

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

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

1. Following your hearing in the 111th Congress, I asked you several questions about your testimony in opposition to Justice Alito's nomination, which you summarized as being concerned with some of Justice Alito's decisions as a lower court judge "in the area in which individual rights come up against assertions of government power."
 - a. Question 1(a)(i) asked if you thought the Supreme Court's holding in *Wickard v. Filburn*, 317 U.S. 111 (1942) posed troubling concerns "in the area in which individual rights come up against assertions of government power." Your reply recited the holding of *Wickard* and stated that "*Wickard* is a precedent of the Supreme Court and I would follow it faithfully if I were confirmed."

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

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

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

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

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

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

As my letter explained, where I have expressed views about a particular case or doctrine in my scholarly work, I have not hesitated to discuss those views when answering oral and written questions throughout the confirmation process. Senator Blumenthal’s questions asked about issues that I have addressed in my scholarly work. In particular, my writings accept that racial quotas are unconstitutional and that affirmative action plans must have a stopping point. See *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 761, 762 (2004); *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 Harv. C.R.-C.L. L. Rev. 383, 389 (1998).

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

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

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

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

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

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

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

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

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

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

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

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

- a. **Question 13(b): Do you believe that the Court’s Second Amendment decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) was correctly decided?**

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

- b. **Question 13(d): Do you believe that the Court’s decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which conferred constitutional habeas rights on aliens detained as enemy combatants at Guantanamo, was correctly decided?**

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

- c. **Question 13(e): Do you believe that the Court’s decision in *Lee v. Weisman*, 505 U.S. 577 (1992), which held that a nonsectarian invocation at a public school graduation violated the Establishment Clause, was correctly decided?**

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

- d. **Question 13(f): Do you believe that the Court’s decision in *Morrison v. Olson*, 487 U.S. 654 (1988), which ruled that the independent counsel statute did not violate the constitutional separation of powers, was correctly decided?**

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

- e. **Question 13(g): Do you believe that the Constitution, properly interpreted, confers a right to engage in obscene speech?**

Response: The Supreme Court has said that “[o]bscene speech ... long been held to fall outside the purview of the First Amendment,” *Ashcroft v. ACLU*, 535 U.S. 564, 574 (2002), and I would faithfully follow the Court’s precedents if I were confirmed. I have not previously expressed any view on whether the Constitution confers a right to engage in obscene speech, and for the reasons stated in my letter to you of May 12, 2010, I do not believe it would be appropriate for me to do so.

- f. **Question 13(h): In 2008, the Supreme Court ruled in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) that the death penalty for the crime of raping a child always violates the Eighth Amendment. Do you believe that the Court reached the correct ruling?**

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

- g. **Question 13(i): In 2007, the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), by a vote of 5 to 4, rejected a facial challenge to the Federal Partial-Birth Abortion Act, but left open the possibility that as-applied challenges could be brought to narrow the scope of the Act’s application. Do you believe that the Court’s ruling in *Gonzales v. Carhart* was correctly decided?**

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

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

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

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

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

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

“[b]efore becoming a judge, he belonged to the Republican National Lawyers Association and the National Legal Center for the Public Interest, whose mission is to promote (among other things) ‘free enterprise,’ ‘private ownership of property,’ and ‘limited government.’ These are code words for an ideological agenda hostile to environmental, workplace, and consumer protections.

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

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

- b. **In response to written questions from this Committee about this statement following your hearing last Congress, you said that you were “objecting to one organization’s use of those values in opposition to government efforts to ensure that our free market system is a fair, sustainable, and level playing field.” Please explain why you thought it was troubling that someone had been appointed to the Supreme Court that felt differently about that matter than you do.**

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

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

“the duty of government cannot be reduced to simply providing the basic necessities of life. . . . Beyond a minimal safety net, the legislative agenda of equal citizenship should extend to systems of support and opportunity that,

like education, provide a foundation for political and economic autonomy and participation. The main pillars of the agenda would include basic employment supports such as expanded health insurance, child care, transportation subsidies, job training, and a robust earned income tax credit.”

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

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

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

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

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

7. **In your 2008 article “Rethinking Constitutional Welfare Rights” you said:**

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

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

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

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

- b. How does a judge determine what statements of constitutional law “the nation can accept as its own”?**

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

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

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

variety of sources to elucidate the meaning of the Constitution. These sources include the document's text, history, structure, and purposes, as well as judicial precedent. They also include contemporary social practices, evolving public understandings of the Constitution's values, and the societal consequences of any given interpretation. The latter sources of meaning, no less than the former, are legitimate components of the methodology that courts use when applying the Constitution's general principles to present-day problems." Keeping Faith with the Constitution 33-34 (2009). The Supreme Court has looked to sources beyond the original meaning of the Constitution in cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954). See Keeping Faith 26-28, 47-51 (discussing those cases). If confirmed, I would faithfully follow the Court's precedents, including any instructions in such precedents on the proper way to interpret specific constitutional provisions in a particular case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response: The Supreme Court has not endorsed colorblindness as an absolute requirement of the Equal Protection Clause; it has held that no racial classification may be used in governmental decision-making unless it is narrowly tailored to promote a compelling interest. *See, e.g.*, *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). If confirmed, I would faithfully follow the Court's precedents in this area. My writings have agreed with the Court's strict scrutiny standard for evaluating racial classifications and with the Court's decision in *Grutter* upholding limited and carefully circumscribed consideration of race in selective university admissions. *See Seattle and Louisville*, 95 Cal. L. Rev. 277, 280-81 (2007); *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 706 (2004); *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1097-99 (2002); *Segregation, Integration, and Affirmative Action After Bollinger* (American Constitution Society panel, 2003) (transcript at 30).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Do you agree with that statement?

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

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

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

Do you think that is an accurate statement?

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