

**Responses of Patty Shwartz  
Nominee to be United States Circuit Judge for the Third 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 Constitution does not change based upon the times. The Constitution is only changed through the amendment process.

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

Response: No, except in the rare circumstance in which binding precedent so dictates.

- a. If not, please explain.**

Response: A lower court confronted with a constitutional question must follow the binding precedent. In the context of the Eighth Amendment, the Supreme Court has considered the “evolving standards of decency.” *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (citations omitted). To identify these standards, the Supreme Court has observed that “community consensus” is “not itself determinative,” but it should be given weight. *Id.* at 2026. According to the Supreme Court, “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citations omitted). As a lower court judge, I am bound to follow this precedent.

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

Response: A statute is presumed to be constitutional. If a case involved a claim that a statute infringed a constitutional right, I would first determine whether binding precedent resolves the specific claim. If it did not, then I would consider the statute, the provision of the Constitution embodying the right alleged to be infringed, the factors set forth in the binding precedent concerning the contours of the constitutional right, and the applicable level of scrutiny to determine if the statute unconstitutionally infringes such a right.

4. 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: The United States Supreme Court has held that the Second Amendment confers an individual and fundamental right to bear arms, *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010), and I would follow that 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: The United States Supreme Court has held that almost all of the rights set forth in the Bill of Rights are fundamental rights and I would follow that precedent.

- 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. The United States Supreme Court has held that many but not all of the provisions in the Bill of Rights are fundamental rights that apply against the States through selective incorporation under the Due Process Clause of the Fourteenth Amendment.

- 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: The United States Supreme Court reviewed the text and history of the Second Amendment and held that the Second Amendment embodies a pre-existing right, *Heller*, 554 U.S. at 592, and I would follow that precedent.

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

Response: The Supreme Court and the Court of Appeals for the Third Circuit have not fully resolved this question. In *Heller*, however, the Supreme Court identified a few such limits, 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 626-27.