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"Liu's approach flouts the Constitution's very purpose"

Damon W. Root | March 24, 2010

Over at *The Daily Caller*, the Cato Institute's Ilya Shapiro and Evan Turgeon make the case against University of California, Berkeley law professor Goodwin Liu, whose nomination to the federal 9th Circuit Court of Appeals will be heard today by the Senate Judiciary Committee:

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.

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[Pro Libertate](#) | 3.24.10 @ 9:28AM | #

That is such a fundamentally flawed conception of the role of the judiciary that she has no business even being considered. The democratic voice and function are represented by Congress. The courts are intentionally and expressly intended to be a check on democratic power and the tyranny of the majority. If you don't get that, you have no business even appearing in court, let alone presiding over it.

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[Pro Libertate](#) | 3.24.10 @ 10:02AM | #
Oops, make that "he."

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"Liu's approach flouts the Constitution'...

JW | 3.24.10 @ 11:11AM | #

And yet, the ABA pronounces him "well qualified" for the appointment.

Should we presume that the criteria is limited to that of a lion towing lawyer with a pulse?

[reply to this](#)

Horselips | 3.24.10 @ 10:39AM | #

Watch and enjoy.

[reply to this](#)

rhofulster | 3.24.10 @ 10:59AM | #

Can't say I have a problem with anything he said in that clip. Where I almost certainly disagree with him is that I believe it would take a constitutional amendment to administer reparations properly.

Just as we inherited the bill of rights, we inherited 3/5s. For about 400 years Blacks and American Indians have been fucked over, fucked over and fucked over, and we still haven't come close to making it right.

[reply to this](#)

\$ | 3.24.10 @ 11:06AM | #

"Reparations" is nothing more than stealing from people who had nothing to do with the crimes you talk about and giving it to people who never suffered from those crimes.

[reply to this](#)

JW | 3.24.10 @ 11:22AM | #

I suspect that he'd happily hand out the blindfolds for the firing squads.

[reply to this](#)

The Libertarian Guy | 3.24.10 @ 12:03PM | #

rhofluster, try this on:

Someone becomes an American citizen the day reparations are imposed. This person had absolutely nothing to do with the past behavior of some past Americans, and yet is handed a bill for payback.

How is this fair?

And would Obama only get reparations for his black half?

[reply to this](#)

\$ | 3.24.10 @ 12:07PM | #

Not even his "black half" has a claim of slavery.

[reply to this](#)

Michael Ejercito | 3.24.10 @ 12:11PM | #

His ancestors were slave *masters*

[reply to this](#)

pmains | 3.24.10 @ 11:17PM | #

Asking about fairness to new immigrants is to misunderstand the point. The point he was making, which I don't think quite falls into the neat talking points that we're all used to, is that we all have a responsibility to set things right in our society that are wrong.

So, for a relatively concrete example, many people not responsible for slavery worked to educate and otherwise aide former slaves after the civil war. They were acting responsibly, even though they were not personally culpable.

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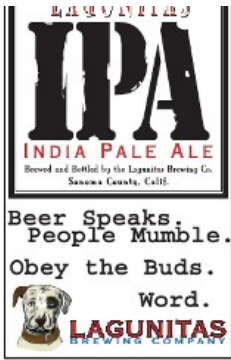
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R C Dean | 3.24.10 @ 12:25PM | #

Would we have pro rata reparations for people who are only part black?

Would we require proof of ancestry stretching back to an actual slave?

Would there be income cutoffs, so Tiger Woods, Michael Jordan, and other wealthy blacks wouldn't get any?

Would black people be excluded from paying the taxes for reparations?

Would people who could show no ancestors in the US before 1860 be excluded from paying the taxes for reparations?

Really, I'm curious how you assess and pay damages for a wrong that ended 150 years ago.

[reply to this](#)

rhofulster | 3.24.10 @ 1:05PM | #

Would we have pro rata reparations for people who are only part black?

Dunno

Would we require proof of ancestry stretching back to an actual slave?

In my mind, no one should be eligible unless their ancestors were slaves. The practical aspects of this would pose issues.

Would there be income cutoffs, so Tiger Woods, Michael Jordan, and other wealthy blacks wouldn't get any?

I would say no.

Would black people be excluded from paying the taxes for reparations?

I would say no.

Would people who could show no ancestors in the US before 1860 be excluded from paying the taxes for reparations?

If they came willingly, no.

Really, I'm curious how you assess and pay damages for a wrong that ended 150 years ago.

First of all, the wrongs done to slaves and their descendants hardly ended 150 years ago. I would say a good start would be to simply give them the money they would otherwise get from the government to spend as they see fit, then shut down the welfare programs. But, gee, I guess you got me. There would be huge practical issues with a reparation amendment.

Now would you mind answering these questions.

Have the effects of slavery and Jim Crow had effects that have harmed subsequent generations of descendents of slaves? (I might add the clumsy, pernicious welfare state programs to this list.)

Have slaves and their descendents been done right in this country?

If we've received the blessings of the BOR and the rest of the constitution (though we've pretty much squandered them) that have been passed to us from previous generations aren't we also obligated to address the harm done by 3/5?

You go ahead and make your cheeky remarks about how you "could do this all day." I think this is a profound issue and I take it very seriously.

[reply to this](#)

Slap the Enlightened! | 3.24.10 @ 2:28PM | #

Really, I'm curious how you assess and pay damages for a wrong that ended 150 years ago.

You don't. That's why we have such a thing as a statute of limitations. It's a recognition that after a certain amount of time, and due to the complexity of ancillary events, justice is not possible.

[reply to this](#)

rhofulster | 3.24.10 @ 3:07PM | #

So as long as society ignores the injustice long enough, they get to say, "sorry, justice is not possible."

Got it.

[reply to this](#)

Slap the Enlightened! | 3.24.10 @ 3:53PM | #

Yep.

Considering it's a choice of that, or clusterfuck notions like yours that will screw at least as many innocent bystanders as it will compensate deserving parties, I'll take it.

[reply to this](#)

rhofulster | 3.24.10 @ 9:54PM | #

AS long as we've got an excuse.

[reply to this](#)

Pro Libertate | 3.24.10 @ 4:15PM | #

Reparations that far back is a stupid idea. Lord, we'd be doing nothing but writing checks as a species if we went around doing that. You try to go back even a couple of generations, and identifying who the actual victims were is very difficult. And among the rest of us footing the bill, are we actually guilty? What about recent immigrants, etc., etc. as Mr. Dean relates?

[reply to this](#)

R C Dean | 3.24.10 @ 12:27PM | #

What if I can show I had ancestors who fought and died to end slavery? Would that get me an exemption from paying the reparations tax?

What if Abe Lincoln is one of my ancestors? That ought to be worth something.

Really, I can do this all day.

[reply to this](#)

Pro Libertate | 3.24.10 @ 4:35PM | #

I'm descended from at least one slave owner and from any number of people who fought for the Confederacy. So I guess I better start saving up, huh? Can't I just apologize or something?

I also would like to apologize to the Native Americans, the Romans for crushing their empire, the Saxons for overrunning Britain, the Jews for all those centuries of oppression, the Neanderthal for exterminating them, and so on.

Jesus, Western guilt is a bitch.

[reply to this](#)

rhofulster | 3.24.10 @ 9:50PM | #

"I also would like to apologize to the Native Americans, the Romans for crushing their empire, the Saxons for overrunning Britain, the Jews for all

"Liu's approach flouts the Constitution'...

those centuries of oppression, the Neanderthal for exterminating them, and so on."

That's great, but all I'm calling for is sharing in the responsibility for atrocities performed under the charter which we are both party to.

[reply to this](#)

ZhugeJustin | 3.25.10 @ 2:22AM | #

But the responsibility isn't ours to shoulder. The sins of the father do not carry over unless you're say, the mafia. Reparations for anyone not the party directly affected is criminal and would most defiantly perpetuate and create more racism towards blacks in America.

In the early 90's the US paid reparations to surviving Japanese for their internment during WW2. Not to descendants or other surviving kin, just those affected. That made sense.

If reparations for blacks were to happen, I would then ask for reparations for the injustice done to me of having to pay reparations, and I would have a more legitimate case.

[reply to this](#)

creech | 3.24.10 @ 9:28AM | #

Any bets on how the judge's tune would change if public opinion swung to libertarian views?

[reply to this](#)

Warty | 3.24.10 @ 9:36AM | #

That statement provides a perfect synopsis of Liu's judicial philosophy: Popular opinion is paramount.

Bullshit. Liu's prejudices are paramount, not public opinion.

[reply to this](#)

John | 3.24.10 @ 9:42AM | #

Exactly. Let public opinion kill one of his sacred cows and he won't think it is so paramount.

[reply to this](#)

robc | 3.24.10 @ 9:53AM | #

Yep. Think she would overturn the health care bill (yeah, I know that wont be a 9th circuit thing, just an example) because it is unpopular?

[reply to this](#)

robc | 3.24.10 @ 11:06AM | #

Damn it proLib, you made me write "she" too.

[reply to this](#)

Pro Libertate | 3.24.10 @ 11:26AM | #

He's a deemed she.

[reply to this](#)

Pro Libertate | 3.24.10 @ 12:18PM | #

I'm Obama's new Gender Czar. Once labeled by me, there's no appeal.

[reply to this](#)

yonemoto | 3.24.10 @ 9:39AM | #

This is why I hate asians.

[reply to this](#)

Michael Ejercito | 3.24.10 @ 9:55AM | #

"Liu's approach flouts the Constitution'...

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."

So he would have upheld racial segregation and anti-miscegnation laws?

[reply to this](#)

[virginia](#) | 3.24.10 @ 10:06AM | <#>

No, no, you don't get it. Those were examples of mob rule, not collective values.

[reply to this](#)

[Michael Ejercito](#) | 3.24.10 @ 10:15AM | <#>

No, no, you don't get it. Those were examples of mob rule, not collective values.

What is the difference?

[reply to this](#)

[Evil Libertarian](#) | 3.24.10 @ 10:32AM | <#>

The delicate nuances between mob rule and collective values are obvious to enlightened liberals, but they are just too hard to explain to us knuckle-dragging, mouth-breathing right wingers and libertarians. But that's ok because Liu and his superior intellect will be looking out for us like wayward children. So just trust him on this.

[reply to this](#)

[Bradley](#) | 3.24.10 @ 10:10AM | <#>

Presumably anything enacted by a duly democratically-elected government, such as the internment of Japanese-descended Americans, would be OK too.

[reply to this](#)

[Michael Ejercito](#) | 3.24.10 @ 10:15AM | <#>

Presumably anything enacted by a duly democratically-elected government, such as the internment of Japanese-descended Americans, would be OK too.

Korematsu

[reply to this](#)

[yonemoto](#) | 3.24.10 @ 10:24AM | <#>

I think you mean "democratically" with a capital "D".

[reply to this](#)

[dwcarkuff](#) | 3.24.10 @ 10:32AM | <#>

Does "socially contingent character of welfare rights" actually mean anything? How do you decipher the views of someone who writes like that? I'm sorry, but from my perspective this sort of language is meaningless. I certainly could not begin to understand it in the absence of Reason's interpretation.

[reply to this](#)

[Kiwi Dave](#) | 3.24.10 @ 10:43AM | <#>

For a start, "foreign law" is a ridiculous term -- as if Switzerland and Cambodia are basically the same. Secondly, given that the majority of countries in the world do not operate according to democratic or rule of law principles that Americans would find acceptable, and (as has been well documented) the UN and other international bodies that form most of these "international norms" are dominated by tyrannical regimes, I don't see why domestic law should incorporate them when they conflict with America's own constitution as interpreted domestically. But worst of all, when lawyers and judges talk about adopting foreign law norms, what they really mean is adopting foreign law when the results are to the "left" of the results in America. Scalia made this

"Liu's approach flouts the Constitution'...

point so well regarding citing foreign law in his dissent in *Roper v. Simmons*. America is to the "left" of almost the entire rest of the world when it comes to the exclusionary rule of evidence; the right to jury trial for the accused; and the separation between religion and state (no other country has such strict separation that it would prevent almost any state funding of faith-based schools). I don't think Prof. Liu is talking about adopting those norms. So, really, reference to "foreign law" is just a convenient way of cherry-picking results that are more favorable to the judge's own political views where the constitutional/legal situation in America conflicts with them. Now, I happen to be on the left when it comes to issues such as the exclusionary rule, separation of church and state etc., but there is no intellectual honesty in pretending fealty to international norms only when it suits you.

[reply to this](#)

Michael Ejercito | 3.24.10 @ 12:15PM | <#>

America is to the "left" of almost the entire rest of the world when it comes to the exclusionary rule of evidence; the right to jury trial for the accused; and the separation between religion and state (no other country has such strict separation that it would prevent almost any state funding of faith-based schools).

Not to mention the right to remain silent, which is rarely recognized even among Western liberal democracies.

Now, I happen to be on the left when it comes to issues such as the exclusionary rule, separation of church and state etc., but there is no intellectual honesty in pretending fealty to international norms only when it suits you.

Quite a few people want to adopt Taliban precedents as law.

[reply to this](#)

Shyne | 3.24.10 @ 10:00AM | <#>

People keep using the pronoun *she* but I think this is a male asshole.

[reply to this](#)

Pro Libertate | 3.24.10 @ 10:03AM | <#>

Thanks, just caught that one myself. I think I started it.

[reply to this](#)

Jeff | 3.24.10 @ 10:09AM | <#>

Yeah, he is, and I have not seen such an asshole since Goatse. My very soul cringes at the thought of him landing a seat on the Supreme Court.

[reply to this](#)

BakedPenguin | 3.24.10 @ 10:09AM | <#>

According to Google images, you're right.

Or else she probably hangs out at Feministing.

[reply to this](#)

R C Dean | 3.24.10 @ 10:03AM | <#>

Liu has apparently forgotten that there is a mechanism for enshrining "the evolving norms of the public culture" (whatever that means) into the Constitution that he is supposed to be upholding. Its called amendment. Until the Constitution is amended, the "evolving norms of public culture" are irrelevant to determining the Constitutionality of laws.

[reply to this](#)

Pro Libertate | 3.24.10 @ 11:06AM | <#>

Why amend the Constitution when you can "interpret" its plain meaning into wisps of aether? I mean, you've got to be a complete imbecile not to see that the Commerce Clause, for instance, is not some catch-all grant of general police power.

I really wish we could put this debate where it belongs: Should government have limits, or shouldn't it? Putting things that starkly, I think our side would do much better with the public, even among those who benefit from government largess with our money. Most people are scared of some part of the federal government.

[reply to this](#)

Michael Ejercito | 3.24.10 @ 12:16PM | #

Why amend the Constitution when you can "interpret" its plain meaning into wisps of aether? I mean, you've got to be a complete imbecile not to see that the Commerce Clause, for instance, is not some catch-all grant of general police power.

Could the Commerce Clause justify a federal ban on legal recognition of same-sex "marriage"?

Some people would argue just that.

[reply to this](#)

JW | 3.24.10 @ 11:12AM | #

Liu seems to have confused the judiciary with the legislature.

[reply to this](#)

P Brooks | 3.24.10 @ 10:15AM | #

Mob Rule: it's what's for dinner.

[reply to this](#)

Steve | 3.24.10 @ 10:16AM | #

Why is this a problem? If a law is created democratically and it is supported by the majority of people it is OK, provided it doesn't violate the constitution, that is how democracy works and we are a democracy. The constitution is a living document which interpretation evolves over time.

[reply to this](#)

Warty | 3.24.10 @ 10:22AM | #

B+

[reply to this](#)

yonemoto | 3.24.10 @ 10:27AM | #

Unfortunately, it **is** true that the framers could not have anticipated everything that could occur. The correct way to apply liberal interpretation of the constitution is to do it when it LIMITS the power of government (for example, extending the 1st amendment to the executive) versus when it EXPANDS the power of government.

[reply to this](#)

Marc | 3.24.10 @ 10:53AM | #

If a law is created democratically and it is supported by the majority of people it is OK, provided it doesn't violate the constitution

Depends on what you mean by "is OK", but stipulated...

The constitution is a living document which interpretation evolves over time.

I take the "living document" approach to mean that one interprets the Constitution according to current social norms, i.e. according to how the majority of people would interpret it.

Why is this a problem?

Connect the dots.

[reply to this](#)

P Brooks | 3.24.10 @ 10:17AM | #

Call me crazy, but the assertion of **obligations of mutual provision** should automatically disqualify this person.

From any job, at any time.

[reply to this](#)

P Brooks | 3.24.10 @ 10:23AM | #

Goodwin Liu, whose nomination to the federal 9th Circuit Court of Appeals will be heard today

Golly, I wonder what Constitutional Law scholar nominated him.

One more reason to hate that bastard.

[reply to this](#)

dwcarkuff | 3.24.10 @ 10:27AM | #

Is there anything wrong with plain English which most people can comprehend? I could barely understand Lui's description of his judicial philosophy. As with most academic types, the actual purpose is to obfuscate. Even the most offensive views can be cloaked in language which makes them seem reasoned and defensible.

[reply to this](#)

Gilbert Martin | 3.24.10 @ 10:55AM | #

"As with most academic types, the actual purpose is to obfuscate"

Indeed.

The actual purpose is always to set themselves up as philosopher kings ruling over us all with their uniquely "enlightened" prospective.

[reply to this](#)

Gilbert Martin | 3.24.10 @ 10:55AM | #

perspective that is.

[reply to this](#)

mick travis | 3.24.10 @ 11:00AM | #

Cal is really turning'em out these days eh?

[reply to this](#)

Thought Criminal | 3.24.10 @ 11:02AM | #

I like that his name is one letter away from Godwin.

[reply to this](#)

\$ | 3.24.10 @ 11:10AM | #

You know who else had the support of the public's considered judgment?

[reply to this](#)

Spoonman. | 3.24.10 @ 11:12AM | #

Good lord. I'm reminded of the sociological essays my fiancee had to interpret for term papers. Some of them were written by this French assmaster (Pierre Bourdieu, I think) who refused to define his terms, as he "felt that restricted their meaning". Jesus ass fuck.

[reply to this](#)

Warty | 3.24.10 @ 11:18AM | #

"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."

Politics and the English Language

[reply to this](#)

Reflection Eternal | 3.24.10 @ 11:20AM | #

I was a student in Professor Liu's Con law class. I don't think student's should comment on views faculty express in class / office hours, but I do think on a personal level professor liu is fundamentally a political operator and strategic thinking is a big part of how he reaches conclusions. If you're a partisan democrat that is probably a good thing; if you think judges should decide the case that's in front of them and take intellectually honest positions, he isn't that kind of guy.

[reply to this](#)

John | 3.24.10 @ 2:54PM | #

Reflection,

If professor Liu was someone who could separate his beliefs from his practice of the law, it might not matter what he says or does in class/office hours. But since you say he's not able to do so, shouldn't America get a hint about what to expect if he is elevated to the 9th circuit?

Contact me if you want to share more.

[reply to this](#)

Every Man A King | 3.24.10 @ 11:11PM | #

Did you say the same about John Roberts?

[reply to this](#)

Reflection Eternal | 3.25.10 @ 1:26AM | #

I don't know John Roberts personally or what makes him tick. Goodwin Liu I have a personal sense of. From what I've seen of Roberts he is strategic.

[reply to this](#)

R C Dean | 3.24.10 @ 11:35AM | #

I don't think student's should comment on views faculty express in class / office hours

Why not? Those sound to me like the very views that should be publicly aired, discussed, and criticized.

[reply to this](#)

Reflection Eternal | 3.25.10 @ 1:40AM | #

Students informing on their professors / seeking to prevent the Professor from advancing a career of government service is too pinko for my tastes. Call me a hysterical free-speech nut, but academics express views for pedagogical reasons or mention ideas they're flirting with but not committed to and that needs protection.

[reply to this](#)

JW | 3.24.10 @ 11:52AM | #

Didn't we already have trials for this type of judge at Nuremberg?

[reply to this](#)

Bob Smith | 3.24.10 @ 1:06PM | #

Here's the quote proving Liu doesn't care about any opinion other than his own: "help forge or frustrate a social consensus". It is obvious, therefore, that only leftist "social consensus" will be aided by Liu.

[reply to this](#)

R C Dean | 3.24.10 @ 1:52PM | #

He views the judiciary not as a safeguard against state tyranny, but as a rubber stamp for any legislation that reflects popular opinion.

Its worse than that. He sees the judiciary not merely as a rubber stamp for legislation, but as a legislature obligated to implement whatever it divines the "evolving norms of the public culture" should be.

You know, like Obama and his "its a shame the Court isn't more into positive rights" schtick.

[reply to this](#)

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