

**Responses of Goodwin Liu
Nominee to be U.S. Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Hatch**

- 1. In *Keeping Faith with the Constitution*, you write that “constitutional meaning is a function of both text and context. In many instances, a court cannot be faithful to the principle in the text unless it takes into account the social context in which the text is interpreted.” Do you equate the meaning of the text and the principle in the text? If not, please explain the difference.**

Response: Because our Constitution is a written document, the text is central to the Constitution’s meaning. In some places, the text is very specific and prescriptive. For example, Article I, Section 7 dictates that “[a]ll bills for raising revenue shall originate in the House of Representatives.” The application of such provisions is straightforward on the basis of the text alone.

Elsewhere, the Constitution’s text is more general and abstract. For example, the First Amendment protects “freedom of speech” and “free exercise” of religion. In such instances, the text has been understood to express an underlying principle. For example, the Supreme Court has read the First Amendment to protect “freedom of conscience.” See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In other places, the Constitution’s text has been understood to reflect a pre-existing principle. For example, the Supreme Court has said that the Second Amendment “codified a *pre-existing* right,” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008), and that the Eleventh Amendment “confirm[s]” rather than “establish[es]” a principle of state sovereign immunity “implicit in the constitutional design.” *Alden v. Maine*, 527 U.S. 706, 728-29 (1999).

The Supreme Court has also recognized constitutional principles that do not appear in any particular textual provision but derive from the structure of the Constitution as a whole. For example, the terms “separation of powers” and “federalism” do not appear in the text of the Constitution, yet they are well-established constitutional principles that courts apply in specific cases and controversies.

- 2. In *Keeping Faith with the Constitution*, you write that the Supreme Court considers “social practices, evolving norms, and practical consequences in order to give concrete, every meaning to text and principle.”**

- Do you believe that judges may properly consider social practices, evolving norms, and practical consequences in order to determine the meaning of constitutional provisions? I am asking about your view of this approach, not whether the Supreme Court has used it or whether you would, if confirmed, follow the Supreme Court’s precedents.**

Response: Throughout American history, Justices of all stripes have examined text, original meaning, and precedent, as well as social practices, evolving norms, and

practical consequences when applying the Constitution's provisions to specific cases and controversies. I have written approvingly of this approach because it explains why the Constitution's text and principles have endured even as our society has changed. For example, this approach explains why a telephone wiretap is a "search" under the Fourth Amendment despite the absence of a physical trespass, *see* *Katz v. United States*, 389 U.S. 347 (1967); why the Equal Protection Clause protects women against gender discrimination even though the original understanding was otherwise, *see* *United States v. Virginia*, 518 U.S. 515 (1996); and why Congress's power to address twenty-first century challenges in our economy is not limited by eighteenth-century definitions of "commerce," *see* *Gonzales v. Raich*, 545 U.S. 1 (2005).

Judges who serve on the lower federal courts are bound by Supreme Court precedents, including any instructions in those precedents on how to interpret specific constitutional provisions. If confirmed, I would faithfully follow the Court's precedents, not my own views on constitutional interpretation.

- **This passage refers separately to constitutional "text and principle." Please explain the difference.**

Response: Please see response to Question 1.

3. **In your article *Rethinking Constitutional Welfare Rights*, you write that "the problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine."**

- **What do you mean by "legal doctrine?" Does this refer to the meaning of a constitutional provision?**

Response: By "legal doctrine," I mean the holdings, rules, and analytical tests that comprise adjudicated case law. For example, the strict scrutiny test is a part of equal protection doctrine. As a matter of usage, I would not say that the strict scrutiny test states the "meaning" of the Equal Protection Clause. But the test directs how the Equal Protection Clause applies in a specific case or controversy where, for example, a government policy treats individuals differently on the basis of race.

- **This passage appears to say that judges may consider collective values in giving meaning to constitutional provisions. Is this your view?**

Response: The meaning of the passage is perhaps best explained through examples. In applying the Fourth Amendment guarantee against "unreasonable searches and seizures," the Supreme Court has asked whether the person subject to search has a "reasonable expectation of privacy." *Bond v. United States*, 529 U.S. 334, 337 (2000). Reasonableness is an objective inquiry that asks "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* at 338 (internal quotation marks and citation omitted). Judges properly consider

collective values in applying the Fourth Amendment insofar as they must determine what privacy expectations our society is prepared to recognize as reasonable. In applying the Equal Protection Clause to sex-based classifications, the Supreme Court has asked whether the classification is based on “outmoded,” “outdated,” or “archaic” notions of gender roles. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135, 139 n.11 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982). Judges properly consider collective values in applying the Equal Protection Clause insofar as they must determine whether a sex-based classification reflects outmoded, outdated, or archaic notions of gender roles.

4. In an interview you gave to the Brennan Center for Justice, you said that looking at constitutional text and asking “how did the people in 1789 or the people in 1868 understand it...misses an entire range of experience that the nation has, itself, learned and that judges can rightly take into account in reading legal principles and legal texts.”

- **Does your reference to how a text was understood at a particular point in the past refer to its meaning?**

Response: In that interview, my reference to “how did the people in 1789 or the people in 1868 understand it” is a reference to the original expected application of constitutional text and principle, that is, “the Framers’ expectations of how [the Constitution’s] principles would have applied at the time they were adopted.” *Keeping Faith with the Constitution* 35 (2009). The term “original meaning” is often used to mean the original expected application of the Constitution. However, original expected application is distinct from original meaning understood as “the underlying principles that the Framers’ words were publicly understood to convey.” *Id.* My writings have urged fidelity to original meanings in the latter sense and not to original expected applications. *See id.* at 35-36.

- **If so, then do you believe that judges can change or depart from the original meaning of constitutional provisions by taking into account experience the nation has learned?**

Response: Judges must be faithful to, and cannot change or depart from, the original meaning of constitutional provisions where original meaning refers to “the underlying principles that the Framers’ words were publicly understood to convey.” *Keeping Faith with the Constitution* 35; *see id.* at 36 (“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.”). My writings have agreed with Justice Holmes that judges, in order to preserve the Constitution’s original meaning, can take into account experience that the nation has learned when applying the Constitution to new issues and circumstances. *See id.* at 1-2 (quoting *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920)). In other words, judges may depart from the original expected application of a constitutional provision or principle in order to remain faithful to its original meaning.

- **If so, are there any limitations, criteria, or other restraints on how judges take into account experience the nation has learned when determining the meaning of constitutional provisions?**

Response: Judges may take into account experience the nation has learned when applying the Constitution's text and principles to new issues and circumstances. In so doing, judges may not engage in free-wheeling inquiry into the nation's experience. Judges are constrained insofar as they apply constitutional text and principles not in the abstract, but in concrete cases and controversies; insofar as they seek guidance in precedent, which itself is part of the nation's experience; and insofar as they look to objective evidence of relevant historical facts or evolution of legal traditions.

For example, in *United States v. Lopez*, 514 U.S. 549, 556 (1995), the Supreme Court said: "*Jones & Laughlin Steel, Darby, and Wickard* ... greatly expanded the previously defined authority of Congress under [the Commerce] Clause" because of "a recognition of the great changes that had occurred in the way business was carried on in this country" and "a view that earlier Commerce Clause cases artificially had constrained the authority of Congress." In *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954), the Court said: "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." And in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 428, 442-43 (1934), the Court said: "To ascertain the scope of the [Contracts Clause], we examine the course of judicial decisions in its application.... It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."

- **Please explain the difference between legal principles and legal texts.**

Response: Please see response to Question 1.

5. **In your Brennan Center for Justice interview, you said that the Obama administration should appoint judges who are "broad minded in their view of the kinds and sources that are legitimate to take into account in reading especially the Constitution, but...legal texts of all sorts." By "reading" the Constitution, do you mean determining the meaning of constitutional provisions? In other words, do you believe that judges may consider a broad range of kinds and sources in determining the meaning of constitutional provisions?**

Response: I have written that "judges generally look to a variety of sources to elucidate the meaning of the Constitution. These sources include the document's text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation. The latter sources of meaning, no less

than the former, are legitimate components of the methodology that courts use when applying the Constitution's general principles to present-day problems." *Keeping Faith with the Constitution* 33-34 (2009).

If confirmed, I would set my own views aside and faithfully follow the Supreme Court's precedents, including any instructions in those precedents on the kinds of sources that may be used to determine how a particular constitutional provision should be applied in a specific case or controversy.

6. **In your article *Separation Anxiety: Congress, the Courts, and the Constitution*, you wrote that the Constitution "has shown a remarkable capacity to absorb new meanings and new commitments forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience." Please explain what you mean by "new meanings" and "new commitments."**

Response: Those terms refer to applications of the Constitution's text and principles to new circumstances brought about by political, economic, or social change. During the New Deal, for example, the Supreme Court rejected its earlier applications of the Commerce Clause when it applied the clause to uphold novel legislation that sought to stabilize and protect the national economy. *See Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439, 440-42 (2003).

- **The same article refers to the "ongoing search for constitutional meaning." Do you believe that judges may consider the elements you mentioned such as dialogue, debate, dissent, and disobedience in determining the meaning of constitutional provisions?**

Response: No. My reference to dialogue, debate, dissent, and disobedience was a reference to processes by which ordinary citizens and their elected representatives seek to understand and express their view of the Constitution.

7. **I understand originalism to be an approach to discovering the meaning of the Constitution's text, not to determining its application. You have criticized originalism for its indeterminacy. In your own writings and speeches, however, you discuss a very broad range of factors and considerations that judges may use to interpret the Constitution.**

- **How are things such as evolving social norms, "dialogue and debate," "experience" that the nation has learned, social practices, collective values, or practical consequences any more determinate than the factors originalism uses to determine the meaning of constitutional provisions?**

Response: My writings do not contend that the method of constitutional fidelity is more determinate than originalism, only that originalism is often no more determinate than constitutional fidelity. *See Keeping Faith with the Constitution* 37-38 (2009). My writings have acknowledged that "the interpretive methodology we describe does

not dictate a single ‘right answer’ in every case” but rather serves to promote “transparency” in the judicial decision-making process. *Id.* at 35.

- **How are the factors you discussed to be weighed in reaching a conclusion, relative to the original meaning of a constitutional provision?**

Response: The Supreme Court has weighed those factors along with the original meaning of a constitutional provision in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the Court’s precedents, including any instructions in those precedents on how a particular constitutional provision should be applied in a specific case or controversy.

8. **In *Keeping Faith with the Constitution*, you criticize originalism because it “cannot account for many of the constitutional understandings that Americans take for granted today.”**

- **By “constitutional understandings,” do you mean the meaning of constitutional provisions or its application?**

Response: In the above-quoted sentence, I use “constitutional understandings” to mean the ways in which the Constitution has been applied over time.

- **This criticism suggests that the proper approach or method for interpreting the Constitution should be driven by the “constitutional understandings” for which it can account. Is this your view? Please explain.**

Response: My writings have suggested that in assessing a method for interpreting the Constitution, it is appropriate to consider whether the method can explain basic understandings of the Constitution that Americans take for granted today, such as the unconstitutionality of racial segregation in public schools or the unconstitutionality of policies that exclude women from service on juries or in various occupations.

9. **In your article “National Citizenship and Equality of Educational Opportunity,” you wrote that the Fourteenth Amendment guarantees substantive rights that are necessary for “equal standing in the national political community.” Do you believe that judges may determine what these substantive rights are?**

Response: My writings have not claimed that judges may determine what the substantive rights of national citizenship are, apart from rights protected elsewhere in the Constitution. The above-referenced article was addressed to Congress, not the courts, and my writings have approached this subject from the standpoint that Congress is best situated to determine what the substantive rights of national citizenship are. See *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339-40 (2006).

- 10. In a January 2009 broadcast of the National Public Radio broadcast “Weekend Edition,” you said that “in the nomination of judges, the decision-makers are entitled to consider a broad range of factors, including the political background and affiliations of the candidates.” Please explain why political background and affiliation is a legitimate consideration in the nomination or confirmation of federal judges.**

Response: The quotation above occurred in a portion of the radio broadcast that reported findings by the Justice Department’s inspector general that “managers there regularly hired conservative Federalist Society members over liberal ACS members for nonpartisan jobs, even if the ACS members were more qualified. That violates federal laws and civil service rules.” Ari Shapiro, *Balance of Power Swings to Liberal Legal Group*, NPR Weekend Edition, Jan. 3, 2009. After identifying this issue, the broadcast then quoted me saying that “I have a lot of confidence, actually, that the new people in the Justice Department and elsewhere in the government are keenly aware of that issue, and that in the hiring of career staff, that will not be an issue.” That statement then led to my statement partially quoted in the question above, which drew a contrast between the hiring of civil servants and “the hiring of political staff as well as ... the nomination of judges.” The quoted statement indicated that, unlike the rules for hiring civil servants, it is permissible for decision-makers to consider a broad range of factors, including political background and affiliations, in appointing judges. The statement did not say, and I do not believe, that decision-makers *should* consider political background and affiliations. Factors that decision-makers should consider are whether the judicial candidate will approach each case impartially and objectively; whether the candidate will faithfully apply the law to the facts of each case or controversy and not his or her personal views; and whether the candidate is fully committed to upholding the Constitution.

- 11. In your confirmation hearing, you said that the role of the 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. That’s simply not the role of a judge.”**

- **Please give some examples of court decisions that improperly invented or created new theories.**

Response: *Lochner v. New York*, 198 U.S. 45 (1905), improperly invented a constitutional right of contract. *Plessy v. Ferguson*, 163 U.S. 537 (1896), improperly invented the doctrine of separate but equal.

- **It appears that you were referring to the lower courts. Is it permissible or appropriate for the Supreme Court to invent or create new theories when it interprets and applies the Constitution or statutes? Why or why not?**

Response: Because the Supreme Court decides cases in which the law is unsettled, the legal rules and tests announced by the Court are sometimes “new” in that respect. Even so, however, it is not appropriate or permissible for the Court to invent or create

new theories because the Court must be faithful to the text and principles of the Constitution and to the statutes it interprets, and because the Court must faithfully apply the doctrine of stare decisis, which requires adherence to precedent unless certain conditions are met.

- 12. In *Keeping Faith with the Constitution*, you wrote that “a court cannot be faithful to the principle embodied in the text unless it takes into account the social context in which the text is interpreted.” You also wrote that the Supreme Court gives meaning to the principles of the Constitution by considering “social practices, evolving norms, and practical consequences.” Social contexts and practices, evolving norms, and practical consequences all change over time. In your confirmation hearing, however, you said that “the principles that are embodied in that [constitutional] text endure over the ages. Those things do not change.” Please reconcile what appear to be contradictory positions.**

Response: The principles embodied in the Constitution’s text endure over the ages and do not change. To preserve the meaning of the text and its underlying principles, it may be necessary to take social context and practices into account when applying constitutional text and principle to a specific case or controversy. My writings have cited *Katz v. United States*, 389 U.S. 347 (1967), as an example. See *Keeping Faith with the Constitution* 28 (2009). In *Katz*, the Supreme Court said that “the Fourth Amendment protects people, not places,” 389 U.S. at 351, an enduring principle embodied in the text that makes the finding of an unreasonable search or seizure turn on expectations of privacy rather than physical trespass. To uphold this principle, the Court took social context and practices into account when it said that “a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.” *Id.* at 352.

- 13. In your confirmation hearing, you said that “the principles that are embodied in that [constitutional] text endure over the ages. Those things do not change.” A moment later, however, you said that to “preserve the meaning of that text,” it is necessary for judges to “give those phrases and those words meaning in the light of the current conditions of the society.” Those conditions obviously change over time. You were referring to the meaning of constitutional provisions, not their application. Please reconcile what appear to be contradictory positions.**

Response: The above-quoted statement from my confirmation hearing does not state my view clearly. The principles embodied in the Constitution’s text endure over the ages and do not change. In order to preserve the meaning of the text and its underlying principles, it may be necessary to take social context and practices into account when applying constitutional text and principle to a specific case or controversy.

14. In your confirmation hearing, you said that the original meaning of constitutional provisions is a “very important” consideration that judges may consider. In your writings, you describe how judges may also look to “social practices, evolving norms, and practical consequences in order to give concrete, everyday meaning” to those provisions. In an interview, you said that judges should be “broad minded” regarding the sources they may take into accounting in interpreting the Constitution. And in an amicus brief you joined, you argued that “constitutional interpretation appropriately takes into account changes in social circumstances and cultural understandings.”

- **If the original meaning of a constitutional provision is at odds with or inconsistent with current social practices or circumstances, evolving norms, or cultural understandings, is a judge free to choose which meaning he or she will attribute to a constitutional provision?**

Response: I have written that judges must be faithful to, and cannot change or depart from, the original meaning of constitutional provisions where original meaning refers to “the underlying principles that the Framers’ words were publicly understood to convey.” *Keeping Faith with the Constitution* 35; *see id.* at 36 (“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.”). The Supreme Court has addressed instances where the original expected application of a constitutional provision is at odds with contemporary norms in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). If confirmed, I would faithfully follow the Court’s precedents, including any instructions in those precedents on how a particular constitutional provision should be applied in a specific case or controversy.

- **Are there considerations or factors which you believe judges may not consider in interpreting the Constitution or, as you put it in one article, engaging in “the ongoing search for constitutional meaning”?**

Response: In interpreting the Constitution, a judge must be impartial and objective; a judge may not consider his or her own personal views (whether like or dislike) of a constitutional provision or principle. A judge may not interpret the Constitution based on sympathy for or bias toward a particular group, interest, or party. A judge may not interpret the Constitution based on any economic, political, social or other theory or ideology extrinsic to the text and principles of the Constitution. A judge may not rely on foreign law as legal authority in interpreting the Constitution unless American law so requires. In general, a judge may not consider any factor that would cause him or her to ignore or depart from the text or principles of the Constitution.

15. In your writings, you have argued that judges may consider many factors and what appear to be quite subjective considerations such as evolving social norms, practices, and circumstances as well as cultural understandings and other elements.

During your confirmation hearing, however, you told Senator Kaufman that personal beliefs “never have a role in the act of judging.” Please reconcile what appear to be contradictory positions. How can a judge take into account, consider, and utilize evolving and changing norms to interpret the Constitution without his personal beliefs playing any role whatsoever?

Response: Personal beliefs have no role in the faithful discharge of judicial duty, and the consideration of social norms and practices in judging is not inconsistent with this idea. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on “an objective standard of reasonableness in light of prevailing professional norms.” *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring “whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” *Bond v. United States*, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment “from the perspective of the average person, applying contemporary community standards.” *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices is objective and neither requires nor permits the judge to consider his or her personal beliefs.