

**Responses of Gerard E. Lynch
Nominee to the U.S. Court of Appeals for the Second Circuit
to the Written Questions of Senator Orrin G. Hatch**

1. **Judge Lynch, I believe that the Senate owes some deference to a President's nominees, so long as they are qualified. In the case of judicial nominees, qualifications include a proper understanding of the power and role of judges in our system of government. So I am interested in knowing more about your judicial philosophy. When Justice William Brennan died, the *Washington Post* described him as the voice of the Supreme Court's "social revolution" and said that he "found the essential meaning of the Constitution not in the past but in contemporary life." Do you agree with that description of Justice Brennan's judicial philosophy and do you share it?**

Response: I would not characterize Justice Brennan as a "social revolution[ary]." I think that Justice Brennan believed, rightly or wrongly, that the values he found in the Constitution derived from the ideals of the Framers.

As for my own "judicial philosophy," I believe that the role of the courts is to decide disputes between citizens by impartial application of the law, as it is found in the Constitution and laws of the United States and of the several states, and not to "solve" perceived social problems or to advance any political agenda.

2. **In the memorial article you wrote about Justice Brennan that appeared in the *Columbia Law Review*, you described as "a simple necessity" Justice Brennan's "belief that the Constitution must be given meaning for the present" and wrote that judges must derive that meaning "in light of their own wisdom and experience, and in light of the conditions of American society today." This is clearly directed at the meaning of the Constitution itself rather than its application to the facts of a particular case. Do you believe that judges can and should determine the meaning of the Constitution according to their own wisdom and experience, in light of American society today, and in order to make sense for the present generation?**

Response: The Constitution is a written document, many of the provisions of which were deliberately written to adopt broad principles. The fundamental meaning of those principles is fixed and unchanging, and judges may not revise or repeal or add to that meaning. But courts are constantly faced with new contexts in which the application of those principles to new realities is debatable. Of necessity, judges must draw on their understanding of those realities in deciding the concrete meaning of the unchanging principles as applied to the facts of those cases.

3. **In that memorial article, you wrote that a judge determining the Constitution’s meaning “in the way that he believed made the most sense today seems far more honest and honorable than the pretense that the meaning of those principles can be found in eighteenth- or nineteenth-century dictionaries.” Do you consider the view that the Constitution’s meaning was determined by those who made it law to be, in any way, dishonest or dishonorable? I assume you know that when judges seek the original meaning of a constitutional provision (or a statutory provision, for that matter), they are not limited to dictionaries. What do you believe the search for original meaning is a pretense for?**

Response: There is nothing dishonest or dishonorable about seeking to understand the historical background of a legal provision. Where history gives a clear answer as to the intended meaning of a constitutional provision, that meaning should be adopted. However, historical evidence is sometimes incomplete, and historians often dispute the meaning of the available evidence. Historical evidence can be used, intentionally or inadvertently, to reach decisions that accord with a judge’s personal predilections. It is only a judge’s sense of restraint, and understanding of the proper role of the courts, rather than any particular theory of interpretation, that can protect against such decisions.

4. **In *Marbury v. Madison*, the Supreme Court said that America’s founders “contemplated [the Constitution] as a rule for the government of courts, as well as of the legislature.” If judges can use such things as their own experience or contemporary events and conditions to change the meaning of the Constitution, don’t judges govern the Constitution? How can the Constitution limit judges if judges can define the Constitution?**

Response: I do not believe that judges can change the meaning of the Constitution according to their own opinions or contemporary events. Judges must do their best to interpret the Constitution not according to their own preferences, but according to the text, the history and the body of precedent that makes up our law. Only in that way can the Constitution limit the judiciary. I believe that my record in the nearly nine years I have served on the district court demonstrates that I approach the task of judging in that spirit and with that sense of restraint.