Congress that sends the President a bill containing thousands of new laws and regulations and spending authorizations that effectively prevents the President from exercising his constitutional power of veto? See the entry on the “Presentment Clause.”
- What would the Founders think of a Supreme Court that supplants the state’s police powers with the Court’s own view of what, for example, constitutes human life? See the entry on the “Due Process Clause” by James Ely, Jr.

Perhaps more important, what would the Framers think of what has happened to the separation of powers? That brilliant constitutional invention was designed, on the one hand, to frustrate factions and passions while, on the other, to enable cooperation for the common good. The result, the Framers hoped, would be an effective government that still protected the people’s liberties and security.

Elements of the Separation of Powers

As created by the Framers, as explained by *The Federalist Papers*, and as practiced by the Founding generation, the separation of powers has a number of elements. Let’s look at these elements, and we might be able to gauge just how well we have done with those gifts that have been bequeathed to us by the Founders.

First, having separate constituencies is an element of the separation of powers. The Constitution

required that each element of government be peopled by individuals who were chosen in a particular way to prevent a majority and a possibly tyrannical faction from gaining power. The people chose the House of Representatives. The states chose the Senate. A separately constituted College of Electors chose the President. And the President and Senate chose and approved a specially trained group of people to be the judiciary. Moreover, the double security of our freedoms—as James Madison put it—was to limit the range of power of the federal government as a whole, leaving the enormous residue to the states.

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What is the situation today of the element of separate constituencies? The Seventeenth Amendment has removed the states from choosing Senators. The College of Electors remains, but presidential elections have become more of a popularity contest, and even appointments to the courts are now tinged with political objectives.

The second element of the separation of powers is partial agency. As James Madison explained in *Federalist* No. 47, partial agency means that one branch of government is given a key role in the operations of another branch. The President’s veto is part of the legislative process. Through the Necessary and Proper Clause, Congress sets and regulates much of what happens in the executive and judicial branches. The President nominates members of the judiciary. The Senate must approve principal executive appointments as well as treaties.

But for partial agency to work, something more must happen. The branches must be willing to deal with one another, to be agencies in one another. It does not help if the President is not an agent in the functioning of the legislative branch, if he simply is absent, if he seeks to act unilaterally. It does not help if the House and Senate do not speak to one another. I’m not sure that this method of partial agency has

much currency in the governance in Washington at the present time.

Third, the political process keeps in check the elements of government. What Madison called “the republican principle”—an appeal to the people—keeps selfish minorities from exercising power over the majority. Thus, the people can change who are to be Members of Congress or who is to be the President if they enact bad policy or exceed their powers.

But do political checks work today? Certainly, elections continue to matter and to direct the country in one direction or another, but what kind of political checks do we have on the host of independent agencies seemingly accountable to no one? What kind of political check do we have on the Environmental Protection Agency or the Internal Revenue Service? What kind of political check is there on a President who no longer has to answer to the people?

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Fourth, there is the moral sense of self-restraint. This is a significant element in the separation of powers. Checking won’t do everything. That is what Chief Justice John Marshall understood in *Marbury v. Madison* (1803) when he eschewed any attempt of the judiciary to involve itself in the political discretionary work of the executive branch, when he interpreted Article III to allow Congress the widest range of regulating the appellate jurisdiction of the Supreme Court. This principled manner of acting as a self-restrained republican leader was exemplified by George Washington.

Recall the restraint shown by Congress when it considered limiting the appellate jurisdiction of the Supreme Court but chose not to do so on the argument that it might disable the courts from performing their separation of powers function. The judiciary restrains itself by a host of procedural rules, such as standing, jurisdiction, ripeness, or the doctrine

of non-justiciability, when the courts refrain from deciding an issue lest they intrude upon the appropriate functions of another branch. These are self-restrained elements that a limited and republican government imposes upon itself.

Fifth, the Constitution does allow for extraordinary actions when there is a crisis of someone or some element exceeding his allotted power. Those actions are impeachment and the amendment process. Both were intended to be very limited, and both have been very limited. They are designed to be used only in the most extreme kind of situation.

Sixth—and not many people think about this—is non-compliance. There are times when one branch so invades the core functioning of another branch that the other branch will simply say that it will not obey. Let me give you some examples.

Right after the Civil War, Congress attempted to determine the outcome of a particular case before the Supreme Court through legislation. In *United States v. Klein* (1871), the Supreme Court said that Congress cannot, under its allotted powers, prescribe a rule or decision of the Court: that is, tell the Court how to decide a case. Rather, reaching a decision is what the courts do. In a more recent case, the Supreme Court held that Congress could not reopen a case that had already been decided by legislation.

Every President from Richard Nixon to the present has said that the War Powers Resolution constrains some of the essential commander-in-chief power of the President. Recent Presidents stake out their own exclusive powers in signing statements when they declare that parts of acts of Congress intrude into the exclusive powers of the presidency.

Unilateral Presidential Actions

This leads to the question of unilateral presidential actions, which may be justified non-compliance or may exceed constitutional limits. What are the powers of the President over acts of another branch that he regards as unconstitutional? After all, he takes an oath to support and defend the Constitution.

His primary method is to veto unconstitutional acts. The Constitution gives that to him directly. In fact, George Washington did not believe that his veto extended beyond unconstitutional acts. He would not veto unpopular acts or those he thought were bad policy. But because it is hard to draw the line between the veto of an unconstitutional act and an act of bad policy, we have accepted that it is

perfectly proper for the President to veto acts he regards as imprudent.

But what about non-compliance with the law after it has been passed and signed but the President thinks it is unconstitutional? There the line is not so clearly on the President's side. If the President decides not to comply with a law because it intrudes upon his essential constitutional powers, that is one thing, but if he withholds enforcing a validly passed law simply because he thinks it (or a part of it) is unconstitutional, that is another situation altogether. Certainly, the Framers did not want to lodge in the President a unilateral veto of laws already passed.

If the President decides not to comply with a law because it intrudes upon his essential constitutional powers, that is one thing, but if he withholds enforcing a validly passed law simply because he thinks it is unconstitutional, that is another situation altogether. The Framers did not want to lodge in the President a unilateral veto of laws already passed.

And certainly the separation of powers is not on the President's side when he decides not to comply with acts that he thinks are bad policy, for under the Faithful Execution of the Laws Clause, he is obliged to follow and execute validly passed laws. What we have seen lately are, for example, unilateral actions outside of statutory authorization or the actual changing of the text of the law.

Thus, we come back to the sense of moral self-restraint as essential to the proper separation of powers mechanism in our country. This is what the Founders called public virtue. Why do we see so little of it today?

Professor Phillip Munoz of Notre Dame has given us a clue. He notes that, as we all know, in 1938, the Supreme Court left off the business of checking Congress. No longer would it enforce the limits of the Commerce Power upon Congress, or the Spending Power. To a large extent, the Supreme Court has also left off limiting the President.

What has the Supreme Court done since then? It has said, "Our job is to protect rights," and what has been the result? It has left Congress under no sense of constraint, so Congress now can regulate under the Commerce and Spending Powers, believing it has no limit to what it can regulate.

The Supreme Court, as the exclusive guardian of rights, thought of itself as the wise repository of what rights are, and it went into the business of creating new rights that had been completely beyond the ken of the Founding generation. And the President, already given discretionary power by the Framers in order to check what they had feared would be a more powerful legislature, now moves far beyond what the executive power is.

So what the result has been is that the Supreme Court has left the field of checking—of being faithful to the commands of the Constitution—and that the branches no longer feel an obligation to check one another. By not doing so, they are tempted to leave off the greatest element of the separation of powers: that of their own moral self-restraint.

Thus, what is needed most in this country is to return to the original vision and experience of the Founders as a renewed sense among our public leaders, among the politicians we elect, of public virtue and respect of the individual rights of the people and the limits of what government is entitled to do.

—*David Forte is Professor of Law at Cleveland-Marshall College of Law and Senior Editor of The Heritage Guide to the Constitution.*

MATTHEW SPALDING: This is actually a very important occasion to look ahead not only to the anniversary of the Constitution next week, but to the publication of this volume. The first one was in 2005, so we are just under 10 years since that one came out.

It is quite an amazing thing. I have to agree with David's comments. Ed Meese, whom I had the lifetime privilege of working for, saw the possibilities of this book, this project from the very beginning—as did Phil Truluck, I would add. They saw the possibilities. There was this great scholar and teacher out there named David Forte, whom I got to work with, and I was merely young enough and naïve enough to think we could actually do it. And though it was many years, we accomplished the feat.

I think it is a project that is going to be hard—if ever—to replicate. We had this idea from the

beginning that we would go clause by clause by clause; we would not skip a one. As David will recall, it was hard sometimes finding a scholar to write on some of those obscure clauses, but 10 years later, we have produced another volume.

Much has happened in the last 10 years, which leads me to think we need a new originalism, or at least a return to originalism. We have debated the Constitution from the very beginning—indeed, before the Constitution itself. The American Revolution in many ways was a debate and effort of constitutional reform: How do we take what we have learned from British constitutionalism and the rule of law and bring it to America in written form?

James Madison wrote that there were two compacts to the American Founding: the Declaration of Independence, asserting the ends of American government, equal rights, consent of the governed for the sake of life, liberty, and the pursuit of happiness, and the Constitution, which creates the institutions and political array by which we express our consent and govern ourselves.

James Madison wrote that there were two compacts to the American Founding. One was the Declaration of Independence, asserting the ends of American government, equal rights, consent of the governed for the sake of life, liberty, and the pursuit of happiness. The other was the Constitution: that act of law-giving which orders our politics, secures our rights, defines our nation; that constitutes us, creates the institutions and political array by which we express our consent and govern ourselves.

From the moment the Constitution was written, and during its writing, we debated it. One need merely look to the debates of the Federalists and the Anti-Federalists.

The first histories of the American Founding—John Marshall’s, David Ramsey’s, Mercy Otis Warren’s—talk about the period of the Constitution, but they have a problem: Madison’s notes weren’t available to them, so they skip over that. Joseph Story’s

three-volume *Commentaries on the Constitution*, which we use in many cases as our guide, from 1833, talks about the text of the Constitution but very little about the Convention.

This changed with the publication of Madison’s notes in 1840. George Bancroft’s great *History of the United States* looks at them extensively, opening up more debate about what exactly was intended. The first group to use those notes was the Abolitionists, who used them to criticize the Constitution. The debate over slavery was, of course, central to understanding the Constitution, an argument which I would suggest was resolved when Lincoln properly recalled the nation to the Founders’ Constitution.

The Rise of Progressivism

This all changed after the Civil War when the Progressives set out to create a movement to redefine what the Constitutional Republic meant. This revolt against formalism had various forms: theology, history, law, politics, and social policy. Scholars like James Allan Smith and, most famously, Charles Beard argue that the Constitution represented the triumph of moneyed elites protecting their economic interests.

Progressive historians assert that democratic forces of the American Revolution, having produced an idealistic Declaration of Independence, were later defeated by reactionary forces that produced an anti-democratic Constitution. The Constitution’s focus on restricting government power and moderating democratic opinion was viewed as misguided—a serious barrier to extensive government necessary for progress. The result was that the Constitution must be made flexible, pliable, and “living.”

It turns out the judiciary would play a key role in all of this. Justice Oliver Wendell Holmes, Jr., famously argued, “The life of the law has not been logic; it has been experience”—a key factor in the development and interpretation of the law based on the consideration of the “felt necessities of the time.” In this view, for outcome-oriented jurisprudence, later called legal realism, judging is not distinct from legislating, but merely a different form of it, filling in the gaps, so to speak, created by general laws. Judges determine not only what the Constitution says, but also certain questions about, in effect, what policies will best harmonize with the document’s presumptions.

The response to the claims of Progressives came in several forms. Historians like Robert Brown and

Forrest McDonald argued against the economic interpretation, and major academics attempted to forge an alternative historical consensus emphasizing Lockean principles of classical liberalism and republican consensus of Whig ideology. Over time, these historical, scholarly debates turned attention increasingly to a reconsideration of the Founders' ideas and political thought; see the essays of Douglass Adair and Martin Diamond that rival the *Federalist Papers*.

Meanwhile, constitutional historians and practitioners argued against the Progressives. Scholars of the time such as Edwin S. Corwin and Andrew McLachlan defended traditional constitutionalism as a means to order and restrain government. We think of jurists like William Howard Taft and George Sutherland, the National Association for Constitutional Government, and publications like *The Constitutional Review*.

Then there were political figures. In many ways, I would argue that the modern political conservative movement began with the Republican Convention of 1912, when several important figures, particularly Henry Cabot Lodge and Elihu Root, took a stand in the name of the Constitution against Theodore Roosevelt. They were followed by others, perhaps most famously and most articulately by Calvin Coolidge.

The Progressive view came to maturity in the New Deal, and the response to the New Deal and the later Warren Supreme Court led eventually to the revival of traditional constitutionalism of the Founding, or what Attorney General Ed Meese in his important speeches of 1985 and 1986 called “a jurisprudence of original intention.” The thrust of recovering constitutionalism against the Progressives was very successful: He made it nationally prominent in this debate. This changed how the Senate thought about these questions and how the public looked at the courts and led to great research and education of judges, some of whom still sit on the Supreme Court.

Likewise, scholarship continued along its way, recovering the thought and action of the American Founding. The work of Adair and Diamond continues in the work of various students of political philosophy—the Claremont School, now followed by many scholars at Hillsdale College.

The weakest point of this broad sense of originalism, and my point today, is that the weakness is not in our politics. The New Deal weakened that part, destroyed the base of constitutional originalism

in the political field. Conservatism in its early days looked to many places for its sense of authority. Traditionalists looked to Burke and other European thinkers, largely because they were convinced that Progressive scholars were right about the Constitution. At the same time, there is a rising interest in economic analysis, warning about a new road to serfdom—all very good but not that constitutional (or political, for that matter).

In many ways, the modern political conservative movement began with the Republican Convention of 1912, when several important figures, particularly Henry Cabot Lodge and Elihu Root, took a stand in the name of the Constitution against Theodore Roosevelt.

Neither fully embraced the American Founding. The fusion of conservatism was more a result of the Cold War. The more recent popular turn of conservatism back to the Founders can be traced to Ronald Reagan, again contributed to greatly by Ed Meese.

The Founders' Constitutionalism vs. the “Living Constitution”

But on this aspect of the originalist movement, I think we need to do more work. I am struck reading Ed Meese's speeches again—looking at how much he emphasized structure and form; the distinction between the Constitution, as he says, and constitutional law. It is about court and branch construction. The Supreme Court was not the only interpreter: Each branch had a duty to interpret as it performed its functions.

Unfortunately, originalism in the popular sense of shaping politics has come to be associated with the courts. It has been less consistently and rigorously applied to other departments, especially from the point of view of those departments. It is now time for an equivalent scholarship of that aspect, originalism, and argument, and more work needs to be done.

If there is anything we see in the pages of this great book, it is a clear divide growing over time between the Founders' constitutionalism and the

“living Constitution” given to us by the Progressives. Although shaped by the courts, the regime created by the Progressives, the very concept of it, is political and comprehensive. It is a new administrative order, a bureaucratic order, a new form of governing that threatens to overwhelm us, threatens self-government, and threatens to take away our consent.

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The courts cannot restore the Constitution by themselves. This is partially a question of institutional capacity, but also the natural arguments of judicial restraint and politics, especially constitutional politics—arguments that bring in the popular opinion needed to reconstruct a constitutional government.

The rise of the Tea Party has been one of the most important aspects of recent political history, especially since the publication of our first edition of *The Heritage Guide to the Constitution*. That is our opportunity: The Progressive project, it seems, has not yet been settled; it is up for debate. Here they are, all of these Americans turning back to the Declaration of Independence and the Constitution. Their instincts are good: They talk less about rights and the Bill of Rights and more about structure. They want to talk about federalism, checks on power—all for the good, but it needs to grow more, to mature and deepen.

I do not think we have sufficiently articulated the constitutional arguments needed right now in politics. I fear sometimes we are overly technical and legalistic—judicial, if you will. We object to what the President’s doing. While we can make a good technical argument about whether we should do this or not, “Let’s sue him” does not strike me as a good constitutional political argument of how the House of Representatives should deal with the President by going to a third branch to ask permission.

There is an important distinction between what Jim Ceasar calls legalistic constitutionalism—rules

decide cases, definitive answers enforced by courts—and political constitutionalism, what I call constitutional politics, that emphasizes political actors who are making political decisions in the political realm in light of the Constitution. They both must work together.

We need a new fusionism in the conservative movement between judicial originalism—scholarly originalism, if you will—and political originalism. Each has a contribution, but they are unique in what they do. There are important legal questions, but the most important issues in our politics right now require prudence: that is, political prudence, not just jurisprudence. Legalistic constitutionalism is necessary but insufficient for the task.

What would this look like? Very briefly, it would emphasize distinctions of principle—say between constitutional government and the rule of bureaucrats, equal rights for all, special privileges for none. It would talk about the purposes of government. It would emphasize the constitutionalism of individual branches, the separation of powers as David talked about, federalism, checks on power, an aspect of constitutional interpretation.

If the judiciary does not have the sole claim on interpretation, “the final say” as Ed Meese likes to say, the legislative branch and the executive also interpret the Constitution through what is called construction. We need to think more about constitutional construction, more scholarship on that, more writing about it, the application of meaning in particular circumstances.

- How do you amend something in a way that makes it more constitutional, recognizing it still has a constitutional problem?
- How do you deal with things like entitlements?
- How do you drive a wedge between the administrative state, which we really object to, and other things we can possibly accommodate?

The legislative branch does not have to follow the precedence of the courts: They have to build consensus, move political opinions, and create governing coalitions. And the legislature and executive, the popular branches, can rally the people as Reagan did, which gave rise to modern originalism in the first place. These decisions are less definitive,

often temporary, less technical, and partial, but politics looks for results over the long term. They are directional, and that is how you reform the lines of the debate.

In the end, having originalism in the court room, it seems to me, is necessary and important but insufficient for the task of constitutional revival. We need something more dynamic, about checks and balances, robust federalism, political figures making the case, arguing, and deliberating—perhaps even making compromises—to preserve the Constitution. That is the Madisonian solution, I would argue.

The work to be done recovering the Constitution is to be done by statesmen in the end, in the realm of politics, in ordinary policy, and issues that go beyond what the courts can do. It strikes me that this is the *original* originalism—Ed Meese’s originalism—consistent with the original intention of the Framers, and it is time to pursue that. Pursuing originalism is a larger project to which this book and all of our work contribute.

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