

to reach the status of conventional wisdom, there has been very little systematic research on the content of the hearings themselves.³ Consequently, with few exceptions, our understanding of the substance of the hearings is primarily based on anecdotal accounts of hearing testimony, rather than the rigorous analysis of what actually transpires at the hearings.

To remedy this state of affairs, we investigate one particularly important aspect of the hearings: the extent to which hearing dialogue is motivated by the discussion of judicial decisions. In so doing, we address a series of interrelated questions: How much hearing testimony is devoted to the treatment of judicial decisions? Do senators or nominees address judicial decisions more frequently? Which court's decisions are most commonly debated? How old are the court cases scrutinized at the hearings? Which issue areas provoke discussion of precedent? Do these issue areas vary depending on the political party of the senator interrogating the nominee?

Understanding the discussion of judicial decisions at Supreme Court confirmation hearings is important for several reasons. First, at the most basic level, this analysis provides insight into whether any generalized claims can be made about the confirmation process.⁴ By demonstrating that a substantial portion of hearing dialogue involves the concrete discussion of judicial decisions, this research contributes to the view that the confirmation process is a core part of our governing system. As such, this work speaks directly to the question of whether the hearings have substantive content independent of opportunities for senators to score political points by probing the idiosyncrasies of individual nominees, such as asking abstract and relatively meaningless questions about their preferred methods of constitutional interpretation. Second, because respect for precedent is a cornerstone of the American common law system, investigating the treatment of judicial decisions at the confirmation hearings provides a window into how constitutional change is driven by a common-law

methodology, illustrating the importance nominees and senators attach to the acceptance (or rejection) of existing case law. Because nominees are rarely willing to violate the norm of not forecasting their positions on legal disputes they might encounter, should they be confirmed to the Court,⁵ taking the confirmation process seriously requires examining what nominees are willing to say about previously decided constitutional cases. By interrogating nominees on past decisions, senators are provided insight into the nominees' positions on prominent legal issues without pressing them to divulge how they might rule on future disputes.⁶ Third, this research contributes to our understanding of the impact of court cases by demonstrating how judicial decisions motivate senatorial questioning at the hearings. Thus, rather than starting from a blank slate in their questioning, we reveal that senators utilize existing case law to probe nominees as to their positions on a diverse array of issue areas. Fourth, analyzing the age of the cases canvassed at the hearings contributes to our understanding of whether hearing dialogue reflects the salient legal issues of the time period corresponding to the confirmation hearing. On the one hand, if the cases discussed at the hearings are centuries-old, this suggests that the hearings may not be relevant to contemporary legal discourse. On the other hand, if the cases debated at the hearings are relatively recent, this provides evidence that hearing colloquy closely represents the contemporary

concerns of members of the Senate Judiciary Committee and, by implication, the Americans they represent. Finally, unearthing variation in the issue areas implicated in the discussion of judicial decisions with respect to the political party of the senator questioning the nominee enhances our appreciation of the role of partisanship in the judicial selection process.

Taken as a whole, this research makes a novel contribution to our understanding of the Supreme Court confirmation process, the impact of court decisions, and the partisan nature of federal judicial selection. As noted above, though there has been no shortage of ink spilled on discussions of the Supreme Court confirmation process, there has been very little systematic research devoted to understanding the content of the Senate Judiciary Committee hearings. This line of inquiry began more than two decades ago when Watson and Stookey⁷ rigorously analyzed the hearings and demonstrated that senators pursue varying goals that influence the nature and tone of their questioning. Since that seminal contribution, scholars have addressed other aspects of the hearings. Following Robert Bork's controversial nomination, Guliuzza, Reagan, and Barrett⁸ sought to examine whether that hearing marked a pivotal shift in the types of questions asked of nominees. Though they failed to find any major changes in nominee questioning, a subsequent analysis by Ogundele and Keith⁹ evidenced subtle shifts in the post-Bork era, such

3. But see, e.g., Dion Farganis and Justin Wedeking, "No Hints, No Forecasts, No Previews": An Empirical Analysis of Supreme Court Nominee Candor From Harlan to Kagan, 45 L. & SOC. REV. 525 (2011); Frank Guliuzza III, Daniel J. Reagan, and David M. Barrett, *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria*, 56 J. OF POLITICS 773 (1994); Ayo Ogundele and Linda Camp Keith, *Reexamining the Impact of the Bork Nomination to the Supreme Court*, 52 POL. RES. Q. 403 (1999); Ringhand and Collins, *supra* note 1; Margaret Williams and Lawrence Baum, *Questioning Judges about their decisions: Supreme Court nominees before the Senate Judiciary Committee*, 90 JUDICATURE 73 (2006); Justin Wedeking and Dion Farganis, *The Candor Factor: Does Nominee Evasiveness Affect Judiciary Committee Support for Supreme Court Nominees?*, 39 HOFSTRA L. REV. 329 (2010). For an analysis of lower court confirmation hearings see

Logan Dancy, Kjersten Nelson, and Eve Ringsmuth, "Strict scrutiny?" *The content of Senate judicial confirmation hearings during the George W. Bush administration*, 95 JUDICATURE 126 (2012).

4. For assertions to the contrary, see Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 85 NORTHWESTERN L. REV. 935 (1989-1990), at 935 (stating that "any claim to scientific generalization about Supreme Court appointments is highly dubious").

5. Albert P. Melone, *The Senate's confirmation role in Supreme Court nominations and the politics of ideology versus impartiality*, 75 JUDICATURE 68 (1991).

6. Williams and Baum, *supra* note 3, at 75.

7. George Watson and John Stookey, *Supreme Court confirmation hearings: a view from the Senate*, 71 JUDICATURE 186 (1988).

8. Guliuzza, Reagan, and Barrett, *supra* note 3.

9. Ogundele and Keith, *supra* note 3.

as an increase in questioning nominees on their constitutional philosophies. More recent scholarship on the hearings has focused on the types of questions asked by senators and the nominees' responses. For example, Ringhand and Collins¹⁰ analyzed the issues addressed in senatorial inquiries and nominee responses, including whether these issues vary depending on attributes of the nominees, such as their race or gender. Farganis and Wedeking¹¹ have expanded this effort by examining nominee candor, finding few changes over time with respect to the willingness of nominees to answer the senators' questions. In the only previous study of the role of judicial decisions at the hearings, Williams and Baum¹² analyzed the extent to which senators probe nominees on their previous judicial decisions and the tone of their questions. Below, we contribute to this limited, but important vein of research by more fully exploring the discussion of judicial decisions at the hearings.

The Discussion of Judicial Decisions

To investigate the extent to which judicial decisions are discussed at the hearings, we collected data on every question asked and answer given at every open, transcribed, public Supreme Court confirmation hearing from 1939-2010.¹³ This represents the universe of confirmation hearings at which nominees testified and is thus the most expansive analysis of confirmation hearing dialogue to

date. The unit of analysis in the data is the change of speaker. As such, a new observation begins whenever the speaker changes (e.g., from senator to nominee). Our data identify each judicial decision named in a statement, the name of each decision, the court that decided each case, and the date each decision was handed down. While most statements reference a lone court case, on occasion, a single comment may identify several cases. In such instances, each case is coded separately. In addition, we coded the party of the senator asking the question and the issue area corresponding to the discussion of the decision (which we address further below).

We coded all situations in which a statement by a nominee or senator unambiguously references a named case as involving the discussion of that case, even if the nominee or senator does not identify the case in a given comment. For example, if a question by a senator asks about a specific case, and the nominee discusses the case without repeating its name, the nominee's statement is coded to reflect the fact that it involved the judicial decision, despite the fact the decision was not specifically identified by the nominee. Statements regarding an issue area commonly associated with a particular case, such as abortion and *Roe v. Wade*,¹⁴ are not coded as involving a decision unless the statements are made in reference to a judicial decision.

To illustrate, consider the following

exchange between Senator Specter (R-PA) and Justice William Rehnquist at Rehnquist's hearing for Chief Justice in 1986:

Senator SPECTER. Mr. Justice Rehnquist, at the risk of asking questions which may come before the Court, I think these are pretty well established principles, but, there is considerable concern on the part of this Senator about the applicability of the due process clause of the 14th amendment to certain fundamental liberties, as embodied in the first 10 amendments. And I would like to ask your view as to the inclusion of the free exercise of religion in *Cantwell v. Connecticut*. It was a unanimous opinion. Does that matter rest, so far as you are concerned?

Justice REHNQUIST. Most certainly, yes.¹⁵

Given our coding rubric, both of these statements are treated as having referenced the Supreme Court's decision in *Cantwell v. Connecticut*,¹⁶ despite the fact Rehnquist did not specifically name *Cantwell* in his response. Such is the case because both comments concern themselves with whether Rehnquist accepts *Cantwell's* principle of incorporating the Free Exercise Clause of the First Amendment against the states.

We begin our examination of the discussion of judicial decisions at the confirmation hearings by investigating the extent to which such decisions make their way into hearing dialogue. Figure 1 identifies the percentage of statements related to judicial decisions for each nominee. The nominees are arrayed along the vertical y-axis, while the horizontal x-axis reports the percentage of all statements at each hearing involving judicial decisions. Statements made by senators appear in the left-hand graph, while nominee comments appear in the right-hand graph.

Overall, 16% of hearing dialogue involves the specific discussion of judicial decisions, with 15% of senatorial comments referencing precedents and 17% of nominee comments doing the same. As such, the identity of the speaker (i.e., senator or nominee) makes little difference in the canvass-

10. Ringhand and Collins, *supra* note 1.

11. Farganis and Wedeking, *supra* note 3. See also Wedeking and Farganis, *supra* note 3.

12. Williams and Baum, *supra* note 3.

13. We obtained transcripts of the confirmation hearings from five sources. The transcripts of the early hearings, Frankfurter (1939) to Blackmun (1970), are found in Roy M. Mersky and J. Myron Jacobstein, eds., *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975* (Buffalo: William S. Hein, 1977). The transcripts of Powell (1971) through Alito (2006) are available on the Senate Judiciary Committee's webpage (http://www.senate.gov/pagelayout/reference/one_item_and_tasers/Supreme_Court_Nomination_Hearings.htm). The Bork (1987) transcript is found on the Law Library of Congress's webpage (<http://www.loc.gov/law/find/court-withdrawn.php>). The Sotomayor transcript is available from

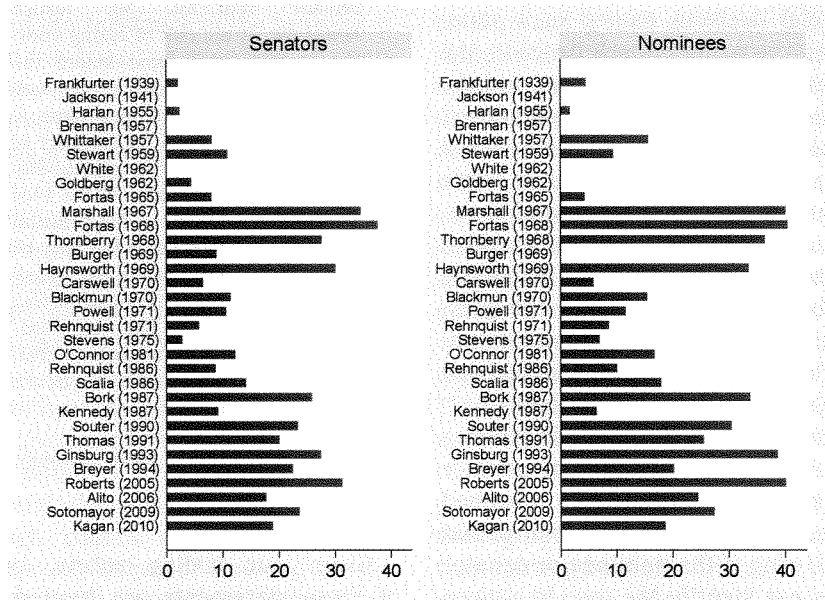
the *New York Times* (http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&pagewanted=all). The Kagan transcript is available from the *Washington Post* (<http://www.washingtonpost.com/wp-srv/package/supremecourt/2010candidates/elena-kagan.html>). Because we are concerned with the question and answer sessions that are the heart of the confirmation hearings, we have excluded opening statements made by nominees and senators. In addition, we have excluded the portion of the Clarence Thomas hearing that was re-opened solely for the purpose of investigating allegations of sexual harassment made by Anita Hill since that testimony is qualitatively different than traditional hearing dialogue.

14. 410 U.S. 113 (1973).

15. Confirmation Hearing on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, at 192 (<http://www.gpo.gov/fdsys/pkg/GPO-CHRG-REHNQUIST/pdf/GPO-CHRG-REHNQUIST.pdf>).

16. 310 U.S. 296 (1940).

FIGURE 1. The Percentage of Comments Made by Senators and Nominees Discussing Judicial Decisions at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2010



ing of judicial decisions. In fact, the correlation between the percentage of senatorial statements addressing precedents and that of nominees at each hearing is 0.99 ($p < 0.001$). Thus, the structure of our data corroborate the reality that the hearings take place in a question and answer format, with senators setting the hearing agenda through their questions, followed by nominees responding in turn.

Figure 1 also reveals that there is substantial variation in the discussion of judicial decisions at the hearings. No judicial decisions were brought up at three of the early hearings—those of Jackson (1941), Brennan (1957), and White (1962)—and less than 4% of dialogue at the Frankfurter (1939), Harlan (1955), and Goldberg (1962) hearings involved debates over precedents. It is thus apparent that the discussion of judicial decisions did not take foothold until the Marshall hearing in 1967. Beginning with Marshall, 20% of all comments at the hearings involved the treatment of judicial decisions. Moreover, dialogue relating to court cases played a par-

ticularly prominent role at the hearings of Marshall (1967), Fortas (for Chief Justice in 1968), Thornberry (1968), Haynsworth (1969), Ginsburg (1993), and Roberts (2005). At each of these hearings, more than 30% of all statements involved the analysis of judicial decisions, ranging from 31% for Thornberry to a high of 39% for Fortas. Thus, while it took the discussion of judicial decisions some time to gain traction, once it did, inquiries related to specific precedents have become a mainstay of hearing colloquy. In the last two decades, more than 25% of hearing discourse involved senators interrogating nominees on specific judicial decisions.

The Courts

Having established the extent to which judicial decisions are discussed at Supreme Court confirmation hearings, we now turn to identifying the courts that rendered the decisions that make their way into the hearings. This information is presented in Table 1. The first column lists the court type, the second column identifies the

percentage of statements pertaining to the decisions of each court, and the third column reports the percentage of unique cases canvassed at the hearings for each court type.

Beginning with column two, it is evident that, far and away, the majority of judicial decisions discussed at the hearings involve the decisions of the U.S. Supreme Court. Indeed, more than 6,100 separate statements implicated Supreme Court cases, comprising almost 72% of all judicial decisions discussed. That so much focus is given to Supreme Court decisions is not surprising for two reasons. First, because the Supreme Court sits atop the judicial hierarchy, its precedents bind the decisions of all lower courts and thus weigh more heavily than precedents set by lower federal and state courts. Second, because senators can utilize the discussion of the Court's precedents to interrogate nominees as to their positions on those precedents, without requiring the nominees to forecast their positions on pending or potential cases, querying nominees on Supreme Court precedents provides a powerful mechanism for senators to glean the nominees' positions on seemingly settled legal disputes.

Following the Supreme Court, decisions handed down by the U.S. courts of appeals constitute 25% of



Justice Thurgood Marshall, whose 1967 confirmation hearings marked a watershed in the discussion of judicial decisions.

all court cases addressed at the hearings. As Williams and Baum¹⁷ point out, the federal circuit courts have become fertile sources of Supreme Court nominees in recent decades. For example, of the justices sitting on the current Court, only one, Elena Kagan, has not served on one of the courts of appeals. Given that senators will frequently probe nominees on their previous judicial decisions,¹⁸ and given that a majority of the nominees in our dataset served on the courts of appeals, it makes sense that a substantial portion of the judicial decisions addressed at the confirmation hearings come from these courts. Notably, however, the fact that the vast majority of decisions discussed come from the Supreme Court, not the appeals courts where nominees have served, demonstrates that the hearings do more than rehash the nominees' prior judicial pronouncements.

Decisions handed down by the other courts identified in Table 1 are examined relatively infrequently. Only 2% of all mentions of judicial decisions involve cases disposed of by the federal district courts, while only 1.3% address precedents set by state high courts. Moreover, only five statements pertain to the decisions of state trial courts and only three involve the decisions of state intermediate appellate courts. Interestingly, one case decided by a foreign judicial body made an appearance at the hearings: *Dudgeon v. United Kingdom*.¹⁹ In *Dudgeon*, the European Court of Human Rights determined that a law criminalizing male homosexual sodomy ran afoul of the European Convention on Human Rights. This case was discussed at Anthony Kennedy's hearing in relation to the Supreme Court's decision in *Bowers v. Hardwick*,²⁰ which upheld a Georgia statute outlawing sodomy. Also of interest is the fact that a case from a U.S. Department of Defense military commission made its way into

TABLE 1. The Judicial Decisions Discussed at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees by Court Type, 1939-2010

Court	Percentage of Statements	Percentage of Unique Cases Discussed
U.S. Supreme Court	71.9% (6,138)	65.5% (578)
U.S. Courts of Appeals	24.6% (2,101)	27.0% (239)
U.S. District Courts	2.0% (173)	3.4% (30)
State Courts of Last Resort	1.3 % (113)	3.2% (28)
State Trial Courts	0.06% (5)	0.2% (2)
European Court of Human Rights	0.05% (4)	0.1% (1)
State Intermediate Appellate Courts	0.04% (3)	0.3% (3)
U.S. Department of Defense Military Commission	0.01% (1)	0.1% (1)
Totals	100.0% (8,538)	100.0% (882)

The entries in column two represent the percentage of statements discussing a decision from each court as a function of all comments regarding judicial decisions, while the numbers in parentheses indicate the total number of statements pertaining to the decisions of each court. The entries in column three represent the percentage of unique cases from each court discussed as a function of all unique cases addressed at the hearings, while the numbers in parentheses indicate the total number of unique decisions from each court mentioned at the hearings.

the hearings. During the Sotomayor hearing, Senator Graham (R-SC) brought up the case of Khalid Sheikh Mohammed, who was scheduled to appear before a military tribunal on the third day of Sotomayor's testimony to face charges related to his alleged involvement in terrorist activities (the case is still pending).

Column three of Table 1 reports the percentage of unique cases addressed at the hearings for each court type. Among the more than 6,100 mentions of Supreme Court decisions, these discussions focused on 578 cases, comprising 66% of all unique cases broached at the hearings. Thus, on average, each Supreme Court precedent addressed at the hearings appears in about 10 comments. However, this average is deceiving because four cases make up more than 20% of the discussion of Supreme Court precedent: *Roe v. Wade* (7.7%), *Brown v. Board of Education*²¹ (5.2%), *Griswold v. Connecticut*²² (4.2%), and *Miranda v. Arizona*²³ (4.0%). As such, it is apparent that particularly salient decisions, such as these four, regularly make their way into hearing discourse.

Of the U.S. Courts of Appeals cases debated at the hearings, 239 separate cases are represented, compared to 30 unique decisions from the federal district courts, 28 from state courts of last resort, three from state intermediate appellate courts, two from state trial courts, and a single decision each from the European Court of Human Rights and U.S. military tribunals. Thus, it is clear that the discussion of judicial decisions at Supreme Court confirmation hearings is dominated by Supreme Court precedents.

The Age of Cases

We now turn to an investigation of the age of the cases debated at the hearings. This analysis is valuable in that it provides insight into the extent to which the discussion of judicial decisions reflects contemporary debates over the salient legal issues corresponding to the time period surrounding the nomination. This information is presented in Figure 2. This figure reports the age of the case in years, which was calculated by subtracting the date the decision was handed down from the date of

17. Williams and Baum, *supra* note 3, at 74.

18. Williams and Baum, *supra* note 3.

19. Series A, No. 45 (1981).

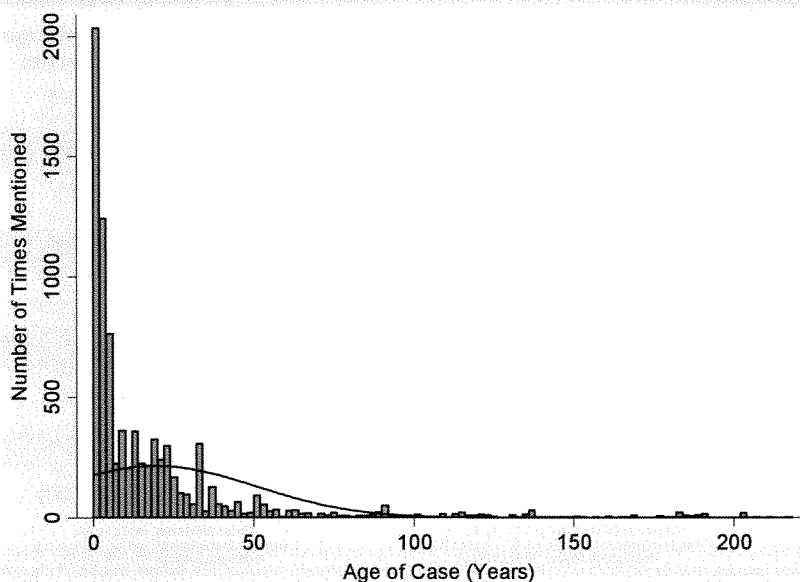
20. 478 U.S. 186 (1986).

21. 347 U.S. 483 (1954).

22. 381 U.S. 479 (1965).

23. 384 U.S. 436 (1966).

FIGURE 2. The Age of Cases Discussed at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2010



the confirmation hearing. The vertical y-axis reports the number of times each case was mentioned at the hearings, while the horizontal x-axis represents the age of the case. To facilitate a visual understanding of the age of cases, we employ two-year bins in Figure 2. Thus, each vertical bar in the graph represents a two-year time period. The black line represents the fitted normal distribution of the age of cases.

Note that, in creating this figure, we excluded pending cases from consideration. While rare, from time to time senators will query nominees on cases that have yet to be decided. In the data under analysis, nine cases, comprising 16 statements, were discussed before a final decision was rendered. For example, Senator Feingold (D-WI) questioned Sonia Sotomayor about *Citizens United v. Federal Election Commission*²⁴ six months before it was decided. Sotomayor declined to offer her opinion about the case, which was one of the first decisions handed down during her freshman term on the Court.

The average age of the cases debated

at the hearings is 19.4 years. However, Figure 2 reveals that this average does not tell the full story of the age of cases. In particular, the graph in Figure 2 is heavily skewed towards more recent cases: 24% of cases mentioned are less than two years old and 39% are less than four years old. The median age of cases is 7.8 years, meaning that 50% of cases addressed at the hearings are less than eight years old, and more than 75% of cases are less than 23 years old. It is thus apparent that, while nominees are queried on a handful of seminal centuries-old cases, such as *Marbury v. Madison*²⁵ (84 comments) and *Dred Scott v. Sanford*²⁶ (60 statements), most of the case-specific discussion reflects more recent judicial decisions, with a majority of cases discussed being less than a decade old. Given this, these data provide strong evidence that debates over judicial decisions closely reflect issues of contemporary relevance to the American legal system.

The Issues

We conclude our empirical analysis of the discussion of judicial decisions at

Supreme Court confirmation hearings by analyzing the issue areas raised in the canvassing of court cases. Our purpose is to shed light on the substantive content of the hearings by examining which issues most frequently motivate the discussion of judicial decisions, as well as whether these issues vary depending on the political party of the questioning senator. To do this, we coded the statements relating to the discussion of judicial decisions based on the topics in the Policy Agendas Project,²⁷ supplemented by the addition of several hearing-specific categories.²⁸ Note that the issue area corresponds to the context of the statement. While most of these topics reflect the issue area of the judicial decision, they need not do so if the case was named in a context other than that involving the subject matter of the litigation. In addition, we coded the political party of the senator asking the question at the time of the confirmation hearing.²⁹

To illustrate, consider the dialogue between Senator Metzenbaum (D-OH) and Judge Robert Bork, involving Bork's role in the firing of Watergate Special Prosecutor Archibald Cox.

24. 175 L. Ed. 2d 753 (2010).

25. 5 U.S. 137 (1803).

26. 60 U.S. 393 (1857).

27. Frank Baumgartner and Bryan Jones, *Policy Agendas Project* (<http://www.policyagendas.org>). The topics consist of macroeconomics; civil rights; health; agriculture; labor and employment; education; environment; energy; transportation; law, crime, and family; social welfare; community development and housing; banking, finance, and domestic commerce; defense; space, technology, and communications; foreign trade; international affairs and aid; government operations; public land and public water; state and local government; weather; fires; arts and entertainment; sports and recreation; death notices; and churches and religion.

28. We added the following hearing-specific categories to the topics contained in the Policy Agendas Project database: federalism; court administration; statutory interpretation; best/favorite justices; best/favorite cases or opinions; worst cases or opinions; standing/access to courts; non-standing justiciability issues; judicial philosophy; hearing administration; nominee background; media coverage of the hearing; and pre-hearing conversations/coaching.

29. This information was collected from the *Biographical Directory of the United States Congress, 1774-Present* (<http://bioguide.congress.gov>).

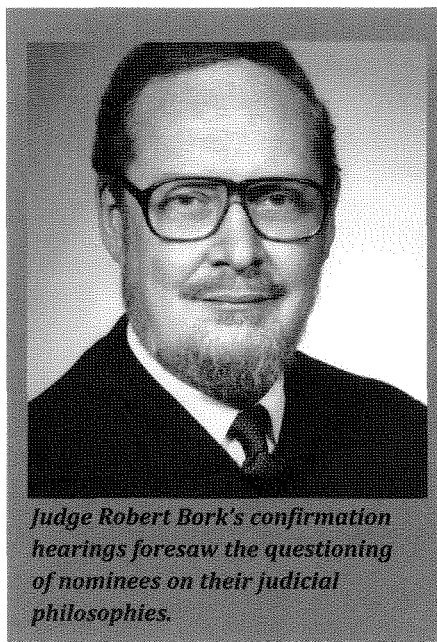
Senator METZENBAUM. ... The court in *Nader v. Bork* stated, "The firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was, therefore, illegal." So when you say it was not, you are saying that the court's decision meant nothing.

Judge BORK. I did not say it meant nothing. I think it is wrong, Senator, and I will be glad to explain why I think so.³⁰

Because these statements pertain to Bork's role in the firing of Cox when he was Acting Attorney General, these comments are coded as involving "nominee background" despite the fact that *Nader v. Bork*³¹ focused on the limits of executive power. Thus, while it is rare for the issue area corresponding to the judicial decision to differ from that of the hearing testimony, it does happen on occasion, typically in relation to inquiries regarding a nominee's background.³²

Table 2 presents the issues addressed in discussions of judicial decisions at Supreme Court confirmation hearings. The first column presents the issue area; the second column indicates the percentage of comments made by Democratic senators; the third column reports the percentage of statements made by Republican senators; and the fourth column reports the p-values corresponding to two-tailed, unpaired difference of means tests. To facilitate interpretation, the p-values appearing in bold indicate that the difference of means in the issue areas discussed by Democratic and Republican senators is statistically significant at $p < 0.05$, meaning there are substantive differences between Democratic and Republican senators with respect to the attention given to these issue areas.

Far and away, statements discussing judicial decisions involve civil rights issues. Overall, 51% of comments relating to court cases touch on civil rights, with 59% of statements initiated by Republican senators relating to civil rights, compared to 46% for Democratic senators.³³ Discussions of judicial decisions in the



context of debates about law, crime, and family are the next most frequently addressed issue area, constituting 14% of statements inaugurated by Democratic senators and 8% by Republican senators. While law, crime and family is a seemingly broad category, it is absolutely dominated by criminal justice issues, including the examination of cases such as *Miranda v. Arizona*, *Escobedo v. Illinois*,³⁴ and *Stovall v. Denno*.³⁵ Statements about judicial philosophy come next, with Republican senators inquiring about a nominee's judicial philosophy in 13% of comments involving cases, compared to 8% for Democratic senators. Given that prior research indicates that specific, case-driven discussions are more illuminating of future judicial behavior than are abstract questions of judicial philosophy,³⁶ the fact that judicial philosophy plays a relatively small role in confirmation dia-

logue, particularly in the discussion of cases, further demonstrates that the hearings are more substantive than is often asserted.

Democratic senators more frequently press nominees on judicial decisions with regard to questions involving the nominees' backgrounds, with 12% of background discussions relating to court cases initiated by Democratic senators, in contrast to only 5% for Republican senators. Democratic senators also focus more attention on government operations, labor and employment, and "other" issues in their discussion of judicial decisions, while Republican senators devote more attention to matters of statutory interpretation when scrutinizing nominees on their opinions of court cases. There are no significant differences between Democratic and Republican senators in terms of treatments of federalism, hearing administration, court administration, and standing/access to courts.

It is thus clear that the senators' political party affiliations play a role with regard to the topics motivating the discussion of judicial decisions. Republican senators probe nominees on matters of civil rights, judicial philosophy, and statutory interpretation more often than their Democratic counterparts. Conversely, Democratic members of the Judiciary Committee focus more attention on issues relating to law, crime, and family, nominee background, government operations, labor and employment, and "other" issue areas. On the one hand, this corroborates existing research evincing that the Democratic Party "owns" some issues, such as labor and employment, while the Republican Party stakes a claim to others, such

30. Confirmation Hearing on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, at 194 (<http://www.loc.gov/law/find/nominations/bork/hearing-pt1.pdf>).

31. 366 F.Supp. 104 (D. D.C. 1973).

32. Another example of this is the series of questions William Rehnquist received at his 1986 hearing involving a memo he wrote as a law clerk for Justice Jackson that supported upholding the separate but equal doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

33. Because our data reflect the fact that senators set the hearing agenda through their questions, the data in Table 2 are separated

by the political party of the senator asking the question and include both the senators' questions and the nominees' responses. When we exclude statements made by nominees from our data, we obtain consistent results with respect to the differences in the issue areas discussed by Democratic and Republican senators.

34. 378 U.S. 478 (1964).

35. 388 U.S. 293 (1967).

36. Jason J. Czarnezki, William K. Ford, and Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONSTITUTIONAL COMMENTARY 127 (2007).

TABLE 2. The Issues Addressed in the Discussion of Judicial Decisions by the Party of the Senator at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2010

Issue	Democratic Senators	Republican Senators	P-value for t-test
Civil Rights	45.7% (2,308)	59.0% (2,055)	< 0.001
Law, Crime, and Family	14.0% (707)	7.9% (275)	< 0.001
Judicial Philosophy	7.7% (387)	12.6% (438)	< 0.001
Nominee Background	11.9% (599)	4.8% (166)	< 0.001
Government Operations	4.6% (234)	3.1% (109)	< 0.001
Federalism	3.2% (164)	2.6% (92)	0.108
Labor and Employment	4.2% (211)	0.9% (31)	< 0.001
Hearing Administration	1.9% (97)	2.4% (84)	0.121
Court Administration	1.2% (58)	1.2% (41)	0.901
Standing/Access to Courts	1.2% (61)	1.0% (33)	0.258
Statutory Interpretation	0.5% (25)	1.8% (62)	< 0.001
Other Issues	4.0% (203)	2.8% (98)	0.003
Totals	100.1% (5,054)	100.1% (3,484)	

The entries in columns two and three represent the percentage of comments regarding each issue area related to the discussion of judicial decisions. The percentages do not sum to 100% due to rounding. The numbers in parentheses indicate the total number of comments pertaining to each issue area. The entries in column four report the p-values corresponding to two-tailed, unpaired difference of means tests for Democratic and Republican senators. P-value entries appearing in bold indicate that the difference of means is statistically significant at $p < 0.05$. Issue areas representing less than 1.0% of the topics implicated in the discussion of judicial decisions are combined into the "Other Issues" category.

as judicial philosophy and statutory interpretation.³⁷ On the other hand, in their discussion of judicial decisions, Democratic senators more frequently press nominees on several issues that are traditionally associated with the Republican Party, including law, crime, and family, while Republican senators press nominees more often on civil rights, generally thought to be an issue owned by the Democratic Party.³⁸

Thus, while there is some correspondence with issue ownership theory in the context of presidential elections, it is evident that members of the Senate Judiciary Committee are willing to appropriate issues traditionally associated with the opposition party when grilling Supreme Court nominees about judicial decisions. While our data cannot speak

to exactly why this is the case, Collins and Ringhand³⁹ argue that a primary function of the hearings is to both shape and entrench the current constitutional consensus, which can be accomplished in two ways. First, senators attempt to secure nominees' agreement with previously controversial decisions that have subsequently been absorbed into our constitutional canon, such as *Brown v. Board of Education*. Second, senators endeavor to shape the constitutional consensus by pushing their preferred constitutional decisions in or out of the constitutional canon. This was on vivid display at John Roberts' hearing as senators debated *Roe v. Wade's* status as a "superprecedent" that warranted particular deference.⁴⁰

This second type of questioning often incentivizes senators to probe

nominees on issues more frequently associated with the opposing party. Indeed, Republican senators asked Roberts a higher percentage of questions about *Roe v. Wade* than did their Democratic counterparts (61% to 39%). As such, while civil rights issues, such as abortion, are generally thought to be owned by the Democratic Party, Republican senators also press nominees on these issues. In the case of Roberts, this was done to argue that *Roe* is not a part of the current constitutional consensus and should not be treated as such. Applying Collins and Ringhand's argument to our findings suggests the need for a more nuanced view of issue ownership theory in the context of confirmation hearing dialogue, one that focuses special attention on what motivates senators to ask particular types of questions.

Conclusions

The Senate Judiciary Committee hearings of Supreme Court nominees provide both a check on the president's appointment power and the only institutionalized opportunity for nominees to face a moment of democratic accountability before they take their place on the High Court. Despite this, much of the public and scholarly discussion of the hearings has assumed that they are of little value, and there has been scant systematic research devoted to understanding exactly what happens at the hearings. In this article, we investigated one particularly significant aspect of the hearings: the extent to which hearing discourse involves the exploration of judicial decisions.

Our findings dispute the asser-

37. E.g., John R. Petrocik, William L. Benoit, and Glenn J. Hansen, *Issue Ownership and Presidential Campaigning, 1952-2000*, 118 *Pol. Sci. Q.* 599 (2003); Ringhand and Collins, *supra* note 1, at 627.

38. E.g., David F. Damore, *Issue Convergence in Presidential Campaigns*, 27 *POL. BEHAVIOR* 71 (2005).

39. Paul M. Collins, Jr. and Lori A. Ringhand, "Super Precedents, Litmus Tests, and Supreme Court Confirmation Hearings" (2012) (paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, Illinois).

40. Jeffrey Rosen, *So, Do You Believe in "Superprecedent"?*, *New York Times*, October 30, 2005, at section 4, column 1.

tion that nothing generalizable or substantial happens at the hearings. We reveal that a significant percentage of hearing dialogue concerns the discussion of court cases. In recent decades, one out of every four questions involves the concrete discussion of judicial decisions. Thus, it is clear that the hearings have substantive content. By pressing nominees on judicial decisions, senators are provided with a powerful mechanism to glean the nominees' perspectives on salient legal issues, without requiring them to violate the norm of not forecasting their positions on future legal disputes. And, while senators do press nominees on their previous judicial decisions,⁴¹ the vast majority of the cases canvassed at the hearings involve U.S. Supreme Court precedents that the nominees did not play a role in shaping.

Though some seminal centuries-old decisions are discussed at the hearings, most of the cases debated involve relatively recent precedents. In fact, the majority of cases scrutinized at the hearings are less than eight years old. As such, our findings indicate that hearing colloquy involving judicial decisions closely represents the salient legal issues of the era in which the nomination hearing takes place. We also find that Democratic and Republican senators exhibit some stark differences in the issues areas implicated in the canvassing of judicial decisions. Inasmuch as members of the Senate Judiciary Committee can utilize their questions to relay their constituents' concerns about the development of federal law to nominees,⁴² it is apparent that senators of varying political stripes approach the hearings from different perspectives on the issues that matter most to their publics.

Taken as a whole, it is clear that members of the Senate Judiciary Committee pay close attention to judicial decisions and utilize those decisions to probe nominees on their positions on the significant legal issues of the day. This advances our



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understanding of the confirmation hearings as involving substantive discussions of contemporary constitutional law, rather than a meaningless process dominated by nominee specific, opportunistic political grandstanding. While we certainly do not deny that such grandstanding occurs, this article reveals that a significant portion of hearing dialogue is motivated by senatorial concerns about constitutional issues exemplified in the Court's prior case law. As it is supported by empirical evidence, rather than just anecdotal impressions, this finding alone makes a meaningful contribution to our understanding of the confirmation process.

The dataset on which this article is based, however, also allows us to explore these issues even further. Using the full range of data collected from more than seventy years of confirmation hearings will enable us in future projects to illustrate the ways in which confirmation dialogue follows public opinion, thereby allowing the public, acting through its elected officials, to influence the development of constitutional law. The discussion of case law at the hearings is a key component of this broader notion of

the hearing process as a mechanism through which each generation of Americans helps to shape the constitutional choices we agree to be governed by. More fully unearthing the connections between public opinion and confirmation dialogue will surely enhance our appreciation of the significance of confirmation hearings in American democracy. ★

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41. Williams and Baum, *supra* note 3.

42. Ringhand and Collins, *supra* note 1.