

**Nomination of Stephen Schwartz to be
Judge of the United States Court of Federal Claims
Questions for the Record
Submitted August 1, 2017**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?
 - a. Would you consider whether the right is expressly enumerated in the Constitution?
 - b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?
 - c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the decisions of other courts of appeals?
 - d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?
 - e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).
 - f. What other factors would you consider?

Response to (a)-(f): The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition[.]'" *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). The Supreme Court's cases applying that test, as well as relevant controlling decisions of the U.S. Court of Appeals for the Federal Circuit, illustrate the types of historical and legal sources that are relevant to that determination. If I am fortunate enough to be confirmed, I would apply the Supreme Court's analysis in each case presenting the issue. I would reach a decision only after carefully considering the arguments of the parties, the applicable precedents, and the facts in the record.

2. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.
 - a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. . . . 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." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment

was dispositive or even conclusively supportive?

Response: I am aware there is some scholarship arguing that the result of *Brown* is justified on originalist grounds, but I have not had occasion to study this issue sufficiently to reach an informed opinion. *Brown* is binding law established by the Supreme Court, and I would apply it faithfully if I am fortunate enough to be confirmed.

- b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism> (last visited August 1, 2017).

Response: Determining the meaning of terms that “are not precise or self-defining” is the fundamental challenge for any method of interpreting legal texts. In cases where the meaning of a statutory or constitutional text is not fixed by controlling caselaw, I would interpret the text according to the methods established by the Supreme Court and other applicable precedents.

3. Does your approach to judicial interpretation lead you to conclude that the Fourteenth Amendment’s promise of “equal protection” guarantees equality across race and gender, or does it only require racial equality?
- a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?
 - b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?
 - c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?
 - d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Response to (a)-(d): The Supreme Court has held that the Fourteenth Amendment’s guarantee of equal protection applies to certain categories of discrimination other than racial discrimination, including sex. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996). If I am fortunate enough to be confirmed, I would faithfully apply those and any other applicable precedents. The scope of the Equal Protection Clause is an issue that is subject to current litigation, including litigation in which I currently represent various parties. My obligations as a judicial nominee, *see* Code of Conduct of United States Judges Canon 3(A)(6), and as an advocate, make it inappropriate for me to answer this question in further detail.

4. With regard to the right to privacy encompassed in substantive due process:
- a. Do you agree that the right to privacy protects a woman’s right to use contraceptives?

- b. Do you agree that the right to privacy protects a woman's right to obtain an abortion?
- c. Do you agree that the right to privacy protects intimate relations between two consenting adults, regardless of their sexes or genders?
- d. If you do not agree with any of the above, please explain whether these rights are protected or not, and which constitutional rights or provisions encompass them.

Response to (a)-(d): The Supreme Court has held that the right to privacy entails certain protections for the decision to use contraceptives, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the decision to obtain an abortion, *see Roe v. Wade*, 410 U.S. 113 (1973), and for intimate relations between consenting adults, including consenting adults of the same sex, *see Lawrence v. Texas*, 539 U.S. 558 (2003). If I am fortunate enough to be confirmed, I would faithfully apply those and any other applicable precedents. The precise scope of those protections is an issue that is subject to current litigation, including litigation in which I currently represent various parties. My obligations as a judicial nominee, *see Code of Conduct of United States Judges Canon 3(A)(6)*, and as an advocate make it inappropriate for me to answer this question in further detail.

- 5. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
 - a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?
 - b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Response to (a)-(b): The Supreme Court's cases illustrate the circumstances where such inquiries and evidence may be appropriate, as well as the methods a court should use if and when it engages in their application. However, the application of those precedents is a complex question that depends on the facts, controlling decisions in given fields of law, and arguments of the parties addressed to particular circumstances, as well as the applicable rules of evidence. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents.

- 6. The brief you filed in *G.G. v. Gloucester County School Board* argued that Title IX is a "straightforward prohibition intended to erase discrimination against women in classrooms, facilities and athletics." Do you agree that Title IX prohibits discrimination based on the failure to conform with gender stereotypes?

Response: This question refers to a pending case in which I currently represent one of

the parties. My obligations as an advocate make it inappropriate for me to answer this question.

7. Do you agree with the Supreme Court's analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holding that treating employees differently in the workplace on the basis of whether they conform to stereotypes constitutes sex discrimination under Title VII of the Civil Rights Act of 1964?

Response: The Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is binding law, which I would faithfully apply if I am fortunate enough to be confirmed.

8. You filed a petition for certiorari in *North Carolina v. North Carolina State Conference of the NAACP*, after the U.S. Court of Appeals for the Fourth Circuit held that the provisions of North Carolina's law "targeted African Americans with almost surgical precision. *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). Do you agree that, even after *Shelby County v. Holder*, 570 U.S. 2 (2013), Section 2 of the Voting Rights Act prohibits voting practices or procedures that have a discriminatory impact on African Americans?

Response: Yes.

9. You filed an amicus brief in *Burwell v. Hobby Lobby Stores, Inc.*, in which you asserted that the First Amendment and Religious Freedom Restoration Act "protect the exercise of religion without regard to corporate form or profit motive." What is the appropriate legal analysis when a business owner's religious rights interfere with the constitutionally protected liberty interests of his/her employees?

Response: The Supreme Court's analysis in *Hobby Lobby Stores, Inc.* illustrates the appropriate analysis under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* A variety of other constitutional, statutory, and factual considerations may apply in other circumstances. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents.

- a. Is it a correct reading of your brief that the arguments set forth therein were not limited to closely held companies, but rather would, in your view, extend to publicly held companies as well?

Response: The arguments I made on behalf of certain clients in the Supreme Court in the referenced *amicus* brief speak for themselves. The applicable law in the area comes not from the *amicus* brief, but from the binding decisions of the Supreme Court and the U.S. Court of Appeals for the Federal Circuit. If I am fortunate enough to be confirmed, I would faithfully apply all applicable precedents, regardless of the arguments I previously made on behalf of clients.

- b. Do you agree that the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*

was limited to closely held companies like Hobby Lobby?

Response: The Supreme Court stated in that case: “we hold that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act].” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014). The scope of that holding is an issue that is subject to current litigation, including litigation in which I currently represent various parties. My obligations as a judicial nominee, *see* Code of Conduct of United States Judges Canon 3(A)(6), and as an advocate, make it inappropriate for me to answer this question in detail. However, I would faithfully apply all applicable precedents if I am fortunate enough to be confirmed.