

Do you have a right to health care? Judicial nominee Liu thinks so

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On Sunday, the House voted 219-212 to approve Obamacare. Tomorrow, the Senate Judiciary Committee will hold a hearing to consider the nomination of 39-year-old Berkeley law professor Goodwin Liu to a seat on the U.S. Court of Appeals for the 9th Circuit. These two events are not unrelated: Liu's confirmation would compromise the judiciary's check on legislative overreaching and push the courts not only to ratify such constitutional abominations as the individual health insurance mandate but to establish socialized health care as a legal mandate itself.

Of course, a president is entitled to some deference in his judicial appointments. We don't expect a president of either party to appoint judges who adhere 100 percent to the Cato line—though that would be nice—so we do not object to every judicial nominee whose philosophy differs from ours.

Goodwin Liu's nomination, however, is different. By far the most extreme of Obama's picks to date, Liu would push the Ninth Circuit to redistribute wealth by radically expanding—and constitutionalizing—welfare "rights."

In his 2008 article, "Rethinking Constitutional Welfare Rights," Liu attempted to paint himself as a moderate by distinguishing his approach to constitutional interpretation from the infamous "Living Constitution" model. Progressive judges who see the Constitution as "living" have long been faulted for looking beyond the document's plain meaning, considering social trends alongside established law. Such an approach allows judges to invent constitutional rights—"discovering" those that have emerged as the country evolved—and impose their policy preferences.

In supposed contrast, Liu advocates an approach he labels "constitutional fidelity." He argues that he remains faithful to the Constitution by interpreting it "in light of the conditions and challenges faced by succeeding generations." Accordingly, judges must ask "how those principles should be applied today in order to preserve their power and meaning in light of the concerns, conditions, and evolving norms of our society."

While Liu purports to develop an original approach, his nuanced methodology fails to generate a novel result. He may "suggest a more cautious and discriminating judicial role than one that is guided by a comprehensive moral theory," but it is impossible to imagine a case in which Liu would reach a different outcome than a judge employing the (disfavored) "Living Constitution" analysis. And this is not surprising, given that the stated purpose of Liu's scholarship is to establish legal justifications for "rights" foreign to the Enlightenment tradition on which our republic rests—those that make demands on others (unlike, say, the right to free speech, which makes no demands on anyone).

For example, Liu claims that judges faced with determining our society's "obligations of mutual provision . . . should look to the democratic and cultural manifestations of those understandings, knowing that the legitimacy of judicial intervention on behalf of welfare rights ultimately depends on its coherence with the evolving norms of the public culture."

That statement provides a perfect synopsis of Liu's judicial philosophy: Popular opinion is paramount. As a judge, Liu would uphold any legislation that has undergone "vigorous public contestation" and comports with the public's "considered judgment." Citing what he calls the "socially contingent character of welfare rights" and the "limitations of the judicial role that flow from it," Liu would uphold any legislation supported by popular opinion, foreign or international practices, or any other set of "collective values."

Even more dangerously, Liu's approach flouts the Constitution's very purpose: protecting individual rights by limiting government power. As the branch responsible for interpreting the Constitution, the judiciary must defend citizens' inalienable rights, such as the rights to life, liberty, and property, from infringement by government actors. Liu's approach turns that role

on its head. He views the judiciary not as a safeguard against state tyranny, but as a rubber stamp for any legislation that reflects popular opinion. And it's a one-way ratchet: Liu would likely rule that the next Congress could not repeal Obamacare because it is precisely the kind of "landmark legislation"—to borrow progressive Yale law professor Bruce Ackerman's phrase—that cannot be undone.

As a member of the ACLU and chairman of the American Constitution Society, it is no secret what kind of rights Liu would find justified by "collective values." Liu lists "education, shelter, subsistence, health care and the like, or to the money these things cost" as examples of affirmative rights he would seek to establish in law—to constitutionalize beyond a future legislature's reach.

While Liu notes that "judicial recognition of welfare rights need not occur in a wholesale, across-the-board way," he does not advocate judicial restraint when given a chance to further the progressive cause. After all, according to Liu, it's fine for a judge to make a "predictive judgment" to "help forge or frustrate a social consensus."

Liu's appointment would not only eliminate any hope of restoring balance to an already skewed Ninth Circuit, but would betray the vital role the Founders entrusted to the judiciary. Nobody willing to exalt a nebulous "social consensus" over the Constitution's plain text should sit on an appellate court bench.

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