

**Responses of Thomas I. Vanaskie
Nominee to the U.S. Court of Appeals 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: I do not agree with this perspective of constitutional interpretation. The words, purposes, and structure of the Constitution are fixed. The Constitution is to be interpreted as a document intended to be enduring, and that objective is met by paying careful attention to its text, purposes, structure, history, and Supreme Court interpretations of its provisions. If confirmed, I will continue to defend, obey, and bear true faith and allegiance to the Constitution, as I have endeavored to do as a District Judge, by adhering to controlling precedent and applying the Constitution’s provisions to new contexts by careful attention to its text, structure, purpose, history, and analogous precedents of the Supreme Court.

- 2. 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, but do you agree with Justice Kennedy’s analysis?**

Response: Because the opinion of Justice Kennedy was joined in by a majority of the Court, I will be obligated to follow it. Whether I agree with the analysis articulated by Justice Kennedy will not affect my duty to adhere to it.

- a. How would you determine what the evolving standards of decency are?**

Response: Both the majority opinion and Justice O’Connor’s dissenting opinion in *Roper* explained that the constitutional prohibition against “cruel and unusual punishments” must be assessed in the context of “the evolving standards of decency that mark the progress of a maturing society.” 543 U.S. at 561. The majority stated that “essential instruction” in ascertaining “evolving standards of decency” comes from “enactments of legislatures that have addressed the question.” *Id.* at 564. Justice O’Connor’s dissenting opinion also stated that to discern the “evolving standards of decency,” the court is to “look to ‘objective factors to the maximum possible extent,’” and that “laws enacted by the Nation’s legislatures provide the ‘clearest and most reliable objective evidence of contemporary values.’” *Id.* at 589. If confirmed, I would be bound to follow the approach for ascertaining “evolving standards of decency” prescribed by the Supreme Court.

3. Does the oft-quoted phrase “wall of separation of church and state” appear anywhere in the Constitution?

Response: The phrase does not appear anywhere in the Constitution.

a. To what extent does this phrase, authored by Thomas Jefferson in his letter to the Danbury Baptists, reflect your view of the proper understanding of the Constitution’s Establishment Clause?

Response: If confirmed, I will be obligated to follow the Supreme Court’s precedents applying the Constitution’s Establishment Clause. The First Amendment provides that “Congress shall make no law respecting an establishment of religion.” In Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), the Court held that “[a] given law might not establish a state religion but nevertheless be one ‘respecting’ that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.” It stated that to determine whether a law offends the Establishment Clause a court must assure that the law has “a secular legislative purpose,” that its “primary effect must be one that neither advances nor inhibits religion,” and that it does “not foster ‘an excessive government entanglement with religion.’” Id. at 612-13. The test prescribed by the Supreme Court, as explicated by more recent Supreme Court cases interpreting it, would govern my decision making.

b. Is the First Amendment right to freedom of religion a fundamental right?

Response: The Supreme Court has held that the freedom of religion expressed in the First Amendment is a fundamental right, holding that the First Amendment is made applicable to the states through the Fourteenth Amendment. The Court has stated that “[t]he fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment.” Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).