Responses of Goodwin H. Liu
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Charles Grassley

1. **Senator Feinstein asked you to explain your judicial philosophy of constitutional fidelity, and its consideration of "evolving norms and social understandings along with the text, principle, and precedent in interpreting the Constitution." Referring to *Katz*, you explained that "this was not just a matter of sort of recognizing new technology. It was a matter of recognizing the social norms that had grown up around using telephones."**

   a. **Did the Court consider "evolving norms and social understandings" when it decided *Roe*?**

      Response: Yes. The Supreme Court undertook an historical inquiry into the evolution of English common law, English statutory law, state common law and statutes, and the positions of professional medical, public health, and legal associations, among other sources, in deciding whether the right asserted in *Roe* "can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' " Roe v. Wade, 410 U.S. 113, 129-47, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

   b. **If so, was such consideration appropriate?**

      Response: Yes. The historical inquiry in *Roe* is generally consistent with the Supreme Court's approach in a wide range of substantive due process cases. The Court has said that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). In "examining our Nation's history, legal traditions, and practices," *id.* at 710, the Court has looked first and foremost to the practices of the states, both historical, *see id.* at 710-11, 715-16, and contemporary, *see id.* at 716-19. The Court has also looked to the English common law and to colonial practices. *Id.* at 711-14. If confirmed, I would faithfully follow the Court's precedents. In describing the Court's approach in this area, I have written that "[i]n order to keep faith with the text and principles of the Constitution, judicial decisions have interpreted its guarantee of liberty in light of our society's evolving traditions and shared understandings of personal identity, privacy, and autonomy." Keeping Faith with the Constitution 98 (2009).

   c. **Please describe how the Court should endeavor to uncover and recognize social norms.**

      Response: I believe judges may not rely on their personal or subjective beliefs in uncovering or recognizing social norms. In many areas of constitutional law, the

Supreme Court has set forth legal standards that require consideration of social norms, and the Court has appropriately made clear that such consideration is an objective, not subjective, inquiry. In some areas, the Court has instructed judges to consider societal norms by applying an objective standard of reasonableness. *See, e.g.*, Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (analyzing Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms"); Bond v. United States, 529 U.S. 334, 338 (2000) (analyzing 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"). In other areas, the Court has looked to state and federal legislation as objective indicators of societal norms, *see, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313-17 (2002) (examining state and federal laws in deciding whether the Eighth Amendment prohibits execution of persons who are mentally retarded), or to well-established social facts, *see, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (holding that the Second Amendment protects those weapons "in common use at the time" and that "handguns are the most popular weapon chosen by Americans for self-defense in the home"). In these and other areas, I would faithfully follow the applicable standards and instructions for objective inquiry set forth by the Supreme Court if I were confirmed.

2. **At your hearing, I asked about a chapter of your book in which you defended, in your words, a "constellation of cases extending constitutional protection to individual decision making on intimate questions of family life, sexuality, and reproduction." Your book then argues that these cases, "from *Griswold* . . . to *Lawrence*" are "wholly consistent with an approach to constitutional interpretation that reads original commitments and contemporary social contexts together. The evolution of constitutional protection for individual autonomy in certain areas of intimate decision making reflects precisely the rich form of constitutional interpretation this book envisions." I asked whether these cases, given that they "reflect precisely the rich form of constitutional interpretation this book envisions," demonstrate fidelity to the Constitution. You did not answer. Rather, you said only that they are precedents of the Court that you would follow. I am not asking whether you would follow precedent. I am not asking whether you personally agree with those precedents. I am not asking whether you would employ, as a judge, the judicial philosophy you have advocated. I am asking only if you are willing to confirm what your book suggests. Do you believe *Roe* and its progeny demonstrate fidelity to the Constitution?**

   Response: Yes. In describing *Roe*, its progeny, and its precursors, I have written that the methodology of those cases "keep[s] faith with the text and principles of the Constitution." Keeping Faith with the Constitution 98 (2009).

3. **During your first hearing, you said, "I think foreign precedent can be cited in the same way that a Law Review article might be cited, which is simply to say, judges can collect ideas from anyplace that they find it persuasive." You went on to draw a**

distinction between citing foreign law for "authority," as opposed to merely looking to foreign law for "ideas or guidance."

a. Please explain the rationale for the claim that "judges can collect ideas from any place that they find it persuasive."

Response: My statement was intended to mean that I believe there is nothing inappropriate about judges having a well-informed and broad-minded perspective on the legal issues that come before them. Indeed, the Supreme Court has regularly cited books and law review articles to support or illuminate aspects of its legal reasoning. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (citing a multitude of books and law review articles bearing on the text and history of the Second Amendment).

b. Please explain how the distinction you draw is meaningful.

Response: When the Court cites a law review article to support or illuminate an aspect of its legal reasoning, no one would say that the Court has treated the law review article as a binding legal authority in its decision. I believe foreign law should be treated the same way: just as law review articles have no legal authority in the process of adjudication, foreign law also has no legal authority in the process of adjudication.

c. Even if the distinction you draw is meaningful, please explain why judges should look to foreign law for "ideas or guidance" at all. In what way is foreign law relevant?

Response: In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas. I have written that foreign law may provide ideas on how to address "common legal problems faced by constitutional democracies around the world." *Developments in U.S. Education Law and Policy*, 2 Daito L. Rev. 17, 27 (2006). The corollary is that 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.

4. Prior to your nomination, you made your views on same-sex marriage well known. You joined a brief in the California Supreme Court - a brief which relied primarily on federal law - challenging California's ban on same-sex marriage. You signed a letter concluding the legal arguments of those who supported Prop. 8 were false. You authored a letter in the *L.A. Times* arguing that permitting domestic partnerships, and not same-sex marriage, was an unacceptable "separate-but-equal regime." Yet, in a written response to Senator Coburn, you would not state whether you believe the federal Constitution confers a right to same-sex marriage. In fact, you indicated you have never expressed a view on this issue.

a. Do you believe the federal Constitution confers a right to same-sex marriage?

Response: I have not previously expressed any view on whether the federal Constitution confers a right to same-sex marriage, and because that issue may come before me as a judge if I am confirmed, I believe it is not appropriate for me to do so now.

b. The first argument in your brief to the California Supreme Court was entitled "Constitutional Interpretation Appropriately Takes Into Account Changes in Social Circumstances and Cultural Understanding." Do you stand by that argument?

Response: Yes.

c. In *Keeping Faith with the Constitution*, you wrote that "the history of litigation over the right to marry" is an example of how "changes in social understandings often, <u>and rightly</u>, change how constitutional principles are applied." (emphasis added). Regardless of your view on whether the Constitution confers a right to same-sex marriage, what sources should a judge utilize to determine "social understandings" regarding same-sex marriage?

Response: Because the question of how, if at all, courts should determine social understandings regarding same-sex marriage may come before me as a judge if I am confirmed, I believe it is not appropriate for me to answer this question.

d. Assuming a judge is capable to accurately discerning "social understandings," please explain how a judge should take them into account when considering the constitutionality of same-sex marriage?

Response: Because the question of how, if at all, courts should take into account social understandings regarding same-sex marriage may come before me as a judge if I am confirmed, I believe it is not appropriate for me to answer this question.

5. At your first hearing, you argued that the job of a law scholar "is to probe, criticize, invent, and be creative," but the role of a judge is different. Your sworn testimony before the Senate Judiciary Committee during consideration of now-Justice Alito's nomination was one of the few opportunities you have had to set aside your role as a law professor and instead offer a neutral and objective assessment. You have characterized that testimony as "unduly harsh" and an exercise of "poor judgment." Considering this, how can the Committee be assured that you will set aside your strongly held views, if confirmed?

Response: I believe there are three reasons the Committee can be assured that, if confirmed, I will set aside my own views and render decisions impartially based on the

facts and applicable law in each case. First, I demonstrated this ability when a committee of the California Legislature asked me to testify on Proposition 8 as a neutral legal expert in October 2008. Although I personally opposed Proposition 8, I testified (correctly) that Proposition 8 could not be overturned by the California Supreme Court under applicable state constitutional law precedents. Second, my scholarly writings demonstrate my ability to objectively state and apply the law. Where my writings have criticized current law or proposed a different approach, I have been careful to state the law accurately and to distinguish clearly between what the law is and what I might want it to be. My writings recognize this crucial difference, and if confirmed, I would faithfully follow what the law is and not what I might want it to be. Third, I fully understand and respect the difference between the role of a scholar and the role of a judge. Although both roles require fairness, open-mindedness, and intellectual rigor, they are fundamentally different in that a judge, unlike a scholar, has an absolute duty to follow the law, even when it leads to an outcome with which he personally disagrees.

I wish to add one clarification on the question as stated above. My acknowledgment of "poor judgment" pertains to one paragraph of the seventeen pages of testimony I submitted and not to the testimony as a whole. Apart from that paragraph, the rest of my testimony involved careful and thorough analysis of legal opinions that Justice Alito had written before his confirmation to the Supreme Court.

6. **In response to a question from Senator Feinstein, you said that references in your book to "evolving norms" were merely descriptions of how evolving norms "inform the Supreme Court's elaboration of constitutional doctrine." Likewise, you said "the notion of evolving norms is simply a reference to – it is a way to describe how the Supreme Court has applied some of the text and principles of the Constitution to specific cases and controversies." You have also argued repeatedly that the theory of constitutional interpretation you defend in your book will not influence your decisions as a judge. Instead, you will simply follow your understanding of Supreme Court precedent and instruction. If your book, and what you call "constitutional fidelity," is merely an attempt to describe Supreme Court precedent, and if you would follow your best understanding of that precedent, why is it not fair to conclude that your decisions would reflect the judicial philosophy you propose and defend, "constitutional fidelity"?**

   Response: If confirmed, I would not seek to apply my own theory of constitutional interpretation or any other because it is not the proper role of a circuit judge to decide specific cases or controversies on the basis of any general theory of constitutional interpretation. Instead, I would faithfully follow the precedents of the Supreme Court, including any instructions in such precedents on the proper way to interpret specific constitutional provisions in a particular case.

7. **Senator Franken quoted from a blog post that argued your "opponents have sought to demonize [you] as a radical, extremist, and worse." Do you believe those who oppose your nomination have "sought to demonize [you] as a radical, extremist, and worse"?**

Response: Although I am aware that some opponents of my nomination have used various labels to characterize me or my scholarly views, I do not know whether they have "sought to demonize" me. In general, I believe the Advice and Consent requirement in Article II is an essential part of our Constitution's checks and balances. Accordingly, I believe it is appropriate that there be full and fair debate on judicial nominees before they are voted on by the Senate.

8. What is the most important attribute of a judge, and do you possess it?

Response: The most important attribute of a judge is the ability and unwavering commitment to apply the law impartially to the facts of each case. I believe I possess that attribute.

9. Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?

Response: I understand judicial temperament to encompass several qualities, most importantly impartiality, open-mindedness, collegiality, patience, fairness, and the treatment of all persons with dignity and respect. I believe I possess those qualities.

10. In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?

Response: Yes.

11. At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Response: When an inferior court judge hears a case of first impression or otherwise confronts an issue on which there is no controlling precedent, Supreme Court precedent is still relevant and constrains the decision-making process. Thus, even in a novel case, a circuit judge must take his guidance from the Supreme Court and lacks authority to improvise his own approach to deciding legal issues. *See, e.g.*, United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010) (en banc) (applying *Jackson v. Virginia*, 443 U.S. 307 (1979), to sustain federal conviction for being a felon in possession of a firearm and ammunition); Bull v. City & County of San Francisco, 595 F.3d 964 (9th Cir. 2010) (en banc) (applying the Supreme Court's Fourth Amendment precedents to uphold the strip search policy of the county jail system). In addition to Supreme Court precedent, I would consult relevant circuit precedent as well as any decisions by sister circuits on the issue.

In a statutory case, I would look first to the text and structure of the statute. If there is ambiguity in the statute, then I would faithfully follow the Supreme Court's approach to seeking other evidence of legislative purpose. I would also consult relevant circuit precedent as well as any decisions by sister circuits on the issue.

12. What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?

Response: If confirmed, I would faithfully apply Supreme Court and circuit precedent even if I believed that the precedent was erroneous. A circuit judge may never deviate from Supreme Court precedent, and a circuit judge may not deviate from circuit precedent when serving on a three-judge panel unless doing so is required by an intervening Supreme Court precedent. Although circuit precedent may be reconsidered through the *en banc* process, the process should not be used frequently given the importance of maintaining stability in the law. *See* Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.").

13. Under what circumstances do you believe it appropriate for a federal court to declare a statute enacted by Congress unconstitutional?

Response: It is appropriate for a federal court to declare a statute enacted by Congress unconstitutional when the statute exceeds the limits of Congress's enumerated powers or when the statute otherwise violates a provision of the Constitution. The Supreme Court has said that acts of Congress carry a presumption of constitutionality, *see, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 617 (1988), and that courts should avoid deciding the constitutionality of an act of Congress when "a construction of the statute is fairly possible by which the question may be avoided," Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (internal quotation marks and citation omitted). If confirmed, I would faithfully follow the Supreme Court's precedents.

14. In response to a question regarding Prop. 8, you testified, "I did also write that the Supreme Court, California Supreme Court, might have some reasons for revisiting that precedent…" Under what circumstances, if any, do you believe an appellate court should overturn precedent within its circuit?

Response: A three-judge panel of a circuit court may not overturn circuit precedent. Circuit precedent may be overturned only through the *en banc* process. The *en banc* process should not be used frequently given the importance of maintaining stability in the law. *See* Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."). In deciding whether to overturn circuit precedent, an *en banc*

court should consider the factors in the doctrine of *stare decisis*: whether the precedent is unworkable; whether the precedent has been relied upon such that overruling it would create special hardships or serious inequities; whether the precedent's reasoning has been eroded by intervening legal developments so that it is no longer persuasive; and whether facts have changed in a way that has eroded the precedent's applicability or justification. In addition, it is sometimes necessary for an *en banc* court to overturn precedent when the *en banc* court is deciding an issue on which circuit precedents are in conflict.

15. Please describe with particularity the process by which these questions were answered.

Response: I prepared a complete draft of my answers and then discussed the draft with a member of the U.S. Department of Justice. I prepared a final draft of my answers and sent them to the Justice Department for submission to the Committee.

16. Do these answers reflect your true and personal views?

Response: Yes.

Responses of Goodwin H. Liu
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Jeff Sessions

On several occasions before this Committee, you have said that whatever you have written as an academic would have no bearing on how you would rule if confirmed as a judge. I find that difficult to understand, given that several of your most important academic writings, by your own admission, are directed at judges and how they, in your view, should approach the law. (Senator Cornyn, Question for the Record #23). However, during your most recent hearing, you were willing to answer Senator Blumenthal's questions on specific issues, *e.g.*, whether you "support racial quotas" ("I absolutely do not, Senator.") and whether you believe "affirmative action plans should exist forever" ("No, I do not, Senator. . . ."). Having provided your views on specific issues, I would ask that, in responding to the following questions, you provide the same type of direct and concrete responses that you provided to Senator Blumenthal.

1. Following your hearing in the 111th Congress, I asked you several questions about your testimony in opposition to Justice Alito's nomination, which you summarized as being concerned with some of Justice Alito's decisions as a lower court judge "in the area in which individual rights come up against assertions of government power."

a. Question 1(a)(i) asked if you thought the Supreme Court's holding in *Wickard v. Filburn*, 317 U.S. 111 (1942) posed troubling concerns "in the area in which individual rights come up against assertions of government power." Your reply recited the holding of *Wickard* and stated that "*Wickard* is a precedent of the Supreme Court and I would follow it faithfully if I were confirmed."

That answer did not respond to my question, so in my letter of May 10, 2010, I provided you a second opportunity to answer. Your response stated that your role as a judge "would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines" and that you did not "believe it is appropriate for [you] now, as a nominee to serve as an inferior court judge, to critique or speculate on the correctness of *Wickard v. Filburn*."

I do not believe Question 1(a)(i) asked you to critique the correctness of the decision, but rather to opine on whether the case raised "troubling concerns in the area in which individual rights come up against assertions of government power." Please take this opportunity to answer that question.

Response: In *Wickard*, the plaintiff challenged the wheat quota in the Agricultural Adjustment Act as a deprivation of property without due process of law in violation of the Fifth Amendment. This was an individual rights claim against an assertion of government power. If confirmed, I would not characterize this claim, or any claims that come before me, as either "troubling" or "not

troubling." Instead, I would give each claim asserted by a litigant full, fair, and impartial consideration under the applicable law.

b. Question 1(a)(ii) did ask whether you believe *Wickard* was correctly decided. This is a topic that has been discussed much in the legal academy and in the media, and I do not believe that answering this question would impair your ability to apply a precedent that you have admitted remains binding on the Ninth Circuit. Please take this opportunity to answer this question.

Response: *Wickard* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed. I have not previously expressed any view on the correctness of *Wickard*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

As my letter explained, where I have expressed views about a particular case or doctrine in my scholarly work, I have not hesitated to discuss those views when answering oral and written questions throughout the confirmation process. Senator Blumenthal's questions asked about issues that I have addressed in my scholarly work. In particular, my writings accept that racial quotas are unconstitutional and that affirmative action plans must have a stopping point. *See* Brown, Bollinger*, and Beyond*, 47 How. L.J. 705, 761, 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).

c. Question 1(b)(ii) asked if you thought the Supreme Court's holdings in *Kelo v. City of New London*, 545 U.S. 469 (2005) posed troubling concerns "in the area in which individual rights come up against assertions of government power." You replied by stating that, as a lower court judge, you would be bound to apply *Kelo* as a valid precedent of the Supreme Court.

Your answer did not reply to my question, so I gave you another opportunity to answer in my letter to you of May 10, 2010. You again replied that "*Kelo v. City of New London* is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed." I appreciate your willingness to commit to follow precedent, but your answer did not respond to my question. The question did not ask you to comment on the correctness of that precedent or on its continued vitality as a precedent. It asked only if that precedent raised a certain tension between individual property rights and the assertion of government power to confiscate private property for the purpose of implementing an economic development plan. Please take this opportunity to answer my question.

Response: *Kelo* did address a tension between individual property rights and the assertion of government power to confiscate private property for the purpose of implementing an economic development plan. It was a case where an individual rights claim was asserted against an exercise of government power. If confirmed

as a judge, I would not characterize this claim, or any claims that come before me, as either "troubling" or "not troubling." Instead, I would give each claim asserted by a litigant full, fair, and impartial consideration under the applicable law.

d. Question 1(b)(ii) did ask whether you believe *Kelo* was correctly decided. This is a topic that has been discussed much in the legal academy, and both critics and supporters from across the ideological spectrum have expressed concern with the opinion and its rationale. Furthermore, some judges have criticized *Kelo* in subsequent opinions, while still applying that case as a binding precedent. Please take this opportunity to answer this question.

Response: *Kelo* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed. I have not previously expressed any view on the correctness of *Kelo*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

2. In Question for the Record 10(b), which I submitted to you following your hearing in the 111th Congress, I asked whether you believed *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which held school choice programs that included religious schools along with secular schools do not violate the Establishment Clause, was correctly decided. You responded by stating that "*Zelman* is a precedent of the Supreme Court, and [you] would follow it faithfully if [you] were confirmed" and stating that one of your law review articles treated *Zelman* as settled law. You gave a similar response when I gave you a second chance to answer this question in my May 10, 2010 letter. I do not believe either of your answers responded to my question. Please provide an answer at this time.

Response: *Zelman* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed. I have not previously expressed any view on the correctness of *Zelman*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

3. In Question for the Record 13, which I submitted to you following your previous hearing, I asked you for your personal position on a number of issues related to constitutional law. In response to seven of the subparts of Question 13, you responded by stating that the case in question was a precedent of the Supreme Court that you would faithfully follow if confirmed. I appreciate that commitment to precedent, but I specifically stated in my question that I was not asking whether you would follow the applicable Supreme Court precedents. Instead, I was seeking your own view on the legal principle in issue. Therefore, I provided you a second opportunity to answer questions 13(b), 13(d), 13(e), 13(f), 13(g), 13(h) and 13(i) when I wrote you on May 10, 2010. You responded to my letter as follows:

> **"If I am confirmed, my role as a circuit judge would not be to evaluate or opine on the correctness of Supreme Court cases or doctrines, but to apply the law faithfully and impartially to the facts of each case. (b) *District of***

***Columbia v. Heller*, (d) *Boumediene v. Bush*, (e) *Lee v. Weisman*, (f) *Morrison v. Olson*, (g) the Court's precedents concerning obscene speech, (h) *Kennedy v. Louisiana*, and (i) *Gonzales v. Carhart* are precedents of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed."**

Again, I appreciate that you understand these are precedents of the Supreme Court and that you would be duty-bound to follow them if you were to be confirmed to the Ninth Circuit. However, I was seeking your own personal legal views on these cases. I was not asking for your policy preferences or political viewpoints, but for your personal judgment on legal questions. Please take this opportunity to provide responses to these questions:

a. Question 13(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: I have not previously expressed any view on the correctness of *Heller*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

b. Question 13(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: I have not previously expressed any view on the correctness of *Boumediene*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

c. Question 13(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: I have not previously expressed any view on the correctness of *Lee v. Weisman*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

d. Question 13(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: I have not previously expressed any view on the correctness of *Morrison v. Olson*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

e. Question 13(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 … 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. I have not previously expressed any view on whether the Constitution confers a right to engage in obscene speech, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

f. Question 13(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: I have not previously expressed any view on the correctness of *Kennedy v. Louisiana*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

g. Question 13(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 not previously expressed any view on the correctness of *Gonzales v. Carhart*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

4. In Question for the Record 18(b), which I sent you following your last hearing, I asked whether, like Professor Mark Tushnet, you believed the "state action doctrine" should be abolished. You responded to my question by stating that "[t]he Supreme Court has consistently affirmed the state-action doctrine as a key limitation on federal power and an important safeguard of individual liberty" and that you "would faithfully follow the Court's precedents if [you] were confirmed."

Although I was glad to hear once again that you would be committed to following the Court's precedents if confirmed, your response did not answer my original question. Therefore, I posed this question to you again in my letter of May 10, 2010. In response to that letter, you stated your view of the role of an intermediate appellate court judge and answered again that "[t]he state action doctrine is governed by precedents of the Court that [you] will be duty-bound to apply faithfully and impartially if [you are] confirmed." This answer does not respond to my question. Please take this opportunity to provide a responsive answer to this question.

Response: I have not previously expressed any view on whether the state-action doctrine should be abolished, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so. My writings have not questioned the

well-settled Supreme Court doctrine that state action is necessary for a judicial finding of state liability under the Fourteenth Amendment.

5. When Chief Justice Roberts was nominated to the Supreme Court, you wrote an article in which you criticized Justice Roberts because

> **"[b]efore becoming a judge, he belonged to the Republican National Lawyers Association and the National Legal Center for the Public Interest, whose 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 environmental, workplace, and consumer protections.**

a. Please explain why you thought it was a problem for a judge to have policy preferences in support of free markets, private property and limited government, all three of which were written or spoken about favorably by almost all of the founding fathers of this country.

Response: Free enterprise, private property, and limited government are cornerstones of America's prosperity and success as a free society, and I do not believe it is a problem for a judge to be committed to those values as they are expressed in our Constitution. A judge, however, should not commit himself to those values as a matter of "policy preferences." *Cf.* Lochner v. New York, 198 U.S. 45 (1905).

b. In response to written questions from this Committee about this statement following your hearing last Congress, you said that you were "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." Please explain why you thought it was troubling that someone had been appointed to the Supreme Court that felt differently about that matter than you do.

Response: For over seven decades, the Supreme Court has held that government efforts to ensure that our free market system is a fair, sustainable, and level playing field are consistent with, and not in opposition to, the Constitution's commitments to private property and limited government. My writings have discussed the Court's approach in this area as an example of fidelity to the Constitution. *See* Keeping Faith with the Constitution 65-72 (2009).

6. In your article "Education, Equality, and National Citizenship" you discussed the meaning of the Citizenship Clause of the Fourteenth Amendment, arguing that

> **"the duty of government cannot be reduced to simply providing the basic necessities of life. . . . 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."

a. If equal participation was the goal of the Citizenship Clause, then why did the authors not choose to include any language related to "equality" or "participation" in the Clause, instead choosing language that addressed only the legal status of citizenship?

Response: The Citizenship Clause overruled *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and extends national citizenship to all persons born or naturalized in the United States and subject to the jurisdiction thereof. A notion of equality or equal participation is implicit in the Fourteenth Amendment's declaration of a single national citizenship. The Civil Rights Act of 1866, whose declaration of national citizenship was a precursor to the Fourteenth Amendment's Citizenship Clause, confirms this point: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color … shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property … as is enjoyed by white citizens …." *See* Education, Equality, and National Citizenship, 116 Yale L.J. 330, 356-57 & n.106 (2006).

b. Do you still maintain that Congress has a constitutional obligation to provide citizens with "health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit"?

Response: The Supreme Court has generally held that the Constitution does not obligate Congress or the states to provide citizens with social or economic benefits, and I would faithfully follow the Court's precedents if I were confirmed.

In the article that includes the quotation above, I state that "the approach to constitutional meaning I take here is that of a 'conscientious legislator' who seeks in good faith to effectuate the core values of the Fourteenth Amendment, including the guarantee of national citizenship." Education, Equality, and National Citizenship, 116 Yale L.J. 330, 339 (2006). The article argues that a legislature seeking to effectuate the principle of equal citizenship should consider a range of policies to support political and economic participation. *See id.* at 407. The article makes clear that the legislative duties I propose do not give rise to individual rights and are not enforceable in court. *See id.* at 338-39.

7. In your 2008 article "Rethinking Constitutional Welfare Rights" you said:

"[t]he historical development and binding character of our constitutional understanding demand more complex explanations than a conventional account of the courts as independent, socially detached decision makers that 'say what the law is.' The enduring task of the judiciary . . . is to 'find a way to articulate constitutional law that the nation can accept as its own.'"

Alexander Hamilton's view of the role of the Judiciary was stated in Federalist Number 78, where he wrote that "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment." I believe that was the role envisioned by Chief Justice Marshall when he wrote in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the Judicial Department to say what the law is."

a. Are you able to identify any writing, speech or other evidence that members of the founding-era public understood the task of the judiciary as being "to 'find a way to articulate constitutional law that the nation can accept as its own'"?

Response: In context, that phrase in my 2008 law review article was used to distinguish and reject a conception of judges as philosopher-kings who interpret the Constitution in light of their preferred moral theory. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 227-28 (2008). The article used the phrase to indicate that judges must ground constitutional doctrine in our nation's own legal texts, traditions, and practices as they develop in response to the needs and challenges of our society over time. This view is consistent with Chief Justice Marshall's admonition that courts, in interpreting our Constitution, must recognize that it is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

b. How does a judge determine what statements of constitutional law "the nation can accept as its own'"?

Response: My article used the phrase to mean that judges must ground constitutional doctrine in our nation's own legal texts, traditions, and practices, and not in any abstract moral or political theory.

c. If the original meaning of a constitutional provision conflicts with the constitutional principles the nation can accept as its own, is it the task of the judiciary to look to sources beyond the original meaning of the text in order to find an acceptable reading?

Response: In describing the actual practice of constitutional adjudication throughout American history, I have written that "judges generally look to a

variety of sources to elucidate the meaning of the Constitution. These sources include the document's text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation. The latter sources of meaning, no less than the former, are legitimate components of the methodology that courts use when applying the Constitution's general principles to present-day problems." Keeping Faith with the Constitution 33-34 (2009). The Supreme Court has looked to sources beyond the original meaning of the Constitution 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 26-28, 47-51 (discussing those cases). If confirmed, I would faithfully follow the Court's precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions in a particular case.

8. At your hearing last Congress, you discussed originalism as a method of constitutional interpretation with Senator Klobuchar. During that discussion, you said:

> **"If originalism is taken to mean that the original understanding of the constitutional provision is the sole touchstone of decision and decisive sole touchstone for interpreting the Constitution, I would simply observe that the Supreme Court, throughout its history, has never adhered to that methodology."**

I agree that the Supreme Court has, at many times in its history, rendered opinions that departed from the original meaning of the Constitution.

a. I think that one case that did so was *Plessy v. Ferguson,* the case that approved separate-but-equal discrimination against African-Americans. Do you agree that case departed from the original meaning of the Equal Protection Clause of the Fourteenth Amendment?

Response: I have not had occasion to examine whether *Plessy v. Ferguson* departed from the original meaning of the Equal Protection Clause, although I am aware of scholarly work arguing that *Plessy* was wrong on originalist grounds in upholding racial segregation on common carriers. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 981-82, 1120-31 (1995); Earl M. Maltz, *"Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 Rutgers L.J. 553, 564-68 (1986). It is a separate issue whether racial segregation in other contexts, such as public schools, departs from the original meaning of the Equal Protection Clause. In *Brown v. Board of Education*, the Supreme Court—after ordering the parties to brief the original meaning of the Fourteenth Amendment as it relates to school segregation—unanimously concluded that the original understanding is "[a]t best … inconclusive." 347 U.S. 483, 489 (1954). Citing this statement in

Brown, I have written that "for over half a century, a scholarly consensus across the ideological spectrum has recognized that *Brown* cannot be explained on originalist grounds. Even the most ambitious and labored effort to reconcile *Brown* with originalism comes up short for reasons lucidly elaborated by one of the nation's leading civil rights historians." Keeping Faith with the Constitution 50 & nn.14-16 (2009) (citing McConnell, *supra*, and Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995), among other sources).

b. I think another case was *Grutter v. Bollinger*, the case that upheld using race in law school admissions decisions. Do you agree that case departed from the original meaning of the Equal Protection Clause?

Response: I have not had occasion to examine whether *Grutter v. Bollinger* departed from the original meaning of the Equal Protection Clause, although I am aware of scholarly work arguing that affirmative action is consistent with the Fourteenth Amendment's original intent. *See, e.g.*, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985). Neither the majority nor the dissenting opinions in *Grutter* examined the original meaning of the Equal Protection Clause.

9. During your above-referenced discussion with Senator Klobuchar, you went on to say that:

> **"If originalism is taken to mean instead that the original meaning, and of course the text of the Constitution, are very important considerations that any judge, in interpreting a provision of the Constitution, must look to, [then] absolutely. . . . in many cases, that could be determinative. But it is not, in some sense, the sole or ultimate touchstone against which all other considerations must yield."**

a. Aside from precedent, can you provide an example of other factors in addition to the text and original meaning of the Constitution that would be relevant to constitutional interpretation?

Response: If confirmed, I would take my instruction on issues of constitutional interpretation from the Supreme Court precedents applicable to each case, and not from my scholarly writings. In describing the actual practice of constitutional adjudication throughout American history, I have written that "judges generally look to a variety of sources to elucidate the meaning of the Constitution. These sources include the document's text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation. The latter sources of meaning, no less than the former, are legitimate components of the methodology that courts use when

applying the Constitution's general principles to present-day problems." Keeping Faith with the Constitution 33-34 (2009).

b. You said that the original meaning of the Constitution could be determinative in many cases. Assume there is no precedent controlling a case and we can determine the original meaning of a constitutional provision. Can you name a situation where the original meaning of a provision is not determinative under those circumstances?

Response: Although the Fourteenth Amendment was not originally intended to prohibit gender discrimination, *see* U.S. Const. amend. XIV, § 2 (reducing apportionment of any state that denies the franchise to its "male citizens"); *The Originalist*, California Lawyer, Jan. 2011, at 33 (quoting Justice Scalia's statement that the Fourteenth Amendment "doesn't" prohibit discrimination on the basis of sex: "Nobody ever thought that that's what it meant. Nobody ever voted for that."), the Supreme Court has held that the Equal Protection Clause prohibits various forms of discrimination on the basis of sex. *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

10. In a 2006 article in the *Los Angeles Times* you discussed the reasoning of *Brown v. Board of Education*, saying that "the target of *Brown's* reasoning was not racial classification, but the use of race to separate and thereby stigmatize and subordinate minority schoolchildren." Is it fair to say that you do not believe the Equal Protection Clause requires governments to be "color blind," meaning that they do not rely on race as a basis for treating similarly-situated individuals differently?

Response: The Supreme Court has not endorsed colorblindness as an absolute requirement of the Equal Protection Clause; it has held that no racial classification may be used in governmental decision-making unless it is narrowly tailored to promote a compelling interest. *See, e.g.*, Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). If confirmed, I would faithfully follow the Court's precedents in this area. My writings have agreed with the Court's strict scrutiny standard for evaluating racial classifications and with the Court's decision in *Grutter* upholding limited and carefully circumscribed consideration of race in selective university admissions. *See* Seattle *and* Louisville, 95 Cal. L. Rev. 277, 280-81 (2007); Brown, Bollinger, *and Beyond*, 47 How. L.J. 705, 706 (2004); *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).

11. John Adams once said that people have "rights antecedent to all earthly government—Rights that cannot be repealed or restrained by human laws—Rights derived from the Great Legislator of the Universe." Our founding fathers, like

Adams, believed that rights were derived from man's creator, and were merely protected by the Constitution from wrongful government deprivation. From what source do you believe constitutional rights originate?

Response: The Declaration of Independence states "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." I understand that statement to mean that in our legal tradition, those rights ("Life, Liberty and the pursuit of Happiness") existed prior to the ratification of the Constitution. In addition, the Supreme Court has said that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right" that was "inherited from our English ancestors." District of Columbia v. Heller, 554 U.S. 570, 599 (2008) (internal quotation marks and citation omitted). Other constitutional rights, such as the Fourteenth Amendment's citizenship guarantee and the Fifteenth and Nineteenth Amendments' prohibitions on race and gender discrimination in voting, have been understood as positive enactments in response to our nation's historical experience. *See* U.S. Const. amend. XIV, § 1 (overruling Dred Scott v. Sandford, 60 U.S. 393 (1857)); U.S. Const. amend. XIX, § 1 (overruling Minor v. Happersett, 88 U.S. 162 (1875)); South Carolina v. Katzenbach, 383 U.S. 301, 308-09 (1965) (discussing origins of the Fifteenth Amendment).

12. Recently, Federal District Judge Roger Vinson held that a portion of President Obama's healthcare bill—the portion requiring every American Citizen to purchase at least a certain level of health insurance—was unconstitutional because it exceeded the power granted to Congress under the Commerce Clause. Judge Vinson's decision was based, in large part, on his conclusion that "if Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be difficult to perceive any limitation on federal power, and we would have a Constitution in name only."

a. Do you agree with Professor Charles Fried's testimony before this Committee that Congress can force people to purchase goods and services that Congress believes, for policy reasons, would benefit commerce?

Response: Because Professor Fried's testimony bears on the constitutionality of the health care legislation, and because that issue could come before me if I were confirmed, I believe it is not appropriate for me to answer this question.

b. Do you believe Congress can force every individual American to purchase a product based on the idea that the inactivity of many has an effect on interstate commerce?

Response: Because this question bears on the constitutionality of the health care legislation, and because that issue could come before me if I were confirmed, I believe it is not appropriate for me to answer this question.

c. If the Court were to uphold Congress's claim of power under the Commerce Clause to force every individual American to purchase health insurance coverage because the mere fact of that individual's existence had some remote impact on interstate commerce, could you articulate any workable and meaningful limitation on Congress's authority under the Commerce Clause?

Response: Because this question bears on the constitutionality of the health care legislation, and because that issue could come before me if I were confirmed, I believe it is not appropriate for me to answer this question.

13. At your hearing last Congress, you were asked about your extensive involvement with the American Constitution Society, including as a founding member. In response to a question from Senator Kyl, you described the organization dedicated to "certain basic principles in our Constitution: genuine equality, liberty, access to the courts, and a broad commitment to the rule of law."

a. Could you explain what you meant by "genuine equality"? Does that mean absolute legal equality, or does it allow for affirmative action programs and other programs that give preferences to some racial groups over others?

Response: I have discussed the meaning of equality as a constitutional value in Keeping Faith with the Constitution 47-63 (2009), and my writings have agreed with Supreme Court precedent holding that affirmative action policies that are narrowly tailored to serve a compelling interest are consistent with the principle of equality in our Constitution, *see* Brown, Bollinger, *and Beyond*, 47 How. L.J. 705 (2004).

b. In 2007, this Committee considered the nomination of Judge Leslie Southwick, a highly-respected nominee for the Fifth Circuit. One of my colleagues in the majority on this Committee was very interested in that nominee's involvement with the Federalist Society, a Constitutional debate society that does not take positions on political issues. At one point in the hearing, my colleague said: "You were a member of the Federalist Society and wrote articles for the Federalist Society. Could you describe to me why you joined the organization and what you think it represents?" So, that is my question to you: You were a member of the American Constitution Society from its inception, you were a member of its board, and you wrote a book for the organization. Could you describe to me why you joined that organization and what you think it represents?

Response: The American Constitution Society is an organization dedicated to the fundamental values in our Constitution, including individual rights and liberties, genuine equality, access to justice, democracy, and the rule of law. I joined the organization because I believe in those values.

c. The mission statement of the American Constitution Society says the following:

> **"In recent years, an activist Conservative legal movement has gained influence—eroding [the Constitution's] enduring values and presenting the law as a series of sterile abstractions. This new orthodoxy, which threatens to dominate our courts and our laws, does a grave injustice to the American vision."**

Do you believe there is "an activist Conservative legal movement" which "does a grave injustice to the American vision?"

Response: I have not expressed any view on whether there exists "an activist conservative legal movement," although I am aware of scholarly work on the subject. *See* Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law (2008). I have written that "judicial activism … appropriately characterizes many decisions of judicial conservatives in recent years." Keeping Faith with the Constitution 40 (2009).

d. Last year, the American Constitution Society published a paper by Professor Alan B. Morrison entitled "The Right and Wrong Kinds of Judicial Activism." Professor Morrison wrote that his theory on judicial activism is as follows:

> **"it is most appropriate for the Court to intervene and overturn legislative decisions when there is some reason to believe that our system of representative government has not worked and that the protections that the Constitution is supposed to afford are lacking. The most common circumstance of appropriate intervention is to safeguard rights of a racial or other minority that were not adequately represented in the political process."**

Do you agree with that statement?

Response: I agree with the statement insofar as it reflects the role of the judiciary described by Alexander Hamilton in Federalist No. 78 and by the Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). However, I do not agree with the statement insofar as it suggests that judicial activism is ever "right" or that courts should somehow prioritize those cases where "our system of representative government has not worked" or where "rights of a racial or other minority … were not adequately represented in the political process." I believe it is the judiciary's duty to carefully consider all constitutional claims properly within its jurisdiction and to declare the law impartially in all cases and controversies.

e. In 2009, the American Constitution Society published a paper on the future of Fourth Amendment jurisprudence entitled "The Roberts Court and the Future of the Exclusionary Rule" by Professor Susan Bandes, which said the following:

> **"The Reagan-era Justice Department, led by Attorney General Edwin Meese, spearheaded the first frontal attack on the exclusionary rule. Under the current Supreme Court, these efforts may finally come to fruition. Chief Justice John Roberts and Justice Samuel Alito, both of whom served in the Meese Justice Department, are now part of a four-member voting block (with Justices Antonin Scalia and Clarence Thomas) that, to all appearances, is busily laying the groundwork for abandoning the exclusionary rule. They lack only a reliable fifth vote."**

Do you think that is an accurate statement?

Response: I do not know whether the current Supreme Court "is busily laying the groundwork for abandoning the exclusionary rule." I am aware that the Supreme Court has limited the applicability of the exclusionary rule in recent cases, *see, e.g.*, Herring v. United States, 555 U.S. 135 (2009); Hudson v. Michigan, 547 U.S. 586 (2006), and that Justice Kennedy has said "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt," *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment). If confirmed, I would faithfully follow the Court's precedents in this area.

Responses of Goodwin H. Liu
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Mike Lee

1. **On page 3 of *Keeping Faith with the Constitution,* you wrote, "[C]onstitutional interpretation is not a task for the judiciary alone. Thus it is neither surprising nor illegitimate that judicial doctrine often incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice."**

   a. **You mention social movements. How is a judge to determine which social movements merit incorporation into the understanding of the Constitution?**

      Response: The role of a judge is to decide cases impartially on the basis of the facts and applicable law, not to determine which social movements merit incorporation into the understanding of the Constitution. Social movements can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue. For example, my writings have observed that the women's movement produced federal antidiscrimination legislation that shaped the Supreme Court's analysis of how the Equal Protection Clause applies to gender discrimination. *See* Keeping Faith with the Constitution 54-55 (2009). In that example, and at all times, the judge's role is to engage in legal analysis of the materials in a particular case, not to pick or choose which social movements should inform his or her understanding of the Constitution.

   b. **At any given time, there are myriad social movements that enjoy substantial support, but may conflict or even be diametrically opposed in their views and objectives. How is a judge to decide which of the various competing social movements should influence his or her Constitutional interpretation and to what degree?**

      Response: The role of a judge is to decide cases impartially on the basis of the facts and applicable law, not to decide which of various competing social movements should influence his or her interpretation of the Constitution. Social movements can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue. But the judge's role is always to engage in legal analysis of the materials in a particular case, not to pick or choose which social movements should inform his or her understanding of the Constitution.

   c. **Could a small, determined group change the meaning of the Constitution by instigating a social movement?**

Response: No. A social movement can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue. But a social movement by itself cannot change the meaning of the Constitution unless it results in an amendment to the Constitution through the procedures in Article V.

2. **On page 45 of your book, you wrote, "In interpreting the Constitution, the Court . . . considers social practices, evolving norms, and practical consequences in order to give concrete, everyday meaning to text and principle."**

   a. **How is a judge to determine which evolving norms and social practices to consider when interpreting the Constitution? Are these the norms of the majority? A significant minority? Are these the norms of Peoria or Los Angeles?**

   Response: If confirmed, I would take my instruction on issues of constitutional interpretation from the Supreme Court precedents applicable to each case. In some areas, the Court has instructed judges to consider societal norms and practices by applying an objective standard of reasonableness. *See, e.g.*, Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (analyzing Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms"); Bond v. United States, 529 U.S. 334, 338 (2000) (analyzing 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"). In other areas, the Court has looked to state and federal legislation as objective indicators of societal norms, *see, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313-17 (2002) (examining state and federal laws in deciding whether the Eighth Amendment prohibits execution of persons who are mentally retarded), or to well-established social facts, *see, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 629 (2008) (holding that the Second Amendment protects those weapons "in common use at the time" and that "handguns are the most popular weapon chosen by Americans for self-defense in the home"). In these and other areas, I would faithfully follow the applicable standards and instructions for objective inquiry set forth by the Supreme Court if I were confirmed.

   b. **How does a judge come into possession of sufficient objective information to determine the nature and substance of these social practices and evolving norms?**

   Response: In each of the doctrinal areas mentioned in the previous response, the Court undertakes an objective inquiry into social norms and practices in applying a constitutional standard. For example, when analyzing Sixth Amendment claims of ineffective assistance of counsel, the Court has said that "[r]estatements of professional standards," such as American Bar Association

guidelines, "can be useful as 'guides' to what reasonableness entails" if "they describe the professional norms prevailing when the representation took place." *Van Hook*, 130 S. Ct. at 16. When analyzing how the Fourth Amendment applies to new technology, the Court has looked to state and institutional privacy policies. *See, e.g.*, City of Ontario v. Quon, 130 S. Ct. 2619, 2629-30 (2010). If confirmed, I would faithfully follow the Supreme Court's instructions on how to acquire sufficient objective information to correctly apply constitutional standards in these and other areas.

3. **On page 98 of *Keeping Faith with the Constitution*, you wrote, "[J]udicial decisions have interpreted [the Constitution's] guarantee of liberty in light of our society's evolving traditions and shared understandings of personal identity, privacy, and autonomy."**

   a. **Whose evolving traditions and shared understandings should a judge consider?**

      Response: The above-quoted sentence is from a discussion in the book about the Supreme Court's application of the Due Process Clause. The Court has said that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted). In "examining our Nation's history, legal traditions, and practices," *id.* at 710, the Court has looked first and foremost to the practices of the states, both historical, *see id.* at 710-11, 715-16, and contemporary, *see id.* at 716-19. The Court has also looked to the English common law and to colonial practices. *Id.* at 711-14. If confirmed, I would faithfully follow the instructions of the Supreme Court's substantive due process cases in determining whose traditions and understandings to consider when analyzing a constitutional liberty claim.

   b. **At any given time, traditions and understandings vary widely from region to region, from state to state, from urban to rural. How does a judge decide on which traditions and understandings to base his interpretation of the Constitution?**

      Response: If confirmed, I would faithfully follow the instructions of the Supreme Court's substantive due process cases in deciding which traditions and understandings to consider when analyzing a constitutional liberty claim.

4. **In a 2009 interview at the Brennan Center event, "The Next Democracy," you said,**

   "Conservatives have, I think, been remarkably successful in using language about strict construction of the Constitution or originalism as a way of

reading the Constitution to try to reduce constitutional interpretation, or adjudication more generally, into something formulaic and mechanical that you can hold judges accountable for. I think that's nice in theory, but the reality is, every judge really knows and every lawyer really knows, is that the job, of course, really involves, fundamentally, acts of judgment, especially in the hard cases. And how do people come at their judgments? Well, I think, in our system, they have come at it through a variety of ways that, over time, represents the gradual accretion of precedent, principle, lessons learned from experience, and an awareness of the evolving norms and social understandings of our country." . . . "Judges can rightly take [such things] into account" . . . "I would hope that the Obama administration would appoint judges who are broad minded in their view of the kinds of sources that are legitimate to take into account."

a. Isn't the identification of shared understandings, social movements, evolving norms, and collective values dependent on the particular judge making the "act of judgment"?

Response: The subjective or personal beliefs of a particular judge have no role in the faithful discharge of judicial duty, and the consideration of societal norms and understandings in judging is not inconsistent with this idea. In the areas of constitutional law where the Supreme Court has required judges to consider societal norms and understandings, the Court has made clear that such consideration is an objective, not subjective, inquiry. *See, e.g.*, Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (analyzing Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms"); Ashcroft v. ACLU, 535 U.S. 564, 575 (2002) (analyzing whether material is obscene and thus unprotected by the First Amendment "from the perspective of the average person, applying contemporary community standards."); Bond v. United States, 529 U.S. 334, 338 (2000) (analyzing 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"); Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) ("[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition ….").

b. It appears that you were talking about the job of all judges, not just Justices of the Supreme Court. If "every judge really knows" that acts of judgment are involved in the hard cases, and judges come at those acts of judgment through "lessons learned from experience" and "an awareness of the evolving norms and social understandings of our country," does this mean that you would consider evolving norms and social understandings in your acts of judgment? Please explain.

Response: If confirmed, I would consider evolving norms and social understandings only to the extent that applicable Supreme Court precedent required me to do so in analyzing a particular constitutional issue.

5. **In a 2003 *Georgetown Law Journal* article, you wrote, referring to the Constitution, "Our fundamental law has shown a remarkable capacity to absorb new meanings and new commitments . . . forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience." Do you believe that the Constitution's meaning is changed by passionate dialogue or disobedience?**

Response: No. It is one of our nation's virtues that Americans believe deeply in our Constitution and vigorously debate its meaning. But passionate dialogue or disobedience by itself cannot change the meaning of the Constitution unless it results in an amendment to the Constitution through the procedures in Article V. Passionate dialogue or disobedience can lead to the development of factual findings, historical research, legislation, and legal arguments that courts may objectively evaluate in deciding a constitutional issue.

6. **On page 5 of your 2009 book, *Keeping Faith with the Constitution*, you wrote, "[N]either originalism nor strict construction has proven to be a persuasive or durable methodology, not least because they cannot explain many of the basic constitutional understandings we now take for granted." Do you believe that originalism is an illegitimate methodology for interpreting the Constitution?**

Response: If confirmed, I would take my instruction on issues of constitutional interpretation from the Supreme Court precedents applicable to each case, and not from my personal views about originalism or any other theory of constitutional interpretation. My writings have said that "the original understanding of a particular constitutional provision, no less than the text of the provision itself, is an important consideration in constitutional interpretation." Keeping Faith with the Constitution 37 (2009). Further, my writings have endorsed originalism "if originalism is understood to mean a commitment to the underlying principles that the Framers' words were publicly understood to convey, as opposed to the Framers' expectations of how those principles would have applied at the time they were adopted." *Id.* at 35. However, my writings have rejected originalism when it is understood to require judges to "adhere to a historically fixed understanding of … how the Framing generation would have applied [the Constitution's] principles to specific situations." *Id.* at 36.

7. **A Sept 2009 post on the *ACSblog* reads, "For too long, liberals, progressives and moderates have been defensive about how the Constitution should be interpreted. But an examination of the document itself and the way its principles have been applied . . . reveals that the progressive view is, in fact, the one that prevailed." Would you characterize yourself as an advocate of the "progressive view"?**

Response: I would characterize myself as a person who is committed to the actual values and principles that exist in our Constitution, whether they are labeled "progressive," "moderate," or "conservative."

8. **In a speech given in May 2006 at the National Taiwan University Law School, you said, "[A] liberal judge is one who is more likely to protect individual rights against government power, except property rights; more likely to read the constitutional right of equality broadly to protect disadvantaged groups; more likely to favor federal government power over state power; and more likely to favor checks and balances to limit assertions of power by the President."**

    a. **Does your definition of a "liberal judge" accurately describe what your tendencies would be in applying law to facts, if were you to be appointed a judge?**

        Response: No. If confirmed, I would apply the law to the facts of each case objectively and impartially, with fidelity to applicable precedents.

    b. **If so, do you believe that a judge should have a political leaning?**

        Response: I do not believe a judge should have a political leaning.

    c. **If not, which specific part do you not tend towards? Protecting individual rights against government power? A broad reading of the right of equality to protect disadvantaged groups? Favoring federal power over state power? Favoring checks and balances?**

        Response: If confirmed, I believe it would be inappropriate to decide cases on the basis of any of those "tendencies" as opposed to the facts and applicable law in each case.

9. **In your chapter of *The Constitution in 2020*, you wrote, "We should not use the concept of citizenship to deny education to noncitizen children, not least because the Equal Protection Clause extends to 'persons,' not only to citizens." While people can and do disagree on the policy aspect of providing education to noncitizen children, do you believe that the Constitution requires the government to provide education to noncitizen children?**

    Response: The Supreme Court has held under the Equal Protection Clause that a state may not deny free public education to children who are here illegally if the state provides such education to other children. *See* Plyler v. Doe, 457 U.S. 202 (1982). The Court qualified its holding by saying that a state's prerogative to deny public education to children who are here illegally might be different if such denial were supported by congressional policy. *See id.* at 224-26. I would faithfully follow the Court's precedent if I were confirmed.

I have written that "we should not use the concept of citizenship to deny education to noncitizen children," citing *Plyler* to support the proposition that "the Equal Protection Clause extends to 'persons,' not only to citizens." *National Citizenship and the Promise of Equal Educational Opportunity* 130 & n.22, *in* The Constitution in 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009). I have not previously expressed any view specifically on whether noncitizen children who are here illegally have a constitutional right to public education, and because I would serve as an inferior court judge who is duty-bound to apply Supreme Court precedent faithfully and impartially if I am confirmed, I believe it would not be appropriate for me to do so now.

10. In a 2006 *San Antonio Express News* article, you said, "The federal constitution guarantees to every person equal citizenship. I don't think that means just legal status . . . [C]itizenship, in a broader sense, is the ability to be a fully able, participating member of society." In your view, what rights are fundamental to being a "fully able participating member of society"?

Response: My writings have emphasized the role of education, as well as other supports that promote political and economic participation, in enabling all individuals to become full, participating members of our society. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006). I expressly avoid characterizing those supports as "rights" because the term suggests judicial enforceability. *See id.* at 339. Instead, my proposals are "chiefly directed at Congress," and they come from the perspective of "a 'conscientious legislator' who seeks in good faith to effectuate the core values of the Fourteenth Amendment, including the guarantee of national citizenship." *Id.*

Responses of Goodwin H. Liu
Nominee to be United States Circuit Judge for the Ninth Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **Given you writings on the constitutional interpretation employed in *District of Columbia v. Heller*, I previously asked whether you believed the right to bear arms was a fundamental right. You responded that, although you have analyzed the *Heller* opinion, you could not answer my question. Now that the Court has decided *McDonald v. Chicago*, do you personally agree with the Court's majority opinion that the right to bear arms is fundamental?**

   Response: The Supreme Court in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), held that the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right to keep and bear arms fully applicable to the states. The Court reached this holding by determining that the right to keep and bear arms is a fundamental right deeply rooted in our nation's history and tradition. *See id.* at 3036-44. If confirmed, I would faithfully follow the Supreme Court's holding that the right to keep and bear arms is a fundamental right. I have not previously expressed any view on the question decided in *McDonald*, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so now.

   a. **What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?**

      Response: In *District of Columbia v. Heller*, the Supreme Court said that "the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose…. [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. 570, 626-27 (2008); *see McDonald*, 130 S. Ct. at 3047 (quoting *Heller*). Moreover, noting the "historical tradition of prohibiting the carrying of dangerous and unusual weapons," the Court recognized "another important limitation on the right to keep and carry arms"—namely, "the sorts of weapons protected [are] those in common use at the time." *Heller*, 554 U.S. at 627 (internal quotation marks and citations omitted). *Heller* addressed the scope of the Second Amendment right in relation to the federal government; *McDonald* held that the Second Amendment right has the same scope in relation to the states.

   b. **Do you agree that the *McDonald* decision left certain questions unanswered – such as what are protected places – that lower court judges will have to decide?**

Response: *McDonald* reaffirmed the Court's statement in *Heller* that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are not cast into doubt by the Court's decisions. 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 626). The Supreme Court has not indicated whether there are places other than schools and government buildings that qualify as "sensitive places" within the meaning of *Heller*. To the extent that issue is raised in litigation, lower court judges will have to address it.

c. Is it limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: The Supreme Court stated its holding in *Heller* as follows: "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." 554 U.S. at 635. The Court in *McDonald* stated its holding similarly: "In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense…. We … hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*."). While the Court has not said that the Second Amendment right is limited only to possession of a handgun for self-defense in the home, it has not had occasion to determine what the Second Amendment right encompasses beyond possession of a handgun for self-defense in the home.

2. I asked you previously whether you personally believed the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by states. You responded that it was "a question upon which you had not previously expressed a view." As a law professor in California and a participant in the Prop 8 litigation, have you really never expressed a view on this issue, even in casual conversation?

Response: I joined an amicus brief filed in the California Supreme Court in 2007, arguing that state laws prohibiting same-sex marriage violated the California Constitution. The California Supreme Court invalidated those laws in May 2008; six months later, the voters of California passed Proposition 8. I have not participated in any litigation concerning Proposition 8. In October 2008 testimony before the California Assembly and Senate Judiciary Committees, I predicted (correctly) that Proposition 8 would be upheld under applicable state constitutional law precedents. As to the validity of Proposition 8 under *federal* constitutional law, I explained that it is "an open question" under *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and I predicted (incorrectly) that "Prop. 8 will not be invalidated under federal law in the near future." That is the extent of any views I have expressed on whether the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by states.

a. If you have expressed a view, please disclose that view?

Response: Please see the response above.