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) then [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

[2]ACSBlog, 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 a 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*, 91GEO. 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 segregrative 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").

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[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 decisonmakers 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. Cout 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).

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

1. **In *Keeping Faith with the Constitution*, you write that "constitutional meaning is a function of both text and context. In many instances, a court cannot be faithful to the principle in the text unless it takes into account the social context in which the text is interpreted." Do you equate the meaning of the text and the principle in the text? If not, please explain the difference.**

   Response: Because our Constitution is a written document, the text is central to the Constitution's meaning. In some places, the text is very specific and prescriptive. For example, Article I, Section 7 dictates that "[a]ll bills for raising revenue shall originate in the House of Representatives." The application of such provisions is straightforward on the basis of the text alone.

   Elsewhere, the Constitution's text is more general and abstract. For example, the First Amendment protects "freedom of speech" and "free exercise" of religion. In such instances, the text has been understood to express an underlying principle. For example, the Supreme Court has read the First Amendment to protect "freedom of conscience." *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). In other places, the Constitution's text has been understood to reflect a pre-existing principle. For example, the Supreme Court has said that the Second Amendment "codified a *pre-existing* right," District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008), and that the Eleventh Amendment "confirm[s]" rather than "establish[es]" a principle of state sovereign immunity "implicit in the constitutional design." Alden v. Maine, 527 U.S. 706, 728-29 (1999).

   The Supreme Court has also recognized constitutional principles that do not appear in any particular textual provision but derive from the structure of the Constitution as a whole. For example, the terms "separation of powers" and "federalism" do not appear in the text of the Constitution, yet they are well-established constitutional principles that courts apply in specific cases and controversies.

2. **In *Keeping Faith with the Constitution*, you write that the Supreme Court considers "social practices, evolving norms, and practical consequences in order to give concrete, every meaning to text and principle."**

   - **Do you believe that judges may properly consider social practices, evolving norms, and practical consequences in order to determine the meaning of constitutional provisions? I am asking about your view of this approach, not whether the Supreme Court has used it or whether you would, if confirmed, follow the Supreme Court's precedents.**

     Response: Throughout American history, Justices of all stripes have examined text, original meaning, and precedent, as well as social practices, evolving norms, and

practical consequences when applying the Constitution's provisions to specific cases and controversies. I have written approvingly of this approach because it explains why the Constitution's text and principles have endured even as our society has changed. For example, this approach explains why a telephone wiretap is a "search" under the Fourth Amendment despite the absence of a physical trespass, *see* Katz v. United States, 389 U.S. 347 (1967); why the Equal Protection Clause protects women against gender discrimination even though the original understanding was otherwise, *see* United States v. Virginia, 518 U.S. 515 (1996); and why Congress's power to address twenty-first century challenges in our economy is not limited by eighteenth-century definitions of "commerce," *see* Gonzales v. Raich, 545 U.S. 1 (2005).

Judges who serve on the lower federal courts are bound by Supreme Court precedents, including any instructions in those precedents on how to interpret specific constitutional provisions. If confirmed, I would faithfully follow the Court's precedents, not my own views on constitutional interpretation.

- **This passage refers separately to constitutional "text and principle." Please explain the difference.**

  Response: Please see response to Question 1.

3. **In your article *Rethinking Constitutional Welfare Rights*, you write that "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."**

   - **What do you mean by "legal doctrine?" Does this refer to the meaning of a constitutional provision?**

     Response: By "legal doctrine," I mean the holdings, rules, and analytical tests that comprise adjudicated case law. For example, the strict scrutiny test is a part of equal protection doctrine. As a matter of usage, I would not say that the strict scrutiny test states the "meaning" of the Equal Protection Clause. But the test directs how the Equal Protection Clause applies in a specific case or controversy where, for example, a government policy treats individuals differently on the basis of race.

   - **This passage appears to say that judges may consider collective values in giving meaning to constitutional provisions. Is this your view?**

     Response: The meaning of the passage is perhaps best explained through examples. In applying the Fourth Amendment guarantee against "unreasonable searches and seizures," the Supreme Court has asked whether the person subject to search has a "reasonable expectation of privacy." Bond v. United States, 529 U.S. 334, 337 (2000). Reasonableness is an objective inquiry that asks "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* at 338 (internal quotation marks and citation omitted). Judges properly consider

collective values in applying the Fourth Amendment insofar as they must determine what privacy expectations our society is prepared to recognize as reasonable. In applying the Equal Protection Clause to sex-based classifications, the Supreme Court has asked whether the classification is based on "outmoded," "outdated," or "archaic" notions of gender roles. *See, e.g.*, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135, 139 n.11 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725-26 (1982). Judges properly consider collective values in applying the Equal Protection Clause insofar as they must determine whether a sex-based classification reflects outmoded, outdated, or archaic notions of gender roles.

4. **In an interview you gave to the Brennan Center for Justice, you said that looking at constitutional text and asking "how did the people in 1789 or the people in 1868 understand it…misses an entire range of experience that the nation has, itself, learned and that judges can rightly take into account in reading legal principles and legal texts."**

   - **Does your reference to how a text was understood at a particular point in the past refer to its meaning?**

     Response: In that interview, my reference to "how did the people in 1789 or the people in 1868 understand it" is a reference to the original expected application of constitutional text and principle, that is, "the Framers' expectations of how [the Constitution's] principles would have applied at the time they were adopted." Keeping Faith with the Constitution 35 (2009). The term "original meaning" is often used to mean the original expected application of the Constitution. However, original expected application is distinct from original meaning understood as "the underlying principles that the Framers' words were publicly understood to convey." *Id.* My writings have urged fidelity to original meanings in the latter sense and not to original expected applications. *See id.* at 35-36.

   - **If so, then do you believe that judges can change or depart from the original meaning of constitutional provisions by taking into account experience the nation has learned?**

     Response: Judges must be faithful to, and cannot change or depart from, the original meaning of constitutional provisions where original meaning refers to "the underlying principles that the Framers' words were publicly understood to convey." Keeping Faith with the Constitution 35; *see id.* at 36 ("When 'original meaning' refers to the core principles that underlie the Constitution's broad and general terms, fidelity to the Constitution requires that its original meaning be preserved over time."). My writings have agreed with Justice Holmes that judges, in order to preserve the Constitution's original meaning, can take into account experience that the nation has learned when applying the Constitution to new issues and circumstances. *See id.* at 1-2 (quoting Missouri v. Holland, 252 U.S. 416, 433-34 (1920)). In other words, judges may depart from the original expected application of a constitutional provision or principle in order to remain faithful to its original meaning.

- **If so, are there any limitations, criteria, or other restraints on how judges take into account experience the nation has learned when determining the meaning of constitutional provisions?**

  Response: Judges may take into account experience the nation has learned when applying the Constitution's text and principles to new issues and circumstances. In so doing, judges may not engage in free-wheeling inquiry into the nation's experience. Judges are constrained insofar as they apply constitutional text and principles not in the abstract, but in concrete cases and controversies; insofar as they seek guidance in precedent, which itself is part of the nation's experience; and insofar as they look to objective evidence of relevant historical facts or evolution of legal traditions.

  For example, in *United States v. Lopez*, 514 U.S. 549, 556 (1995), the Supreme Court said: "*Jones & Laughlin Steel*, *Darby*, and *Wickard* … greatly expanded the previously defined authority of Congress under [the Commerce] Clause" because of "a recognition of the great changes that had occurred in the way business was carried on in this country" and "a view that earlier Commerce Clause cases artificially had constrained the authority of Congress." In *Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954), the Court said: "We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." And in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 428, 442-43 (1934), the Court said: "To ascertain the scope of the [Contracts Clause], we examine the course of judicial decisions in its application…. It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."

- **Please explain the difference between legal principles and legal texts.**

  Response: Please see response to Question 1.

5. **In your Brennan Center for Justice interview, you said that the Obama administration should appoint judges who are "broad minded in their view of the kinds and sources that are legitimate to take into account in reading especially the Constitution, but…legal texts of all sorts." By "reading" the Constitution, do you mean determining the meaning of constitutional provisions? In other words, do you believe that judges may consider a broad range of kinds and sources in determining the meaning of constitutional provisions?**

   Response: 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).

If confirmed, I would set my own views aside and faithfully follow the Supreme Court's precedents, including any instructions in those precedents on the kinds of sources that may be used to determine how a particular constitutional provision should be applied in a specific case or controversy.

6. **In your article *Separation Anxiety: Congress, the Courts, and the Constitution*, you wrote that the Constitution "has shown a remarkable capacity to absorb new meanings and new commitments forged from passionate dialogue and debate, vigorous dissent, and sometimes disobedience." Please explain what you mean by "new meanings" and "new commitments."**

   Response: Those terms refer to applications of the Constitution's text and principles to new circumstances brought about by political, economic, or social change. During the New Deal, for example, the Supreme Court rejected its earlier applications of the Commerce Clause when it applied the clause to uphold novel legislation that sought to stabilize and protect the national economy. *See Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439, 440-42 (2003).

   - **The same article refers to the "ongoing search for constitutional meaning." Do you believe that judges may consider the elements you mentioned such as dialogue, debate, dissent, and disobedience in determining the meaning of constitutional provisions?**

     Response: No. My reference to dialogue, debate, dissent, and disobedience was a reference to processes by which ordinary citizens and their elected representatives seek to understand and express their view of the Constitution.

7. **I understand originalism to be an approach to discovering the meaning of the Constitution's text, not to determining its application. You have criticized originalism for its indeterminacy. In your own writings and speeches, however, you discuss a very broad range of factors and considerations that judges may use to interpret the Constitution.**

   - **How are things such as evolving social norms, "dialogue and debate," "experience" that the nation has learned, social practices, collective values, or practical consequences any more determinate than the factors originalism uses to determine the meaning of constitutional provisions?**

     Response: My writings do not contend that the method of constitutional fidelity is more determinate than originalism, only that originalism is often no more determinate than constitutional fidelity. *See* Keeping Faith with the Constitution 37-38 (2009). My writings have acknowledged that "the interpretive methodology we describe does

not dictate a single 'right answer' in every case" but rather serves to promote "transparency" in the judicial decision-making process. *Id.* at 35.

- **How are the factors you discussed to be weighed in reaching a conclusion, relative to the original meaning of a constitutional provision?**

  Response: The Supreme Court has weighed those factors along with the original meaning of a constitutional provision 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 Court's precedents, including any instructions in those precedents on how a particular constitutional provision should be applied in a specific case or controversy.

8. In *Keeping Faith with the Constitution,* you criticize originalism because it "cannot account for many of the constitutional understandings that Americans take for granted today."

- **By "constitutional understandings," do you mean the meaning of constitutional provisions or its application?**

  Response: In the above-quoted sentence, I use "constitutional understandings" to mean the ways in which the Constitution has been applied over time.

- **This criticism suggests that the proper approach or method for interpreting the Constitution should be driven by the "constitutional understandings" for which it can account. Is this your view? Please explain.**

  Response: My writings have suggested that in assessing a method for interpreting the Constitution, it is appropriate to consider whether the method can explain basic understandings of the Constitution that Americans take for granted today, such as the unconstitutionality of racial segregation in public schools or the unconstitutionality of policies that exclude women from service on juries or in various occupations.

9. In your article "National Citizenship and Equality of Educational Opportunity," you wrote that the Fourteenth Amendment guarantees substantive rights that are necessary for "equal standing in the national political community." Do you believe that judges may determine what these substantive rights are?

Response: My writings have not claimed that judges may determine what the substantive rights of national citizenship are, apart from rights protected elsewhere in the Constitution. The above-referenced article was addressed to Congress, not the courts, and my writings have approached this subject from the standpoint that Congress is best situated to determine what the substantive rights of national citizenship are. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 339-40 (2006).

10. In a January 2009 broadcast of the National Public Radio broadcast "Weekend Edition," you said that "in the nomination of judges, the decision-makers are entitled to consider a broad range of factors, including the political background and affiliations of the candidates." Please explain why political background and affiliation is a legitimate consideration in the nomination or confirmation of federal judges.

Response: The quotation above occurred in a portion of the radio broadcast that reported findings by the Justice Department's inspector general that "managers there regularly hired conservative Federalist Society members over liberal ACS members for nonpartisan jobs, even if the ACS members were more qualified. That violates federal laws and civil service rules." Ari Shapiro, *Balance of Power Swings to Liberal Legal Group*, NPR Weekend Edition, Jan. 3, 2009. After identifying this issue, the broadcast then quoted me saying that "I have a lot of confidence, actually, that the new people in the Justice Department and elsewhere in the government are keenly aware of that issue, and that in the hiring of career staff, that will not be an issue." That statement then led to my statement partially quoted in the question above, which drew a contrast between the hiring of civil servants and "the hiring of political staff as well as … the nomination of judges." The quoted statement indicated that, unlike the rules for hiring civil servants, it is permissible for decision-makers to consider a broad range of factors, including political background and affiliations, in appointing judges. The statement did not say, and I do not believe, that decision-makers *should* consider political background and affiliations. Factors that decision-makers should consider are whether the judicial candidate will approach each case impartially and objectively; whether the candidate will faithfully apply the law to the facts of each case or controversy and not his or her personal views; and whether the candidate is fully committed to upholding the Constitution.

11. In your confirmation hearing, you said that the role of the judge "is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories. That's simply not the role of a judge."

- **Please give some examples of court decisions that improperly invented or created new theories.**

  Response: *Lochner v. New York*, 198 U.S. 45 (1905), improperly invented a constitutional right of contract. *Plessy v. Ferguson*, 163 U.S. 537 (1896), improperly invented the doctrine of separate but equal.

- **It appears that you were referring to the lower courts. Is it permissible or appropriate for the Supreme Court to invent or create new theories when it interprets and applies the Constitution or statutes? Why or why not?**

  Response: Because the Supreme Court decides cases in which the law is unsettled, the legal rules and tests announced by the Court are sometimes "new" in that respect. Even so, however, it is not appropriate or permissible for the Court to invent or create

new theories because the Court must be faithful to the text and principles of the Constitution and to the statutes it interprets, and because the Court must faithfully apply the doctrine of stare decisis, which requires adherence to precedent unless certain conditions are met.

12. In *Keeping Faith with the Constitution*, you wrote that "a court cannot be faithful to the principle embodied in the text unless it takes into account the social context in which the text is interpreted." You also wrote that the Supreme Court gives meaning to the principles of the Constitution by considering "social practices, evolving norms, and practical consequences." Social contexts and practices, evolving norms, and practical consequences all change over time. In your confirmation hearing, however, you said that "the principles that are embodied in that [constitutional] text endure over the ages. Those things do not change." Please reconcile what appear to be contradictory positions.

Response: The principles embodied in the Constitution's text endure over the ages and do not change. To preserve the meaning of the text and its underlying principles, it may be necessary to take social context and practices into account when applying constitutional text and principle to a specific case or controversy. My writings have cited *Katz v. United States*, 389 U.S. 347 (1967), as an example. *See* Keeping Faith with the Constitution 28 (2009). In *Katz*, the Supreme Court said that "the Fourth Amendment protects people, not places," 389 U.S. at 351, an enduring principle embodied in the text that makes the finding of an unreasonable search or seizure turn on expectations of privacy rather than physical trespass. To uphold this principle, the Court took social context and practices into account when it said that "a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.* at 352.

13. In your confirmation hearing, you said that "the principles that are embodied in that [constitutional] text endure over the ages. Those things do not change." A moment later, however, you said that to "preserve the meaning of that text," it is necessary for judges to "give those phrases and those words meaning in the light of the current conditions of the society." Those conditions obviously change over time. You were referring to the meaning of constitutional provisions, not their application. Please reconcile what appear to be contradictory positions.

Response: The above-quoted statement from my confirmation hearing does not state my view clearly. The principles embodied in the Constitution's text endure over the ages and do not change. In order to preserve the meaning of the text and its underlying principles, it may be necessary to take social context and practices into account when applying constitutional text and principle to a specific case or controversy.

14. In your confirmation hearing, you said that the original meaning of constitutional provisions is a "very important" consideration that judges may consider. In your writings, you describe how judges may also look to "social practices, evolving norms, and practical consequences in order to give concrete, everyday meaning" to those provisions. In an interview, you said that judges should be "broad minded" regarding the sources they may take into accounting in interpreting the Constitution. And in an amicus brief you joined, you argued that "constitutional interpretation appropriately takes into account changes in social circumstances and cultural understandings."

- **If the original meaning of a constitutional provision is at odds with or inconsistent with current social practices or circumstances, evolving norms, or cultural understandings, is a judge free to choose which meaning he or she will attribute to a constitutional provision?**

  Response: I have written that judges must be faithful to, and cannot change or depart from, the original meaning of constitutional provisions where original meaning refers to "the underlying principles that the Framers' words were publicly understood to convey." Keeping Faith with the Constitution 35; *see id.* at 36 ("When 'original meaning' refers to the core principles that underlie the Constitution's broad and general terms, fidelity to the Constitution requires that its original meaning be preserved over time."). The Supreme Court has addressed instances where the original expected application of a constitutional provision is at odds with contemporary norms in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). If confirmed, I would faithfully follow the Court's precedents, including any instructions in those precedents on how a particular constitutional provision should be applied in a specific case or controversy.

- **Are there considerations or factors which you believe judges may not consider in interpreting the Constitution or, as you put it in one article, engaging in "the ongoing search for constitutional meaning"?**

  Response: In interpreting the Constitution, a judge must be impartial and objective; a judge may not consider his or her own personal views (whether like or dislike) of a constitutional provision or principle. A judge may not interpret the Constitution based on sympathy for or bias toward a particular group, interest, or party. A judge may not interpret the Constitution based on any economic, political, social or other theory or ideology extrinsic to the text and principles of the Constitution. A judge may not rely on foreign law as legal authority in interpreting the Constitution unless American law so requires. In general, a judge may not consider any factor that would cause him or her to ignore or depart from the text or principles of the Constitution.

15. In your writings, you have argued that judges may consider many factors and what appear to be quite subjective considerations such as evolving social norms, practices, and circumstances as well as cultural understandings and other elements.

During your confirmation hearing, however, you told Senator Kaufman that personal beliefs "never have a role in the act of judging." Please reconcile what appear to be contradictory positions. How can a judge take into account, consider, and utilize evolving and changing norms to interpret the Constitution without his personal beliefs playing any role whatsoever?

Response: Personal beliefs have no role in the faithful discharge of judicial duty, and the consideration of social norms and practices in judging is not inconsistent with this idea. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." Bond v. United States, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment "from the perspective of the average person, applying contemporary community standards." Ashcroft v. ACLU, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices is objective and neither requires nor permits the judge to consider his or her personal beliefs.

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

1. **How do you define "judicial activism"?**

   Response: "Judicial activism" is a term often used to criticize a judicial decision for usurping the prerogatives of democratic decision-making, for failing to follow text or precedent faithfully, for going beyond the facts on record or the arguments made by the parties, for imposing the judge's own values or beliefs, or for committing other legal errors in order to achieve a desired result. In general, I have not used the term "judicial activism" very often because it has no settled meaning and "often conveys little of substance beyond the fact that the decision has produced a result with which the critic disagrees." Keeping Faith with the Constitution 41 (2009). In general, unelected judges must be very cautious in exercising power that displaces judgments made through the democratic process. At the same time, one of the crucial functions of an independent judiciary is to protect constitutional rights and liberties against encroachment by the political branches. *See* 1 Annals of Cong. 457 (1789) (statement of Rep. Madison); The Federalist No. 78 (Hamilton). I believe that labeling a judicial decision "activist" is less illuminating than identifying the specific legal errors that the decision committed.

2. **Could you identify three recent Supreme Court cases that you believe are examples of "judicial activism"? Please explain why you believe these cases are examples of "judicial activism".**

   Response: My writings have identified some Supreme Court cases as "activist" based on a failure to adhere to constitutional text (*Alden v. Maine*, 527 U.S. 706 (1999)) and lack of deference to precedent (*FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Bowles v. Russell*, 551 U.S. 205 (2007)).

3. **How do you define "judicial restraint"?**

   Response: I have written that judicial restraint "is an important value" and "requires judges to refrain from enacting their own policy preferences into law." Keeping Faith with the Constitution 41 (2009). At the same time, "while the notion of judicial restraint instructs judges to be vigilant against abuses of their own power, it does not provide much guidance as to what interpretive methods or substantive judgments properly fall within the scope of judicial power." *Id.* For this reason, I believe the term "judicial restraint," like "judicial activism," is of limited utility in describing the virtues or vices of a particular judicial decision.

4. **Could you identify three recent Supreme Court cases that you believe are examples of "judicial restraint"? Please explain why you believe these cases are examples of "judicial restraint".**

Response: My writings have identified *Gonzales v. Raich*, 545 U.S. 1 (2005), *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), as examples of cases where the Court deferred to the institutional competence or prerogatives of the political branches, a feature commonly associated with judicial restraint.

5. **Do you believe that it is ever appropriate for judges to indulge their own values and/or policy preferences in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: I do not believe it is ever appropriate for judges to indulge their own values or policy preferences in determining what the Constitution and the laws mean.

6. **Do you believe that it is ever appropriate for judges to indulge their own subjective sense of empathy in determining what the Constitution and the laws mean? If so, under what circumstances?**

Response: To the extent that empathy means an ability to understand a claim from another person's point of view, I think it can help a judge to appreciate the arguments on all sides of a case and to ensure that the litigants' claims have been fully heard. However, to the extent that empathy causes a judge to be biased or prejudiced or to identify with a particular litigant or outcome, it is inappropriate and must have no role in judicial determinations of what the Constitution and the laws mean.

7. **Do you believe that it is ever appropriate for judges to indulge their empathy for particular groups of persons? For example, do you believe that it's appropriate for judges to favor those who are poor? Do you believe that it's appropriate for judges to disfavor corporations?**

Response: I do not believe it is ever appropriate for judges to indulge their empathy for particular groups of persons. A judge must approach every case objectively and impartially.

8. **Should the courts, rather than the elected branches, ever take the lead in creating a more just society?**

Response: If "creating a more just society" means addressing issues of distributive justice, I have written that it is solely the prerogative of the elected branches, not the courts, to take the lead. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008). If "creating a more just society" means protecting the rights and liberties specified in the Constitution against encroachment by the political branches, I have written that this is a task appropriate for the courts because of their "independence from the political branches and public passions of the moment." Keeping Faith with the Constitution 24 (2009).

9. In your hearing testimony, you spoke about the role of a judge by paraphrasing now Chief Justice Roberts's umpire analogy: "I think the role of the judge is to be an impartial, objective and neutral arbiter of specific cases and controversies that come before him or her, and the way that that process works is through absolute fidelity to the applicable precedents and the language of the laws, statutes, regulations that are at issue in the case." However, in your book *Keeping Faith with the Constitution*, you expressed a very different view. There, quoting Chief Justice Roberts's umpire analogy, you argued that it did "not withstand scrutiny." Specifically, you stated "Ironically, the significance of Chief Justice Roberts's baseball analogy is exactly the opposite of what he intended. Just as baseball players and many fans know that umpires over time have interpreted the strike zone differently in response to changing aspects and contemporary understandings of the game, so too do lawyers, judges, and ordinary citizens know that the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context." Do you stand by your position that "the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context"? How do you reconcile your statements in your book and your statements before the Judiciary Committee?

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

My hearing testimony urged "fidelity" to applicable precedents and the language of laws, statutes, and regulations at issue in a given case. My book does not address interpretation of statutes or regulations. The book defines "fidelity" to the Constitution to require that judges "interpret its words and … apply its principles in ways that sustain their vitality over time." Keeping Faith with the Constitution 25 (2009). Using various Supreme Court cases as examples, including *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954), the book shows that "the faithful application of constitutional principles to new and specific circumstances demands attention to evolving social context." Keeping Faith 28.

Consideration of social context is not at odds with the duty of a judge to be impartial and objective. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." Bond v. United States, 529 U.S. 334,

338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment "from the perspective of the average person, applying contemporary community standards." Ashcroft v. ACLU, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices requires the judge to be objective and impartial.

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

10. In your hearing testimony, you stated that academics, when they write, are not bound in the same way judges are when they judge. You said: "The job of law scholars, when they write, largely, I think, is to probe, criticize, invent, be creative . . . ." You have certainly been creative and inventive during your academic career and have written in/spoken with "unnecessarily flowery language." Doesn't your written and spoken academic record shed light on what your judicial philosophy is and what your judicial method would be if you were confirmed to be a judge? How can you assure us that your academic creativity and inventiveness would be in check if you were confirmed to be a judge?

Response: If confirmed as a circuit judge, I would set aside my own views and fully commit myself to the obligation of deciding cases impartially and objectively, with faithful adherence to the applicable law, including Supreme Court and circuit precedent. I recognize that the role of a judge is not to bend the law in service of any academic theory or to pontificate on what the law should be. The role of a judge is to apply the law *as it is* to the facts and arguments raised in specific cases or controversies.

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

11. In your hearing testimony, you said that statements you made in writings[1] were not an "agenda" but rather "my endorsement of precedents of the court that have done

[1] "Once a legislative body creates a welfare program it's the proper role of the courts to grasp the community meaning and purpose for that welfare benefit. When necessary, courts should expand the wealth redistributing effects of the program to satisfy needs of equality and national citizenship."

precisely those things." Are you saying that you endorse judges and courts that expand rights that have been legislatively created?

Response: My testimony was a reference to published work in which I have endorsed the reasoning of Supreme Court precedents that have applied the Constitution in cases involving social welfare benefits and programs. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 255-66 (2008).

12. **You also indicated in your testimony that you believe your writings demonstrate "a perspective of judicial restraint". I'm not so sure they do. Could you please explain in detail how your writings demonstrate "a perspective of judicial restraint"?**

Response: The comment in my testimony was made in reference to my academic writings on education and welfare rights. Most of my writings on these subjects have been directed at legislators and policymakers, not judges, reflecting my belief in the limited role of courts. For example, my article, *Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006), was "chiefly directed at Congress" and urged Congress to adopt educational policies that enable all children to become full and equal citizens. *Id.* at 339. In that article, I sought to avoid "the language of *rights*" because of "its deep undertone of judicial enforceability," *id.*, and I have not urged any court to hold that a right to education exists under the Constitution.

Similarly, my article, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203 (2008), agrees 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).

13. **In your hearing testimony, you stated: "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, absolutely. I believe that it is absolutely true. 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." What other "touchstones" are there? What "other considerations" are you talking about? What do you consider to be the "ultimate touchstone against which all other considerations must yield"?**

Response: 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 evaluated the text and original meaning of the Constitution in the context of other considerations 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.

14. One reason you thought it was necessary to oppose Chief Justice Roberts was because of his association with the National Legal Center for the Public Interest, and specifically "its mission to promote, among other things, free enterprise, private ownership of property, and limited government." Please explain your fundamental concerns with free enterprise, private ownership of property, and limited government, addressing each issue separately.

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

15. In your hearing testimony, you stated: "whatever I have written in the books and in the articles would have no bearing on my role as a judge." A number of those books and writings specifically discuss the role of a judge and how judges should perform their constitutional duties. Why should the Committee disregard those writings and which one of your writings should the Committee look to in order to grasp an understanding of your judicial philosophy? In responding to the question, please explain whether the writings you no long embrace should be referred to by others as supporting the proper role of a judge.

Response: That statement in my hearing testimony was intended to mean that, if confirmed as a judge, my duty would be to follow the law and not my personal views on legal issues. It was not intended to suggest that the Committee should disregard my writings in evaluating my qualifications to be a judge. I believe my writings shed light on my qualifications in at least three respects. First, they show that I would bring to the

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

16. **At the hearing, Senator Sessions asked you about the Second Amendment in regard to your theory of constitutional fidelity that "[it] may be valid when the object of interpretation is one of the Constitution's concrete and precise commands. For example, all bills for raising revenue must originate in the House of Representatives . . . ." Senator Sessions' specific question was whether the Second Amendment, which states the right to bear arms shall not be infringed, provides such a concise command? I don't believe that you actually answered the Senator's question. Please explain if the Second Amendment is one of the precise commands in the Constitution or whether evolving norms might be use to modify its clear meaning.**

Response: In *District of Columbia v. Heller*, the Supreme Court engaged in a lengthy discussion of historical and contextual sources in interpreting the text of the Second Amendment, *see* 128 S. Ct. 2783, 2788-2804 (2008), which suggests that the amendment does not have the same precision that Article I, Section 7 has when it says "[a]ll bills for raising Revenue shall originate in the House of Representatives." Based on its extensive historical inquiry, the Court in *Heller* rested its holding that the Second Amendment protects an individual right to bear arms on "the original understanding of the Second Amendment." *Id.* at 2816. The Court further held that the Second Amendment covers only those arms "in common use at the time," *id.* at 2817 (internal quotation marks and citation omitted), and it considered contemporary societal norms in applying this limitation to the case at bar, *see id.* at 2818 ("handguns are the most popular weapon chosen by Americans for self-defense in the home"). If confirmed, I would faithfully follow the Court's precedent, including any instructions in the precedent on the proper way to apply the Second Amendment to a specific case or controversy.

17. **The First Amendment contains the phrase "Congress shall make no law." Yet, in *Keeping Faith with the Constitution,* you wrote that the word "no" in this phrase does not mean no. You also wrote, in *Keeping Faith with the Constitution,* that the word "necessary" in the "necessary and proper" clause does not mean necessary. I am concerned about common words having different or changing meanings. For example, in response to a question from Senator Coburn, you stated that your testimony about Proposition 8 was that it "should" be upheld. Senator Coburn noted that your testimony was that it "would" be upheld, not "should" be upheld. If "no" does not mean no and "necessary" does not mean necessary, how can legal**

rulings be consistent and predictable as intended when the Constitution was drafted?

Response: Those examples are from a discussion in the book about strict construction that sought to illustrate that "the Constitution contains phrases that do not bear a literal reading." Keeping Faith with the Constitution 42 (2009). For example, in reading the Necessary and Proper Clause, the Supreme Court in *McCulloch v. Maryland* rejected the ordinary meaning of the term "necessary" and held that "necessary" means "convenient," "useful," "plainly adapted," or "conducive to the end." 17 U.S. 316, 413-15, 421 (1819). This holding does not appear to have produced inconsistency or unpredictability; *McCulloch*'s reading of the Necessary and Proper Clause remains a stable and authoritative precedent on the scope of Congress's power.

18. You've written that "[t]he enduring task of the judiciary . . . is to 'find a way to articulate constitutional law that the nation can accept as its own."

a. Is it your position, then, that Constitutional law is whatever the nation is willing to "accept as its own," rather than what the text of the Constitution provides?

Response: No. The above quotation is simply meant to indicate that it is important for courts to give reasons for their constitutional decisions that are persuasive not only to lawyers, judges, and others who are trained in the law, but also to the citizenry.

b. How, exactly, is a judge supposed to decipher what the "nation can accept as its own"?

Response: Judges may not decide cases on the basis of public opinion polls, majority sentiments, or the likely approval or disapproval of political leaders. Judges must decide cases on the basis of legal principles. The above quotation is simply meant to indicate that it is important for courts to give reasons for their constitutional decisions that are persuasive not only to lawyers, judges, and others who are trained in the law, but also to the citizenry.

19. I would like to get a better understanding of how you would interpret statutes and what your judicial method would be if you were confirmed to be a judge.

a. In cases involving a close question of law, what would you look to when determining which way to rule?

Response: The intent of the legislature is the ultimate touchstone of statutory interpretation. The best evidence of legislative intent is the text of the relevant statute, and the Supreme Court has said that a judge must "identify and give effect to the best reading of the words in the provision at issue" regardless of the policy

wisdom of the resulting interpretation. Harbison v. Bell, 129 S. Ct. 1481, 1493 (2009). Further, "[i]n reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." Dada v. Mukasey, 128 S. Ct. 2307, 2317 (2008) (internal quotation marks and citation omitted).

Where the statutory text is ambiguous, the Supreme Court has applied various rules of construction where appropriate, such as the rule of constitutional avoidance, the rule of lenity, or the rule against absurdity. Statutory purpose and legislative history also may provide evidence of legislative intent. *See, e.g.*, Zedner v. United States, 547 U.S. 489, 500-02 (2006). However, where the statutory text is clear, neither legislative history nor any other extrinsic source may be used to create ambiguity or an alternative meaning. *See* Boyle v. United States, 129 S. Ct. 2237, 2246 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity."); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history or any other extrinsic material"). If confirmed, I would faithfully follow the Court's precedents on statutory interpretation.

b. Would you agree that the meaning of a statute is to be ascertained according to the understanding of the law when it was enacted?

Response: The Supreme Court has held that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005); *see* Boyle v. United States, 129 S. Ct. 2237, 2246 (2009). These cases hold that, where the text is clear, the text is decisive as to the meaning of the statute notwithstanding any other evidence of how the law was understood when it was enacted. If confirmed, I would faithfully follow the Court's precedents on statutory interpretation.

c. How would you use legislative history when interpreting a statute? What kind of weight would you give legislative history, if any, when interpreting a statute?

Response: The Supreme Court has looked to legislative history for evidence of legislative intent. *See, e.g.*, Zedner v. United States, 547 U.S. 489, 500-02 (2006). However, where the statutory text is clear, legislative history may not be used to create ambiguity or an alternative meaning. *See* Boyle v. United States, 129 S. Ct. 2237, 2246 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity."); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history or any other extrinsic material"). If confirmed, I would faithfully follow the Court's precedents on the use of legislative history.

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

1. You co-authored a recent book published by the American Constitution Society entitled *Keeping Faith with the Constitution*. In that book, you claimed that constitutional interpretation

> **"requires adaptation of its broad principles to the conditions and challenges faced by successive generations. The question that properly guides interpretation is not how the Constitution would have been applied at the founding, but rather how it should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society."[1]**

You went on to argue that constitutional interpretation properly considers "the evolving understandings of the Constitution forged through social movements, legislation, and historical practice."[2] It seems from these statements that you believe the meaning of the Constitution is not fixed at what the framers intended it to mean.

a. If confirmed, what "changing needs, conditions, and understandings of our society" would you choose to consider as you interpret the Constitution?

Response: If confirmed, I would faithfully follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy. In many areas of constitutional law, the Supreme Court has required judges to consider social understandings while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." Bond v. United States, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment "from the perspective of the average person, applying contemporary community standards." Ashcroft v. ACLU, 535 U.S. 564, 575 (2002).

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[1] GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 2 (2009).
[2] *Id.* at 3.

b. At your hearing, I read a shortened form of the quotation below that omitted the words "in order to sustain its vitality." You testified that you believed that the missing words were: "to preserve the power and meaning of the text and the principles." Obviously, your recollection of the missing words (versus the real text) changed the meaning. The full quotation is: "The question that properly guides interpretation is not how the Constitution would have been applied at the founding, but rather how it should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society." Looking at the full quotation, how would you decide how the Constitution "should" be applied today?

Response: I apologize for misremembering the missing words of the quotation, and I stand corrected. I had in mind a similar quotation from the book: "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." Keeping Faith with the Constitution 25 (2009). I believe the two quotations express the same idea, *i.e.*, that the Constitution should be applied in a way that preserves the meaning or sustains the vitality of its text and principles. My writings do not claim that the Constitution should be applied to conform to the changing needs, norms, or understandings of society. Instead, my writings state that the application of the Constitution should always be faithful to its text and principles, and that such fidelity may require judges to consider the changing needs, norms, or understandings of society. *See id.* at 24-29.

c. What is legal test for how you decide how the Constitution "should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society"?

Response: My book provides several examples of how Supreme Court implements this approach in its legal reasoning on a wide range of constitutional issues. The examples include *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 Court's precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy.

d. Do you stand by the quotation as written in the book (i.e., "The question that properly guides interpretation is not how the Constitution would have been applied at the founding, but rather how it should be applied today in order to sustain its vitality in light of changing needs, conditions, and understandings of our society.")?

Response: I stand by the quotation as an expression of my scholarly views on constitutional interpretation. If confirmed, I would set aside my scholarly views and faithfully follow the instructions of applicable Supreme Court and Ninth Circuit precedents, including any instructions in those precedents on how to interpret the constitutional provisions that apply to a particular case or controversy.

2. At your confirmation hearing, you testified that you have "the highest regard for Justice Alito's intellect and his career as a lawyer."

a. Do you have high regard for Justice Alito himself?

Response: Yes. In addition to his intellect and professional accomplishments, I have particular respect and admiration for his personal background. Justice Alito grew up in an immigrant family, and he was raised by parents who worked very hard and made sacrifices for their children. He went to public schools, he studied hard, he was an active member of his community, and he went on to Princeton and Yale Law School. I believe he was the first person in his family to become a lawyer. He is an American success story, and he has served our country honorably as a prosecutor and as a judge.

3. At the confirmation hearing of Samuel Alito (January 12, 2006), you offered the following testimony:

> **Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some. Mr. Chairman, I humbly submit that this is not the America we know. Nor is it the America we aspire to be.**

a. Do you really believe that that is his view of America?

Response: No. The passage above described a series of opinions that Justice Alito had written as a government lawyer and as a Third Circuit judge regarding what he believed to be permissible under the Constitution. Those writings were analyzed in my 2006 testimony, and the passage above was not intended to suggest that he supported, condoned, or endorsed those practices as a policy matter. However, upon rereading and reflecting on this passage in response to this question, I believe the passage is unduly harsh and provocative and does not add to the fifteen pages of legal analysis that preceded it. What troubles me most is that the passage has an *ad hominem* quality that is unfair and hurtful to the nominee—a reality that, in all

candor, I did not appreciate then nearly as much as I appreciate now. The passage does not reflect and indeed obscures the respect I have for Justice Alito as a person who rose from humble origins to serve our country honorably as a prosecutor, judge, and now Supreme Court Justice. For these reasons, I regret having written this passage, and I would omit it if I had the opportunity to rewrite my testimony.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. What is the substantive difference between your hearing statement and Chief Justice Roberts's remarks?

b. Do you still stand behind your criticism of the Chief Justice's statement?

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

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

Consideration of social context is not at odds with the duty of a judge to be impartial and objective. In many areas of constitutional law, the Supreme Court has required judges to consider social norms and practices while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as

reasonable." Bond v. United States, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment "from the perspective of the average person, applying contemporary community standards." Ashcroft v. ACLU, 535 U.S. 564, 575 (2002). In each instance, the consideration of social norms and practices requires the judge to be objective and impartial.

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

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

   a. **How did you reach this conclusion?**

   b. **Do you still believe that "free enterprise, private ownership of property, and limited government" are "code words for an ideological agenda hostile to the environment, workplace, and consumer protections"?**

   c. **Isn't our Constitution based in large part on ideas of free enterprise, private ownership of property, and limited government?**

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

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

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

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

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

Response: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: Please see response to subpart (b).

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

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

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

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

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

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

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

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

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

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

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

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

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

13. In your article, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 254 (2008), you write: "The problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17. You testified at your confirmation hearing that the "role of a judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories. That's simply not the role of a judge." In many of your writings, however, you advocate broad and novel readings of the Constitution. For example, you write that under the Citizenship Clause of the Fourteenth Amendment,

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

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

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

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

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

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

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

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

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

d. On what basis did you determine your list of "necessary" social and economic rights?

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

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

written: "*The problem of courts* is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus." *Id.* at 254 (emphasis added).

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

Response: In many areas of constitutional law, the Supreme Court has required judges to consider social norms and understandings while making clear that such consideration is an objective, not subjective, inquiry. For example, the Court analyzes Sixth Amendment claims of ineffective assistance of counsel based on "an objective standard of reasonableness in light of prevailing professional norms." Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009). The Court analyzes Fourth Amendment claims of unreasonable search or seizure by inquiring "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." Bond v. United States, 529 U.S. 334, 338 (2000). And the Court analyzes whether material is obscene and thus unprotected by the First Amendment "from the perspective of the average person, applying contemporary community standards." Ashcroft v. ACLU, 535 U.S. 564, 575 (2002). In each instance, the inquiry is objective and does not direct the judge to act on what he or she personally believes or on what a majority of society thinks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. **In response my question about using foreign law in interpreting the Constitution, you noted that "what I've observed the Justices doing in some of these cases, is they choose the law that is favorable to the argument."**

   a. **Do you believe that the Court "[chose] the law that is favorable to [their] argument] in *Lawrence v. Texas*, which cited to foreign law when undercutting the reasoning in *Bowers v. Hardwick*?**

      Response: Yes. The Supreme Court in *Lawrence v. Texas* cited an act of the British Parliament and decisions of the European Court of Human Rights in support of its assertion that the "references [in *Bowers*] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction." 539 U.S. 558, 572-73, 576-77 (2003).

   b. **Do you believe that is what the Court did in *Roper v. Simmons*, which cited the death penalty laws of foreign nations in an effort to show that sentencing a person under 18 years old to death, regardless of the severity of the crime, constituted cruel and unusual punishment under the Eighth Amendment?**

      Response: Yes. The Supreme Court in *Roper v. Simmons* cited the laws of several nations as well as the United Nations Convention on the Rights of the Child in support of its assertion that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." 543 U.S. 551, 575-78 (2003).

   c. **At your hearing, you indicated that it was appropriate for courts to cite foreign law for "ideas and other forms of guidance." To your credit, you said that "[a]uthority is the basis on which cases are decided, not ideas or other forms of guidance." However, in a constitutional law case, the relevant authority is the Constitution. The only possible relevance I can see for citing foreign law as a source of "ideas [and] other forms of guidance" in such a case is to influence how a judge interprets the Constitution, the relevant authority; therefore, while your answer may have shown your understanding that foreign law may not *control* the meaning of the Constitution, I am still unsure of how you think it is permissible for foreign law to *influence* the interpretation of our Constitution. Do you think there is another relevant purpose for citing to foreign law, other than influencing how a judge interprets authority and legal standards?**

      Response: Legal standards may occasionally require a judge to rely on foreign law, as in cases involving treaties, conflict of laws, or foreign contracts. Apart from circumstances where American law requires a judge to rely on foreign law, however, I do not believe a judge should rely on foreign law as legal authority in interpreting U.S. law, including the U.S. Constitution. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have

no legal authority in the interpretation of the U.S. Constitution, foreign law also has no legal authority in the interpretation of the U.S. Constitution.

d. In your view, is it ever proper for judges to look to contemporary foreign or international laws or decisions in determining the meaning of provisions of the Constitution? If so, under what circumstances?

Response: Because foreign law has no legal authority in our legal system, judges should not rely on contemporary foreign or international laws or decisions in determining the meaning of provisions of the U.S. Constitution, unless American law so requires. In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own.

e. If so, how would you choose which foreign law to consider as you interpret the Constitution?

Response: Please see response to subpart (d) above.

f. How do contemporary foreign and international legal materials have any genuine relevance to the issue of American law being decided?

Response: In limited circumstances, foreign law can be a source of ideas, just as treatises and law review articles can be sources of ideas, although any value that foreign law might have as a source of ideas is circumscribed by differences in the legal, political, and social culture of other nations compared to our own. Just as law review articles have no relevance as legal authority in the interpretation of American law, foreign law likewise has no relevance as legal authority in the interpretation of American law, except where American law so provides.

g. There is a surprising dearth of Supreme Court case law on the Second Amendment. Given the paucity of case law on the subject and the clearly unsettled areas of Second Amendment law, would it be appropriate for the Supreme Court to look to "wise solutions" in foreign law when deciding whether the right to bear arms in America is a fundamental right and should be incorporated on to the states?

Response: Whether the right to bear arms is a fundamental right that should be incorporated on to the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

h. Would foreign law be relevant to any aspect of your efforts to interpret the Second Amendment?

Response: If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment, including any instructions in those precedents on how to interpret the Second Amendment.

i. Why is foreign law relevant when interpreting the Eighth Amendment and not the Second Amendment?

Response: If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment and the Eighth Amendment, including any instructions in those precedents on how to interpret these amendments.

2. You have written a number of articles arguing that the Citizenship Clause of the 14th Amendment creates a positive right to whatever welfare benefits are necessary to facilitate full participation as a citizen.

In "Interstate Inequality in Educational Opportunity," you argued that "the Fourteenth Amendment guarantee of national citizenship [was] a generative source of substantive rights."[1] You also argued that "contrary to the conventional wisdom that 'the Constitution is a charger of negative rather than positive liberties,' the social citizenship tradition assigns equal status to negative rights . . . and positive rights to government assistance."[2]

In a companion article entitled "Education, Equality, and National Citizenship," you stated: "by virtue of its affirmative character, the substantive protections of the Citizenship Clause are guaranteed not only against state abridgment, but also as a matter of positive right."[3] You ultimately concluded that the "the duty of government cannot be reduced to simply providing the basic necessities of life . . . the main pillars of the agenda would include . . . expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit."[4]

Throughout our history, most lawyers and judges have not viewed the Constitution in this way. The predominant view has been, as Judge Richard Posner of the Seventh Circuit put it, that the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."[5]

a. Why do you think Congress and the Court's interpretation of the Constitution in general has shifted to an affirmative-right guarantee, rather than a set of restrictions on government power?

Response: In general, I do not think Congress or the Court has interpreted the Constitution to recognize affirmative rights. My writings make clear my awareness that "[t]he concept of positive rights [is] disfavored in Supreme Court doctrine." *Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336 (2006) (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). If confirmed as a judge, I would faithfully follow the Supreme Court's precedents, not the views I have expressed as a scholar.

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[1] Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044 2047-48 (2006).
[2] Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330, 336 (2006).
[3] *Id.* at 358.
[4] *Id.* at 407.
[5] *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

3. **You have argued that the Constitution creates, in all citizens, a positive right to whatever welfare benefits are necessary for full participation as a citizen of the United States. 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, not least because the Equal Protection Clause extends to 'persons,' not only to citizens."**

   a. **Do you personally believe that people whose presence in this country violates our immigration laws nonetheless have a constitutional right to public education?**

      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). *Plyler* dealt only with "innocent" children who "can affect neither their parents' conduct nor their own status." *Id.* at 220, 230 (internal quotation marks and citation omitted). The Court also said 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 on whether people who are here illegally have a constitutional right to public education, and I believe it would not be appropriate for me to do so now.

   b. **Do you personally believe the U.S. Constitution guarantees any "persons" living in the United States a right to healthcare and other 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. My writings have not claimed that there is a constitutional right to health care or welfare for any citizen or person. My writings have indicated 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, or define the contours of any such right. *Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 244-45, 264-66 & n.324 (2008).

4. **You were one of several law professors who filed an amicus brief with the California Supreme Court in a suit seeking to have California's definition of marriage as between a man and a woman declared unconstitutional. Your brief argued that California's definition of marriage violated the equal protection guarantees of the U.S. Constitution, and, therefore, also violated the equal protection guarantees of the California constitution. You also have repeatedly used the language of the majority opinions in *Plessy v. Ferguson* and *Brown v. Board of Education* to describe most states' definition of marriage as a union between a man**

and a woman. In discussing the recognition of only civil unions among same-sex couples, you have repeatedly made statements to the effect that "[e]ven if marriage provides no greater rights than domestic partnership, a separate-but-equal regime unavoidably signals that same-sex relationships are of lesser worth."[6]

a. Do you stand by your repeated statements that even if marriage provides no greater rights than domestic partnership, such an arrangement is a "separate but equal regime" similar to the majority opinion in *Plessy*?

Response: I stand by my use of the term "separate but equal" and will leave any comparison to *Plessy* to others. The amicus brief I joined did not argue that California's definition of marriage violated the U.S. 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 personally believe that the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by the states?

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

c. In an *LA Times* article on Prop. 8, you stated: "Each of the 18,000 same-sex couples and their families in California represents a potential catalyst for broader acceptance of gay marriage. The more familiar we become with gay spouses and their children -- as our friends, neighbors and co-workers -- the more gay marriage will become an unremarkable thread of our social fabric. Proposition 8 may then come to be viewed, in the long run, not as an enduring constitutional principle but as the will of a narrow and ultimately temporary majority." The idea of marriage as between a man and a woman is one that has endured for thousands of years, since the dawn of man. Do you still believe that traditional marriage, which Proposition 8 protects, "is not as an enduring constitutional principle but… the will of a narrow and ultimately temporary majority?"

Response: Marriage between a man and a woman is an institution that has endured for thousands of years, and my statement in the *Los Angeles Times* editorial did not say that traditional marriage is the will of a narrow and ultimately temporary majority. My statement was a speculative prediction of how a particular state ballot measure, Proposition 8, "may … come to be viewed, in the long run."

d. Is the right to marry an example of the constitutional interpretation that you believe properly considers "the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?"

[6]Goodwin Liu, *The Next Verdict on Prop. 8*, LOS ANGELES TIMES, Nov. 10, 2008, at A-19.

Response: I have written that "the history of litigation over the right to marry" is an example of how "changes in social understandings often, and rightly, change how constitutional principles are applied." Keeping Faith with the Constitution 111 (2009) (discussing *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), and *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated laws against interracial marriage).

5. **You have been extremely critical of Justice Alito saying that "[h]e approaches law in a formalistic, mechanical way abstracted from human experience."[7] This statement seems to reflect the sentiments of Justice Sotomayor who believed that human experiences should influence a judge's decisions. She stated: "Personal experiences affect the facts that judges choose to see," and "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Do you agree with Justice Sotomayor's statement?**

   a. **Why or why not?**

      Response: I do not believe that a judge may "choose to see" particular facts in a case based on personal experiences or for any other reason. A judge has a duty to consider fully and fairly all the facts in the record of a given case or controversy. I also do not believe that the life experiences that arise from being a member of a particular race or gender would lead a judge "more often than not [to] reach a better conclusion" than the life experiences that arise from being a member of another race or gender.

6. **Please describe the criteria and methodology the Supreme Court employs to determine whether a right is a "fundamental right?"**

   Response: The Supreme Court has used the term "fundamental" to describe various rights expressly stated in the Constitution. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2798 (2008) ("the arms provision of the Bill of Rights [was] one of the fundamental rights of Englishmen"); Benton v. Maryland, 395 U.S. 784, 794 (1969) ("the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage"); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (free exercise of religion guaranteed by the First Amendment is a "fundamental concept of liberty"). In those cases, the Court has looked to the history and traditions of Anglo-American jurisprudence to determine whether a right is fundamental. *See, e.g., Benton*, 395 U.S. at 795-96. The Court has also used the term "fundamental right" in interpreting the substantive liberty protected by the Due Process Clause. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (Due Process Clause "provides heightened protection again government interference with certain fundamental rights and liberty interests"). In that context, the Court has similarly looked to "[o]ur Nation's history, legal traditions, and practices" as "the crucial guideposts" for determining whether a right is "implicit in the concept of ordered liberty" and therefore fundamental. *Id.* at 721 (internal quotation marks and citations omitted).

   The Court has occasionally used the term "fundamental" to describe other rights not expressly stated in the Constitution. *See, e.g.*, Crawford v. Marion County Election Bd., 553 U.S. 181, 210 (2008) ("fundamental right to vote"); Tennessee v. Lane, 541 U.S. 509, 533-34 (2004) ("fundamental right of access to the courts"); Dunn v. Blumstein, 405 U.S. 330, 338 (1972)

[7] Daniel Eisenberg, *How Alito Looks Under the Lens*, TIME, Nov. 14, 2005, at 20.

(describing "the right to travel" as a "fundamental personal right"). In those cases, it does not appear that the Court has used specific criteria or a specific methodology in describing a right as "fundamental."

7. In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ___ (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Do you believe the right to bear arms is a fundamental right?

Response: Whether the right to bear arms is a fundamental right such that it should be incorporated against the states is a question presently before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). I have not previously expressed any view on this question, and I believe it would not be appropriate for me to do so now.

a. Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.

Response: The Supreme Court has understood several explicitly guaranteed rights in the Bill of Rights to be fundamental rights based on their roots in Anglo-American jurisprudence. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (Sixth Amendment right to trial by impartial jury); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (First Amendment right to free exercise of religion); Chicago, Burlington & Quincy R. Co. v. City of Chicago, 166 U.S. 226, 235-36 (1897) (Fifth Amendment right against takings without just compensation). However, the Supreme Court has not recognized all of the rights explicitly guaranteed in the Bill of Rights to be "fundamental." *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884) (Fifth Amendment requirement of indictment by grand jury).

b. Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.

Response: Yes. My understanding of Supreme Court precedent is that the Court decides whether a provision of the Bill of Rights should apply to the States by examining whether the provision is properly understood as fundamental within the history and traditions of Anglo-American jurisprudence. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 794 (1969); Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 235-36 (1897). Whether the Second Amendment embodies a fundamental right that applies to the States is a question currently pending in the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521).

c. *Heller* further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.

Response: The Supreme Court has said that the Second Amendment codified a pre-existing right, and I would faithfully follow the Court's precedent if confirmed as a judge.

d. Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?

Response: The Supreme Court has determined that the best reading of the text of the Second Amendment is that it protects an individual right to bear arms and that the Second Amendment codified a pre-existing right. I would faithfully follow the Court's precedent if confirmed as a judge.

e. You testified that "the interpretation of the Constitution … has to be guided by the faithful application of the text, the underlying principles, and the precedents that have accursed up to that time." What underlying principles would you apply when interpreting the Second Amendment?

Response: The Supreme Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008), and I would faithfully follow the Court's precedent if I were confirmed.

f. Similarly, during his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.

Response: The Supreme Court in *Citizens United* applied the doctrine of stare decisis in overruling prior cases contrary to the Court's holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity." 130 S. Ct. 876, 911-13 (2010). *Citizens United* is a precedent of the Supreme Court, and I would follow it faithfully if I were confirmed.

8. You stated during your hearing that "the role of a judge is to faithfully follow the law as it is written and as it is given by the Supreme Court. There is no room for invention or creation of new theories." Do you believe there was no invention or creation of new legal theories in Justice Blackmun's decision in *Roe v. Wade* when he found a right to abortion in the penumbras of the Constitution? Please explain.

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 "nothing about the Court's interpretive method distinguishes the core right in *Roe v. Wade* from its doctrinal forerunners. In *Roe*, as in *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, *Skinner*, *Griswold* and *Eisenstadt*, the Court reasoned from constitutional text, principles, and precedent to the conclusion that that the 'right of privacy … founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action … is broad enough to

encompass a woman's decision whether or not to terminate her pregnancy.'" *Id.* at 104 (quoting *Roe*).

a. Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's March 11, 2010 dissent in *Newdow v. Rio Linda Union School District* (05-17257) when he ruled that including "Under God" in the pledge was unconstitutional? Please explain.

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

b. You also testified that "a court .. judge would have to simply follow what the Supreme Court has instructed the courts to do on particular issues." Do you believe Judge Reinhardt did this in the *Newdow* case? Please explain.

Response: The Ninth Circuit in *Newdow v. Rio Linda Union School District*, 597 F.3d 1007 (9th Cir. 2010), held that teacher-led recitation of the Pledge of Allegiance, including the words "under God," by students in public schools does not violate the Establishment Clause. I would faithfully follow circuit precedent if I were confirmed. I have not previously expressed any view on *Newdow* or Judge Reinhardt's dissent, and I believe it would not be appropriate for me to do so now.

c. Do you believe Judge Diane Wood simply followed what the Supreme Court has instructed the courts to do in *NOW v. Scheidle*? Please explain.

Response: In *Scheidler v. National Organization for Women*, 547 U.S. 9 (2006), the Supreme Court held that threatening or committing physical violence unrelated to robbery or extortion which obstructs, delays, or affects commerce falls outside the scope of the Hobbs Act. I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Wood's opinion in *NOW v. Scheidler*, and I believe it would not be appropriate for me to do so now.

d. Do you believe there was no invention or creation of new legal theories in Judge Reinhart's decision in *Silveira v. Lockyer*, 312 F.3d 1052, which held that the right to bear arms is a collective right? Please explain.

Response: The Supreme Court has held that the right to bear arms is an individual right, and I would faithfully follow the Court's precedent if I were confirmed. I have not previously expressed any view on Judge Reinhardt's opinion in *Silviera v. Lockyer*, and I believe it would not be appropriate for me to do so now.

e. Do you believe there was no invention or creation of new legal theories in Judge Stephen Reinhart's decision in *Gonzales v. Carhart,* 550 U.S. 124, striking down the Partial Birth Abortion Ban? Please explain.

Response: The Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and I would faithfully follow the Court's precedent if I were confirmed.

GOODWIN LIU
Associate Dean and
Professor of Law
[redacted]

BerkeleyLaw
UNIVERSITY OF CALIFORNIA
Boalt Hall

May 12, 2010

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Sessions:

Thank you for your letter of May 10 and for the opportunity to provide additional information in response to your written questions. In answering your letter, I begin with a brief explanation of how I approached some of the questions on which you have requested more information.

Some of your questions ask for my views on specific Supreme Court cases or doctrines beyond what I have provided in my testimony and earlier written responses. As a scholar, I have engaged in academic study and critique of Supreme Court cases and doctrines in an effort to advance understanding and betterment of the law and to promote the education of future lawyers. Where I have expressed views about a particular case or doctrine in my scholarly work, I have identified those views and cited the relevant book, article, or speech, while noting that if confirmed I would faithfully follow the law, regardless of my academic views. Where I am able to supply additional information of this sort, I have done so below.

The role of a scholar, however, is distinct from the role of an inferior court judge. As I said at my confirmation hearing and in my responses to written questions, the role of a circuit judge—unlike that of a scholar—is not to evaluate or opine on the correctness of Supreme Court cases or doctrines. It is to apply the law faithfully and impartially to the facts of each case. Accordingly, like prior nominees who have been nominated to serve as an inferior court judge, I do not believe it is appropriate for me now to critique or speculate on the correctness of Supreme Court precedents or doctrines that I will be duty-bound to apply faithfully and impartially if I am confirmed. My responses to some of your questions reflect this concern.

Questions 1(a)(i) and (ii)

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. Accordingly, I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to critique or speculate on the correctness of *Wickard v. Filburn* because it is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed. In general, my writings have supported a functional approach to Commerce Clause jurisprudence as well as judicial deference to Congress's legislative prerogatives under the clause. *See* Keeping Faith with the Constitution 65-72 (2009); *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 Geo. L.J. 439 (2003).

Questions 1(b)(i) and (ii)

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. *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.

Question 6(a)

The book *Keeping Faith with the Constitution* describes how constitutional interpretation has in fact been practiced by the Supreme Court of the United States. This description does not apply to inferior court judges, for they must accept Supreme Court precedent as controlling. Even when an inferior court judge hears a case of first impression or reviews a panel decision *en banc*, Supreme Court precedent is binding and constrains the decision-making process. Thus, a circuit judge, even in a novel or *en banc* case, must take his guidance from Supreme Court precedent and lacks authority to improvise his own approach to constitutional interpretation, as recent *en banc* decisions in the Ninth Circuit demonstrate. *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). This understanding of the role of an inferior court judge is what I had in mind when I testified that my writings would have no bearing on my role as a judge.

Question 7(a)

I understand your concern that, without accountability, courts can move away from the law. At one level, our system provides that the American people

retain the ultimate power to determine whether the judiciary has been faithful to the Constitution. On occasion, the American people have exercised this power to overrule Supreme Court precedent. *See, e.g.*, U.S. Const. amend. XIII, *overruling* Dred Scott v. Sandford, 60 U.S. 393 (1857); U.S. Const. amend. XI, *overruling* Chisholm v. Georgia, 2 U.S. 419 (1793).

Apart from the process of constitutional amendment, I understand your question to ask how unelected life-tenured judges can be held accountable to the Constitution if they may adapt the Constitution to meet the challenges and conditions of each generation. The independence of our judiciary means that constitutional decisions are not reversible by the elected branches of government. However, in the case of inferior courts, the Supreme Court serves as the ultimate arbiter of when the lower courts have been faithful to the Constitution. In the case of the Supreme Court itself, that institution is constrained by its own commitment to the Constitution and by the doctrine of *stare decisis*, whose faithful application promotes judicial accountability and safeguards the rule of law.

For example, in applying the Fourth Amendment guarantee against "unreasonable searches and seizures," the Supreme Court has asked whether the person subject to search has a "reasonable expectation of privacy." Bond v. United States, 529 U.S. 334, 337 (2000). Reasonableness is an objective inquiry that turns in part on "whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* at 338 (internal quotation marks and citation omitted). Judges properly consider the challenges and conditions of our society in applying the Fourth Amendment insofar as they must determine what privacy expectations our society is prepared to recognize as reasonable. But this is not a free-wheeling, unaccountable inquiry. When the Supreme Court decides cases under the Fourth Amendment, it does so against the backdrop of its own precedents. The process of precedent-based, analogical reasoning disciplines and constrains judicial inquiry into what privacy expectations are reasonable. *See, e.g.*, *id.* at 336-38.

Questions 7(b)(i) and (ii)

(i) I have written disapprovingly of *Buck v. Bell* when I described it as "the notorious '[t]hree generations of imbeciles is enough' case in which Justice Holmes dismissively referred to the Equal Protection Clause as 'the usual last resort of constitutional argument.'" Keeping Faith with the Constitution 99 (2009).

(ii) The fact that a policy is broadly accepted does not make it constitutional, for our Constitution includes express guarantees of individual rights and liberties as safeguards against "tyranny of the majority." Where a broadly accepted policy infringes on a constitutional right, the policy is invalid. Where no countervailing constitutional right exists, however, our system gives the democratic process wide latitude to enact broadly accepted policies. In resolving

conflicts between majoritarian policies and individual rights, the judiciary plays a crucial role. Because it is "[i]nsulated from partisan pressures, the judiciary bears a responsibility to render decisions without fear or favor toward the political majority. As Alexander Hamilton said, independent courts serve as an 'excellent barrier to the encroachments and oppressions of the representative body,' and they play a 'peculiarly essential' role in safeguarding individual rights and liberties." *Id.* at 24. My writings have discussed *Skinner v. Oklahoma* as an example of how the Supreme Court properly applies the Constitution's principles of individual liberty and equal protection of the laws to invalidate a broadly accepted policy. *See id.* at 98-99.

Questions 9(b) and (c)

My writings have generally agreed that the Supreme Court is authorized to make this determination based on whether the original expected application of a constitutional provision would preserve or undermine the vitality of the constitutional text or principle in light of societal change. In my book, I use *Katz v. United States*, 389 U.S. 347 (1967), as an example: "*Katz* illustrates how an approach to interpretation that relies too heavily on original understandings of the reach of a constitutional principle would defy our own understanding of the Constitution as a document meant to retain not lose its significance over time. In reading the terms 'search' and 'seizure' to cover non-physical intrusions such as wiretapping, the Court famously declared that 'the Fourth Amendment protects people, not places,' and effectively heeded Justice Brandeis's admonition that the Constitution 'must have a . . . capacity of adaptation to a changing world' if '[r]ights declared in words [are not to] be lost in reality.'" Keeping Faith with the Constitution 95 (2009) (citing *Katz*, 389 U.S. at 351, and *Olmstead v. United States*, 277 U.S. 438, 472-73 (1928) (Brandeis, J., dissenting) (internal quotation marks and citation omitted)).

Question 10(b)

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. *Zelman v. Simmons-Harris* is a precedent of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 13(b), (d), (e), (f), (g), (h), and (i)

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.

Question 17(a)

Yes, I believe that affecting the distribution of wealth in our society is a permissible constitutional basis for the federal government to enact legislation, provided that the legislation is authorized by one of Congress's enumerated powers.

No, I do not believe that affecting the distribution of wealth in our society is a permissible basis for a judicial decision, unless a court is faithfully applying a duly enacted statute with that purpose or a provision of the Constitution, such as the Due Process Clause or Takings Clause, that protects property rights.

Question 18(a)

I do not agree with Professor Tushnet that there is no "domain of freedom unto which the Constitution doesn't reach."

Question 18(b)

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. The state action doctrine is governed by precedents of the Court that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 19(c)

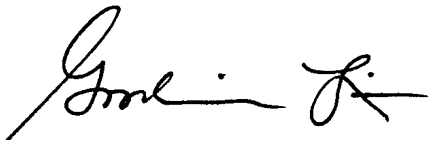
The text of the Constitution says that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The text does not specify a standard for determining whether a state's law violates the Privileges or Immunities Clause, just as the text of the First Amendment does not specify what "speech" is constitutionally protected and the text of the Fourteenth Amendment does not specify what inequalities violate "equal protection of the laws." *See* Keeping Faith with the Constitution 42-43 (2009). The proper application of these generally worded constitutional provisions has been determined through a gradual process of case-by-case judicial interpretation, and that gradual process is what I meant when I said that "[n]ew rights would not 'flood in' if *Slaughterhouse* were reversed today" and that "[i]t would be case-by-case."

Questions 20(a) and (b)

(a) I agree with Justice Kennedy insofar as the Ninth Amendment, like the rest of the Bill of Rights, was originally understood to apply only to the federal government and the Framers generally trusted the states to protect individual rights and liberties.

(b) I do not agree with Professor Grey that the Ninth Amendment is a "license" for judges to "look beyond the substantive commands of the constitutional text." The Ninth Amendment does not say whether unenumerated rights that are retained by the people are judicially enforceable, and the Supreme Court has not read the Ninth Amendment as an independent source of rights beyond those protected elsewhere in the Constitution.

Sincerely,



Goodwin Liu

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

1. **In question 4(a) of my previous questions, I asked whether you thought the arrest challenged in *Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004), violated the defendant's constitutional rights. You did not answer this question. Please answer it now.**

   Response: My concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification and thus might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation. My view on whether the arrest violated the defendant's constitutional rights would depend on whether the arrest policy was based on "mere negative attitudes" or "vague, undifferentiated fears." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448, 449 (1985); *see id.* at 446-50 (applying rational basis review to invalidate the denial of a local use permit for operation of a group home for the mentally retarded). But that argument was not addressed in the court's opinion.

2. **In your answer to my previous question 4(a), you noted that your "concern about *Hedgepeth* was that the mandatory arrest policy for juvenile offenders seemed a rather extreme way to promote parental notification," and you cited then-Judge Roberts's statement that "it is far from clear that the gains in certainty of notification are worth the youthful trauma and tears," *Hedgepeth*, 386 F.3d at 1157. But in your op-ed, *Roberts Would Swing the Supreme Court to the Right*, Bloomberg (July 22, 2005), you used the *Hedgepeth* case as the sole example of how then-Judge Roberts's "legal career is studded with activities unfriendly to civil rights . . . ."**

   a. **What part of then-Judge Roberts's opinion in *Hedgepeth* proved that he was "unfriendly to civil rights"?**

      Response: My concern was that the court's opinion did not address the possibility that the mandatory arrest policy for juvenile offenders might have reflected stereotypes of youth offenders as inherently deviant, threatening, or incorrigible without strong rehabilitation.

   b. **Do you agree with Judges Roberts, Henderson, Williams, and Sullivan that the arrest policy challenged in *Hedgepeth* was constitutional?**

      i. **If not, on what basis do you think it was unconstitutional?**

      ii. **If so, on what basis were you criticizing Judge Roberts's *Hedgepeth* opinion?**

Response: Please see response to Question 1 above.

c. In retrospect, do you think that you fairly used Chief Justice Roberts's opinion in *Hedgepeth* to label him as "unfriendly to civil rights"?

Response: For the reason stated in my response to subpart (a) above, the *Hedgepeth* opinion gave me some concern with respect to civil rights. If I may clarify, I did not use the *Hedgepeth* case as the sole example of then-Judge Roberts's record on civil rights. My op-ed also expressed concern about his contributions as a Justice Department lawyer to "efforts to oppose school desegregation, to prevent employers from using affirmative action to remedy past discrimination, and to defeat a bipartisan consensus to expand voting rights protections."

3. In answering my previous questions (5)(a)-(c), you stressed that a judge must have a "genuine understanding of how the law affects the parties to a given case or controversy." Is this statement of yours consistent with President Obama's statement that, in hard cases, the determinative factors for a judge are "the basis of [his or her] deepest values, [his or her] core concerns, [his or her] broader perspectives on how the world works, and the depth and breadth of [his or her] empathy"?

Response: I do not know whether President Obama intended his statement to encompass the quality of judging identified in my statement above. However, I did not intend my statement to have anything to do with a judge's "deepest values," "core concerns," "broader perspectives on how the world works," or "depth and breadth of empathy." My statement referred only to the notion that a judge must understand how the law affects the parties to a given case in order to apply the law objectively and impartially. One example I have used to illustrate the point is *Plessy v. Ferguson*, where the Supreme Court's misapprehension of how segregation laws affected black Americans led to an erroneous reading of the Fourteenth Amendment. *See* 163 U.S. 537, 551 (1896) (dismissing the argument that "the enforced separation of the two races stamps the colored race with a badge of inferiority" on the ground that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it"); *"History Will Be Heard": An Appraisal of the* Seattle/Louisville *Decision*, 2 Harv. L. & Pol'y Rev. 53, 60-61 (2008).

4. In answering my previous question 7(a) you refused again to say whether you consider yourself a transnationalist or nationalist as described by Dean and State Department Advisor Harold H. Koh in *Why Transnational Law Matters*, 24 Penn. St. Int'l L. Rev. 745, 749-50 (2006). Likewise, in your answer to question 7(b), you declined to say whether you agree with Dean Koh that courts have "a critical role to play in domesticating international law into

U.S. law" and "should use their interpretive powers to promote the development of a global legal system." In both answers, you stated only: "This subject lies outside of my expertise, and I have not previously expressed a view on this question."

a. You have been nominated to a court with jurisdiction over many areas of law in which you are not an expert. Keeping this in mind, please now answer:

i. Do you consider yourself a transnationalist or nationalist as described by Dean Koh in *Why Transnational Law Matters*, 24 Penn. St. Int'l L. Rev. 745, 749-50 (2006)?

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

Response: In stating that the subject of Question 7 "lies outside of my expertise," I intended only to note that the contrast between "nationalists" and "transnationalists" is a complex area of academic debate, and not one where I have sufficient familiarity to categorically identify myself with one camp or the other, given the broad range of views subsumed under each label. If I may move past the labels, I would say that my scholarship has generally treated the American legal system as an autonomous system of law; it has focused on the development of U.S. law as a national system of law; it has not sought to blend international and domestic law; and it has not urged U.S. courts to domesticate international law into U.S. law or to use their interpretive powers to promote the development of a global legal system. In these respects, my record is aligned with the "nationalist" approach as defined by the excerpt from Dean Koh's article.

b. Would you, as a judge on the Ninth Circuit, refrain from deciding a case involving a subject outside your expertise?

Response: If confirmed as a judge on the Ninth Circuit, I would faithfully discharge my duty to decide all cases that are properly within the court's jurisdiction, including cases involving a subject outside of my scholarly expertise.

5. In question 9 of my previous questions, I asked: "Do you agree with Professor Cole that courts should 'employ the rhetoric and tactics of the international human rights movement to help frame our constitutional

vision'?" Your answer was nonresponsive. Please answer now whether you agree with Professor Cole's quoted statement.

Response: To the extent that Professor Cole believes "the rhetoric and tactics of the international human rights movement" include "steer[ing] clear of appeals to citizenship," my writings have rejected that view. *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330 (2006). My writings have also rejected the view that our Constitution can be interpreted in accordance with theories of justice that aspire to universalism. *See Rethinking Constitutional Welfare Rights*, 61 Stan. L. Rev. 203, 218-27 (2008).

6. **In answering my previous question 12(a), you cited *Roper v. Simmons*, 543 U.S. 551, 575-58 (2005), and *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003), as examples of cases in which Supreme Court Justices chose foreign law that was favorable to their argument.**

   a. **Do you believe Justice Kennedy was wrong to reference selectively foreign law in his *Roper* and *Lawrence* opinions for the Court?**

      Response: As a nominee to serve as an inferior court judge, I do not think it is appropriate for me now to critique a sitting Justice of the Supreme Court or precedents that I will be duty-bound to apply faithfully and impartially if I am confirmed. As I said at my confirmation hearing, "choos[ing] the law that is favorable to the argument" is one of "many hazards involved in looking at foreign law as guidance for how we interpret our own principles."

   b. **Do you think that the Supreme Court's reasoning in *Roper* or *Lawrence* was flawed?**

      Response: I have written with approval that *Lawrence*'s reasoning follows the Supreme Court's precedents interpreting "liberty" under the Due Process Clause, *see* Keeping Faith with the Constitution 105-06 (2009), although my writings do not address *Lawrence*'s citations to foreign law. I have not expressed any view about *Roper*, and as a nominee to serve as an inferior court judge, I do not think it is appropriate for me now to critique precedents that I will be duty-bound to apply faithfully and impartially if I am confirmed.

7. **If social norms changed so that handguns were not "the most popular weapon chosen by Americans for self-defense in the home," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 (2008), would you believe that the Second Amendment still protected the right of Americans to possess handguns?**

Response: The Supreme Court in *Heller* held that the sorts of weapons protected by the Second Amendment are those "in common use at the time." 128 S. Ct. 2783, 2817 (2008). Whether or not handguns are "the most popular weapon chosen by Americans for self-defense in the home," they will remain protected by the Second Amendment so long as they are "in common use at the time."

GOODWIN LIU
Associate Dean and
Professor of Law
[redacted]

BerkeleyLaw
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May 12, 2010

The Honorable Tom Coburn, M.D.
United States Senator
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Coburn:

Thank you for your letter of May 11 and for the opportunity to provide additional information in response to your written questions. In answering your letter, I begin with a brief explanation of how I approached some of the questions on which you have requested more information.

Some of your questions ask for my views on specific cases or doctrines of the Supreme Court or other courts, beyond what I have provided in my testimony and earlier written responses. As a scholar, I have engaged in academic study and critique of various cases and doctrines in an effort to advance understanding and betterment of the law and to promote the education of future lawyers. Where I have expressed views about a particular case or doctrine in my scholarly work, I have identified those views and cited the relevant book, article, or speech, while noting that if confirmed I would faithfully follow the law, regardless of my academic views. Where I am able to supply additional information of this sort, I have done so below.

The role of a scholar, however, is distinct from the role of an inferior court judge. As I said at my confirmation hearing and in my responses to written questions, the role of a circuit judge—unlike that of a scholar—is not to evaluate or opine on the correctness of Supreme Court cases or doctrines. It is to apply the law faithfully and impartially to the facts of each case. Accordingly, like prior nominees who have been nominated to serve as an inferior court judge, I do not believe it is appropriate for me now to critique or speculate on the correctness of Supreme Court precedents or doctrines that I will be duty-bound to apply faithfully and impartially if I am confirmed. Moreover, given considerations of respect, comity, and collegiality that are essential to the effective functioning of a multimember court, and because I will be bound by precedents written by my colleagues on the Ninth Circuit if I am confirmed (apart from the *en banc* process), I do not believe it is appropriate for me now, outside the ordinary judicial decision-making process, to critique opinions written by my potential colleagues on the Ninth Circuit. My responses to some of your questions reflect these concerns.

Question 1(g)

If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment, including any instructions in those precedents on how to interpret the Second Amendment. My writings have analyzed the Court's method of constitutional interpretation in *District of Columbia v. Heller*, the Court's most recent and authoritative precedent on the Second Amendment, *see* Keeping Faith with the Constitution 30-33 (2009), and my writings have identified nothing in *Heller* indicating that the Court should look to foreign law (apart from English antecedents to the Second Amendment) in deciding whether the right to bear arms is a fundamental right that should be incorporated on to the states.

Questions 1(h) and (i)

(h) If confirmed, I would faithfully follow the Supreme Court's precedents on the Second Amendment, and there is no indication in *District of Columbia v. Heller*, the Court's most recent and authoritative precedent on the Second Amendment, that foreign law (apart from English antecedents to the Second Amendment) is relevant to judicial interpretation of the Second Amendment.

(i) The Supreme Court has not looked to foreign law in interpreting the Second Amendment, and although the Court has looked to foreign law in interpreting the Eighth Amendment, it has made clear that foreign law is not "controlling." Roper v. Simmons, 543 U.S. 551, 575 (2005). If confirmed, I would faithfully follow the Court's precedents on the Second and Eighth Amendments, paying careful attention to the guidance in those precedents as to what factors are controlling in the legal analysis. My role as a circuit judge would not be to critique or theorize about any differences between the Court's Second and Eighth Amendment jurisprudence, but to apply the law faithfully and impartially to the facts of each case.

Question 2(a)

I do not think Congress and the Court's interpretation of the Constitution in general has shifted to an affirmative right guarantee, rather than a set of restrictions on government power. I agree with you that the predominant view has been, as Judge Richard Posner of the Seventh Circuit put it, that the Constitution is "a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *See Education, Equality, and National Citizenship*, 116 Yale L.J. 330, 336 (2006) (noting "the conventional wisdom that 'the Constitution is a charter of negative rather than positive liberties' (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.))). My scholarly writings have sought to challenge the conventional view in the area of education based on historical inquiry into how leading

Members of Congress between 1870 and 1890 understood the Fourteenth Amendment guarantee of national citizenship. *See id.* at 367-99. But my writings acknowledge that my academic view is at odds with current law. *See id.* at 336 ("[t]he concept of positive rights [is] disfavored in Supreme Court doctrine" (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), among other cases)).

Question 3(a)

In stating that "we should not use the concept of citizenship to deny education to noncitizen children," my writings did not specifically address the constitutional rights of children who are present in this country illegally. Children who are lawful resident aliens are "noncitizen children," and their eligibility for U.S. citizenship distinguishes them from children who are illegal immigrants under current law. Further, my writings have not addressed whether adults who are illegal immigrants have any constitutional right to public education, and this question has been the subject of litigation in recent years.

The Supreme Court has held that, absent a congressional policy providing otherwise, 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). If 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. Accordingly, I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to speculate on whether children who are here illegally have a constitutional right to public education because *Plyler* is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed. In addition, because the question whether adult illegal immigrants have a constitutional right to public education is unsettled and may become before me as a judge if I am confirmed, I believe it is not appropriate for me to speculate on that question.

Questions 4(b)

Whether the U.S. Constitution guarantees same-sex couples the right to have their relationships recognized as marriages by the states is a question on which I have not previously expressed a view, and it is the subject of active litigation that may come before me as a judge if I am confirmed. Accordingly, I do not believe it is appropriate for me to speculate on this question.

Question 7

Although my writings have analyzed the method of constitutional interpretation employed by the majority and dissenting opinions in *District of Columbia v. Heller*, my analysis "d[id] not weigh the merits of the contrasting opinions in *Heller*." Keeping Faith with the Constitution 30 (2009). If

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. The Court's decision in *Heller*, in which Justice Scalia determined that the right to bear arms is a fundamental right, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 7(d) and (e)

(d) If 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. The Court's decision in *Heller*, which held that the text of the Second Amendment is best read as codifying a pre-existing right, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

(e) When interpreting the Second Amendment as a judge if I am confirmed, I would apply the underlying principle that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." District of Columbia v. Heller, 128 S. Ct. 2783, 2797 (2008). I do not believe it is appropriate for me now, as a nominee to serve as an inferior court judge, to speculate on whether some other underlying principle should guide interpretation of the Second Amendment because *Heller* is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Question 7(f)

The Court in *Citizens United* applied the doctrine of *stare decisis* to overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell v. FEC*, 540 U.S. 93 (2003), and thereby "return to the principle established in [*Buckley v. Valeo*, 424 U.S. 1 (1976),] and [*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978),] that the Government may not suppress political speech on the basis of the speaker's corporate identity." Citizens United v. FEC, 130 S. Ct. 876, 913 (2010). If 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. The Court's decision in *Citizens United*, which said it was restoring pre-1990 law, is a precedent that I will be duty-bound to apply faithfully and impartially if I am confirmed.

Questions 8(a), (b), (d), and (e)

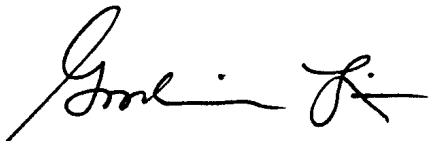
Given considerations of respect, comity, and collegiality that are essential to the effective functioning of a multimember court, and because I will be bound by precedents written by my colleagues on the Ninth Circuit if I am confirmed (apart from the *en banc* process), I do not believe it is appropriate for me now,

outside the ordinary judicial decision-making process, to critique opinions written by a potential Ninth Circuit colleague.

Question 8(c)

Given considerations of respect, comity, and collegiality toward fellow Article III judges that I intend to observe if I am confirmed, I do not believe it is appropriate for me now, outside the ordinary judicial decision-making process, to critique opinions written by a potential Article III colleague on a sister circuit.

Sincerely,



Goodwin Liu