

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

- 1. In criticizing President Bush’s nomination of Chief Justice Roberts, you wrote: “There is no doubt Roberts has a brilliant legal mind, but a Supreme Court nominee must be evaluated on more than legal intellect.” At your confirmation hearing, you stated that whatever you “may have written in [your] books and in [your] articles would have no bearing on [your] role as a judge.”**

- a. If your writings have no bearing on your role as a judge, then on what basis should we evaluate you beyond your “legal intellect”?**

Response: In stating that my writings would have no bearing on my role as a judge, I sought to convey that, if I were confirmed, I would set aside my own views and fully commit myself to the obligation of deciding cases impartially and objectively, with faithful adherence to the applicable law, including Supreme Court and circuit precedent. I recognize that the role of a judge is not to bend the law in service of any academic theory or to pontificate on what the law should be. The role of a judge is to apply the law *as it is* to the facts and arguments raised in specific cases or controversies.

That said, I believe my academic record sheds light on my qualifications to serve as a judge in at least three respects. First, my record shows that I would bring to the bench a broad knowledge of the law. Second, my academic writings clearly and candidly distinguish between what the law is and what I might wish it to be. I know the difference, and my obligation as a judge would be to follow what the law is, not what I might wish it to be. Third, my record shows that I possess the temperament and habits of mind necessary to be a judge. Throughout my academic work, I have approached legal questions with care and discipline; I have described and analyzed cases and statutes fairly and accurately; I have acknowledged weaknesses in my own arguments; I have given fair consideration to counterarguments; and I have followed logic and evidence to the most defensible conclusion whatever its political valence may be. It is this set of qualities, and not my views on particular legal issues, that would inform my approach as a judge if I were confirmed.

In addition, if I were confirmed, I would bring to the bench my experiences in law practice and government, as well as the skills I have developed as a successful teacher and in various leadership positions, including service as Associate Dean of my law school. These aspects of my background are discussed below in my response to subpart (b).

- b. What other than your academic work qualifies you to serve as a federal appellate judge?**

Response: In addition to my academic work, I have practiced as a litigation attorney at O'Melveny & Myers, where I worked on a wide range of business matters, including antitrust, insurance, white collar defense, and class action defense, with appellate litigation comprising roughly half of my practice. As a law professor, I have continued law practice as an outside counsel to the San Francisco Unified School District, I have written and filed an amicus brief in the U.S. Supreme Court, and I am regularly called to advise lawyers and policymakers on issues within my expertise. I have also served as a law clerk at the U.S. Supreme Court and at the U.S. Court of Appeals for the D.C. Circuit. These experiences have enhanced my understanding of the nature of appellate litigation and the concerns of practicing lawyers, and they have strengthened my skills in faithfully applying the law to the facts of a specific case or controversy.

In addition, I have had experience in government. Between clerkships, I served as a special assistant to the Deputy Secretary at the U.S. Department of Education. In that capacity, I advised the Secretary and Deputy Secretary on various legal and policy issues concerning K-12 education. Before law school, I served as senior program officer for higher education at the Corporation for National Service. In that capacity, I led the agency's effort to build community service programs at colleges and universities nationwide. Those experiences gave me valuable exposure to agency decision-making and administrative law.

Other aspects of my background have prepared me well for service as an appellate judge. As a successful teacher, I have developed strong skills in presenting and eliciting all sides of a legal argument and in listening well to opposing viewpoints. In addition, I have demonstrated the important qualities of fairness, collegiality, and sound judgment in various leadership positions, including service as Associate Dean of my law school.

2. **At his confirmation hearing, Chief Justice Roberts stated: "Judges are like umpires. Umpires don't make the rules; they apply them. . . . [i]t is a limited role. . . . Judges have to have the humility to recognize that they operate within a system of precedent" He pledged to "decide every case based on the record, according to the rule of law" and to "remember that it is my job to call balls and strikes and not to pitch or bat."**

In *Keeping Faith with the Constitution*, you criticize Chief Justice Roberts's remarks, writing:

Although these attempts to simplify constitution interpretation may have a surface appeal, they do not withstand scrutiny Ironically, the significance of Chief Justice Roberts's baseball analogy is actually the opposite of what he intended. Just as baseball players and many fans know that umpires over time have interpreted the strike zone differently in response to changing aspects and contemporary

understandings of the game, so too do lawyers, judges, and ordinary citizens know that the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context.

Goodwin Liu, et al., *Keeping Faith with the Constitution* 28 (2009).

However, at your confirmation hearing you offered the following statement that closely tracked Chief Justice Roberts’s words: “I think the role of a judge is to be an impartial, objective, and neutral arbiter of specific cases and controversies that come before him or her, and the way that process works is through absolute fidelity to the applicable precedents and the language of the law, statutes, and regulations that are at issue in the case.”

- a. What is the substantive difference between your hearing statement and Chief Justice Roberts’s remarks?**
- b. Do you still stand behind your criticism of the Chief Justice’s statement?**

Response: Chief Justice Roberts’s umpire analogy makes the point that judges must be impartial and objective arbiters of the specific cases and controversies that come before them. I fully agree with that important point. At the same time, my book explains that the umpire analogy, to the extent it compares constitutional adjudication to calling balls and strikes, does not provide a complete account of how judges interpret the Constitution and tends to oversimplify the process. See *Keeping Faith with the Constitution* 28 (2009).

My hearing testimony urged “fidelity” to applicable precedents and the language of laws, statutes, and regulations at issue in a given case. My book does not address interpretation of statutes or regulations. The book defines “fidelity” to the Constitution to require that judges “interpret its words and ... apply its principles in ways that sustain their vitality over time.” *Keeping Faith* 25. Using various Supreme Court cases as examples, including *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954), the book shows that “the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context.” *Keeping Faith* 28.

Consideration of social context is not at odds with the duty of a judge to be impartial and objective. 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 requires the judge to be objective and impartial.

If confirmed, I would faithfully follow Supreme Court and circuit precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions.

3. **You once criticized Chief Justice Roberts’s work for the National Legal Center for the Public Interest. You said: “its mission is to promote, among other things, free enterprise, private ownership of property, and limited government. These are code words for an ideological agenda hostile to the environment, workplace, and consumer protections.”**

- a. **How did you reach this conclusion?**
- b. **Do you still believe that “free enterprise, private ownership of property, and limited government” are “code words for an ideological agenda hostile to the environment, workplace, and consumer protections”?**
- c. **Isn’t our Constitution based in large part on ideas of free enterprise, private ownership of property, and limited government?**

Response: From the time of America’s founding, our nation and our Constitution have reflected an unwavering commitment to free enterprise, private ownership of property, and limited government. I strongly believe in these important values, and I am personally committed to them. The quotation above was from an op-ed in which I was objecting to one organization’s use of those values in opposition to government efforts to ensure that our free market system is a fair, sustainable, and level playing field. In retrospect, I can see how the language I used may be read to suggest disparagement of the values of free enterprise, private property, and limited government, even though that was not my intention. For that reason, it was a poor choice of words. Free enterprise, private property, and limited government are cornerstones of America’s prosperity and success as a free society, and I regret that the language I used may have suggested otherwise.

4. **Three days after President Bush announced his nomination of John Roberts to the Supreme Court, you wrote an op-ed opposing his nomination. Goodwin Liu, *Roberts Would Swing the Supreme Court to the Right*, Bloomberg (July 22, 2005). The lead items in your attack on Chief Justice Roberts were two of his D.C. Circuit opinions: (1) his unanimous opinion in *Hedgpeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), affirming a ruling by District Judge Emmet Sullivan that the arrest of a 12-year-old girl for eating in a Metro station did**

not violate her constitutional rights; and (2) his brief dissent from denial of rehearing en banc in *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003), a case involving an Endangered Species Act regulation.

I believe that your presentation of Chief Justice Roberts's opinions was wildly distorted. In discussing the *Hedgepeth* case, for example, you left the impression that Judge Roberts personally supported the arrest, and you omitted all passages in the opinion that showed he took the exact same position as Judge Sullivan. Likewise, you claimed that Judge Roberts's *Rancho Viejo* dissent took the position that the Endangered Species Act regulation challenged in the case "exceeded Congress's power to regulate interstate commerce." You further alleged that he expressed a "theory of limited federal power" in the dissent that "would potentially undermine bedrock civil rights laws, including the Civil Rights Act of 1964" and "was all but rejected by the Supreme Court in a recent decision upholding federal power to ban medicinal uses of home-grown marijuana." These assertions were misleading at best. What Judge Roberts did in his *Rancho Viejo* dissent was point out that the *particular approach* the panel majority took "seems inconsistent" with Supreme Court holdings and conflicts with a Fifth Circuit ruling, thus making en banc consideration appropriate. He specifically stated that en banc review "would also afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent."

- a. Did you read Judge Roberts's actual opinions before writing your op-ed?

Response: Yes.

- b. Is it your considered judgment that the arrest in *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), violated the defendant's constitutional rights?

Response: My concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification ("it is far from clear that the gains in certainty of notification are worth the youthful trauma and tears," 386 F.3d at 1157) and thus might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation—an argument that the court's opinion did not address. My op-ed did not express an ultimate view on whether the arrest in *Hedgepeth* violated the defendant's constitutional rights.

- c. After initially advancing a similar line of attack on Chief Justice Robert's *Rancho Viejo* en banc petition dissent, the *New York Times* acknowledged that its account was wrong: "[Roberts] did not say the federal government lacked the power to block a California real estate development because it endangered the toad. . . . He did not question the constitutionality of the Endangered Species Act." David Kirkpatrick, Correction, *Democrats Prepare Ground To Challenge Judge Roberts*, *New York Times* (Aug. 11,

2005). Have you joined the *New York Times* in publicly acknowledging that you misinterpreted Chief Justice Roberts’s dissent? If not, do you now admit that your reading of his dissent was incorrect?

Response: My op-ed did not claim that then-Judge Roberts took the position that the Endangered Species Act regulation “exceeded Congress’s power to regulate interstate commerce.” It stated that “he wrote an opinion urging his court to *consider* overruling its own precedent to hold that an Endangered Species Act regulation exceeded Congress’s power to regulate interstate commerce” (emphasis added). While my op-ed expressed concern about “Roberts’s theory of limited federal power” (see subpart (d) below), it expressed no view on whether he would have concluded, on *en banc* review, that the regulation exceeded Congress’s commerce power.

d. Do you still believe that the Supreme Court’s decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), “all but rejected” the point that Roberts actually made in his *Rancho Viejo* en banc petition dissent?

Response: In *Rancho Viejo*, then-Judge Roberts defined “the *activity* being regulated” as “the taking of a hapless toad that, for reasons of its own, lives its entire life in California,” and he expressed doubt that “the incidental taking of arroyo toads can be said to be interstate commerce.” 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*). In *Gonzales v. Raich*, the Supreme Court said: “Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” 545 U.S. 1, 17 (2005). The Court cited with approval *Perez v. United States*, 402 U.S. 146, 154-55 (1971), which held that Congress’s power to punish extortionate credit transactions extends to local loan sharks because they are part of interstate organized crime. As the panel decision in *Rancho Viejo* observed, the taking of the toad, though a purely local activity, was part of an economic class of activities—“commercial land development”—having substantial effects on interstate commerce. 323 F.3d 1062, 1069 (D.C. Cir. 2003). *Raich* thus suggests that the proper characterization of the regulated activity in *Rancho Viejo* for purposes of Commerce Clause analysis was not the taking of the toad.

5. In testifying against Justice Alito, you stated: “Intellect is a necessary, but not sufficient credential. Equally important are the subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice. We care about nominees’ judicial philosophy.”

a. What are the “subtle qualities of judging that give the law its legitimacy, humanity, and semblance of justice”?

Response: I believe those qualities include objectivity, impartiality, humility, faithful adherence to equal justice under law, and a genuine understanding of how the law affects the parties to a given case or controversy.

b. Does impartial and dispassionate application of the law not suffice to give the law legitimacy and a semblance of justice?

Response: I believe it does, as long as “dispassion” does not mean a lack of understanding of how the law affects the parties to a given case or controversy.

c. What are the “subtle qualities of judging” that underpin your judicial philosophy?

Response: Those qualities include objectivity, impartiality, humility, faithful adherence to equal justice under law, and a genuine understanding of how the law affects the parties to a given case or controversy.

- 6. You concluded your testimony against Justice Alito by declaring: “Judge Alito’s record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won’t turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. . . . [T]his is not the America we know, nor is it the America we aspire to be.”**

At your confirmation hearing, you noted that this passage used “perhaps unnecessary colorful language” or “perhaps unnecessarily flowery language,” but you never answered whether you thought the passage was a fair analysis of Justice Alito’s record. Was it fair? What, if anything, would you change about this passage?

Response: The passage above described a series of opinions that Justice Alito had written as a government lawyer and as a Third Circuit judge regarding what he believed to be permissible under the Constitution. Those writings were analyzed in my 2006 testimony, and the passage above was not intended to suggest that he supported, condoned, or endorsed those practices as a policy matter. However, upon rereading and reflecting on this passage in response to this question, I believe the passage is unduly harsh and provocative and does not add to the fifteen pages of legal analysis that preceded it. What troubles me most is that the passage has an *ad hominem* quality that is unfair and hurtful to the nominee—a reality that, in all candor, I did not appreciate then nearly as much as I appreciate now. The passage does not reflect and indeed obscures the respect I have for Justice Alito as a person who rose from humble origins to serve our country honorably as a prosecutor, judge, and now Supreme Court Justice. For these

reasons, I regret having written this passage, and I would omit it if I had the opportunity to rewrite my testimony.

7. **At your confirmation hearing, you testified that you were “not familiar with th[e] debate in the law” outlined by Harold Koh, the Legal Advisor of the Department of State and former dean of the Yale Law School, between nationalists and transnationalists. Here, in detail, is how Professor Koh explains the difference between nationalists and transnationalists, which, he says, “hold sharply divergent attitudes toward transnational law”:**

Generally speaking, the transnationalists tend to emphasize the interdependence between the United States and the rest of the world, while the nationalists tend instead to focus more on preserving American autonomy. The transnationalists believe in and promote the blending of international and domestic law; while nationalists continue to maintain a rigid separation of domestic from foreign law. The transnationalists view domestic courts as having a critical role to play in domesticating international law into U.S. law, while nationalists argue instead that only the political branches can internalize international law. The transnationalists believe that U.S. courts can and should use their interpretive powers to promote the development of a global legal system, while the nationalists tend to claim that U.S. courts should limit their attention to the development of a national system. Finally, the transnationalists urge that the power of the executive branch should be constrained by judicial review and the concept of international comity, while the nationalists tend to believe that federal courts should give extraordinarily broad deference to executive power in foreign affairs. . . .

Harold Hongju Koh, *Why Transnational Law Matters*, 24 Penn St. Int’l L. Rev. 745, 749-50 (2006); *see also* Harold Hongju Koh, *International Law is Part of Our Law*, 98 Am. J. Int’l L. 43 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996).

- a. **As described by Professor Koh, are you a transnationalist or a nationalist? Have you ever previously expressed your position on this question? What did you say?**

Response: This subject lies outside of my expertise, and I have not previously expressed a view on this question.

- b. **Do you believe that domestic courts have “a critical role to play in domesticating international law into U.S. law” and “should use their interpretive powers to promote the development of a global legal system”?**

Response: I have not previously expressed a view on this question, and if confirmed, I would faithfully follow the commands of the Supreme Court with respect to the proper role of U.S. courts.

- c. Have you ever taken a course taught by Professor Koh? If so, which course[s]?**

Response: Yes. I took International Business Transactions from Professor Koh.

- 8. Professor Koh has said that there can be no “law free” zones, no “extra-legal” spaces, no realm within which judges should not have the final word, no matter to which branch the Constitution allocates the decisionmaking responsibility. According to Professor Koh, the question “[h]ow far do our human rights and constitutional obligations extend?” has been “brought into sharp relief by Abu Ghraib and the debates over extraterritorial torture, the mistreatment of detainees at Guantanamo, and the denial of habeas corpus and full trial rights to suspected enemy combatants.” Professor Koh has stated that there is “no reason why constitutional due process should be limited at our ‘physical borders.’”**

- a. Do you believe the activities of the President, exercising his constitutional powers as Commander in Chief of the United States Military, should have his handling of foreign terrorists captured on the battlefield scrutinized by civilian judges in Article III courts? Have you ever expressed an opinion on this matter? If so, please provide details.**

Response: I have not previously expressed a view on this question, and if confirmed, I would faithfully follow the Supreme Court’s precedents on this issue.

- b. Justice Lewis Powell, Jr., in *INS v. Chadha*, noted that “the [separation of powers] doctrine may be violated in two ways. One branch may interfere impermissibly with the other’s performance of its constitutionally assigned function. Alternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.” What is your view of the Separation of Powers and how it functions in the context of the War on Terror?**

Response: My writings have said that “ours is a system of checks and balances” and that neither historical practices nor judicial decisions have authorized the President to disregard statutes duly enacted by Congress in times of war. Keeping Faith with the Constitution 73-82 (2009). If confirmed, I would faithfully follow the Supreme Court’s precedents on how the principle of separation of powers applies in the context of the war on terror.

- 9. Professor David Cole of the Georgetown Law Center has said that the appeal of international human rights law extends to such matters as**

“the death penalty, criminal justice, gay rights, and economic and social rights, where international human rights standards often reflect more robust visions than does current United States constitutional law. . . . We will be best served by a strategy . . . that seeks to employ the rhetoric and tactics of the international human rights movement to help frame our constitutional vision. We should steer clear of appeals to citizenship in favor of the more universal claim of human dignity, which rests ultimately on personhood.”

Do you agree with Professor Cole that courts should “employ the rhetoric and tactics of the international human rights movement to help frame our constitutional vision”?

Response: I have not previously expressed a view on this issue, and if confirmed, I would faithfully follow the Supreme Court’s precedents in applying the Constitution to specific cases and controversies.

10. You have written: “The use of foreign authority in American constitutional law is a judicial practice that has been very controversial in recent years. . . . The resistance to this practice is difficult for me to grasp, since the United States can hardly claim to have a monopoly on wise solutions to common legal problems faced by constitutional democracies around the world.” Goodwin Liu, *Developments in U.S. Education Law and Policy*, 2 Daito L. Rev. 18, 27 (2006).

a. In your view, what are some examples of “common legal problems faced by constitutional democracies around the world”?

Response: Examples include the role of judicial review and the application of constitutional liberty and equality guarantees.

b. How should judges determine which foreign rulings are “wise solutions” to “common problems”?

Response: Apart from circumstances where American law requires a judge to rely on foreign law, I do not believe a judge should rely on foreign law as legal authority in resolving legal problems that arise under U.S. law, including the U.S. Constitution. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. However, just as law review articles have no legal authority in the interpretation of the U.S. Constitution, foreign law also has no legal authority in the interpretation of the U.S. Constitution.

- c. **Should the rulings of some constitutional democracies matter more than others? Why or why not?**

Response: Please see response to subpart (b).

- d. **Are foreign laws or international norms relevant to determining the rights secured to U.S. citizens by the Citizenship Clause and/or Privileges and Immunities Clause of the Fourteenth Amendment?**

Response: I do not believe foreign laws or international norms have any legal authority in determining the rights secured to U.S. citizens under the Citizenship Clause or the Privileges or Immunities Clause of the Fourteenth Amendment unless U.S. law so provides. I have not previously expressed any view on whether foreign laws or international norms may be a source of ideas on this question, and any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own.

11. **In you hearing testimony, you stated: “I do not believe foreign law should control in any way the interpretation of United States law, whether it’s the U.S. Constitution or a statute.” You also distinguished between the citation of foreign law “like a law review article,” which you suggested a court could do when interpreting U.S. law, and the citation of foreign law as “authority,” which you suggested would be inappropriate. But in your article *Developments in U.S. Education Law and Policy*, 2 Daito L. Rev. 18, 27 (2006), you write that the “resistance” to the “use of foreign authority in American constitutional law . . . is difficult for me to grasp.”**

- a. **Please explain in detail what you mean when you say that foreign law should not “control in any way the interpretation of United States law.” In doing so, please elaborate on how you define “control.”**

Response: What I mean is that foreign law has no legal authority in the interpretation of U.S. law unless U.S. law so provides. Accordingly, foreign law cannot comprise any part of the legal basis for an interpretation of U.S. law unless U.S. law so provides. There are exceptions where legal standards require a judge to rely on foreign law, as in cases involving treaties, conflict of laws, or foreign contracts.

- b. **In your Daito Law Review article, did you mean to say that the resistance to the use of “foreign authority in American constitutional law” was difficult for you grasp? What did you mean by “authority”?**

Response: The article’s reference to “foreign authority” was a reference to law that is authoritative within a foreign legal system. It was not meant to suggest that foreign law has authority within the American legal system. To be clear, my view

is that foreign law has no legal authority in the interpretation of U.S. law, including the U.S. Constitution unless U.S. law so provides.

12. During your hearing testimony, you said: “I believe that the use of foreign law contains within it many potential pitfalls. In other words, I think that what I’ve observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument. It is not a canvassing of the world’s practices or in any way a full account of the various practices throughout the world with respect to their laws.”

a. Please provide citations for the cases in which you observe the Justices “choos[ing] the law that is favorable to the argument.”

Response: *Roper v. Simmons*, 543 U.S. 551, 575-78 (2003); *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003).

b. Would it be acceptable for a court to cite foreign law an authority if the court did “canvass[] the world’s practices” or take “a full account of the various practices throughout the world with respect to their laws”? Why or why not?

Response: No, because foreign law has no legal authority in the interpretation of U.S. law, including the U.S. Constitution, unless U.S. law so provides.

13. In your article, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 254 (2008), you write: “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. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.”

a. Do you think that courts should look to international laws, practices, and social norms when determining whether a “social consensus” has been reached on a given issue? Why or why not?

Response: No. In using the term “social consensus,” my article is referring to the understandings of “a particular society,” “our own society,” the United States of America. *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 210, 233, 234 (2008).

b. Do you think that courts should consider foreign law and practices when assessing the “trajectory of social norms” or applying their “predictive judgment as to how a judicial decision may help forge or frustrate a social consensus”? Why or why not?

Response: Response: No. In using the terms “social norms” and “social consensus,” my article is referring to the norms and understandings of “a particular society,” “our own society,” the United States of America. *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 210, 233, 234 (2008).

14. In *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 266-68 (2008), you conclude that Title I of the Elementary and Secondary Education Act of 1965 has a method of allocating federal funds that you believe is unconstitutional. You also write that California’s system of school finance is “ripe for reexamination.”

a. If the constitutionality of these laws were challenged, would you, as a judge, feel compelled to recuse yourself based on your expressed views?

Response: If confirmed as a judge, I would take seriously my obligation to avoid the reality or appearance of any bias, partiality, or impropriety, as I believe the faithful discharge of this obligation is essential to maintaining public confidence in the judiciary. I would follow any applicable statutes, including 28 U.S.C. § 455, and ethical canons, including Canon 3(C) of the Code of Conduct for United States Judges, and I would recuse myself from any case where my impartiality might reasonably be questioned. I would also seek the advice of my judicial colleagues on any recusal matter, and I would carefully consider the facts of the case and the legal arguments made by the parties in deciding whether to recuse.

b. If you would not feel compelled to recuse yourself, what factors would you as a judge consider in evaluating the constitutionality of the educational provisions that you criticize?

Response: If confirmed as a judge, I would decide whether to recuse myself in a particular case by considering the factors described in the response to subpart (a). If I were to decide not to recuse, I would not evaluate the constitutionality of those educational provisions in the abstract. I would consider the facts on record and the legal arguments made by the parties in the specific case or controversy, and I would faithfully apply Supreme Court and circuit precedent, not my own views, to the facts and legal arguments in the case.

c. Do you believe that your judgments about the constitutionality of these educational provisions “would have [a] bearing on [your] role as a judge”?

Response: No. If confirmed as a judge, I would set aside the views I have taken as a scholar and faithfully follow the law as set forth in applicable Supreme Court and circuit precedents.

15. In your hearing testimony, you said that it was “too early to tell” if the recently passed Patient Protection and Affordable Care Act (P.L. 111-148) gave rise to a cognizable constitutional welfare right.

- a. **What further amount of “vigorous public contestation” would you need to see in order to conclude that the act had “sufficient ambition and durability” to create constitutional welfare rights? See Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 245 (2008).**

Response: I have not read the Patient Protection and Affordable Care Act and have not expressed any view on whether the act creates any welfare rights. The Supreme Court has generally held that the Constitution does not guarantee welfare rights, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970), and if confirmed, I would faithfully follow the Court’s precedents.

- b. **What rights do you anticipate the act might create if it garners a “sufficient ambition and durability”?**

Response: I have not read the Patient Protection and Affordable Care Act and have not expressed any view on whether the act creates any welfare rights.

- c. **You also said at your hearing that the act “could always be repealed.” But if a judge recognized a right stemming from the act as a constitutional welfare right, wouldn’t the only path to repeal be a constitutional amendment?**

Response: I have written that, if a right to health care or welfare is to exist, it must arise from a duly enacted statute and that the legislature retains the ultimate authority to create, eliminate, and define the contours of any such right. *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 244-45, 264-66 & n.324 (2008). The judicial role I have described in my writings is one that “ultimately defer[s] to legislative supremacy.” *Id.* at 265

16. **In your white paper on *Judge Alito and the Death Penalty*, ACS, at 1 (Dec. 2005), you wrote: “The use of capital punishment continues today amid growing evidence of its uneven application, departure from international norms, and high susceptibility to error.”**

- a. **Do you believe that international norms should have any bearing on the constitutionality or application of the death penalty? Why or why not?**

Response: The Supreme Court has evaluated Eighth Amendment claims against the death penalty by examining whether there is a “national consensus” against a challenged practice, and the Court has said that international norms are not “controlling.” *Roper v. Simmons*, 543 U.S. 551, 564, 575 (2004). If confirmed, I would faithfully follow the Court’s precedents. In general, international norms have no legal authority in the interpretation or application of the U.S. Constitution or federal or state laws concerning the death penalty unless U.S. law so provides.

- b. Although you noted at your hearing that you “have no opposition to the death penalty” and would “have no problem enforcing the law as written,” how would you, as a judge, square application of the death penalty with your concerns about the “growing evidence of its uneven application, departure from international norms, and high susceptibility to error”?

Response: The Supreme Court has interpreted the Constitution to establish various safeguards that ensure due process of law in the application of the death penalty. If confirmed, I would faithfully follow the Court’s precedents and applicable statutes concerning the death penalty.

17. You testified at your confirmation hearing that the “role of a 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.” In many of your writings, however, you advocate broad and novel readings of the Constitution. For example, you write that under the Citizenship Clause of the Fourteenth Amendment,

the duty of the federal government cannot be reduced to simply providing the basic necessities of life. Welfare provision in the form of cash assistance, food stamps, and public housing may prevent destitution . . . , but such provision, with its accompanying stigma of dependence and bureaucratic control, does not assure its beneficiaries the dignity of full membership in society. Beyond a minimal safety net, the legislative agenda of equal citizenship should extend to systems of support and opportunity that, like education, provide a foundation for political and economic autonomy and participation. The main pillars of the agenda would include basic employment supports such as expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit. Further the citizenship guarantee would find expression in antidiscrimination laws that promote inclusion in social, economic, and political spheres.”

Goodwin Liu, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 407-08 (2006).

- a. If confirmed, you will have the opportunity to interpret statutes and constitutional challenges on which the Supreme Court has not ruled. In these instances, to what extent will you feel it proper to incorporate your unique views of the Constitution? Will your advocacy for a sweeping legislative agenda encourage you to espouse broad readings of statutes or the Constitution?

Response: If confirmed, I would set aside the views I have expressed as a scholar and faithfully follow any Supreme Court and circuit precedents that provide

guidance on a legal question on which the Supreme Court has not ruled, including any guidance in such precedents on how to interpret particular constitutional provisions or statutes. As my writings make clear, I do not believe that courts can or should interpret the Constitution in the same way as the legislature, *see Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339-40 (2006), and the quoted passage above refers to “the legislative agenda of equal citizenship” because I agree with Supreme Court precedent that it is not the role of courts to create those programs and benefits, *id.* at 407; *see Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 247, 252 (2008).

- b. Under your reading of the Citizenship Clause, what limits do you think exist on the power of legislators to add to the list of social and economic benefits necessary to ensure “the dignity of full membership in society”?**

Response: Legislators generally have broad discretion to decide what social or economic benefits to provide to the citizenry. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). In exercising this discretion, legislators must consider “what is reasonable, feasible, and likely to be effective.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 409 (2006).

- c. Has any federal court endorsed your reading of what rights the Fourteenth Amendment guarantees?**

Response: No. My article acknowledges that “positive rights [are] disfavored in Supreme Court doctrine,” and for that reason, “my thesis is chiefly directed at Congress, ... not to courts.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336, 339 (2006).

- d. On what basis did you determine your list of “necessary” social and economic rights?**

Response: My article sought to identify “systems of support and opportunity that, like education, provide a foundation for political and economic autonomy and participation.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 407 (2006).

- 18. In your hearing testimony, you stated: “I think that the interpretation of the Constitution always has to be on the basis of legal principle and not on the basis of what a majority of the society thinks or what the judge in question thinks.” But in your article *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 228 (2008), you say that “the enduring task for the judiciary . . . is to find a way to articulate constitutional law that the nation can accept as its own,” and you add that “[t]his imperative has special resonance in considering the justiciability of constitutional welfare rights, since the substance of welfare rights is inextricably intertwined with the nation’s changing social and economic norms.” You also have**

written: ***“The problem of 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. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus.”*** *Id.* at 254 (emphasis added).

- a. **How is determining the constitutionality of welfare rights based on the “trajectory of social norms . . . as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus” not interpreting the Constitution “on the basis of what a majority of the society thinks or what the judge in question thinks”?**

Response: In many areas of constitutional law, the Supreme Court has required judges to consider social norms and understandings 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 inquiry is objective and does not direct the judge to act on what he or she personally believes or on what a majority of society thinks.

- b. **Isn’t your article asking judges to look beyond the text of statutes and the Constitution to determine whether a “majority of society” has reached a “social consensus” about the constitutionality of a certain welfare right? What do you mean by the phrase “the problem of courts”?**

Response: My article does not ask judges to look beyond the text of statutes or the Constitution. To the contrary, my article discusses with approval cases in which the Supreme Court identified *in the text of a statute* “the broad, expressly stated purpose of the welfare program and treated that purpose as a deliberate, democratic expression of public values to which implementing provisions are presumed to be aligned.” *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 263 (2008) (citing *Schweiker v. Hogan*, 457 U.S. 569 (1982), *Schweiker v. Wilson*, 450 U.S. 221 (1981), and *USDA v. Moreno*, 413 U.S. 528 (1973)).

The phrase “the problem for courts” refers to the question posed by the remainder of that sentence (quoted above) in the context of the concern that “appealing to societal

values too easily becomes a Trojan horse for imposing the judge's own values." *Id.* at 253.

- c. **Will you, as a judge, make determinations about the constitutionality of welfare rights in accordance with the judicial role that you described in *Rethinking Constitutional Welfare Rights*?**

Response: No. If confirmed as a judge, I would faithfully follow Supreme Court and circuit precedent on these issues as with all other issues.

19. **In your recent book, *Keeping Faith with the Constitution* (2009), you review and analyze the Supreme Court's decision in *District of Columbia v. Heller*. Describing Justice Scalia's majority opinion as an "interest-balancing" approach, you say that "the Court interpreted the constitutional principle to have the 'capacity of adaptation to a changing world.'" You then note that "[e]volving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court."**

- a. **In what way do you think that "evolving social norms can change the ambit of the Second Amendment's protection as interpreted by the Court"?**

Response: The quoted language is a reference to the Supreme Court's limitation of the Second Amendment's protection to weapons "in common use at the time." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008) (internal quotation marks and citation omitted). My book observed that the Court decided whether the Second Amendment protects handguns by looking to "contemporary social practice" and, in particular, "the fact that 'handguns are the most popular weapon chosen by Americans for self-defense in the home.'" *Keeping Faith with the Constitution* 32 (2009) (quoting *Heller*, 128 S. Ct. at 2818). The book noted that if "what 'the American people have considered ... to be the quintessential self-defense weapon'" were to change, then under *Heller* the weapons protected by the Second Amendment would also change. *Id.* at 32-33 (quoting *Heller*, 128 S. Ct. at 2818).

- b. **Are there any "evolving social norms" that you presently think should "change the ambit of the Second Amendment's protection"?**

Response: I am not aware of any evidence calling into question the Supreme Court's statement that "handguns are the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 128 S. Ct. at 2818.

20. **President Obama has stated: "[W]hile adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court . . . what matters . . . is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last**

mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy. In those 5 percent of hard cases . . . the critical ingredient is supplied by what is in the judge's heart."

- a. Do you agree with the President that legal precedent and rules of statutory or constitutional construction sometimes fail to provide an answer in hard cases? If so, what percentage of cases do you think constitute "hard cases"?

Response: I believe all cases must be decided by applying the law to the facts from beginning to end.

- b. Assuming for the sake of argument that there is a "hard case" where the law is indeterminate, what factors and concerns would you, as a judge, consider in deciding the case?

Response: Where the law is indeterminate, I would, if confirmed, faithfully follow any Supreme Court and circuit precedents that provide guidance on legal questions related to the one at issue in the specific case or controversy, including any guidance in such precedents on how to interpret particular constitutional provisions or statutes.

21. In *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 241-43 (2008), you discuss the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, which, you say, "uph[eld] school funding disparities based on local property taxes and declin[ed] to recognize education as a fundamental right." You state in your discussion: "From today's vantage point, this interpretation of educational norms no longer seems persuasive, as centralizing trends have eroded local control of public schools in favor of state and increasingly federal authority." You also remark that the holding of *Rodriguez* "seems open to reexamination," and you say that shifting norms "may one day prompt a court to revisit and distinguish the outdated norms of school finance and organization that prevailed in *Rodriguez*."

- a. If confirmed, will you feel compelled to reexamine the holding in *Rodriguez* if a case relating to substantially the same issues is appealed to the Ninth Circuit? If so, what new social norms would you consider in your reexamination of the case?

Response: No, I would not feel compelled to reexamine the holding in *Rodriguez* if I were confirmed as a Ninth Circuit judge. *Rodriguez* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- b. Would you seek "to revisit and distinguish the outdated norms of school finance and organization that prevailed in *Rodriguez*"?

Response: No. *Rodriguez* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

22. As a legal scholar you have had many opportunities to consider and express your views on contentious issues of constitutional law. I am interested in your views as an academic on a range of these issues.

- a. Do you believe that the Supreme Court’s decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), was correct? Have you ever previously expressed your position on this question? What did you say?**

Response: I have cited *Hamdan v. Rumsfeld* with approval as an example of a case where the Court rejected the notion that the President has power to disregard statutes duly enacted by Congress. See *Keeping Faith with the Constitution* 81 (2009) (citing *Hamdan*, 548 U.S. at 593 n.23). I have not previously expressed any view on the correctness of *Hamdan* in any other respect. *Hamdan* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- b. Do you believe that the Court correctly decided *California v. Hodari D.*, 499 U.S. 621 (1991), which held that a seizure for purposes of the Fourth Amendment requires the application of physical force or submission to a show of authority? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *California v. Hodari D.* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- c. Do you believe that Ninth Circuit correctly decided *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), which held, in part, that the addition of the words “under God” to the pledge of allegiance violated the First Amendment? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words “under God,” by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if confirmed.

- d. Do you believe that the Supreme Court correctly decided *Terry v. Ohio*, 392 U.S. 1 (1968)? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *Terry v. Ohio* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- e. **Do you believe that the Supreme Court correctly decided *Herring v. United States*, 555 U.S. __ (2009)? Have you ever previously expressed your position on this question? What did you say?**

Response: I have cited Justice Ginsburg's dissent in *Herring v. United States* in stating that "'a forceful exclusionary rule' continues to be 'the only effectively available way' to deter and remedy Fourth Amendment violations, especially in an age of increasing bureaucratization and technological sophistication of law enforcement." Keeping Faith with the Constitution 96 (2009) (citing 129 S. Ct. 695, 706, 707 (2009) (Ginsburg, J., dissenting)). I have not previously expressed any other views on *Herring*. *Herring* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- f. **Do you believe that the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), was correct? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *Massachusetts v. EPA* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

- g. **Do you think that the Court correctly decided *Ricci v. DeStefano*, which invalidated the city of New Haven's refusal to honor the results of a merit-based promotion test as "antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race"? Have you ever previously expressed your position on this question? What did you say?**

Response: I have not previously expressed any view on this question. *Ricci v. DeStefano* is a precedent of the Supreme Court, and I would follow it faithfully if confirmed.

23. **At your confirmation hearing, you stated that "most of [your] writings on education, on welfare, and on . . . social policy . . . have been directed actually at policymakers and at legislators, not at judges." Can you please identify those writings of yours that are directed at judges? More broadly, can you identify those writings of yours that you believe are relevant to our evaluation of your judicial philosophy?**

Response: Keeping Faith with the Constitution (2009); *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008); *The First Justice Harlan*, 96 Cal. L. Rev. 1383 (2008); "History Will Be Heard": An Appraisal of the Seattle/Louisville Decision, 2 Harv. L. & Pol'y Rev. 53 (2008); *Seattle and Louisville*, 95 Cal. L. Rev. 277 (2007); *The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. &

Inequality 81 (2006); Brown, Bollinger, *and Beyond*, 47 How. L.J. 705 (2004); *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439 (2003); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002); *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 381 (1998); Brief of 19 Former Chancellors of the University of California as *Amici Curiae* in Support of Respondents, *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, No. 05-908, and *Meredith v. Jefferson County Bd. of Educ.*, No. 05-915 (U.S. Supreme Court, Oct. 10, 2006).