

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

1. At your hearing, I asked you about your characterization of Justice Alito’s decisions in death penalty cases as

“envision[ing] 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 man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some.”

You replied that your statement was “perhaps unnecessarily colorful language,” but went on to say that you had “criticisms and concerns” with his record in “the area in which individual rights come up against assertions of government power.”

- a. The Supreme Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), upheld the power of Congress to regulate the growing of wheat for private consumption on private property under the Interstate Commerce Clause of Article I, Section 8 of the Constitution. More recently, the Court reaffirmed this holding in *Gonzales v. Raich*, 541 U.S. 1 (2005).
- i. Do you think that case posed troubling concerns in “the area in which individual rights come up against assertions of government power”?
- ii. Do you think that case was correctly decided?

Response: In *Wickard v. Filburn*, after upholding the Agricultural Adjustment Act of 1938 as a valid exercise of Congress’s commerce power, the Court proceeded to examine whether the Act deprived the plaintiff of property without due process of law under the Fifth Amendment. The Court unanimously rejected the due process claim on the ground that “[i]t is hardly lack of due process for the Government to regulate that which it subsidizes.” 317 U.S. 111, 131 (1942). The Court said that to find a due process violation would have allowed the plaintiff to “get all that the Government gives and do nothing that the Government asks.” *Id.* at 133. *Wickard* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

b. In *Kelo v. City of New London*, 545 U.S. 469 (2005) the Supreme Court upheld the City of New London, Connecticut’s exercise of eminent domain power to take a private home from a private citizen and give it to a private developer as part of a comprehensive redevelopment plan.

i. Does that case raise any troubling concerns for you regarding the power of government trumping individual rights?

ii. Do you think that case was correctly decided?

Response: *Kelo* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed. I am aware that many states have enacted legislation to restrict the exercise of eminent domain upheld in *Kelo*, and some Members of Congress have introduced similar legislation at the federal level.

2. In your testimony in opposition to then-Judge Alito’s nomination, it seems that you deliberately obscured the distinction between what is permissible under the Constitution and what may be prohibited by statutes and policies. To take just one example, in your summation, you asserted that “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.” There, you were referring to a Department of Justice memo that Judge Alito wrote on the “fleeing felon” rule that took the same position that Justice O’Connor took in her dissent in *Tennessee v. Garner*. Do you acknowledge that there was absolutely nothing in then-Judge Alito’s record that would prevent governments from adopting policies that limited the scope of the traditional “fleeing felon” rule?

Response: Yes. My testimony described only what Judge Alito believed to be permissible under the Constitution, and it noted (on page 4) that his Department of Justice memorandum expressly mentioned that “federal law enforcement agencies ... uniformly restrict the use of deadly force by their agents at least as strictly (and generally more strictly) than [sic] the court of appeals’ rule.”

3. At your hearing, you were asked about your belief that the Citizenship Clause of the Fourteenth Amendment creates a positive right to certain welfare benefits. That belief is well documented in your writings, speeches, and press interviews over recent years. You responded to concerns that this belief indicates an agenda you would bring with you to the bench by saying that your writings were directed at policymakers and not judges. You even seemed to have resorted to that argument with regard to your article entitled “Rethinking Constitutional Welfare Rights.” In that article, you explicitly stated your purpose and the intended audience: “I attempt in this Article a small step toward ‘reformation of thought’ on how welfare rights may be recognized *through constitutional adjudication* in a democratic society.”¹

¹ Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 206 (2008).

- a. **I am certainly aware of Senators’ constant need to evaluate the constitutionality of legislative proposals, but do you contend that policymakers are empowered to engage in “constitutional adjudication”?**

Response: I do not believe policymakers are empowered to engage in constitutional adjudication. My writings have said that Congress, in the exercise of its enumerated powers, has an obligation to consider what the Constitution requires. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339 (2006).

- b. **If Congress fails to provide for a necessary social or economic entitlement, how should courts remedy the situation?**

Response: The Supreme Court has held that courts have no role in creating social or economic entitlements. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). I would faithfully follow the Court’s precedents if I were confirmed. My writings agree with Supreme Court precedent that courts have no role in creating social or economic entitlements. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 247 (2008) (social or economic “rights cannot be reasoned into existence by courts on their own”).

- c. **What tools should judges use to make judgments about the necessity of social entitlements?**

Response: The Supreme Court has held that judgments about the necessity of social entitlements are the purview of legislators, not judges. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). I would faithfully follow the Court’s precedents if I were confirmed. My writings agree with Supreme Court precedent that the necessity of social entitlements is a judgment for legislatures, not courts, to make. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 265 (2008) (courts must defer to “legislative supremacy” in this area).

4. **You have argued that the Constitution creates, for all citizens, a positive right to whatever welfare benefits are necessary for full participation as a citizen of the United States. You have claimed that there is a constitutional right to education and healthcare, in particular. Although you claim these rights arise from the Citizenship Clause of the Fourteenth Amendment, you have also stated that**

“we must be careful to ensure that the ideal of national citizenship does not infuse public education with nativism, cultural conformity, or chauvinistic

nationalism and we should not use the concept of citizenship to deny education to noncitizen children”

- a. Do you believe that the Constitution guarantees people who are here illegally a right to healthcare and welfare benefits?**

Response: The Supreme Court has generally held that the Constitution does not guarantee a right to health care or welfare, and where Congress has restricted the eligibility of noncitizens for such benefits provided by statute, the Court has upheld it. *See Mathews v. Diaz*, 426 U.S. 67 (1976). I would faithfully follow the Court’s precedent if I were confirmed. I have not claimed that there is a constitutional right to health care or welfare. My writings indicate 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. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 244-45, 264-66 & n.324 (2008).

- b. Please explain what you mean by “welfare rights.”**

Response: My writings “use the term ‘welfare right’ to mean an affirmative constitutional right to particular social goods such as ‘education, shelter, subsistence, health care and the like, or to the money these things cost.’” *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 208 n.18 (2008).

- 5. In “Rethinking Constitutional Welfare Rights,” you state that “judicial recognition of welfare rights is best conceived as an act of interpreting the shared understandings of particular welfare goods as they are manifested in our institutions, laws, and evolving social practices.” You also state:**

“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.”

At your hearing, you portrayed as modest the judicial role that you urge in your writings.

- a. What in your proposed methodology would constrain a judge from imposing his or her own policy views in the guise of recognizing rights to a broad array of welfare goods?**
- b. Please cite the passages in your writings or in your speeches that you believe best substantiate your testimony.**

Response: The methodological constraints that prevent judges from imposing their own policy views are discussed in *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 253-66 (2008), and they are illustrated by the Supreme Court opinions discussed in those pages. The principal constraint I propose is that judges may not evaluate the “substantive rationality” of legislative judgments with respect to social welfare provision. *Id.* at 258-60, 263-65; *see id.* at 265 (courts must give “ultimate deference to legislative supremacy”).

6. **You testified: “whatever I may have written in the books and in the articles would have no bearing on my role as a judge.” In your book, *Keeping Faith with the Constitution*, you state that its purpose is to “describe and defend” a “dynamic process of [constitutional] interpretation” that you label “constitutional fidelity.” You wrote: “[i]nterpreting the Constitution requires adaptation of its broad principles to the conditions and challenges faced by successive generations.” Your interpretive approach draws on a variety of considerations: original understandings, “the purpose and structure of the Constitution, the lessons of precedent and historical experience, the practical consequences of legal rules, and the evolving norms and traditions of our society.” Such an approach, you assert, is “richer than originalism or strict construction, more consistent with the history of our constitutional practice, and more persuasive in explaining why the Constitution remains authoritative over two hundred years after the nation’s founding.” Indeed, you claim that your approach “is what enables the American people to keep faith with the Constitution from one generation to the next.”**

In chapter two, you make clear your view that judges should adopt the interpretive approach that you “describe and defend”:

“Fidelity to the Constitution requires judges to ask not how its general principles would have been applied in 1789 or 1868, but rather 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.”

In an interview about your book, you described this approach as follows:

“what we mean by fidelity is that the Constitution should be interpreted in ways that adapt its principles and its text to the challenges and conditions of our society in every single generation.”

- a. **How do you square your testimony that your writings would have no bearing on your role as a judge with the interpretive approach described in your book that you believe is “require[d]” and essential to “enable[] the American people to keep faith with the Constitution from one generation to the next”?**

Response: If confirmed as a judge on the U.S. Court of Appeals for the Ninth Circuit, I would be bound by U.S. Supreme Court and Ninth Circuit precedents. In deciding cases that come before me as a judge, I would set aside the views I have expressed as a scholar and follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in such precedents on how to interpret specific constitutional provisions.

- b. You also argue that “constitutional fidelity” is different from the concept of a “living Constitution.” Please explain the difference.**

Response: The concept of a “living Constitution” misleadingly suggests that the Constitution itself changes over time and can come to mean whatever a judge or a sufficient number of people think it ought to mean. Describing our Constitution as a “living” document unduly minimizes the fixed and enduring character of its text and principles. I use the term “constitutional fidelity” to indicate that constitutional interpretation must take seriously the fact that our Constitution is an enduring written document and, as such, does not grow or evolve except by formal amendment under Article V. Constitutional interpretation must preserve the power and meaning of the text and the principles it expresses. *See Keeping Faith with the Constitution* 24-29 (2009).

- 7. In the above-mentioned interview on your book, you said that “social understanding and popular movements throughout our history have informed our understanding of the Constitution” and that the Constitution “encompass[es] more than the specific applications that the framers had in mind.” You summed up your position by stating that when we interpret the Constitution, “what we’re trying to do is try to *make* the Constitution make sense in terms of how people actually live.”²**

- a. If we accept your notion that unelected, life-tenured judges should be free to “adapt” the Constitution to meet the “challenges and conditions of our society in every single generation,” who will decide when the courts are being faithful to the Constitution and when they are simply being faithful to their own view of what Constitution should be?**

Response: The Supreme Court had held that its interpretation of the Constitution “is the supreme law of the land.” *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *see City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Accordingly, the Supreme Court is the ultimate arbiter of when courts have been faithful to the Constitution.

- b. Justice Oliver Wendell Holmes had a view of the Constitution not unlike yours, and his view is one of which you have written favorably. In *Missouri v. Holland*, Justice Holmes wrote: “when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could**

²ACSBlog, Podcast/Interview with Goodwin Liu on “Keeping Faith with the Constitution,” <http://www.acslaw.org/node/13374> (at 0:16 - 2:32).

not have been foreseen completely by the most gifted of its begetters.”³ Presumably applying that same theory, in *Buck v. Bell*, Justice Holmes upheld a law that called for the compulsory sterilization of patients in state mental hospitals. He said:

“We have seen more than once that the *public welfare* may call upon the best citizens *for their lives*. . . . It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”⁴

It is not my intent to take up the question addressed in the case. It seems, though, that Justice Holmes had “the evolving understandings of the Constitution forged through social movements [and] legislation” in mind when he rendered his decision in *Buck v. Bell*. As terrible as we now view them, at the time, eugenics laws were popular and accepted in society as a whole.

- i. Do you think that Justice Holmes decided that case correctly, given that there was broad consensus that the laws in question met a vital social and economic need consistent with the Constitution?

Response: In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Supreme Court applied the Equal Protection Clause to invalidate a state law that required sterilization as punishment for certain crimes but not for other, similar crimes. Although *Skinner* did not overrule *Buck v. Bell*, it cast considerable constitutional doubt on compulsory sterilization laws. I would faithfully follow the Court’s precedents if I were confirmed.

- ii. If not, how do we decide which broadly-accepted policies are inconsistent with the Constitution?

Response: If confirmed, I would take my instruction from Supreme Court and Ninth Circuit precedents applicable to the specific case or controversy before me.

8. In response to a question from Senator Leahy, you stated at your hearing that “there is no room for invention or creation of new theories. That’s simply not the role of a judge.” Yet, in an article you co-authored, you wrote that

“the meaning of the Constitution cannot be completely discovered by simply sitting down with the text and reading the words. Our [Constitution] has shown a remarkable capacity to absorb new meanings and new commitments

³ 252 U.S. 416, 433 (1920).

⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience.”⁵

In my view, other than through the amendment process set out in Article V, no new meaning or rule can be added to the Constitution. It has a fixed, determinate meaning. If these new “new meanings and new commitments” do not appear in the text or original understanding of the Constitution, then is it not true that they can only become part of our constitutional law through the decisions of judges?

Response: Judges may not add new rules, new meanings, or new commitments to the Constitution beyond its text and principles. The role of a judge is to apply the Constitution to the specific case or controversy before him or her in a way that is faithful to the Constitution’s text and principles. The judiciary is not alone in its obligation to be faithful to the Constitution, and the above-quoted passage referred to historical instances in which “Congress, the courts, and the executive branch have together reflected, refined, and given expression to the fundamental principles that the American people wish to make ‘more firmly law.’” *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439, 444 (2003).

9. **You once wrote that “neither originalism nor strict construction has proven to be a persuasive and durable methodology” for interpreting the Constitution.⁶ Yet, at your hearing, you stated that you “don’t think there’s any one specific way” of interpreting the Constitution. You went on to say that the original meaning of the Constitution “is not, in some sense, the sole or ultimate touchstone against which all other considerations must yield.”**

Thomas Jefferson said that “[o]ur peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by Construction.”⁷ Furthermore, James Madison commented:

“I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers.”⁸

- a. **Do you disagree with Thomas Jefferson and James Madison?**

Response: I am not familiar with those quotations from Thomas Jefferson and James Madison or the context in which they were written or said. In my writings,

⁵ Hillary Rodham Clinton & Goodwin Liu, *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 GEO. L. J. 439, 444 (2003).

⁶ Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, KEEPING FAITH WITH THE CONSTITUTION 5 (2009).

⁷ Letter from Thomas Jefferson to Wilson Carey Nicholas (Sept. 7, 1803), in 10 THE WRITINGS OF THOMAS JEFFERSON 418-19 (Albert E. Bergh ed., 1903).

⁸ Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 192 (G. Hunt, ed., 1910).

I have said that constitutional interpretation must be faithful to “the fixed and enduring character of [the Constitution’s] text and principles.” *Keeping Faith with the Constitution* 29 (2009). I have also written that “constitutional fidelity is not at odds with originalism if originalism is understood to mean a commitment to the underlying principles that the Framers’ words were publicly understood to convey.” *Id.* at 35.

b. Under your theory of interpretation, who will determine when the original meaning of the Constitution must yield to other considerations?

Response: The Supreme Court has made this determination in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the instructions of the Supreme Court when applying the Constitution to specific cases or controversies.

c. Under your theory of interpretation, how is it determined whether the original meaning of the Constitution controls?

Response: The Supreme Court has made this determination in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See *Keeping Faith with the Constitution* 26-28, 47-51 (2009) (discussing those cases). If confirmed, I would faithfully follow the instructions of the Supreme Court when applying the Constitution to specific cases or controversies.

10. You have written that you support only those school choice programs that you believe will lead toward a racial composition of particular schools that, in your words, “reflect[s] the racial and socioeconomic diversity of the metropolitan area—not the local school district—where they are located.”⁹ You also seemed to indicate support for a federal law that would prohibit local school districts from rejecting transferees from other school districts.

a. In view of the Supreme Court’s decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), do you agree that the racial balancing rules you advocated would be unconstitutional, as well as the measures needed to enforce them?

Response: In *Parents Involved*, the Supreme Court held that the use of race in a student assignment policy is subject to strict scrutiny and is thus unconstitutional unless narrowly tailored to serve a compelling government interest. See 551 U.S. 701, 720 (2007). The Court further held that narrow tailoring is not satisfied if “race, for some students, is determinative standing alone” as opposed to “simply

⁹ Goodwin Liu, *School Choice to Achieve Desegregation*, 74 Fordham L. Rev. 791, 808 (2005).

one factor weighed with others in reaching a decision.” *Id.* at 723 (citing *Gratz v. Bollinger*, 539 U.S. 244 (2003)). In a separate opinion, Justice Kennedy said that “having classrooms that reflect the racial makeup of the surrounding community” is one of “our highest aspirations” and that “[a] compelling interest exists in avoiding racial isolation ... [and in] achiev[ing] a diverse student population.” *Id.* at 782, 797-98 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy distinguished individual classifications based on race, which are subject to strict scrutiny, from “mechanisms [that] are race conscious but do not lead to different treatment based on [individual] classification,” which are “unlikely [to] demand strict scrutiny to be found permissible.” *Id.* at 789.

I would faithfully follow the Court’s precedents if I were confirmed. My writings have proposed flexible policies to reward charter schools whose enrollments roughly reflect the racial and socioeconomic diversity of their surrounding communities. See *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* at 808-09. My writings have not proposed any individualized use of race or any other mechanism for achieving diverse enrollments that would violate the Court’s holding in *Gratz* or *Parents Involved*.

- b. Do you believe that the Court’s decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which ruled that school choice programs that include religious schools do not violate the Establishment Clause, was correctly decided?**

Response: *Zelman* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed. My article, *School Choice to Achieve Desegregation*, 74 *Fordham L. Rev.* 791 (2005), treats *Zelman* as settled law.

- i. Have you ever previously expressed your position on this question? When and with whom? What did you say?**

Response: I do not recall any specific conversations I have had about the question presented in *Zelman*.

- c. When you testified that you “do not support racial quotas” and that you believe that “they are unconstitutional,” what precisely did you mean by the term “quotas”?**

Response: I understand “quota” to mean a rigid numerical goal. The paradigmatic example is the University of California, Davis Medical School’s reservation of sixteen seats for minority students in the 100-person entering class that the Supreme Court held unconstitutional in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

- d. **When you testified that you believe that racial quotas “are unconstitutional,” were you describing the current state of case law or were you offering your own best reading of the Constitution?**

Response: I was describing both the current state of case law and my own view of the Constitution.

- e. **Please cite the passages in your writings or in your speeches that you believe best substantiate your testimony that you “do not support racial quotas” and that you believe that “they are unconstitutional.”**

Response: While my writings have analyzed and occasionally raised questions about the Supreme Court’s doctrine on affirmative action, I have stated and accepted the basic proposition that racial quotas are unconstitutional. See *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 762 (2004); *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 383, 389 (1998).

11. **At your hearing, Senator Cornyn asked whether you believed the Tenth Amendment was a “dead letter.” You responded that “[t]he Supreme Court has made amply clear that the Tenth Amendment stands for the fundamental principle of Federalism that imbues our structure of government.” Do you believe that your views favoring strong federal control over education policy are consistent with the dual system of sovereignty inherent in the federalist system and explicit in the Tenth Amendment to our Constitution? Please explain your answer.**

Response: As recently as last year, the Supreme Court has said that “public education” is an “area[] of core state responsibility.” *Horne v. Flores*, 129 S. Ct. 2579, 2593 (2009); see *United States v. Lopez*, 514 U.S. 549, 564 (1995) (identifying “education” as an area “where States historically have been sovereign”). At the same time, the Court has noted the “breadth” of Congress’s power to enact conditional spending programs that touch on matters beyond those specified in Congress’s enumerated powers. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). I would faithfully follow the Court’s precedents if I were confirmed.

My writings on the federal role in education have not proposed any policy that exceeds the scope of Congress’s powers under Supreme Court precedent. My writings acknowledge the need for balance between federal and state policy. For example, I have written in favor of national (but not federal) education standards that states may voluntarily adopt, while also supporting “state and local flexibility to design curriculum, instruction, and assessment” related to those standards. *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044, 2108 (2006). I have written in favor of greater equity in the distribution of federal education aid, see *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 Iowa L. Rev. 973 (2008), while also recognizing that states have a central role in improving school finance, see *Getting Beyond the Facts: Reforming California School Finance* (2008).

12. In August 2003, you participated in a panel on “Segregation, Integration, and Affirmative Action After *Bollinger*” at the American Constitution Society’s national convention. In your questionnaire response, you stated that you do “not have copies of any notes, transcript, or recording” of your presentation. But, as I think you may now know, a transcript of the panel discussion is available online at an American Constitution Society webpage. The transcript shows that your presentation advocated reviving (in your words) “the idea of remedying societal discrimination as a justification for affirmative action.” Although you agreed with the Supreme Court majority in the Michigan racial preference cases that “educational diversity is a compelling interest,” you said that that rationale was too limited and pragmatic. You criticized the Supreme Court precedent that holds that “remedial motives for affirmative action are permissible only where the policy is remedying an institution’s own discrimination, and not society’s,” and you argued that “the issue is really not as settled as it seems” and that people should not “abandon the notion of remedying societal discrimination.”

In his plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), Justice Powell warned:

“[A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”

You plainly do not share Justice Powell’s concern about timelessly “imposing discriminatory legal remedies that work against innocent people.” In your words, “if it seems like the cumulative effects of societal discrimination will take a long time to remedy, that is because it will.” And as you put it, quoting Justice Brennan, concerns that “remedying societal discrimination ... has no foreseeable endpoint” are nothing more than “a fear of too much justice.”

In your comments, you do not recognize, much less give any weight to, the concerns of innocent victims of racial preferences. Instead, your approach would lead to the imposition of racial quotas in education, employment, and contracting *ad infinitum* since any persisting disparities would be attributed to past societal discrimination.

- a. If that is not an accurate reading of your comments, please explain why.

Response: The Supreme Court has held that remedying societal discrimination is not a compelling interest that can justify the use of affirmative action under the Equal Protection Clause. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). I have stated my disagreement with this aspect of *Croson* in my published work. See *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 759-63 (2004). However, I acknowledged in that article and at the August 2003 panel

that *Croson* is the law. I would faithfully follow the Court's precedent, not my personal views, if I were confirmed.

The Supreme Court has held that affirmative action policies are not narrowly tailored unless they have a "logical stopping point." *Croson*, 488 U.S. at 498 (internal quotation marks and citation omitted). I would faithfully follow the Court's precedent if I were confirmed. I have written that "[w]hereas 'diversity' entails no inherent aspiration for an end to race-consciousness, a desire to remedy discrimination and its vestiges logically motivates the hope that affirmative action will some day end." *Brown, Bollinger, and Beyond*, 47 How. L.J. at 761.

The Supreme Court has held that affirmative action policies are not narrowly tailored if they "unduly burden individuals who are not members of the favored racial and ethnic groups." *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (internal quotation marks and citation omitted). I would faithfully follow the Court's precedent if I were confirmed. My writings have affirmed and endorsed this principle. See *Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007) ("race-conscious student assignment is not immune to the risk of improper stereotyping and other harms associated with government decision-making based on race"); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1099 (2002) ("the risk of improper stereotyping [of white applicants] ... raises valid constitutional concerns").

b. Do you believe that the Constitution, properly interpreted, permits the government to engage in so-called "reverse" racial discrimination against whites or males?

Response: The Supreme Court has set forth the applicable standards for evaluating "reverse" racial discrimination policies in cases such as *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989). I would faithfully follow the Court's precedents if I were confirmed. I have agreed with Supreme Court precedent that all government uses of race, including affirmative action, are constitutionally suspect and therefore subject to strict scrutiny. See *Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1097-99 (2002); *Segregation, Integration, and Affirmative Action After Bollinger* (American Constitution Society panel, 2003) (transcript at 30).

The Supreme Court has set forth the applicable standards for evaluating policies that employ gender classifications in cases such as *Nguyen v. INS*, 533 U.S. 53 (2001), *United States v. Virginia*, 518 U.S. 515 (1996), *Califano v. Webster*, 430 U.S. 313 (1977), *Califano v. Goldfarb*, 430 U.S. 199 (1977), and *Craig v. Boren*, 429 U.S. 190 (1976). I would faithfully follow the Court's precedent if I were

confirmed. I have written that “[t]he application of heightened scrutiny to gender classifications is now a firmly settled principle of constitutional law.” *Keeping Faith with the Constitution* 56 (2009).

13. For each of the following, please explain your position. I am asking for views and not whether, if confirmed, you would follow the Supreme Court’s precedents.

a. Do you believe that the Constitution, properly interpreted, confers a right to same-sex marriage?

Response: I have not previously expressed any view on this issue, and I believe it would not be appropriate for me to do so now.

In 2007, I joined an amicus brief filed in the California Supreme Court arguing that the state’s definition of marriage violated the California Constitution. The brief urged the court to “rely solely on California, rather than federal, constitutional law” and noted that “California’s Constitution has often been construed to provide broader protection than its federal counterpart.” Brief of Amicus Curiae Professors of Constitutional Law at 3, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). The brief discussed federal cases “to illustrate” an “analytic methodology for interpreting the California Constitution.” *Id.* The brief expressed no view and made no attempt to resolve whether California’s definition of marriage violated the U.S. Constitution.

b. Do you believe that the Court’s Second Amendment decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) was correctly decided?

Response: My writings have discussed the interpretive methodology of the majority and dissenting opinions in *Heller* without expressing any view on the merits. See *Keeping Faith with the Constitution* 30-33 (2009). *Heller* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

c. Do you believe that the Constitution, properly interpreted, confers a right to human cloning?

Response: I have not previously expressed any view on this issue, and I believe it would not be appropriate for me to do so now.

d. Do you believe that the Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which conferred constitutional habeas rights on aliens detained as enemy combatants at Guantanamo, was correctly decided?

Response: *Boumediene v. Bush* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- e. **Do you believe that the Court’s decision in *Lee v. Weisman*, 505 U.S. 577 (1992), which held that a nonsectarian invocation at a public school graduation violated the Establishment Clause, was correctly decided?**

Response: *Lee v. Weisman* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- f. **Do you believe that the Court’s decision in *Morrison v. Olson*, 487 U.S. 654 (1988), which ruled that the independent counsel statute did not violate the constitutional separation of powers, was correctly decided?**

Response: *Morrison v. Olson* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- g. **Do you believe that the Constitution, properly interpreted, confers a right to engage in obscene speech?**

Response: The Supreme Court has said that “[o]bscene speech ... has long been held to fall outside the purview of the First Amendment,” *Ashcroft v. ACLU*, 535 U.S. 564, 574 (2002), and I would faithfully follow the Court’s precedents if I were confirmed.

- h. **In 2008, the Supreme Court ruled in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) that the death penalty for the crime of raping a child always violates the Eighth Amendment. Do you believe that the Court reached the correct ruling?**

Response: *Kennedy v. Louisiana* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- i. **In 2007, the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), by a vote of 5 to 4, rejected a facial challenge to the Federal Partial-Birth Abortion Act, but left open the possibility that as-applied challenges could be brought to narrow the scope of the Act’s application. Do you believe that the Court’s ruling in *Gonzales v. Carhart* was correctly decided?**

Response: I have cited *Gonzales v. Carhart* as an example of “lack of deference to judicial precedent,” *Keeping Faith with the Constitution* 40 & n.72 (2009), but have not expressed any view on the correctness of the ruling. *Gonzales v. Carhart* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

- j. **Do you believe that the Constitution, properly interpreted, confers a right to abortion?**

Response: My writings have “locate[d] *Roe v. Wade* within the broader constellation of cases extending constitutional protections to individual decision-making on intimate questions of family life, sexuality, and reproduction.” Keeping Faith with the Constitution 97 (2009). I have written that “the joint opinion in *Planned Parenthood v. Casey* was correct to note in 1992 that ‘[a]n entire generation has come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions,’” and that “[t]oday, no woman of reproductive age in the United States has ever lived under a regime where she did not have the constitutional right to control her fertility.” *Id.* at 104.

k. Do you believe that the Constitution, properly interpreted, compels taxpayer funding of abortion?

Response: The Supreme Court has held that the Constitution does not compel taxpayer funding of abortion, see *Rust v. Sullivan*, 500 U.S. 173 (1991); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1997), and I would faithfully follow the Court’s precedents if I were confirmed.

l. Do you believe that the Constitution, properly interpreted, prohibits informed consent and parental involvement provisions for abortion?

Response: The Supreme Court has upheld informed consent and parental involvement provisions in abortion regulations, see *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and I would faithfully follow the Court’s precedents if I were confirmed.

14. According to your April 5th questionnaire supplement, during a panel discussion entitled “The Legacy of *Brown v. Board of Education*” at the American Constitution Society’s 2004 national convention, you observed that *Brown v. Board of Education* “overruled” *Plessy v. Ferguson* and *Lawrence v. Texas* “overruled” *Bowers v. Hardwick*. You then said:

“I’m not saying there’s anything inevitable about this, but if we work hard, if we stick to our values, if we build a new moral consensus, then I think someday we will see Millikan [sic], Rodriguez, Adarand, be swept into the dustbin of history.”

When you referenced “Adarand,” you were presumably referring to the court’s 1995 ruling in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), in which a majority opinion by Justice O’Connor held that racial classifications imposed by the federal government must be subject to strict scrutiny. I asked you about that statement at your hearing, and you responded that you thought

“the only agreement [you] had with *Adarand* was its extension of the principles of the *Croson* case, which dealt with the obligations of states rather

than the Federal Government, with respect to the latitude given to implement Affirmative Action programs.”

I presume you were speaking of *City of Richmond v. J.A. Croson Co*, 488 U.S. 469 (1989), which affirmed a decision of the Fourth Circuit holding a city’s public contracting set-aside plan unconstitutional under the strict scrutiny test.

- a. **Was your testimony intended to suggest that it should be easier for the United States government to discriminate on the basis of race than it is for the state governments to do so? Please explain your answer.**

Response: No. *Adarand* extended the principles of *Croson* to the federal government. *Adarand* and *Croson* are precedents of the Supreme Court, and I would faithfully follow those precedents if I were confirmed. My writings agree with *Adarand* and *Croson* that all governmental classifications based on race are subject to strict scrutiny. See *Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1097-99 (2002). My testimony was meant to indicate that I have disagreed with *Croson* and, by extension, *Adarand* insofar as those cases held that societal discrimination is not a constitutionally valid purpose for implementing affirmative action. See *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 759-63 (2004). I recognize, however, that *Adarand* and *Croson* are the law, and I would follow the Court’s precedents, not my personal views, if I were confirmed.

- b. **If your answer to subpart (a) includes a reference to Section 5 of the Fourteenth Amendment, please explain any tension there is between that answer and the application of Equal Protection principles to the Federal Government through the Due Process Clause of the Fifth Amendment, as endorsed by the Court in *Washington v. Davis*, 426 U.S. 229 (1976).**

Response: My answer to subpart (a) does not include a reference to Section 5 of the Fourteenth Amendment.

- c. **If the Court were to overrule *Adarand* and discard the strict scrutiny standard of review of federal laws that treat people differently based solely on their race, what do you think should be the standard for determining if such a law is constitutional?**

Response: I have agreed with *Adarand* that all governmental classifications based on race are subject to strict scrutiny. See *Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1097-99 (2002); *Segregation, Integration, and Affirmative Action After Bollinger* (American Constitution Society panel, 2003) (transcript at 30).

- i. **Should this standard of review be the same, regardless of whether the law helps or harms minority groups?**

Response: Yes.

- d. **The Court’s decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), prevented courts from ordering school desegregation remedies across district lines except in situations where the plaintiffs could prove that “there has been a constitutional violation within one district that produces a significant segregative effect in another district.”**

- i. **Do you agree that the overruling of *Milliken* would make it much easier for courts to order massive busing of students across district lines in order to achieve so-called racial balancing in the schools?**

Response: *Milliken* is a precedent of the Supreme Court, and I would faithfully follow it if I were confirmed. If *Milliken* were overruled, federal district courts could order interdistrict remedies where necessary to eliminate the vestiges of unconstitutional *de jure* segregation.

- ii. **You have previously acknowledged that *Milliken* “seems firmly embedded in the law.” Is there anywhere besides this 2004 panel where you have called for *Milliken* to be “be swept into the dustbin of history”?**

Response: No. Although my writings have expressed concern that *Milliken* contributed to the isolation of inner cities from surrounding suburbs, see *Brown, Bollinger, and Beyond*, 47 Howard L.J. 705, 724-27 (2004); *School Choice to Achieve Desegregation*, 74 Fordham L. Rev. 791, 792-93 (2005), I have not called for *Milliken* to be overruled. See *School Choice to Achieve Desegregation*, 74 Fordham L. Rev. at 793 (“*Milliken* seems firmly embedded in the law”). Instead, I have proposed school choice initiatives, including charter schools and vouchers, to address the challenge of urban-suburban integration of public schools. See *School Choice to Achieve Desegregation*, 74 Fordham L. Rev. at 808-11; *Real Options for School Choice*, N.Y. Times, Dec. 4, 2002, at A35. These are policy proposals; I have not urged the Court to revisit *Milliken*’s holding that courts may not order busing across district lines.

In addition to references to *Brown* and *Lawrence*, the “dustbin” quotation was preceded by my observation that “[t]he Women’s Movement overcame cases like *Bradwell vs. Illinois* and *Hoyt vs. Florida*,” indicating that judicial decisions can become disfavored in ways other than being overruled. The Legacy of *Brown v. Board of Education* (American Constitution Society panel, 2004) (transcript at 22).

- e. **In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court held that education is not a fundamental right subject to strict judicial scrutiny under the Fourteenth Amendment. A contrary ruling would have subjected systems of school finance and all other aspects of public education to federal judicial micromanagement.**

- i. **Do you disagree with the Supreme Court’s holding in *Rodriguez* that local governments have the power to determine how to finance their local schools?**

Response: No. My writings have urged “a decrease in regulation and an increase in local flexibility” in the area of school finance. *Getting Beyond the Facts: Reforming California School Finance* 16 (2008).

- ii. **Do you acknowledge that allowing federal courts to review the adequacy of all local school finance systems – even in cases where there is no evidence whatsoever of any discriminatory intent in the design of that system – could lead to a greatly expanded federal role in education?**

Response: Yes. While noting that the Supreme Court has left open the question whether the Constitution guarantees a minimally adequate education, my writings have not urged federal courts to answer this question or to review the adequacy of local school finance systems. See *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339 (2006).

- iii. **Is the power to determine local school finance systems ever mentioned as a power of the federal government in the text of the Constitution?**

Response: No.

- iv. **Besides this 2004 panel, on what other occasions have you called for *Rodriguez* to “be swept into the dustbin of history”?**

Response: No. Although I have expressed concern about the *Rodriguez* decision in *Brown, Bollinger, and Beyond*, 47 Howard L.J. 705, 722-24, 765-68 (2004), I have not called for *Rodriguez* to be overruled. I have written that *Rodriguez* reflects “considerations of judicial restraint arising from the countermajoritarian difficulty and limitations on institutional competence.” *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 338 (2006). For that reason, most of my scholarly work on equal educational opportunity has been directed at legislators and policymakers, not the courts.

In addition to references to *Brown* and *Lawrence*, the “dustbin” quotation was preceded by my observation that “[t]he Women’s Movement overcame cases like *Bradwell vs. Illinois* and *Hoyt vs. Florida*,” indicating that judicial decisions can become disfavored in ways other than being overruled. The Legacy of *Brown v. Board of Education* (American Constitution Society panel, 2004) (transcript at 22).

15. **In the context of the Due Process Clause of the Fourteenth Amendment, the Supreme Court has taken the view that the Constitution guarantees only negative rights. Former Chief Justice Rehnquist, in *Deshaney v. Winnebago County*, 489 U.S. 189 (1989), held that “the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.” I recognize that the Citizenship Clause does not use the same language as the Due Process Clause and that the Citizenship Clause affirmatively states that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” But that language does not obligate the federal government to do anything.**

- a. **Why do you believe that we should depart from this settled understanding of the Fourteenth Amendment and instead take the view that the Constitution guarantees welfare benefits?**

Response: My views on the meaning of the Citizenship Clause are set forth in my article, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006).

- b. **Senator Jacob Howard of Ohio was the author of the Citizenship Clause. When the Senate was considering the Fourteenth Amendment, he said that the clause would simply recognize that “every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.” Do you disagree with the author of the Citizenship Clause, that it merely recognizes that, if you are born in this country, you are a citizen?**

Response: By its terms, the Citizenship Clause of the Fourteenth Amendment guarantees U.S. citizenship to persons born in the United States. I do not know whether the quotation above reflects Senator Howard’s complete understanding of the national citizenship guarantee. My writings have cited statements by Senator Howard in which he said that citizenship entails various privileges, immunities, and rights, and that Section 5 of the Fourteenth Amendment empowers Congress to protect “these fundamental rights and privileges which pertain to citizens of the United States.” Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (statement of Sen. Howard), cited in *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 367 (2006).

16. In a 2001 interview with Chicago Public Radio, then-State Senator Obama made some comments that expressed a view very similar to your own. Obama commented that the Warren Court

“wasn’t that radical. It didn’t break free from the essential constraints that were placed by the founding fathers in the Constitution, at least as it’s been interpreted, and the Warren court interpreted it in the same way that generally the Constitution is a charter of negative liberties. It says what the states can’t do to you, it says what the federal government can’t do to you, but it doesn’t say what the federal government or the state government must do on your behalf. And that hasn’t shifted. One of the I think tragedies of the civil rights movement was because the civil rights movement became so court focused, I think that there was a tendency to lose track of the political and community organizing and activities on the ground that are able to put together the actual coalitions of power through which you bring about redistributive change and in some ways we still suffer from that.”

Later in that same broadcast, a caller asked: “[Mr. Obama] made the point that the Warren Court wasn’t that radical with economic changes. My question is, is it too late for that kind of reparative work, economically, and is that the appropriate place for reparative economic work to take place – the court – or would it be legislation at this point?” Obama responded that he was “not optimistic about bringing about major redistributive change through the courts.”

- a. Given your view that the Constitution guarantees welfare benefits, and given that you argued in your article *Rethinking Constitutional Welfare Rights* that courts may recognize welfare rights through constitutional interpretation, is it fair to say that you believe that the courts are the appropriate place for “redistributive change”?
- i. If so, what would be included in this “redistributive change”?
- ii. Who would be responsible for the cost?

Response: The Supreme Court has held that courts have no role in creating social or economic entitlements and that judgments about the necessity of social or economic entitlements are the purview of legislators, not judges. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31-33 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). I would faithfully follow the Court’s precedents if I were confirmed. My writings have said that courts are generally not the appropriate place for “redistributive change.” See *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203 (2008). My writings agree with Supreme Court precedent that courts have no role in creating social or economic entitlements. See *id.* at 247 (social or economic “rights cannot be reasoned into existence by courts on their own”); *id.* at 252 (the judicial role “does not license courts to declare rights to entirely new benefits or

programs not yet in existence”); *id.* at 264 n.324 (there is “no role for courts” to question Congress’s decision in the 1996 welfare overhaul to end the entitlement of poor families to cash assistance). My writings further agree with Supreme Court precedent that the necessity of social or economic entitlements is a judgment for legislatures, not courts, to make. *See id.* at 210 (“the existence of any welfare right depends on democratic instantiation”); *id.* at 265 (courts must defer to “legislative supremacy” in this area).

17. In an interview with the Brennan Center for Justice in 2008, you commented on the Federal government’s bailout of A.I.G., saying you believed it was

“a symbol, it’s the . . . tip of the iceberg of, you know, a much larger problem of . . . wealth, you know, flowing to a small number of people . . . even though the productivity and the . . . ingenuity of America is really due to a quite large number of people. And I think the current debate, right now, is how to engineer a set of rules that are far more fair with respect to the average American.”¹⁰

a. Do you believe it is a legitimate end of the federal government to manage the economy to control the distribution of wealth among individual citizens?

Response: The Supreme Court has held that Congress has wide latitude to enact economic legislation that affects wealth distribution. *See, e.g.,* FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980); Wickard v. Filburn, 317 U.S. 111 (1942). I would faithfully follow the Court’s precedents if I were confirmed.

b. Do you believe the courts have a role in “engineering a set of rules that are far more fair” concerning the redistribution of wealth in this country?

Response: No. The role of courts is to decide specific cases or controversies that come before them based on the facts and applicable law.

18. With respect to traditional Fourteenth Amendment analysis, Professor Mark Tushnet has written:

“The state-action doctrine contributes nothing but obfuscation to constitutional analysis. It works as a bogeyman because it appeals to a vague libertarian sense that Americans have about the proper relation between them and their government. It seems to suggest that there is a domain of freedom unto which the Constitution doesn’t reach. We would be well rid of the doctrine.”

¹⁰ YouTube-Prof. Goodwin Liu Interviewed at White Oak, <http://www.youtube.com/watch?v=eY1F07YqJRY>.

You yourself have argued that “[t]he Citizenship Clause [of the Fourteenth Amendment] is an affirmative recognition of national citizenship and its essential rights. Congress may protect those rights regardless of state action or inaction.”¹¹

- a. Given your belief that Congress may act “regardless of state action or inaction,” is it fair to say that you agree with Professor Tushnet that there is no “domain of freedom unto which the Constitution doesn’t reach”?**

Response: I am not familiar with Professor Tushnet’s views on the state action doctrine. The Supreme Court has held that Congress’s power under Section 5 of the Fourteenth Amendment is limited by the state action doctrine. *See United States v. Morrison*, 529 U.S. 598, 620-21 (2000); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). If confirmed, I would faithfully follow the Court’s precedents, not my personal views.

- b. Do you believe the state-action doctrine should be abolished?**

Response: The Supreme Court has consistently affirmed the state-action doctrine as a key limitation on federal power and important safeguard of individual liberty. *See United States v. Morrison*, 529 U.S. 598, 620-21 (2000); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1992); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). I would faithfully follow the Court’s precedents if I were confirmed.

- c. Some academics believe the Constitution is outdated because it does not restrict the behavior of private actors. Given your views on state action and inaction, is it fair to conclude that you subscribe to that notion?**

Response: My writings do not take the view that the Constitution is outdated. To the contrary, I have written that “the United States Constitution is the world’s most enduring written constitution” and that “[t]he United States Constitution ... not only endures—it thrives.” *Keeping Faith with the Constitution* 1, 109 (2009). The Supreme Court has consistently affirmed the state-action doctrine as a key limitation on federal power and important safeguard of individual liberty. *See United States v. Morrison*, 529 U.S. 598, 620-21 (2000); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 936 (1992); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). I would faithfully follow the Court’s precedents if I were confirmed.

- 19. Some legal commentators believe that the Privileges or Immunities Clause of the Fourteenth Amendment was eviscerated by the Supreme Court in the *Slaughterhouse Cases*. Professor Erwin Chemerinsky has said that “in the long term, the Court should interpret the Constitution as creating a right to minimum entitlements for all Americans to the necessities of life: food, shelter, and medical**

¹¹ Goodwin Liu, *National Citizenship and The Promise of Equal Opportunity*, in *THE CONSTITUTION IN 2020*, 127 (Jack M. Balkin & Reva B. Siegels, eds., 2009).

care.”¹² He went on to predict that, someday, “a more humane Supreme Court will find a constitutional right for every person to have the minimum entitlements needed for subsistence.”¹³ In doing so, he argued that “the Privileges or Immunities Clause of the Fourteenth Amendment might be construed to include a right to basic entitlements.”¹⁴ You have said that “[n]ew rights would not ‘flood in’ if *Slaughter-House* were reversed today” but that “[i]t would be case-by-case, and people would argue over the meaning.”¹⁵

- a. **Do you agree with Professor Chemerinsky that the Privileges or Immunities Clause grants every person a right to force taxpayers to provide them with “food, shelter, and medical care”?**

Response: No. My writings have not claimed that there is a constitutional right to food, shelter, or medical care.

- b. **You have argued that, “at a minimum,” the Privileges or Immunities clause stands for the proposition that all citizens enjoy substantive rights essential to realizing “equal standing in the national political community,” and that both the courts and the Congress “may determine what civil and political rights, and what social and economic entitlements are necessary to make national citizenship meaningful and effective.”¹⁶ It seems like you view the Privileges or Immunities Clause as establishing positive rights.**

- i. **How do you square your view with the text of the Privileges or Immunities Clause, which speaks in negative terms, saying “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”?**

Response: The Supreme Court has held that Section 1 of the Fourteenth Amendment “is prohibitory in its character, and prohibitory upon the states.” *The Civil Rights Cases*, 109 U.S. 3, 10 (1883); *see United States v. Morrison*, 529 U.S. 598, 620-21 (2000). If confirmed, I would faithfully follow the Court’s precedents, not my personal views. The above quotation from my article refers to Congress’s power to enforce the Citizenship Clause of the Fourteenth Amendment, not the Privileges or Immunities Clause. *See National Citizenship and Equality of Educational Opportunity*, 116 Yale L.J. Pocket Part 145, 147 (2006) (“the citizenship guarantee is affirmatively declared”).

¹² Erwin Chemerinsky, *Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich*, 6 CHAP. L. REV. 31, 33 (2003).

¹³ *Id.* at 42.

¹⁴ *Id.* at 40.

¹⁵ Jess Bravin, *Rethinking Original Intent*, WALL STREET JOURNAL, Mar. 14, 2009, available at <http://online.wsj.com/article/SB123699111292226669.html#printMode>.

¹⁶ Goodwin Liu, *National Citizenship and Equality of Educational Opportunity*, 116 YALE L. J. 145, 147 (2006).

ii. What enumerated rights do you think are included within the scope of the Privileges or Immunities Clause?

Response: While noting that there are “fundamentally differing views concerning the coverage of the Privileges or Immunities Clause,” the Supreme Court has applied the clause to protect the right of a newly arrived citizen of a state to enjoy the same privileges and immunities enjoyed by other citizens of the same state. *Saenz v. Roe*, 526 U.S. 489, 503-04 (1999). I would faithfully follow the Court’s precedents if I were confirmed. My writings have not expressed any view on what enumerated rights are included within the scope of the Privileges or Immunities Clause. I recall one panel discussion in which I said that the privileges or immunities of national citizenship include a guarantee of equality. See *The Privileges or Immunities Clause*, American Constitution Society Conference on “The Second Founding and the Reconstruction Amendments: Toward a More Perfect Union” (2008).

c. In your view, is there any objective standard in the text of the Constitution for determining whether a state’s law violates the Privileges or Immunities Clause, if that clause creates a positive right to “minimum entitlements for all Americans”?

Response: The Supreme Court has applied the Privileges or Immunities Clause in cases such as *Saenz v. Roe*, 526 U.S. 489 (1999), and I would faithfully follow the Court’s precedents if I were confirmed. My writings have not expressed any view on the standards for determining whether a state’s law violates the Privileges or Immunities Clause if the clause creates a positive right to minimum entitlements.

20. Professor Thomas Grey of Stanford Law School has stated that the Ninth Amendment constitutes a “license to constitutional decisionmakers to look beyond the substantive commands of the constitutional text to protect fundamental rights not expressed therein.” It was well-understood by the framers that the guarantees of the Bill of Rights comprised a partial enumeration of rights reserved to the people. The Ninth Amendment was designed to dispel any notion that by enumerating particular rights in the Bill of Rights, the people had implicitly relinquished to the new federal government any rights not set listed. As Justice Kennedy has written, the Ninth Amendment expresses a “recognition of state sovereignty . . . and role of states in defining human rights.” It is not an open-ended grant of judicial authority that would allow federal judges to transform a statement of limited constitutional government into a warrant for unlimited government.

a. Do you agree with Justice Kennedy that the Ninth Amendment expresses a “recognition of state sovereignty . . . and role of states in defining human rights”?

Response: My writings have not expressed any view on the meaning of the Ninth Amendment beyond noting that the Framers adopted it “to make clear that the bill of rights did not comprise an exhaustive list of fundamental rights.” *Keeping Faith with the Constitution* 14 (2009).

- b. **Do you agree with Professor Grey that the Ninth Amendment is a “license” for judges to “look beyond the substantive commands of the constitutional text” in determining if the federal Constitution protects a certain behavior?**

Response: My writings have not expressed any view on the meaning of the Ninth Amendment beyond noting that the Framers adopted it “to make clear that the bill of rights did not comprise an exhaustive list of fundamental rights.” *Keeping Faith with the Constitution* 14 (2009). In general, because our Constitution is a written document, interpretation of the Constitution must be an interpretation of its text, although the Supreme Court has recognized some non-textual constitutional principles as well. *See, e.g.,* *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 382-83 (2004) (separation of powers); *Alden v. Maine*, 527 U.S. 706, 728-29 (1999) (state sovereign immunity).

21. **According to your April 5th questionnaire supplement, you authored a 2004 blog post, which said that you had “launched a new project . . . called ‘Rethinking Rodriguez: Education as a Fundamental Right.’” You wrote that “[t]he project was not focused on mapping a litigation strategy for overruling [*San Antonio Independent School District v.*] *Rodriguez*, although that might be one result.”¹⁷**

- a. **Are all the conclusions you reached during this project reflected in your published work? If not, please provide them to the Committee.**

Response: Yes. My published work from the project consists of two articles—*Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006), and *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. Rev. 2044 (2006)—as well as any publications that are derivative of those articles.

- b. **Have those conclusions influenced your thinking about the Fourteenth Amendment?**

Response: Yes. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006).

- c. **In the same blog post, you argued that “[f]orging a strong link between a right to education and the guarantee of national citizenship is a potential beachhead for broader thinking on social and economic rights.”¹⁸ Do you**

¹⁷ The Constitution in 2020: Post by Goodwin Liu, <http://constitutionin2020.blogspot.com/2004/11/post-by-goodwin-liu.html>.

¹⁸ *Id.*

think judges should participate in this “broader thinking on social and economic rights?”

Response: My writings in this area have been directed primarily at legislators and policymakers, not judges. I have written on the limited role of courts in this area in *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008).