

Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. In response my question about using foreign law in interpreting the Constitution, you noted that “what I’ve observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument.”

- a. Do you believe that the Court “[chose] the law that is favorable to [their] argument] in *Lawrence v. Texas*, which cited to foreign law when undercutting the reasoning in *Bowers v. Hardwick*?

Response: Yes. The Supreme Court in *Lawrence v. Texas* cited an act of the British Parliament and decisions of the European Court of Human Rights in support of its assertion that the “references [in *Bowers*] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.” 539 U.S. 558, 572-73, 576-77 (2003).

- b. Do you believe that is what the Court did in *Roper v. Simmons*, which cited the death penalty laws of foreign nations in an effort to show that sentencing a person under 18 years old to death, regardless of the severity of the crime, constituted cruel and unusual punishment under the Eighth Amendment?

Response: Yes. The Supreme Court in *Roper v. Simmons* cited the laws of several nations as well as the United Nations Convention on the Rights of the Child in support of its assertion that “the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” 543 U.S. 551, 575-78 (2003).

- c. At your hearing, you indicated that it was appropriate for courts to cite foreign law for “ideas and other forms of guidance.” To your credit, you said that “[a]uthority is the basis on which cases are decided, not ideas or other forms of guidance.” However, in a constitutional law case, the relevant authority is the Constitution. The only possible relevance I can see for citing foreign law as a source of “ideas [and] other forms of guidance” in such a case is to influence how a judge interprets the Constitution, the relevant authority; therefore, while your answer may have shown your understanding that foreign law may not *control* the meaning of the Constitution, I am still unsure of how you think it is permissible for foreign law to *influence* the interpretation of our Constitution. Do you think there is another relevant purpose for citing to foreign law, other than influencing how a judge interprets authority and legal standards?

Response: Legal standards may occasionally require a judge to rely on foreign law, as in cases involving treaties, conflict of laws, or foreign contracts. Apart from circumstances where American law requires a judge to rely on foreign law, however, I do not believe a judge should rely on foreign law as legal authority in interpreting U.S. law, including the U.S. Constitution. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have

no legal authority in the interpretation of the U.S. Constitution, foreign law also has no legal authority in the interpretation of the U.S. Constitution.

- d. In your view, is it ever proper for judges to look to contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution? If so, under what circumstances?**

Response: Because foreign law has no legal authority in our legal system, judges should not rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the U.S. Constitution, unless American law so requires. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own.

- e. If so, how would you choose which foreign law to consider as you interpret the Constitution?**

Response: Please see response to subpart (d) above.

- f. How do contemporary foreign and international legal materials have any genuine relevance to the issue of American law being decided?**

Response: In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have no relevance as legal authority in the interpretation of American law, foreign law likewise has no relevance as legal authority in the interpretation of American law, except where American law so provides.

- g. There is a surprising dearth of Supreme Court case law on the Second Amendment. Given the paucity of case law on the subject and the clearly unsettled areas of Second Amendment law, would it be appropriate for the Supreme Court to look to “wise solutions” in foreign law when deciding whether the right to bear arms in America is a fundamental right and should be incorporated on to the states?**

Response: Whether the right to bear arms is a fundamental right that should be incorporated on to the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

- h. Would foreign law be relevant to any aspect of your efforts to interpret the Second Amendment?**

Response: If confirmed, I would faithfully follow the Supreme Court’s precedents on the Second Amendment, including any instructions in those precedents on how to interpret the Second Amendment.

i. Why is foreign law relevant when interpreting the Eighth Amendment and not the Second Amendment?

Response: If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment and the Eighth Amendment, including any instructions in those precedents on how to interpret these amendments.

2. You have written a number of articles arguing that the Citizenship Clause of the 14th Amendment creates a positive right to whatever welfare benefits are necessary to facilitate full participation as a citizen.

In "Interstate Inequality in Educational Opportunity," you argued that "the Fourteenth Amendment guarantee of national citizenship [was] a generative source of substantive rights."¹ You also argued that "contrary to the conventional wisdom that 'the Constitution is a charter of negative rather than positive liberties,' the social citizenship tradition assigns equal status to negative rights . . . and positive rights to government assistance."²

In a companion article entitled "Education, Equality, and National Citizenship," you stated: "by virtue of its affirmative character, the substantive protections of the Citizenship Clause are guaranteed not only against state abridgment, but also as a matter of positive right."³ You ultimately concluded that the "the duty of government cannot be reduced to simply providing the basic necessities of life . . . the main pillars of the agenda would include . . . expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit."⁴

Throughout our history, most lawyers and judges have not viewed the Constitution in this way. The predominant view has been, as Judge Richard Posner of the Seventh Circuit put it, that the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."⁵

a. Why do you think Congress and the Court's interpretation of the Constitution in general has shifted to an affirmative-right guarantee, rather than a set of restrictions on government power?

Response: In general, I do not think Congress or the Court has interpreted the Constitution to recognize affirmative rights. My writings make clear my awareness that "[t]he concept of positive rights [is] disfavored in Supreme Court doctrine." *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336 (2006) (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). If confirmed as a judge, I would faithfully follow the Supreme Court's precedents, not the views I have expressed as a scholar.

¹ Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044-2047-48 (2006).

² Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330, 336 (2006).

³ *Id.* at 358.

⁴ *Id.* at 407.

⁵ *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

3. **You have argued that the Constitution creates, in all citizens, a positive right to whatever welfare benefits are necessary for full participation as a citizen of the United States. Although you claim these rights arise from the Citizenship Clause of the Fourteenth Amendment, you have also stated that: “we must be careful to ensure that the ideal of national citizenship does not infuse public education with nativism, cultural conformity, or chauvinistic nationalism and we should not use the concept of citizenship to deny education to noncitizen children, not least because the Equal Protection Clause extends to ‘persons,’ not only to citizens.”**

- a. **Do you personally believe that people whose presence in this country violates our immigration laws nonetheless have a constitutional right to public education?**

Response: The Supreme Court has held under the Equal Protection Clause that a state may not deny free public education to children who are here illegally if the state provides such education to other children. *See Plyler v. Doe*, 457 U.S. 202 (1982). *Plyler* dealt only with “innocent” children who “can affect neither their parents’ conduct nor their own status.” *Id.* at 220, 230 (internal quotation marks and citation omitted). The Court also said that a state’s prerogative to deny public education to children who are here illegally might be different if such denial were supported by congressional policy. *See id.* at 224-26. I would faithfully follow the Court’s precedent if I were confirmed. I have written that “we should not use the concept of citizenship to deny education to noncitizen children,” citing *Plyler* to support the proposition that “the Equal Protection Clause extends to ‘persons,’ not only to citizens.” *National Citizenship and the Promise of Equal Educational Opportunity* 130 & n.22, in *The Constitution in 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009). I have not previously expressed any view on whether people who are here illegally have a constitutional right to public education, and I believe it would not be appropriate for me to do so now.

- b. **Do you personally believe the U.S. Constitution guarantees any “persons” living in the United States a right to healthcare and other welfare benefits?**

Response: The Supreme Court has generally held that the Constitution does not guarantee a right to health care or welfare, and where Congress has restricted the eligibility of noncitizens for such benefits provided by statute, the Court has upheld it. *See Mathews v. Diaz*, 426 U.S. 67 (1976). I would faithfully follow the Court’s precedent if I were confirmed. My writings have not claimed that there is a constitutional right to health care or welfare for any citizen or person. My writings have indicated that, if a right to health care or welfare is to exist, it must arise from a duly enacted statute and that the legislature retains the ultimate authority to create, eliminate, or define the contours of any such right. *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 244-45, 264-66 & n.324 (2008).

4. **You were one of several law professors who filed an amicus brief with the California Supreme Court in a suit seeking to have California’s definition of marriage as between a man and a woman declared unconstitutional. Your brief argued that California’s definition of marriage violated the equal protection guarantees of the U.S. Constitution, and, therefore, also violated the equal protection guarantees of the California constitution. You also have repeatedly used the language of the majority opinions in *Plessy v. Ferguson* and *Brown v. Board of Education* to describe most states’ definition of marriage as a union between a man**

and a woman. In discussing the recognition of only civil unions among same-sex couples, you have repeatedly made statements to the effect that “[e]ven if marriage provides no greater rights than domestic partnership, a separate-but-equal regime unavoidably signals that same-sex relationships are of lesser worth.”⁶

- a. Do you stand by your repeated statements that even if marriage provides no greater rights than domestic partnership, such an arrangement is a “separate but equal regime” similar to the majority opinion in *Plessy*?**

Response: I stand by my use of the term “separate but equal” and will leave any comparison to *Plessy* to others. The amicus brief I joined did not argue that California’s definition of marriage violated the U.S. Constitution. The brief urged the court to “rely solely on California, rather than federal, constitutional law” and noted that “California’s Constitution has often been construed to provide broader protection than its federal counterpart.” Brief of Amicus Curiae Professors of Constitutional Law at 3, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). The brief discussed federal cases “to illustrate” an “analytic methodology for interpreting the California Constitution.” *Id.* The brief expressed no view and made no attempt to resolve whether California’s definition of marriage violated the U.S. Constitution.

- b. Do you personally believe that the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by the states?**

Response: My writings have not previously expressed any view on this issue, and I believe it would not be appropriate for me to do so now.

- c. In an *LA Times* article on Prop. 8, you stated: “Each of the 18,000 same-sex couples and their families in California represents a potential catalyst for broader acceptance of gay marriage. The more familiar we become with gay spouses and their children -- as our friends, neighbors and co-workers -- the more gay marriage will become an unremarkable thread of our social fabric. Proposition 8 may then come to be viewed, in the long run, not as an enduring constitutional principle but as the will of a narrow and ultimately temporary majority.” The idea of marriage as between a man and a woman is one that has endured for thousands of years, since the dawn of man. Do you still believe that traditional marriage, which Proposition 8 protects, “is not as an enduring constitutional principle but... the will of a narrow and ultimately temporary majority?”**

Response: Marriage between a man and a woman is an institution that has endured for thousands of years, and my statement in the *Los Angeles Times* editorial did not say that traditional marriage is the will of a narrow and ultimately temporary majority. My statement was a speculative prediction of how a particular state ballot measure, Proposition 8, “may ... come to be viewed, in the long run.”

- d. Is the right to marry an example of the constitutional interpretation that you believe properly considers “the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?”**

⁶Goodwin Liu, *The Next Verdict on Prop. 8*, LOS ANGELES TIMES, Nov. 10, 2008, at A-19.

Response: I have written that “the history of litigation over the right to marry” is an example of how “changes in social understandings often, and rightly, change how constitutional principles are applied.” Keeping Faith with the Constitution 111 (2009) (discussing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), and *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated laws against interracial marriage).

5. **You have been extremely critical of Justice Alito saying that “[h]e approaches law in a formalistic, mechanical way abstracted from human experience.”⁷ This statement seems to reflect the sentiments of Justice Sotomayor who believed that human experiences should influence a judge’s decisions. She stated: “Personal experiences affect the facts that judges choose to see,” and “a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Do you agree with Justice Sotomayor’s statement?**

a. Why or why not?

Response: I do not believe that a judge may “choose to see” particular facts in a case based on personal experiences or for any other reason. A judge has a duty to consider fully and fairly all the facts in the record of a given case or controversy. I also do not believe that the life experiences that arise from being a member of a particular race or gender would lead a judge “more often than not [to] reach a better conclusion” than the life experiences that arise from being a member of another race or gender.

6. **Please describe the criteria and methodology the Supreme Court employs to determine whether a right is a “fundamental right?”**

Response: The Supreme Court has used the term “fundamental” to describe various rights expressly stated in the Constitution. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2798 (2008) (“the arms provision of the Bill of Rights [was] one of the fundamental rights of Englishmen”); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (“the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage”); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (free exercise of religion guaranteed by the First Amendment is a “fundamental concept of liberty”). In those cases, the Court has looked to the history and traditions of Anglo-American jurisprudence to determine whether a right is fundamental. See, e.g., *Benton*, 395 U.S. at 795-96. The Court has also used the term “fundamental right” in interpreting the substantive liberty protected by the Due Process Clause. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests”). In that context, the Court has similarly looked to “[o]ur Nation’s history, legal traditions, and practices” as “the crucial guideposts” for determining whether a right is “implicit in the concept of ordered liberty” and therefore fundamental. *Id.* at 721 (internal quotation marks and citations omitted).

The Court has occasionally used the term “fundamental” to describe other rights not expressly stated in the Constitution. See, e.g., *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 210 (2008) (“fundamental right to vote”); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (“fundamental right of access to the courts”); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972)

⁷ Daniel Eisenberg, *How Alito Looks Under the Lens*, TIME, Nov. 14, 2005, at 20.

(describing “the right to travel” as a “fundamental personal right”). In those cases, it does not appear that the Court has used specific criteria or a specific methodology in describing a right as “fundamental.”

7. **In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ____ (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. Do you believe the right to bear arms is a fundamental right?**

Response: Whether the right to bear arms is a fundamental right such that it should be incorporated against the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

- 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 Supreme Court has understood several explicitly guaranteed rights in the Bill of Rights to be fundamental rights based on their roots in Anglo-American jurisprudence. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (Sixth Amendment right to trial by impartial jury); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (First Amendment right to free exercise of religion); *Chicago, Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226, 235-36 (1897) (Fifth Amendment right against takings without just compensation). However, the Supreme Court has not recognized all of the rights explicitly guaranteed in the Bill of Rights to be “fundamental.” *See, e.g.*, *Hurtado v. California*, 110 U.S. 516 (1884) (Fifth Amendment requirement of indictment by grand jury).

- 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. My understanding of Supreme Court precedent is that the Court decides whether a provision of the Bill of Rights should apply to the States by examining whether the provision is properly understood as fundamental within the history and traditions of Anglo-American jurisprudence. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 235-36 (1897). Whether the Second Amendment embodies a fundamental right that applies to the States is a question currently pending in the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521).

- c. ***Heller* 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 Supreme Court has said that the Second Amendment codified a pre-existing right, and I would faithfully follow the Court's precedent if confirmed as a judge.

- d. Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: The Supreme Court has determined that the best reading of the text of the Second Amendment is that it protects an individual right to bear arms and that the Second Amendment codified a pre-existing right. I would faithfully follow the Court's precedent if confirmed as a judge.

- e. You testified that "the interpretation of the Constitution ... has to be guided by the faithful application of the text, the underlying principles, and the precedents that have accursed up to that time." What underlying principles would you apply when interpreting the Second Amendment?**

Response: The Supreme Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008), and I would faithfully follow the Court's precedent if I were confirmed.

- f. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ____ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: The Supreme Court in *Citizens United* applied the doctrine of stare decisis in overruling prior cases contrary to the Court's holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity." 130 S. Ct. 876, 911-13 (2010). *Citizens United* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- 8. You stated during your hearing that "the role of a judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories." Do you believe there was no invention or creation of new legal theories in Justice Blackmun's decision in *Roe v. Wade* when he found a right to abortion in the penumbras of the Constitution? Please explain.**

Response: My writings have "locate[d] *Roe* [*v. Wade*] within the broader constellation of cases extending constitutional protections to individual decision-making on intimate questions of family life, sexuality, and reproduction." *Keeping Faith with the Constitution* 97 (2009). I have written that "nothing about the Court's interpretive method distinguishes the core right in *Roe v. Wade* from its doctrinal forerunners. In *Roe*, as in *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Skinner*, *Griswold* and *Eisenstadt*, the Court reasoned from constitutional text, principles, and precedent to the conclusion that that the 'right of privacy ... founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... is broad enough to

encompass a woman's decision whether or not to terminate her pregnancy.'" *Id.* at 104 (quoting *Roe*).

- a. **Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's March 11, 2010 dissent in *Newdow v. Rio Linda Union School District* (05-17257) when he ruled that including "Under God" in the pledge was unconstitutional? Please explain.**

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

- b. **You also testified that "a court .. judge would have to simply follow what the Supreme Court has instructed the courts to do on particular issues." Do you believe Judge Reinhardt did this in the *Newdow* case? Please explain.**

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

- c. **Do you believe Judge Diane Wood simply followed what the Supreme Court has instructed the courts to do in *NOW v. Scheidler*? Please explain.**

Response: In *Scheidler v. National Organization for Women*, 547 U.S. 9 (2006), the Supreme Court held that threatening or committing physical violence unrelated to robbery or extortion which obstructs, delays, or affects commerce falls outside the scope of the Hobbs Act. I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Wood's opinion in *NOW v. Scheidler*, and I believe it would not be appropriate for me to do so now.

- d. **Do you believe there was no invention or creation of new legal theories in Judge Reinhart's decision in *Silveira v. Lockyer*, 312 F.3d 1052, which held that the right to bear arms is a collective right? Please explain.**

Response: The Supreme Court has held that the right to bear arms is an individual right, and I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Reinhardt's opinion in *Silveira v. Lockyer*, and I believe it would not be appropriate for me to do so now.

- e. **Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's decision in *Gonzales v. Carhart*, 550 U.S. 124, striking down the Partial Birth Abortion Ban? Please explain.**

Response: The Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and I would faithfully follow the Court's precedent if I were confirmed.