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Keeping Faith with the Constitution

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**Goodwin Liu
Pamela S. Karlan
Christopher H. Schroeder**

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The views expressed in this book and any errors are of course our own.

Editor's Note

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We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights... .

—*The Declaration of Independence*

HOW DO WE “keep faith with the Constitution”? This question has haunted constitutional lawyers since the earliest days of judicial review. As judges give meaning to the often vague generalities of the Constitution, how can they ensure that they protect our essential constitutional liberties in an ever-changing society, without usurping the legitimate authority of the states or of the democratically elected branches of the federal government?

This challenge has vexed judges and scholars for more than two hundred years—perhaps most emphatically over the past four decades. By the end of the 1960s, conservatives were convinced that the justices of the Warren Court had run amuck and had flagrantly used the cover of constitutional law to impose their own “liberal” version of the good society on the nation. Where, they asked, did the Constitution require the exclusionary rule, *Miranda* warnings, “one person—one vote,” the prohibition of school prayer, the protection of sexually explicit expression, or racial integration? The criticism became even more fervent in the 1970s, after the Burger Court announced a constitutional right to abortion. Conservative critics railed that the justices had manipulated the text and design of the Constitution in order to smuggle their own personal value judgments into constitutional law.

In the 1980s, these critics, led by such figures as Ed Meese, Robert Bork, and Antonin Scalia, insisted that judges should limit themselves to enforcing the “original meaning” of the Constitution. They argued that the judiciary could legitimately hold a law unconstitutional only if the Framers themselves had intended the law to be unconstitutional. By focusing on the original meaning, they argued, judges would remain faithful to the true meaning of the Constitution, resist the temptation to interpret the Constitution to suit their own policy preferences, and exercise judicial review in a more circumscribed and constitutionally appropriate manner.

As Ronald Reagan, the Federalist Society, and other conservative voices popularized this view, they attacked competing theories of constitutional law and sought to discredit decisions that had protected the rights of minorities, dissenters, and the outcasts of society. Advocates of originalism lauded the authority of the elected branches of government and associated their view with such popular catch-phrases as “strict construction,” “judicial passivism,” “applying rather than making up the law,” “judicial restraint,” and “calling balls and strikes.” Over time, they persuaded many if not most Americans that the proper role of judges is to take a highly mechanical

approach to constitutional interpretation. They were largely successful in this campaign, even though many conservative jurists often embraced quite activist interpretations of the Constitution in such controversial areas as federalism, property rights, affirmative action, gun rights, and the First Amendment rights of corporations.

Whether or not originalism is coherent, principled, or restrained, its popularizers effectively put the proponents of a Warren Court–style of jurisprudence on the defensive. Although the critics of original meaning took issue with the logic and practice of the methodology, they found it difficult affirmatively to articulate how they believed judges *should* interpret the Constitution. If the idea of an open-textured and evolving Constitution is legitimate, how can judges give it meaning without injecting their personal values into constitutional law? Is there any credible mode of constitutional interpretation that can both respond to the constantly evolving nature of American society, and at the same time “keep faith” with the Constitution in a principled and coherent manner? This is the most fundamental question of early twenty-first century constitutional law, and it is the central question of this volume.

Goodwin Liu, Pamela Karlan, and Christopher Schroeder attempt in *Keeping Faith with the Constitution* to demonstrate that there is, in fact, a convincing and principled alternative to the view that the Constitution’s meaning must be frozen in time—an alternative that interprets the text and aspirations of the Constitution as the Framers understood them, while at the same time ensuring that specific interpretations and applications of the text can change in appropriate ways over time. They argue that such an approach is implicit in the actual practices of American constitutional law, and that without that approach fundamental decisions that the Supreme Court has reached over the years would be simply inexplicable. Whether they succeed in this effort is a judgment that you, the reader, will have to make for yourself. The stakes in this debate are high, for it will help shape the future of constitutional law well into the twenty-first century.

Geoffrey R. Stone

Introduction

...

JUSTICE OLIVER WENDELL HOLMES was right when he said that the words of the Constitution “have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.”¹

The reason the United States Constitution is the world’s most enduring written constitution is not simply the genius of fifty-five men who met in Philadelphia in 1787. Rather, it is the way that generation after generation of Americans has made the Constitution ours. The Constitution endures because its meaning and application have been shaped by an ongoing process of interpretation. That process includes both judicial interpretation and transformations in constitutional understanding pressed by political leaders and ordinary citizens throughout our history. Our Constitution retains its vitality because it has proven adaptable to the changing conditions and evolving norms of our society. Its words and principles still resonate centuries after they were written because time and again, as Justice Holmes urged, we have interpreted the Constitution in light of “what this country has become.”² Americans of all backgrounds can wholeheartedly take an oath to support and defend the Constitution when they are naturalized, join the armed forces, gain admission to the bar, or assume elective office not because of how our founding text was understood in 1789, or even in 1870, but because of how we understand it today.

In recent decades, this common-sense understanding of the Constitution has been eclipsed by alternative conceptions of our founding document and the proper way to interpret it. Originalism—an exclusive reliance on public understandings of the text at the time it was ratified—has been vigorously championed by judges such as Antonin Scalia, Clarence Thomas, and Robert Bork, and by prominent conservatives such as Edwin Meese, who as Attorney General of the United States issued litigation guidelines directing government attorneys to “advance constitutional arguments based only on [the document’s] ‘original meaning.’”³ In addition to (and allied with) calls for originalism, a familiar refrain among conservative politicians is their promise to appoint only “strict constructionists” to the bench. Although the meaning of strict construction is far from clear, popular invocations of the term, like appeals to originalism, have served as a powerful polemic in opposition to evolving understandings of individual liberty, equal protection, federalism, and other constitutional principles. Whether applied with rigor or intoned as rhetoric, originalism and strict construction have served to legitimize conservative dominance of the federal judiciary for more than three decades.

In this book, we describe and defend an approach to constitutional interpretation that is richer than originalism or strict construction, more consistent with the history

of our constitutional practice, and more persuasive in explaining why the Constitution remains authoritative over two hundred years after the nation's founding. Interpreting the Constitution, we argue, requires adaptation of its text and principles to the conditions and challenges faced by successive generations. The question that properly guides interpretation is not how the Constitution would have been applied at the Founding, but rather how it should be applied today in order to sustain its vitality in light of the changing needs, conditions, and understandings of our society.

We use the term *constitutional fidelity* to describe this approach. To be faithful to the Constitution is to interpret its words and to apply its principles in ways that preserve the Constitution's meaning and democratic legitimacy over time. Original understandings are an important source of constitutional meaning, but so too are the other sources that judges, elected officials, and everyday citizens regularly invoke: the text of the Constitution, its purpose and structure, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society. A dynamic process of interpretation informed by these considerations is what enables the American people to keep faith with the Constitution from one generation to the next.

In elaborating this approach, we start from the premise that constitutional interpretation must be faithful to the character of the document itself. Three features are particularly important. First, the Constitution is “the basic charter of our society, setting out in spare but meaningful terms the principles of government.”⁴ Although some of its provisions establish clear and precise rules—for example, the age of eligibility to serve as a member of Congress or as President⁵—the Constitution, for the most part, does not “partake of the prolixity of a legal code.”⁶ As Chief Justice Marshall observed, the nature of a constitution “requires that only its great outlines should be marked [and] its important objects designated,” and the language of the U.S. Constitution makes clear that “this idea was entertained by [its] framers.”⁷ Our Constitution was not intended to supply a ready answer for every problem or every question that might arise. The Framers memorialized our basic principles of government with broad language whose application to future cases and controversies would be determined not by a mechanical formula but by an ongoing process of interpretation. The Constitution is “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs”; it is a charter of general principles open to “fair and just interpretation” over time.⁸ That is “the character of the instrument” that Chief Justice Marshall emphasized when he said “we must never forget that it is a *constitution* we are expounding.”⁹

Second, the Constitution is a document designed to be “understood by the public.”¹⁰ To quote President Franklin Roosevelt, it is “a layman’s document, not a lawyer’s contract.”¹¹ Throughout our history, the meaning of the Constitution’s text and principles has been the subject of public debate and, at times, intense mobilization among the American people and their representatives. Judges, of course, play a critical role in interpreting the Constitution. But the popular character of the Constitution has meant that constitutional interpretation is not a task for the judiciary

alone. Thus it is neither surprising nor illegitimate that judicial doctrine often incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice. Public engagement with the meaning of the Constitution is what has enabled our founding document to retain its democratic authority through changing times.

Third, the Constitution is a declaration of our ideals as well as a set of operational commands. The Constitution does not state our ideals as merely lofty aspirations; it records our commitment to put our ideals into practice. To keep faith with the Constitution is to fulfill its promises “not as a matter of fine words on paper, but as a matter of everyday life in the Natio[n].”¹² What this means for constitutional interpretation is that the application of the Constitution’s broad principles to specific controversies must take into account the lived experience and practical consequences of the law. In this way, the task of interpretation serves to realize the Constitution’s guarantees “not simply as a matter of legal principle but in terms of how we actually live.”¹³

In presenting these ideas, our approach is both descriptive and normative. It is descriptive insofar as it provides an account of our actual constitutional practice. As a historical matter, many of our fundamental constitutional understandings came into being through the adaptation of text and principle to the changing needs and norms of our society. At the same time, our project is normative insofar as it defends the dominant features of our constitutional practice against critics who would reduce the process of interpretation to something more mechanical or formulaic. Unlike alternatives such as originalism, interpretation that strives for constitutional fidelity succeeds over time in preserving the vitality of our founding text and securing the democratic legitimacy that ultimately anchors our continuing allegiance to the Constitution.

We begin in [chapter 1](#) with an overview of the text and historical development of the Constitution. Our discussion starts with the Founding context and the principles set forth in the unamended Constitution, and then examines the concerns that shaped the adoption of the Bill of Rights. From there, we turn to the next burst of additions to the Constitution, the Reconstruction Amendments, whose transformative principles forged what many have called America’s Second Founding. We conclude this chapter with a brief discussion of the amendments adopted over the last century. In its entirety, the Constitution charts the centuries-long progress of our nation toward greater liberty and equality and more effective and democratic government. At each critical juncture, the Framers inscribed our fundamental values into the Constitution with broad language and expansive principles open to future interpretation.

[Chapter 2](#) focuses on judicial interpretation of the Constitution. We use the term *constitutional fidelity* to describe an approach to interpretation that sustains the vitality of the Constitution’s text and principles over time. This approach does not disavow original understandings as a legitimate source of constitutional meaning. But the overarching question it poses is not simply how the Constitution would have applied during the Framing era, but rather how it should apply today in order to preserve its meaning and authority in the light of evolving precedent, historical experience,

practical consequences, and societal change. As many examples show, these considerations inform the constitutional reasoning of judges of all stripes, and their importance and legitimacy are well established in our interpretive tradition. By contrast, neither originalism nor strict construction has proven to be a persuasive or durable methodology, not least because they cannot explain many of the basic constitutional understandings we now take for granted.

In [chapters 3](#) through [9](#), we illustrate our interpretive approach with historical narratives that show how several constitutional principles have acquired the meaning they have today. Individually and collectively, the narratives provide a textured account of how the Constitution's values have endured through adaptation to contemporary challenges posed by social, economic, and political change. They also demonstrate how our courts interact with the political branches and with the American people in giving practical effect to individual rights and structural guarantees. Finally, the narratives show that the actual practice of constitutional interpretation has never been reducible to a singular inquiry into original understandings or the plain meaning of the text. Throughout our history, judicial and nonjudicial interpreters have rejected such narrow methodologies in favor of a more dynamic and multifaceted approach to interpretation that is faithful to the character of the Constitution itself.

[Chapter 3](#) discusses the interpretive approach underlying *Brown v. Board of Education*, the modern jurisprudence of gender equality, and civil rights protections enacted by Congress as constitutional enforcement measures. [Chapter 4](#) describes the development of Supreme Court doctrine that protects freedom of political expression. [Chapter 5](#) examines the New Deal transformation of constitutional understandings regarding the proper scope of government power to meet our social and economic needs. [Chapter 6](#) discusses the application of the principle of checks and balances to contemporary challenges posed by the war on terrorism. [Chapter 7](#) addresses the interplay of judicial and legislative solutions to malapportionment and vote dilution. [Chapter 8](#) examines the revolution in criminal procedure that now informs our understanding of due process of law. And [chapter 9](#) traces the evolving scope of constitutional protection for individual liberty to make decisions concerning intimate aspects of our lives. Similar narratives could be written on how our society has come to understand free exercise of religion, separation of church and state, cruel and unusual punishment, and other constitutional principles. Our purpose here is not to provide a comprehensive survey but to illustrate a general and widely applicable approach to constitutional interpretation.

In [chapter 10](#), we conclude with a brief summary and a glimpse at future challenges that will continue to require an interpretive approach that adapts the words and principles of our founding document to the evolving conditions and norms of our society and, in so doing, sustains the faith of the American people in our enduring Constitution.

KEEPING FAITH WITH THE CONSTITUTION

CHAPTER ONE

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The Constitution's Vision and Values

OUR FOUNDING DOCUMENT establishes a general framework for effective governance of a nation destined to grow and change. It fixes the basic structure of government and some of its important procedures while expressing our commitment to certain core values: liberty, equality, and democracy. This chapter provides an initial grounding in the words and vision of the Constitution and its Framers. The next chapter turns to the role of courts in constitutional interpretation.

THE FOUNDING CONTEXT

As Dr. Martin Luther King observed in his *I Have a Dream* speech, “[w]hen the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir.”¹ Dr. King was right to link these two documents. The Constitution was drafted and ratified against the backdrop of the recent war for independence from Great Britain, and the Declaration expressed Americans’ aspirations for the kind of government they sought:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.²

The Declaration thus expresses a background understanding among the Founding generation that equality, liberty, and opportunity (“the pursuit of Happiness”) were fundamental rights; that legitimate government depends on the consent of the governed; and that the powers of government should be organized to enable it to affirmatively “secure” and “effect” the rights and liberties of the people.

At the same time, in its allegations against the King, the Declaration also identified some of the key principles limiting governmental authority. Among the acts justifying America’s secession from the British Empire were the King’s interference with judicial independence and trial by jury, his elevation of military authority over

civilian control, his refusal to respect popular election and legislative authority, and, perhaps most famously, his imposition of taxation without representation.

The Constitution, now more than two hundred years old, was not the first attempt by the thirteen colonies to create a nation. The Articles of Confederation were ratified in 1781, but they failed after a half-dozen years. A key reason for the failure was that the Articles did not create a national government capable of dealing with the economic and international issues of the times. Not only was the national government's power limited, but two of the three branches—the executive and the judiciary—did not even exist. The desire to create a national government capable of confronting unforeseen and unforeseeable problems was a central motivation behind the Constitution.

The Framers were part of a bold but pragmatic generation. They knew they were creating a nation that would change in important ways over time. The very decision to ratify the proposed Constitution reflected their recognition that America was an expanding nation where commerce and not merely agrarian traditions would play an increasing role. Moreover, the structure of the Constitution reflected the Framers' comfort with innovation as well as their determination to ensure that the government would have sufficient power to deal with the nation's problems as they arose.

At the same time, the Framers understood that dividing power—horizontally within the national government and vertically between the national government and the states—would help protect individual liberty against government abuse. “Ambition must be made to counteract ambition,” James Madison wrote, if we are to have “security against a gradual concentration of [power] in the same department.”³ By creating a national government with three interdependent branches, the Framers sought to enlarge the government's capabilities while also limiting the potential for abuse through a system of checks and balances. And by maintaining a federal system, the Framers contemplated “a double security [for] the rights of the people,” as the national and state governments “will control each other, at the same time that each will be controlled by itself.”⁴

Moreover, although classical republican theory saw the size and diversity of the growing nation as a threat to self-government, Madison argued that these features provide additional protection for individual liberty. In a large, heterogeneous society with a “multiplicity of interests” among its citizens, “the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”⁵ The minority group of primary concern to the Founders may have been wealthy creditors and landowners. And one reason for the system of checks and balances may have been to safeguard property rights by making redistributive measures difficult to enact. But, as a general principle, the republican theory that informs our Constitution is one that values pluralism and diversity, and protects individual rights of all kinds against government abuse.

Even before the addition of any amendments, the Constitution expresses fundamental commitments to democracy, equality, and individual liberty, and to a robust but carefully calibrated system of government power commensurate with the nation's needs. These values are reflected in the text.

The Preamble

The Constitution's opening words describe its ambitions. As the Supreme Court recognized early on, the source of the Constitution's power is the people: "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.'"⁶ Thus, democratic self-determination is the source of the Constitution's legitimacy, and the Constitution signaled the transformation of the "league of friendship" among sovereign states under the Articles of Confederation⁷ into a single nation governed by "the people of the United States."

The language the Constitution uses to describe its purposes is far more capacious than the immediate economic and geopolitical exigencies that prompted the Constitutional Convention. As the Preamble says, the Constitution aims to "establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty." These phrases could not then, and cannot now, be defined with precision. But the fact that the phrases are repeated in the text of the Constitution—the Spending Clause of Article I, for example, declares Congress's power to "provide for the common Defence and general Welfare," and the Fifth Amendment prohibits deprivations of "liberty" without due process of law—shows that they were intended to be given real effect.

Government power to address the nation's needs

By expanding the powers of the federal government beyond their limited scope under the Articles of Confederation, the Constitution significantly enhanced the power of government to address the nation's needs. And by creating distinct legislative, executive, and judicial branches within a framework of separated powers, the Framers moderated the exercise of national power through a complex system of checks and balances.

In Article I, the Framers enumerated a broad array of congressional powers—among them, the power to tax and spend for the general welfare, the power to regulate commerce among the states and with foreign nations, the power to establish post offices and roads to link the new nation together, the power to promote scientific progress and innovation through a system of intellectual property, and the power to establish a process for naturalization to welcome immigrants. Further, Article I authorizes Congress to make all laws "necessary and proper" for executing the enumerated legislative powers and all other powers vested in the national government. At the same time, the Framers circumscribed these lawmaking powers through mechanisms such as the presidential veto, judicial power to decide constitutional cases, and the fragmentation of Congress into two chambers, the House and Senate.

Article II creates the office of the President and assigns the President the duty to “take Care that the Laws be faithfully executed.” The President also has the power to appoint the principal officers of the government, including federal judges. Article II designates the President as Commander in Chief of the armed forces and assigns the President various diplomatic and foreign policy functions. Importantly, the Constitution makes clear that those powers are shared with Congress. For example, while the President has the power to make treaties and to appoint ambassadors, both require the approval of the Senate, as do the appointments of judges and other principal officers. And while the President serves as Commander in Chief, Article I assigns Congress the power to declare war, to raise and support armies, to provide and maintain a navy, to make rules concerning captures, and to make rules governing land and naval forces.

Article III establishes an independent judiciary with life tenure and protected compensation. The Framers defined the judicial power so that the federal courts would decide cases, such as disputes between states or their respective citizens, that help to ensure uniform application of federal law. In addition, Article III assigns federal courts the power to decide cases arising under the Constitution, a function we discuss throughout this book. As with legislative and executive power, the Framers situated the judicial power within various checks and balances, including presidential appointment and Senate confirmation of federal judges, Congress’s impeachment power, and a degree of legislative control over the lower courts and the Supreme Court’s appellate jurisdiction.

Liberty and protection against government oppression

In addition to the need for a more effective national government, the Framers were well aware of the awesome power of government to suppress dissent and restrict liberty. Although many of the liberty-protecting features of the 1789 Constitution are structural, the Framers also thought it appropriate to include several specific protections against government abuse. For example, Article III, Section 2 guarantees all defendants in federal criminal cases the right to trial by jury. In addition, Article I, Section 9 guarantees access to habeas corpus and prohibits the enactment of bills of attainder or ex post facto laws. Further, it is significant that even before the Constitution was amended or interpreted to impose general constraints on state governments, Article I, Section 10 prohibited states from passing bills of attainder or ex post facto laws. By creating an independent judiciary, the Framers also sought to ensure that individual rights would not be entirely dependent on current popular will.

Despite its many commitments to individual liberty, the original Constitution was deeply flawed in its express recognition and permission of slavery. Article I, Section 9 prohibited Congress from banning the slave trade until 1808; the Three-Fifths Clause of Article I, Section 2 accounted for slavery in allocating seats in the House of Representatives and the Electoral College; and the Fugitive Slave Clause of Article IV, Section 2 conscripted non-slave states into returning escaped slaves into bondage. Given the glaring incongruity between slavery and the “Blessings of Liberty” mentioned in the Preamble, it is unsurprising that the most far-reaching