

FROM THE SENATE JUDICIARY COMMITTEE MAJORITY STAFF

## GOODWIN LIU: CORRECTING THE RECORD

### **PROFESSOR LIU'S MAINSTREAM METHODS OF CONSTITUTIONAL INTERPRETATION RECOGNIZE THE IMPORTANCE OF THE CONSTITUTION'S TEXT AND ORIGINAL MEANING**

**RHETORIC:** Professor Liu is a judicial activist who will ignore the plain text of the Constitution and rewrite it based on society's evolving standards.

**BACKGROUND:** Professor Liu outlined "constitutional fidelity," his preferred method of constitutional interpretation, in a 2009 American Constitution Society book, *Keeping Faith with the Constitution*.

**Professor Liu is an advocate for "constitutional fidelity," an approach that recognizes the importance of the Constitution's text and strives to preserve its modern-day meaning.**

**FACT:** *Keeping Faith with the Constitution* recognizes the importance of the Constitution's text. It reads:

"[T]he term constitutional fidelity [is used] 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 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 . . ."

(*Keeping Faith*, p. 4-5)

"When 'original meaning' refers to the core principles that underlie the Constitution's broad and general terms, fidelity to the Constitution requires that **its original meaning be preserved over time.**"

(*Keeping Faith*, p. 36)

**FACT:** Professor Liu does not see the Constitution as a "living" document. Indeed, *Keeping Faith with the Constitution* explicitly disavows this approach:

"The metaphor of a 'living Constitution' misleadingly suggests that . . . the Constitution can come to mean whatever a sufficient number of people think it ought to mean. Describing our Constitution as a 'living' document **unduly minimizes the fixed and enduring character of its text and principles.** We approach the Constitution quite differently. In our view, interpretations, applications, and understandings of the Constitution's text and principles may change, but **the Constitution itself does not change unless properly amended.**" (*Keeping Faith*, p. 29)

**Professor Liu's views on constitutional interpretation are well within the mainstream.**

**FACT:** Justice Stephen Breyer, known for his cautious, pragmatic methods, suggests a similar approach:

"The judge should recognize that the Constitution will apply to 'new subject matter . . . with which the framers were not familiar.' Thus, the judge . . . should 'reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision.' Since law is connected to life, judges, in applying a text in light of its purpose, **should look to consequences, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'** And since 'the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.'" (Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* at 18 (2005) (quoting Thomas Jefferson, John Adams, and Benjamin Constant))