



**Keeping Faith with the Constitution**  
**By Goodwin Liu, Pamela S. Karlan and Christopher H. Schroeder\***

**Frequently Asked Questions**

- 1. What do “keeping faith with the Constitution” and “constitutional fidelity” mean?**  
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. Fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society. This interpretive approach is true to the vision of the Framers, who chose broad language to express their commitment to a set of core values – liberty, equality, democracy – and deliberately left these principles open to future interpretation and adaptation to new conditions and challenges that arise in a changing world. Through an ongoing process of interpretation, each generation of Americans comes to accept the Constitution as legitimate, authoritative, and worthy of their continuing allegiance and faith. (See pages 1-4, 23-29.)
- 2. Is the approach offered in *Keeping Faith with the Constitution* the same as the “living constitution”?**  
The approach offered in *Keeping Faith* is quite different from a “living Constitution” approach in which the Constitution is understood to grow and evolve over time as society changes. In the authors’ view, that approach unduly minimizes the fixed and enduring character of the Constitution’s text and principles. In their view, the Constitution itself does not change unless properly amended, but particular applications and understandings of the Constitution’s text and principles may change. (See pages 24-29.)
- 3. How does the approach offered in *Keeping Faith* differ from originalism?**  
If originalism means a commitment to the underlying principles that the Constitution’s words were understood to convey, then originalism is consistent with the concept of constitutional fidelity. However, if originalism means that specific constitutional disputes must be resolved according to how those who wrote or ratified the text would have resolved them at the time, it is an approach that the authors of *Keeping Faith* squarely reject. That approach cannot explain the most basic constitutional understandings we take for granted today, such as the prohibition on racial segregation in public schools or well-established protections against gender discrimination. Moreover, it is unfaithful to the Framers’ own understanding of what they accomplished when they

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\* *Keeping Faith with the Constitution* is available in full at [www.acslaw.org](http://www.acslaw.org). The views expressed in the book, and in this FAQ, are those of the authors. ACS takes no position on particular legal or policy initiatives.

wrote our Constitution. The Framers were not so parochial as to bind future generations to their own specific understandings of broad principles. They chose general language to anchor a set of basic values that the nation could adapt as it grew and changed in unforeseeable ways. The genius of their accomplishment is not that they had answers to every imaginable challenge facing our society. It is that they correctly anticipated that a constitution written in general terms, open to interpretation and adaptation by succeeding generations, would endure and retain its legitimacy even as the nation experienced profound social, economic, and political transformations. (See pages 35-40, 44-45.)

**4. What else should a court consider besides the Constitution’s actual text and what the Framers intended it to mean?**

According to *Keeping Faith*, judges should, and generally do, look to a variety of sources to elucidate the meaning of the Constitution. These sources include the document’s text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution’s values, and the societal consequences of any given interpretation. All of these sources of meaning are legitimate components of the methodology that courts use when applying the Constitution’s general principles to present-day problems. (See pages 29-36; see also a companion volume released by ACS entitled *It Is a Constitution We Are Expounding: Collected Writings on Interpreting Our Founding Document*.)

**5. Does the approach in *Keeping Faith* invite judicial activism?**

No, constitutional fidelity is not a license for judicial activism. By any definition of “judicial activism” – whether it be lack of deference to Congress, failure to adhere to constitutional text or original meaning, lack of deference to judicial precedent, or selective use of judicial power to achieve partisan objectives – the term appropriately characterizes many decisions of judicial conservatives in recent years. Constitutional fidelity, by contrast, calls for interpretation of the Constitution that takes into account the sources discussed above. It is a mistake to think this approach invariably enlarges the judicial role. In fact, it has served to promote judicial restraint in instances where originalism has led to judicial activism. The constitutional history of the New Deal is a case in point: the courts came to exercise judicial restraint only when they read the Constitution in light of the nation’s evolving needs and its changing understandings of the role of government. (See pages 34, 40-41, 65-72.)

**6. If the Constitution’s text and principles were meant to be adapted to new challenges, as this book argues, does the rise of terrorism directed against American targets call for greater presidential power than the framers may have intended? In other words, does constitutional fidelity support the expansive view of executive power adopted by Vice President Cheney and John Yoo?**

Proponents of increased presidential power have argued that the evolving nature of war and the new threat of terrorism require a departure from our original understanding of separation of powers, particularly the power of Congress to regulate the President’s conduct of war. Such claims merit careful consideration because our Constitution’s text and principles were meant to be adapted to new challenges. Based on a review of the original understandings and our subsequent history, however, the authors of *Keeping*

*Faith with the Constitution* conclude that the argument for unchecked presidential power based on changed conditions should be viewed with great skepticism, and that fidelity to the Constitution requires that we preserve, not abandon, the core principle of checks and balances. (See pages 73-82.)

**7. If the meaning of the Constitution needs to evolve to meet new circumstances as our society changes, why not just amend it? Isn't that what the Article V amendment process is for?**

*Keeping Faith* explains that the Framers deliberately made the Constitution difficult to amend, so that the amendment process would be reserved for extraordinary occasions. As they intended, it has been used sparingly: aside from the ten amendments comprising the Bill of Rights, which are essentially part of the original document, the Constitution has been amended formally only 17 times even though our nation has continued to evolve and change, often in dramatic ways that the Framers did not anticipate. By using broad language to set forth basic principles, the Framers ensured that the document would remain stable, and that ongoing interpretation would be the primary way that the Constitution would retain its relevance, legitimacy, and authority over time. (See pages 39-40.)