

**Responses of Goodwin H. Liu
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Mike Lee**

1. On page 3 of *Keeping Faith with the Constitution*, you wrote, “[C]onstitutional interpretation is not a task for the judiciary alone. Thus it is neither surprising nor illegitimate that judicial doctrine often incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice.”

- a. You mention social movements. How is a judge to determine which social movements merit incorporation into the understanding of the Constitution?

Response: The role of a judge is to decide cases impartially on the basis of the facts and applicable law, not to determine which social movements merit incorporation into the understanding of the Constitution. Social movements can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue. For example, my writings have observed that the women’s movement produced federal antidiscrimination legislation that shaped the Supreme Court’s analysis of how the Equal Protection Clause applies to gender discrimination. See *Keeping Faith with the Constitution* 54-55 (2009). In that example, and at all times, the judge’s role is to engage in legal analysis of the materials in a particular case, not to pick or choose which social movements should inform his or her understanding of the Constitution.

- b. At any given time, there are myriad social movements that enjoy substantial support, but may conflict or even be diametrically opposed in their views and objectives. How is a judge to decide which of the various competing social movements should influence his or her Constitutional interpretation and to what degree?

Response: The role of a judge is to decide cases impartially on the basis of the facts and applicable law, not to decide which of various competing social movements should influence his or her interpretation of the Constitution. Social movements can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue. But the judge’s role is always to engage in legal analysis of the materials in a particular case, not to pick or choose which social movements should inform his or her understanding of the Constitution.

- c. Could a small, determined group change the meaning of the Constitution by instigating a social movement?

Response: No. A social movement can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue. But a social movement by itself cannot change the meaning of the Constitution unless it results in an amendment to the Constitution through the procedures in Article V.

2. On page 45 of your book, you wrote, “In interpreting the Constitution, the Court . . . considers social practices, evolving norms, and practical consequences in order to give concrete, everyday meaning to text and principle.”

a. How is a judge to determine which evolving norms and social practices to consider when interpreting the Constitution? Are these the norms of the majority? A significant minority? Are these the norms of Peoria or Los Angeles?

Response: If confirmed, I would take my instruction on issues of constitutional interpretation from the Supreme Court precedents applicable to each case. In some areas, the Court has instructed judges to consider societal norms and practices by applying an objective standard of reasonableness. *See, e.g., Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009) (analyzing Sixth Amendment claims of ineffective assistance of counsel based on “an objective standard of reasonableness in light of prevailing professional norms”); *Bond v. United States*, 529 U.S. 334, 338 (2000) (analyzing 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”). In other areas, the Court has looked to state and federal legislation as objective indicators of societal norms, *see, e.g., Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002) (examining state and federal laws in deciding whether the Eighth Amendment prohibits execution of persons who are mentally retarded), or to well-established social facts, *see, e.g., District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) (holding that the Second Amendment protects those weapons “in common use at the time” and that “handguns are the most popular weapon chosen by Americans for self-defense in the home”). In these and other areas, I would faithfully follow the applicable standards and instructions for objective inquiry set forth by the Supreme Court if I were confirmed.

b. How does a judge come into possession of sufficient objective information to determine the nature and substance of these social practices and evolving norms?

Response: In each of the doctrinal areas mentioned in the previous response, the Court undertakes an objective inquiry into social norms and practices in applying a constitutional standard. For example, when analyzing Sixth Amendment claims of ineffective assistance of counsel, the Court has said that “[r]estatements of professional standards,” such as American Bar Association

guidelines, “can be useful as ‘guides’ to what reasonableness entails” if “they describe the professional norms prevailing when the representation took place.” *Van Hook*, 130 S. Ct. at 16. When analyzing how the Fourth Amendment applies to new technology, the Court has looked to state and institutional privacy policies. *See, e.g., City of Ontario v. Quon*, 130 S. Ct. 2619, 2629-30 (2010). If confirmed, I would faithfully follow the Supreme Court’s instructions on how to acquire sufficient objective information to correctly apply constitutional standards in these and other areas.

3. **On page 98 of *Keeping Faith with the Constitution*, you wrote, “[J]udicial decisions have interpreted [the Constitution’s] guarantee of liberty in light of our society’s evolving traditions and shared understandings of personal identity, privacy, and autonomy.”**

- a. **Whose evolving traditions and shared understandings should a judge consider?**

Response: The above-quoted sentence is from a discussion in the book about the Supreme Court’s application of the Due Process Clause. The Court has said that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). In “examining our Nation’s history, legal traditions, and practices,” *id.* at 710, the Court has looked first and foremost to the practices of the states, both historical, *see id.* at 710-11, 715-16, and contemporary, *see id.* at 716-19. The Court has also looked to the English common law and to colonial practices. *Id.* at 711-14. If confirmed, I would faithfully follow the instructions of the Supreme Court’s substantive due process cases in determining whose traditions and understandings to consider when analyzing a constitutional liberty claim.

- b. **At any given time, traditions and understandings vary widely from region to region, from state to state, from urban to rural. How does a judge decide on which traditions and understandings to base his interpretation of the Constitution?**

Response: If confirmed, I would faithfully follow the instructions of the Supreme Court’s substantive due process cases in deciding which traditions and understandings to consider when analyzing a constitutional liberty claim.

4. **In a 2009 interview at the Brennan Center event, “The Next Democracy,” you said,**

“Conservatives have, I think, been remarkably successful in using language about strict construction of the Constitution or originalism as a way of

reading the Constitution to try to reduce constitutional interpretation, or adjudication more generally, into something formulaic and mechanical that you can hold judges accountable for. I think that's nice in theory, but the reality is, every judge really knows and every lawyer really knows, is that the job, of course, really involves, fundamentally, acts of judgment, especially in the hard cases. And how do people come at their judgments? Well, I think, in our system, they have come at it through a variety of ways that, over time, represents the gradual accretion of precedent, principle, lessons learned from experience, and an awareness of the evolving norms and social understandings of our country." . . . "Judges can rightly take [such things] into account" . . . "I would hope that the Obama administration would appoint judges who are broad minded in their view of the kinds of sources that are legitimate to take into account."

- a. Isn't the identification of shared understandings, social movements, evolving norms, and collective values dependent on the particular judge making the "act of judgment"?

Response: The subjective or personal beliefs of a particular judge have no role in the faithful discharge of judicial duty, and the consideration of societal norms and understandings in judging is not inconsistent with this idea. In the areas of constitutional law where the Supreme Court has required judges to consider societal norms and understandings, the Court has made clear that such consideration is an objective, not subjective, inquiry. *See, e.g.,* Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (analyzing Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms"); *Ashcroft v. ACLU*, 535 U.S. 564, 575 (2002) (analyzing whether material is obscene and thus unprotected by the First Amendment "from the perspective of the average person, applying contemporary community standards."); *Bond v. United States*, 529 U.S. 334, 338 (2000) (analyzing 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"); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition").

- b. It appears that you were talking about the job of all judges, not just Justices of the Supreme Court. If "every judge really knows" that acts of judgment are involved in the hard cases, and judges come at those acts of judgment through "lessons learned from experience" and "an awareness of the evolving norms and social understandings of our country," does this mean that you would consider evolving norms and social understandings in your acts of judgment? Please explain.

Response: If confirmed, I would consider evolving norms and social understandings only to the extent that applicable Supreme Court precedent required me to do so in analyzing a particular constitutional issue.

5. **In a 2003 *Georgetown Law Journal* article, you wrote, referring to the Constitution, “Our fundamental law has shown a remarkable capacity to absorb new meanings and new commitments . . . forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience.” Do you believe that the Constitution’s meaning is changed by passionate dialogue or disobedience?**

Response: No. It is one of our nation’s virtues that Americans believe deeply in our Constitution and vigorously debate its meaning. But passionate dialogue or disobedience by itself cannot change the meaning of the Constitution unless it results in an amendment to the Constitution through the procedures in Article V. Passionate dialogue or disobedience can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue.

6. **On page 5 of your 2009 book, *Keeping Faith with the Constitution*, you wrote, “[N]either originalism nor strict construction has proven to be a persuasive or durable methodology, not least because they cannot explain many of the basic constitutional understandings we now take for granted.” Do you believe that originalism is an illegitimate methodology for interpreting the Constitution?**

Response: If confirmed, I would take my instruction on issues of constitutional interpretation from the Supreme Court precedents applicable to each case, and not from my personal views about originalism or any other theory of constitutional interpretation. My writings have said that “the original understanding of a particular constitutional provision, no less than the text of the provision itself, is an important consideration in constitutional interpretation.” *Keeping Faith with the Constitution* 37 (2009). Further, my writings have endorsed originalism “if originalism is understood to mean a commitment to the underlying principles that the Framers’ words were publicly understood to convey, as opposed to the Framers’ expectations of how those principles would have applied at the time they were adopted.” *Id.* at 35. However, my writings have rejected originalism when it is understood to require judges to “adhere to a historically fixed understanding of . . . how the Framing generation would have applied [the Constitution’s] principles to specific situations.” *Id.* at 36.

7. **A Sept 2009 post on the *ACSBlog* reads, “For too long, liberals, progressives and moderates have been defensive about how the Constitution should be interpreted. But an examination of the document itself and the way its principles have been applied . . . reveals that the progressive view is, in fact, the one that prevailed.” Would you characterize yourself as an advocate of the “progressive view”?**

Response: I would characterize myself as a person who is committed to the actual values and principles that exist in our Constitution, whether they are labeled “progressive,” “moderate,” or “conservative.”

8. **In a speech given in May 2006 at the National Taiwan University Law School, you said, “[A] liberal judge is one who is more likely to protect individual rights against government power, except property rights; more likely to read the constitutional right of equality broadly to protect disadvantaged groups; more likely to favor federal government power over state power; and more likely to favor checks and balances to limit assertions of power by the President.”**

- a. **Does your definition of a “liberal judge” accurately describe what your tendencies would be in applying law to facts, if were you to be appointed a judge?**

Response: No. If confirmed, I would apply the law to the facts of each case objectively and impartially, with fidelity to applicable precedents.

- b. **If so, do you believe that a judge should have a political leaning?**

Response: I do not believe a judge should have a political leaning.

- c. **If not, which specific part do you not tend towards? Protecting individual rights against government power? A broad reading of the right of equality to protect disadvantaged groups? Favoring federal power over state power? Favoring checks and balances?**

Response: If confirmed, I believe it would be inappropriate to decide cases on the basis of any of those “tendencies” as opposed to the facts and applicable law in each case.

9. **In your chapter of *The Constitution in 2020*, you wrote, “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.” While people can and do disagree on the policy aspect of providing education to noncitizen children, do you believe that the Constitution requires the government to provide education to noncitizen children?**

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). The Court qualified its holding by saying 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 specifically on whether noncitizen children who are here illegally have a constitutional right to public education, and because I would serve as an inferior court judge who is duty-bound to apply Supreme Court precedent faithfully and impartially if I am confirmed, I believe it would not be appropriate for me to do so now.

10. In a 2006 *San Antonio Express News* article, you said, “The federal constitution guarantees to every person equal citizenship. I don’t think that means just legal status . . . [C]itizenship, in a broader sense, is the ability to be a fully able, participating member of society.” In your view, what rights are fundamental to being a “fully able participating member of society”?

Response: My writings have emphasized the role of education, as well as other supports that promote political and economic participation, in enabling all individuals to become full, participating members of our society. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006). I expressly avoid characterizing those supports as “rights” because the term suggests judicial enforceability. *See id.* at 339. Instead, my proposals are “chiefly directed at Congress,” and they come from the perspective of “a ‘conscientious legislator’ who seeks in good faith to effectuate the core values of the Fourteenth Amendment, including the guarantee of national citizenship.” *Id.*