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American Constitution Society Releases
Keeping Faith with the Constitution

Keeping Faith with the Constitution presents a common-sense approach to interpreting the U.S. Constitution and explains why it is the world's most enduring written Constitution. Authored by legal scholars Goodwin Liu, Pamela S. Karlan and Christopher H. Schroeder, the book shows how the Framers inscribed the fundamental values of liberty, equality and democracy into the Constitution and offers an approach to interpreting the Constitution that, as its Framers envisioned, applies the Constitution's text and broad principles to the changing needs and conditions of our society.

What is "constitutional fidelity"?

The authors call their approach "constitutional fidelity," and argue that being faithful to the Constitution requires judges to ask not how the Constitution's general principles would have been applied in 1789 or 1868, but rather how those principles should be applied today. As the authors explain, this approach is true to the vision of the Framers, who deliberately left the words and broad principles in the document open to future interpretation and adaptation.

The book notes the shortcomings of originalism and so-called "strict construction." The authors argue, for example, that if originalism means resolving constitutional disputes according to how those who wrote the text would have resolved them at the time, it would not be faithful to the Framers' own vision. The Framers, they explain, were not so parochial as to bind future generations to their own specific understandings of broad principles. The genius of their accomplishment 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.

How has this approach to constitutional interpretation brought about understandings we take for granted today?

Contemporary economic challenges. The constitutional history of the New Deal demonstrates the shortcomings of the Supreme Court's attempts to interpret the scope of government power without due regard for the dramatic changes in the scale and

interdependence the national economy. If the Supreme Court had continued to apply 18th Century definitions of commerce to a modern economy, it would have undermined the government's ability to meet today's economic challenges.

Racial and gender equality. Our progress toward racial and gender equality is due in large measure to Supreme Court decisions that took into account historical change and social context. While the Supreme Court's decision in *Brown v. Board of Education* is today considered self-evident, it cannot be explained by an originalist approach given the widespread practice and acceptance of school segregation when the Fourteenth Amendment was adopted. In *Brown*, the Court interpreted the concept of equality in light of the real harms of segregation and the growing importance of public education in fostering equal citizenship. The gender equality cases similarly demonstrate how judicial interpretation of the Constitution legitimately incorporates evolving social understandings.

Liberty. The privacy rights that Americans cherish today depend on Supreme Court cases finding privacy to be a dimension of individual liberty, which not only appears in the Constitution's text but is central to the document's overall meaning. As such, the right to privacy reflects a widely shared understanding that certain activities involved private decision-making that ought to be free from government control. The Court's decisions in this area – striking down forced sterilization and criminal bans on contraceptive use, as well as upholding the right to choose abortion and protecting intimate decision-making by gay people – have built incrementally on core themes of liberty as well as attention to our society's evolving traditions and understandings of personal identity, privacy, and autonomy.

The authors show that in these and other areas of law discussed in the book, fundamental constitutional principles have acquired their widely-accepted meanings through the idea of constitutional fidelity that is advanced in *Keeping Faith with the Constitution*.