



New Publications on the Constitution from the American Constitution Society

Keeping Faith with the Constitution is a new publication of the American Constitution Society that presents a compelling and common-sense approach to constitutional interpretation – one that is faithful to the Constitution’s words and principles and that explains why it is the world’s most enduring written constitution. The book, authored by scholars Goodwin Liu, Pamela S. Karlan, and Christopher H. Schroeder, examines the text and history of the Constitution to show how the Framers inscribed the fundamental values of liberty, equality, and democracy into the document. It then describes and defends an approach to interpreting the Constitution the authors call “constitutional fidelity,” which, as the Framers envisioned, applies the Constitution’s broad principles to the changing needs, conditions, and understandings of our society. This dynamic process of constitutional interpretation, the book shows, has brought about the greatest legal achievements in our history, has allowed us to meet new challenges and unforeseen circumstances, and has enabled each generation of Americans to keep faith with the Constitution.

ACS also has published a companion volume, entitled *It Is a Constitution We Are Expounding: Collected Writings on Interpreting Our Founding Document*. This book, with a Foreword by Professor Laurence H. Tribe, contains excerpts from some of the finest existing writing on methods of constitutional interpretation, taken from decisions of the Supreme Court and other opinions and speeches by Justices and judges, the scholarly literature, and other sources. The materials gathered in this volume explore a variety of interpretive resources that can help illuminate the Constitution’s meaning, including its text, structure, and history, the shared values it embodies, judicial precedent, and the consequences a particular interpretation is likely to have. Like *Keeping Faith* – whose authors drew upon many of the ideas presented in this volume – this publication presents accepted tools of interpretation that are faithful to the Constitution.

Both books are designed to be useful to a wide readership, including law students, lawyers, judges, and every citizen engaged in the nation’s debates over the Constitution, the courts, and judicial nominations.*

Keeping Faith with the Constitution

Keeping Faith with the Constitution begins with two chapters describing the Constitution’s commitment to certain core values – liberty, equality, and democracy – and the judiciary’s role in interpreting the document. These chapters, which present the idea of

* Both volumes are available in full at www.acslaw.org. The views expressed in these volumes, and in this summary, are those of the authors. ACS takes no position on particular legal or policy initiatives.

constitutional fidelity, form the nucleus of the book. They are followed by six chapters in which the authors illustrate their interpretive approach with historical narratives showing how several important constitutional principles have acquired the meaning they have today. The book concludes with a glimpse at future challenges that will continue to demand an approach to constitutional interpretation that enables the document to retain its relevance and authority. The full text of the U.S. Constitution is included at the end.

The authors of *Keeping Faith with the Constitution* are three leading scholars of constitutional law. Goodwin Liu is Associate Dean and Professor of Law at the University of California, Berkeley, School of Law (Boalt Hall). Pamela S. Karlan is Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School, and co-director of the school's Supreme Court Litigation Clinic. Christopher H. Schroeder is Charles S. Murphy Professor of Law and Professor of Public Policy Studies, Duke University School of Law, where he also serves as director of the Program in Public Law.

Chapter One: The Constitution's Vision and Values, gives a short overview of the Constitution's text and historical development. It first explores how the fundamental commitments to democracy, equality, individual liberty, and a carefully calibrated system of government power are reflected both in the original text and in the Bill of Rights. Next, it discusses the profound changes wrought by the Reconstruction Amendments following the Civil War, "America's Second Founding." The chapter also addresses the contributions of the post-Reconstruction Amendments to expanding the nation's commitment to democracy. The authors conclude that "[I]n 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 Two: Judicial Interpretation of the Constitution, discusses the role of the judiciary in interpreting and applying the Constitution and explains the concept of "constitutional fidelity." The authors make the case that constitutional fidelity requires judges to look to a variety of sources to elucidate the meaning of the Constitution, including text, history, structure, purposes, and judicial precedent, as well as contemporary social practices, public understandings of the Constitution's values, and the societal consequences of a given interpretation. In particular, they argue that interpreting the Constitution in light of the concerns, conditions, and evolving norms of our society – and not simply according to how the Constitution would have been applied in 1789 or 1868 – is faithful to the approach envisioned by the Framers and explains how our Constitution retains its authority and legitimacy centuries after it was written.

As one example of how an interpretation in response to changed circumstances can be an act of fidelity to the Constitution, the authors discuss the application of the Fourth Amendment to government wiretapping. Although the Framers would have understood the Fourth Amendment's prohibitions to apply only to physical "search and seizures," the authors show that rigidly adhering to this original understanding would undermine the principle that the amendment expresses. Interpreting the Fourth Amendment to allow wiretaps without a warrant simply because they did not involve a physical "search," they explain, would unduly narrow its protections in the face of new, previously unimagined technologies.

Chapter 2 also discusses the shortcomings of originalism and so-called “strict construction” as theories of constitutional interpretation. For example, the authors note that 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 unfaithful to the Framers’ own decision to anchor in the document a set of basic values and broad principles that the nation could adapt as it grew and changed in unforeseeable ways. Although originalism and strict construction suggest that constitutional interpretation can be reduced to a mechanical or formulaic process, the actual practice of constitutional interpretation by judges of all stripes involves a more nuanced and multifaceted approach that properly takes into account the contemporary context and norms of our society.

In the next six chapters, the authors further describe and defend constitutional fidelity by explaining how constitutional principles in several areas of law have acquired their widely accepted meanings. The authors show that many of the fundamental constitutional understandings that we take for granted today came into being through this dynamic process of interpretation.

Chapter Three: Equality. The strides we have made toward racial and gender equality are due in large measure to Supreme Court decisions that take an interpretative approach sensitive to historical change and social context. *Brown v. Board of Education* is the paradigm example: while its holding is today considered self-evident, it cannot be explained by an originalist approach given the widespread practice and acceptance of school segregation at the time the Fourteenth Amendment was adopted. The Supreme Court in *Brown* interpreted the concept of equality not as an abstract formula or a narrow idea limited by historical practice, but in light of the real harms of segregation and the growing importance of public education to fostering equal citizenship in our society. The Supreme Court’s jurisprudence on gender equality and other civil rights issues similarly demonstrates how judicial interpretation of the Constitution legitimately incorporates evolving social understandings.

Chapter Four: Promoting the General Welfare. 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, interdependence, and inequities of the national economy. By invoking freedom of contract to defeat economic regulation, and by applying eighteenth-century definitions of commerce to a twentieth-century economy, the Supreme Court undermined the government’s ability to meet society’s needs. The application of the Constitution’s text and principles to authorize government to address contemporary economic challenges provides another illustration of what the authors mean by constitutional fidelity.

Chapter Five: Separation of Powers. 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. Constitutional fidelity demands that we examine both the original understandings of the Constitution, and its structure of checks and balances, as well as the nation’s most recent experiences in the war on terrorism, in order to evaluate this claim.

Where neither the original understandings nor constitutional practice provide support for unchecked presidential power, fidelity to the Constitution requires that we preserve rather than abandon the core principle of checks and balances.

Chapter Six: Democracy. The Supreme Court’s reapportionment cases, which established the principle of one person, one vote, are faithful interpretations of the constitutional principles of self-government and equality. The decisions themselves cannot be explained by invoking original applications of the Constitution, and yet they demonstrate how courts properly interpret the Constitution to give practical meaning to its enduring text and principles.

Chapter Seven; Criminal Justice. The landmark criminal procedure decisions of the 1960s, offering protections against abuses in our criminal justice system, remain largely intact today. *Miranda v. Arizona*, requiring that a defendant in a custodial interrogation be given a warning of his right to remain silent and to have a lawyer present, adapted the Fifth Amendment privilege against self-incrimination to important transformations of the criminal justice system since the Founding era, when custodial police interrogations did not occur. The application of the exclusionary rule to the states in *Mapp v. Ohio* illustrates the adaptation of constitutional principles to societal changes that had rendered existing remedies for warrantless searches inadequate to deter Fourth Amendment violations.

Chapter Eight: Liberty. Although the word “privacy” does not appear in the Constitution, privacy is a dimension of individual liberty. Liberty 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 involve private decision-making that ought to be free from government control. That is the basis of cases striking down forced sterilization and criminal prohibitions on contraceptive use, decisions that are widely accepted by the American people. And it is the principles of those cases that lead directly to *Roe v. Wade*, upholding the right to choose abortion, and *Lawrence v. Texas*, protecting intimate decision-making by gay people. The Court’s decisions in this area have built carefully and incrementally on a consistent set of core themes as well as attention to our society’s evolving traditions and understandings of personal identity, privacy, and autonomy.

Chapter Nine: Progress and Possibilities, concludes the book by outlining some of the challenges presented as the Constitution is applied to a rapidly changing world. Just as the Framers could not have imagined the internet, DNA testing, global warming, or women’s equality, there are undoubtedly social developments and constitutional questions we cannot imagine today. If our national experience is any guide, the authors conclude, we can be confident that the Constitution will endure because its text and principles are adaptable to new conditions and new challenges through an ongoing process of interpretation.

***It Is a Constitution We Are Expounding:
Collected Writings on Interpreting Our Founding Document***

The second ACS volume is an anthology of some of the best writing on constitutional interpretation by judges, scholars, and others. Its title is taken from Chief Justice John

Marshall’s famous statement almost 200 years ago in *McCulloch v. Maryland*, “we must never forget that it is a *constitution* we are expounding.” The excerpts in the collection explore a variety of resources for constitutional interpretation. With the exception of Robert Bork’s defense of originalism, the excerpts all implicitly or explicitly reject the view that the Constitution’s text and history, by themselves, are sufficient to answer all constitutional questions. As Professor Tribe explains in his Foreword, “most judges and constitutional scholars – nearly everyone, in fact – would agree that the constitutional text is a necessary starting point for constitutional interpretation and that, on occasion, the text furnishes both the beginning and the end of the inquiry. But examination of the words alone frequently yields little guidance, because the meanings of the Constitution’s most important phrases are anything but self-evident and are often endlessly contestable.” The writings in this book show that where the Constitution’s text fails to provide a clear answer, the solution is not simply to put the Constitution aside or to resort to free-form theorizing, but instead to look to additional tools of constitutional interpretation – further sources of guidance and meaning rooted in the Constitution itself.

The structure of the volume, and the materials excerpted in it, are as follows:

Framework

- Laurence H. Tribe, *American Constitutional Law*, Chapter 1, “Approaches to Constitutional Analysis”

Text and Structure

- Lawrence Lessig, “Fidelity in Translation”
- *McCullough v. Maryland*, 17 U.S. 316 (1819), opinion of Chief Justice Marshall
- Akhil Reed Amar, “Intratextualism”

History

- Robert H. Bork, *The Tempting of America: the Political Seduction and the Law*, Chapter 7, “The Original Understanding”
- Richard A. Posner, “Bork and Beethoven”
- Jack M. Balkin, “Abortion and Original Meaning”
- Mitchell N. Berman, “Originalism and its Discontents (Plus a Thought or Two About Abortion)”
- Anthony G. Amsterdam, “Perspectives on the Fourth Amendment”
- Suzanna Sherry, “The Founders’ Unwritten Constitution”

Values

- Justice Thurgood Marshall, “Reflections on the Bicentennial of the U.S. Constitution”
- Justice William J. Brennan, Jr., “The Constitution of the United States: Contemporary Ratification”

Precedent

- David Strauss, “Common Law Constitutional Interpretation”
- *Lawrence v. Texas*, 539 U.S. 558 (2003), opinion of Justice Kennedy

Consequences

- *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S Ct. 2738 (2007), dissenting opinion of Justice Breyer

Judging

- Alexander Hamilton, Federalist No. 78
- Justice Stephen Breyer, “Judicial Review: A Practicing Judge’s Perspective”
- Justice Ruth Bader Ginsburg, “*Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*”

Conclusion

- Geoffrey R. Stone, “The Roberts Court, *Stare Decisis*, and the Future of Constitutional Law”