

**Responses of Andrew D. Hurwitz
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Tom Coburn, M.D.**

- 1. Some people refer to the Constitution as a “living” document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

Response: No.

- a. If not, please explain.**

Response: The principles of the Constitution do not change with the times.

- 2. Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

Response: No.

- a. If not, please explain.**

Response: The principles of the Constitution do not change with the times.

- 3. Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge’s consideration of a case?**

Response: No.

- a. If not, please explain.**

Response: A judge should decide cases based on the law and the facts of the case before him.

- b. Can you provide an example of a case where you had to set aside your feelings of empathy for the litigant and, instead, pursue a result that was consistent with the law?**

Response: In a recent decision involving foreclosure of a deed of trust on a residence, I noted that the Court of course understood the difficult personal situation created by the loss of a home, but nonetheless was required to apply the law as written. *In Re Vasquez*, 228 Ariz. 357, ¶ 4, 621 Ariz. Adv. Rep. 22 (Nov. 18, 2011).

- 4. What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

Response: I would of course look to binding Supreme Court precedent first. If there were none, I would then look to precedents within my circuit. Assuming that neither my circuit nor the Supreme Court had addressed the issue, I would then analyze the language of the statute and the Constitution. If the language of the relevant provisions does not solve the issue, I would look to persuasive opinions of other courts for guidance. I would also look at the origin and history of the constitutional provision and would always start from the presumption that if a statute can reasonably be interpreted as constitutional, a court should do so.

5. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment of the United States Constitution “protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.” As Justice Scalia’s opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Leaving aside the *McDonald v. Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

Response: As a sitting judge, I do not believe I should express a personal opinion as to matters settled by Supreme Court decisions. *McDonald* holds that the right to bear arms is a right protected by the Due Process Clause of the Fourteenth Amendment because it is fundamental to our scheme of ordered liberty, and thus settles this issue as a matter of law. 130 S. Ct. 3020, 3050 (2010). As a judge, I would faithfully apply this Supreme Court precedent.

- a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

Response: Yes, at least as against infringement by the federal government. As I note below, not every protection in the Bill of Rights has been held by the Supreme Court to be applicable against the states under the Fourteenth Amendment.

- b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes. With some exceptions, the Supreme Court has held that the rights guaranteed by the Bill of Rights are fundamental rights that apply against the States under the Due Process Clause of the Fourteenth Amendment. But the Court has not held that all rights guaranteed by the Bill of Rights are fundamental. For example, the Fifth Amendment’s Indictment Clause does not apply to the States, *Hurtado v. People of State of Cal.*, 110 U.S. 516, 534-38 (1884); the Sixth

Amendment's unanimous jury requirement does not apply to the States, *Apodaca v. Oregon*, 406 U.S. 404, 406 (1972) (plurality opinion); and the Seventh Amendment's guarantee of a jury trial in civil cases does not apply to the States, *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 217-222 (1916).

- c. **The *Heller* Court further stated that “it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right.” Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: I have not done independent research on the historical origins of the Second Amendment, but have no reason to disagree with the Supreme Court's statement.

- d. **What limitations remain on the individual, Second Amendment rights now that the amendment has been incorporated against the States?**

Response: The Court identified some limitations in *Heller*, explaining that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. at 626. But because the Supreme Court's decisions in *Heller* and *McDonald* do not fully resolve what limitations may be legally placed on an individual's right to bear arms, I do not believe it appropriate to speculate on how the Court may rule in future cases.

6. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the “evolving standards of decency” to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter and you are obliged to follow it, but do you agree with Justice Kennedy's analysis?**

Response: I do not believe it appropriate for a sitting judge to comment about whether he agrees with the analysis in an opinion of the Supreme Court, which both as a state judge, and, if confirmed, as a circuit judge, I am obligated to follow. Under *Roper*, I am obliged to hold that the death penalty cannot be imposed on a murderer under the age of 18.

- a. **When determining what the “evolving standards of decency” are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,¹ in addition to foreign law, and in other cases have looked solely to the laws and traditions**

¹ *Roper v. Simmons*, 543 U.S. 551, 564-65.

of foreign countries.² Do you believe either standard has merit when interpreting the text of the Constitution?

Response: I believe the laws and traditions of foreign countries do not control the interpretation of our Constitution. Decisions of the Supreme Court, which I am obliged to follow, however, hold that reference to law of the various American states is permissible in determining whether a punishment is “unusual” under the Eighth Amendment.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: As noted above, I do not believe that the laws and traditions of foreign countries should control the interpretation of the Eighth Amendment.

7. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: No, although as Justice Scalia’s recent opinion in *United States v. Jones*, 2012 WL 171117 (2012), demonstrates, the Founders’ understanding of English common law traditions may inform constitutional interpretation.

a. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Only in the instance noted above.

b. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: As stated above, foreign laws should not be relied upon when interpreting our laws.

8. In 2002, you published an article in the *New York Law School Legal Review* entitled, “Jon O. Newman and the Abortion Decisions: A Remarkable First Year.” The article analyzes two opinions (*Abele I*, *Abele II*) authored by Judge Newman and their influence on the Supreme Court’s decision in *Roe v. Wade*. You clerked for Judge Newman at the time he authored these opinions. Further, in footnote 55 of the article, you wrote,

The author received some small inkling of the influence of *Abele II* on the Court’s thinking in the fall of 1972, when interviewing for clerkships at the Supreme Court. Justice Powell devoted over an hour of conversation to a discussion of Judge Newman’s analysis, while Justice Stewart (my future

² *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

boss) jokingly referred to me as ‘the clerk who wrote the Newman opinion.’ I assume that the latter was based on Judge Newman’s generous letter of recommendation, a medium in which some exaggeration is expected.

Did you assist Judge Newman in researching and/or writing the *Abele* opinions?

Response: I assisted in research, but Judge Newman wrote the opinion, as he did all opinions which bore his name during the time I clerked for him.

- 9. Your article states *Abele II* had a “crucial influence” on the *Roe* decision and Judge Newman’s “careful and meticulous analysis of the competing constitutional issues” in *Abele II* was reflected in “almost perfect lockstep” in *Roe*. Numerous other scholars have credited Judge Newman’s opinion as having a decisive effect on the thinking of the *Roe* majority. Do you still believe *Abele II* had a “crucial influence” on *Roe*?**

Response: I think that the historical record, particularly the papers of retired Justices, indicates the influence of the *Abele II* opinion, whether or not one agrees with the Supreme Court’s decision.

- 10. In *Abele II*, Judge Newman opines: “If the fetus survives the period of gestation, it will be born and then become a person entitled to the legal protections of the Constitution. But its capacity to become such a person does not mean that during gestation it is such a person. The unfertilized ovum also has the capacity to become a living human being, but the Constitution does not endow it with rights ...” Similarly, in your article, you wrote that Judge Newman “candidly conceded that a court could never resolve the philosophical issue of whether a fetus was a human being from the moment of conception, or whether abortion amounted to murder.”**

- a. Do you believe the question of when a fetus becomes a human being is a philosophical question?**

Response: In the article, I was accurately describing what Judge Newman said in fn. 9 of his *Abele II* opinion, which was that there was a wide range of views on this topic in philosophy and religion. I did not express my personal opinion in the article, and I do not think it appropriate for a sitting judge to express his views on such issues.

- b. Does science play a role in when a fetus becomes a human being?**

Response: As explained above, I do not believe that it is appropriate for a sitting judge to express a personal view on this issue or how that determination should be made. If presented with a case implicating these issues, I would apply the law as determined by Supreme Court and Ninth Circuit precedents, without regard to my personal views.

c. What is the difference between being a “human being” and believe alive?

Response: I am unaware of any Supreme Court or Ninth Circuit jurisprudence making a distinction between being a “human being” and “being alive.”

i. Please explain.

Response: See above.

d. Do you believe there is a difference between an unfertilized ovum and a fetus?

Response: Yes.

i. Please explain.

Response: Although I am not a scientist, there is an obvious biological difference. The decisions of the Supreme Court also recognize a legal distinction, allowing far greater state regulation of abortion than of contraception.

11. In your article, you state: “in language that once again virtually echoes that of *Abele II*, *Roe* concluded that ‘by adopting one theory of life,’ Texas may not ‘override the rights of the pregnant woman.’” Does it matter to the legal reasoning whether the “theory of life” is based on science or philosophy?

Response: As a sitting judge, I do not believe that it is appropriate for me to criticize the reasoning of a Supreme Court decision. The point of the article was simply to suggest that the Supreme Court seemed to have followed the reasoning of *Abele II*.

a. Should the courts take into consideration these questions about science and technology and how they affect the law or should they rely solely on *stare decisis*?

Response: Trial courts do, and should, hear evidence in appropriate cases about science and technology, and make factual findings based on these matters. In general, appellate courts should rely on trial courts to hear evidence and find the relevant facts, and should not make such factual findings on their own. The principle of *stare decisis* suggests that appellate courts should be reluctant to overturn prior decisions. In the Ninth Circuit, a three-judge panel may not overrule a prior decision of the Court – only the en banc Court may do so.

12. In all 50 States, death is recognized and defined as the irreversible cessation of the brain and heart activity. It seems like common sense and logic that if a lack of brain waves and a heartbeat signifies death, then the presence of brain waves and a

heartbeat signifies life. Do you agree that the irreversible cessation of brain and heart activity constitutes death under the law?

Response: I have not researched the law in other states. In Arizona, a statute, Ariz. Rev. Stat. § 14-1107, requires that “a determination of death must be made in accordance with accepted medical standards.” The Arizona Supreme Court has stated that “while the common law definition of death is still sufficient to establish death, the test of the Harvard Medical School or the Commissioners on Uniform State Laws [for brain death], if properly supported by expert medical testimony, is also a valid test for death in Arizona.” *State v. Fierro*, 124 Ariz. 182, 185-86, 603 P.2d 74, 77-78 (1979).

a. Does the presence of brain waves and a heartbeat equate to life under the law? Please explain.

Response: I am not familiar with the law of other states. Arizona law defines knowingly and recklessly causing the death of an unborn child at any state of its development as manslaughter, but the legislature has determined to exempt a death caused by a lawfully performed abortion. Ariz. Rev. Stat. § 13-1103.

13. If someone driving a car hits a pregnant woman who has a 28-week-old fetus and the woman survives but the fetus dies, that person can be held prosecuted for murder of the fetus. Thus, society recognizes that fetus as a life, as evidenced by law. However, if a pregnant woman wants to terminate that fetus at 28 weeks, the courts prevent states from protecting that life and recognizing the termination of that life as murder. How do you explain this inconsistency in the law?

Response: I do not think it appropriate for a sitting judge to opine on issues that may someday come before him, as Chief Justice Roberts recognized when posed similar questions during his confirmation hearing. As noted above, I am not familiar with the law of other states, but Arizona law does allow for prosecution for manslaughter pursuant to Ariz. Rev. Stat. § 13-1103 for causing the death of an unborn child, but expressly exempts from the criminal statute lawfully performed abortions. As the Arizona Supreme Court stated in *State v. Brewer*, “[we] can assume that the legislature, when it drew up this statute in 1983, considered the complex issue of when the murder statute should apply.” 170 Ariz. 486, 508, 826 P.2d 783, 805 (1992).

14. In Abele II, Judge Newman writes: “perhaps in the view of some of the legislators who enacted this statute, abortion is considered the deliberate killing of a human being. ... But under the Constitution, their judgment must remain a personal judgment ... a judgment they may not impose upon others by force of law.” Do you believe judges are better equipped to decide the standards of human decency than the people’s elected representatives?

Response: No.

15. Do you agree with Judge Newman that abortion is a “constitutional right of special significance?”

Response: The Supreme Court has held that under certain circumstances, the Constitution prohibits a state from denying access to an abortion. I would refrain from ranking constitutional rights.