

SUPER PRECEDENTS, LITMUS TESTS, AND SUPREME COURT CONFIRMATION HEARINGS*

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ABSTRACT

We explore the discussion of precedent at Supreme Court confirmation hearings as a means to demonstrate how the hearings represent the opportunity to construct a democratically accepted set of constitutional commitments capable of changing over time. Employing both quantitative and qualitative methods, we investigate the precedents addressed at the hearings and how the treatment of these cases changes as new issues gain constitutional salience with the public. In addition, we use the discussion of precedents at the hearings to illustrate how the Court's prior decisions are affirmed or rejected by Senators and nominees. In doing so, we pay particular attention to those precedents and issue areas that have become confirmation litmus tests that nominees are expected to embrace or renounce in order to secure confirmation. We conclude that, far from being empty rituals, the confirmation hearings are prized opportunities for vigorous and effective democratic debates about constitutional meaning.

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Since 1939, almost every candidate nominated to serve on the Supreme Court has appeared to testify before the Senate Judiciary Committee. At each of these hearings, Americans re-engage in a debate about the meaning of the Constitution. Not only do the nominees respond to question after question from the Senators, but these questions (and the nominees' answers) frequently spark intense and colorful debate in the larger public. Nominees are grilled on everything from iconic and sublime cases such as *Brown v. Board of Education*,¹ to deceptively trivial things like spending Christmas Eve at a Chinese restaurant – things which sometimes turn out to have important cultural and political resonances.

To understand the confirmation hearings through this swirl of contemporary public debate is to get a rich education about what the Constitution means to us at a given moment in time. One might think, therefore, that these hearings would be viewed as important constitutional moments; essential discussions about constitutional meanings that would be welcomed, even celebrated, in a democratic system of governance such as ours. But the confirmation hearings are rarely thought of in this way. Instead, they are much maligned. The hearings are routinely criticized as empty rituals (at best) or deceptive debacles (at worst).² Some legal scholars have even called for abolishing them entirely.³

This paper presents and defends the celebratory view: far from being empty rituals that degrade all involved, the confirmation hearings are, and should be recognized as, prized opportunities for vigorous and effective democratic discussions about what the Constitution means. The hearings, we argue, are the key moment at which an otherwise independent judiciary confronts its political accountability. As such, they are the mechanism by which constitutional choices made by the Supreme Court earn their democratic legitimacy. Nominees testifying at the hearings, as we show, repeatedly affirm their allegiance to (or

¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

² See, e.g., Richard Brust, “No More Kabuki Confirmations,” 95 *ABA Journal* 39 (2009); Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New York: Basic Books, 1994); Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005); Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton: Princeton University Press, 2007); Elena Kagan, “Review: Confirmation Messes, Old and New,” 62 *University of Chicago Law Review* 919 (1995); David A. Yalof, “Confirmation Obfuscation: Supreme Court Confirmation Politics in a Conservative Era,” 44 *Studies in Law, Politics, and Society* 141.

³ See Stephen Choi and Mitu Gulati, “A Tournament of Judges?,” 92 *California Law Review* 299 (2004); Glenn Harlan Reynolds, “Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process,” 65 *Southern California Law Review* 1572 (1992).

rejection of) what were once disputed constitutional meanings. Over time, these repeated avowals turn those disputed meanings – the constitutional choices made by the judiciary – into part of our constitutional fabric. They become constitutional meanings that are truly accepted by “We the People,” acting not as a metaphysical abstraction, but as we actually think, live, and vote *today*. Constitutional meaning, in the process we describe here, is not pulled from the parchment by nine legal seers, but rather is created in fits and starts as the Court issues decisions that are, over time through the confirmation hearings, accepted, rejected, and passionately argued about by *us*.

We demonstrate that the hearings provide a forum in which controversial judicial decisions become democratically validated (or rejected) through the use of what we call confirmation litmus tests. Contrary to the way it frequently is used in discussions of the confirmation process, we decidedly are not using the term “litmus tests” to mean the hot button issues, such as abortion, that Presidents and Senators are sometimes said to employ as the determining factor in their decision to appoint a nominee (in the case of Presidents) or to support or oppose a nominee (in the case of Senators).⁴ Instead, the cases and constitutional issues we refer to as litmus tests are those nominees are expected to *accept* or *reject* as a part of our constitutional consensus in order to win confirmation. In our lexicon, then, the use of litmus tests at confirmation hearings is a good thing: it works to provide democratic validation (or rejection) of the constitutional choices made by the Court. Over time, the repeated use of the same cases or issues as litmus test provides a mechanism by which judicially initiated choices about constitutional meaning are accepted or rejected in a transparent, democratically legitimated way.⁵

This paper proceeds as follows. We begin our investigation of confirmation litmus tests through the empirical analysis of the role of precedent at the hearings. Our purpose here is two-fold. First, we shed light on how the use of Supreme Court precedents as litmus tests has developed over time. Second, we

⁴ See, e.g., Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New York: Basic Books, 1994); Michael Stokes Paulsen, “Straightening Out the *Confirmation Mess*,” 105 *Yale Law Journal* 549 (1995); Christopher Wolfe, “The Senate’s Power to Give ‘Advice and Consent’ in Judicial Appointments,” 82 *Marquette Law Review* 355 (1999).

⁵ Our use of the term “litmus tests” is different from the idea of “super precedents,” which Senators appear to use for the purpose of questioning nominees on their support for currently *contested* constitutional concepts, such as abortion. See, e.g., Jeffrey Rosen, “So, Do You Believe in ‘Superprecedent’?,” *New York Times*, October 30, 2005.

establish exactly which precedents have so ingrained themselves into constitutional discourse that they have become confirmation litmus tests. Following this, we take a closer look at how confirmation litmus tests have been used in debates about four issue areas. The first two, *Brown v. Board of Education* and the cases surrounding the constitutionalization of gender equality, are examples of norms nominees are expected to accept to win confirmation. Conversely, *Lochner v. New York*⁶ is an example of a constitutional holding that nominees are expected to reject at the hearings. While this was true for most of the hearings, we demonstrate that the norm represented in *Lochner* may be shifting out of the anti-cannon and into the contested zone of constitutional meaning. Finally, we discuss the likely development of a new confirmation litmus test involving the Second Amendment that followed the Court's decision in *District of Columbia v. Heller*.⁷ We conclude by discussing the implications of this research for our understanding of the relationship between Supreme Court confirmation hearings and constitutional change.

THE DISCUSSION OF PRECEDENT AT THE HEARINGS

In order to investigate how frequently Supreme Court precedents are addressed at the hearings and exactly which precedents are most commonly discussed, we collected data on every question asked and answer given at every open, transcribed, public Supreme Court confirmation hearing from 1939-2010.⁸ 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

⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

⁷ *District of Columbia v. Heller*, 171 L. Ed. 2d 637 (2008).

⁸ 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_teasers/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 excluded opening statements made by nominees and Senators. In addition, we 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.

of speaker. As such, a new observation begins whenever the speaker changes (e.g., from Senator to nominee).

To determine the extent to which precedents are canvassed at the hearings, we have coded all situations in which a statement made by a nominee or Senator relates to a named Supreme Court case as involving the discussion of a precedent, even if the nominee or Senator does not identify the case in a given comment. For example, if a four-statement line of questioning begins with a Senator inquiring about a specific case, and all four statements touch on the case, each of the four observations is coded to reflect the fact that these statements discussed a given precedent, regardless of whether one (or more) of the comments did not specifically name the case. In addition, we have separately coded each named case in a given statement. As such, a single statement by a nominee or Senator can reference multiple cases.⁹

To illustrate, consider the following conversation between Chairman Biden (D-DE) and Judge Souter:

The CHAIRMAN. You very rightly and skillfully, Judge, always refer to the equal protection aspect of that case, which was not the basis upon which *Griswold* was decided. What would have happened had *Eisenstadt* come before the Court before *Griswold*, so that there was not an equal protection portion to it? Do you believe that there is a constitutional right to privacy in the liberty clause of the 14th amendment, not the equal protection clause of the 14th amendment for unmarried couples?

Judge SOUTER. I don't know the extent an answer to that question can be given in the abstract without the kind of Harlan inquiry that I'm talking about. It was not made and I have not made it. The thing that I can say is that if that question had come up before *Griswold* as you posit, exactly the same kind of analysis that Harlan would have used and did use in his concurring opinion should be used to address the same issue of nonmarital privacy.

The CHAIRMAN. That is worrisome, because I know of no tradition in American society where an inquiry into the history and traditions of the American people have guaranteed a right of privacy to unmarried couples

⁹ To conduct reliability analyses of the variables used in this project, we extracted a random sample of 96 pages of transcript (out of 4,021 pages), constituting 2.4% of the data. This sample size gives us precision of $\pm 3.6\%$ with 95% confidence. The average intercoder agreement rate for the variables that capture the precedents discussed at the hearings is 92.6%, with a kappa value of 0.92 ($p < 0.001$). This is a substantial improvement over the expected rate of agreement by chance (7.3%) and is considered "almost perfect" by one commonly used interpretation of kappa. See Richard J. Landis and Gary G. Koch, "The Measurement of Observer Agreement for Categorical Data," 33 *Biometrics* 159 (1977).

relating to procreation or sexual activity. So it seems to me that you would have come down and concluded that married couples do not have a right to privacy, based on that set of inquiry.

Am I wrong about that?

Judge SOUTER. I think, yes, I think it is wrong simply to draw that conclusion because as you, yourself, have pointed out in the analyses that go on, there is a two-part inquiry. The first inquiry is No. 1: Is there a liberty interest to be asserted and how may it be valued? The other inquiry that goes on is, when, in fact, is the weight to be given to the State interest which may be brought up as a countervailing interest when the liberty interest is, in some way, restricted?

One of the questions, of course, that would have to be asked if we were approaching *Eisenstadt* first and not *Griswold* first, is not merely the weight to be given to the privacy interest to be asserted, but the weight to be given to the State interest in asserting the right to preclude people under those circumstances from obtaining contraceptive information and devices. I do not think that is a simple question to answer.¹⁰

Given our coding rules, each of these statements is treated as referencing both *Griswold v. Connecticut*¹¹ and *Eisenstadt v. Baird*,¹² despite the fact that only the first and fourth comments specifically name both precedents. This is because all four comments involve the back-and-forth between Biden and Souter regarding the relationship between these cases and the right to privacy in the Fourteenth Amendment.

Finally, note that our focus in this paper is on Supreme Court precedent. While other courts' decisions occasionally make their way into confirmation hearings, typically relating to the nominees' prior judicial decisions (if any),¹³ such discussions are nominee-specific and are therefore short-lasting. The decisions of lower courts do not lodge themselves in the public conscious, and thus do not become confirmation litmus tests in the same way that Supreme Court decisions do. Of the 8,538 statements exploring judicial decisions made at the confirmation hearings, 72% (6,138) involved Supreme Court precedents, compared to only 28% (2,400) of comments about the decisions of other courts. Of those lower court decisions, moreover, only three appeared at the confirmation hearing of more than a single

¹⁰ Souter Transcript, questioning by Senator Biden (D-DE) at 233-234.

¹¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹² *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹³ Margaret Williams and Lawrence Baum, "Questioning Judges About Their Decisions: Supreme Court Nominees Before the Senate Judiciary Committee," 90 *Judicature* 73 (2006).

nominee.¹⁴ As we illustrate below, this positively pales in comparison to the host of Supreme Court decisions that were discussed at myriad confirmation hearings.

***** Figure 1 About Here *****

Figure 1 reports the extent to which Supreme Court precedents make their way into hearing dialogue. The nominees are arrayed along the vertical y-axis, while the horizontal x-axis reports the percentage of all statements at each hearing involving Supreme Court precedent. Nominee comments are indicated by the white bars, while senatorial comments are shown by the black bars.

This figure reveals three interesting patterns relating to the discussion of precedent at the confirmation hearings. First, it is evident that questioning nominees regarding the Court's decisions did not become a routine part of the process until the Marshall hearing in 1967. Prior to this, precedents were broached in less than 2% of all comments and five hearings, those of Frankfurter, Jackson, Brennan, Whittaker, and White, featured no mentions of Supreme Court precedent. This is not to say that these hearings involved no discussion of constitutional issues; they plainly did. Rather, our data show that hearing dialogue was slow to take the form of discussions about particular cases. Beginning with Marshall, however, 14% of all comments at the hearings involved the Court's prior decisions. Moreover, dialogue relating to precedent played a particularly prominent role at the hearings of Marshall, Fortas (for Chief Justice), and Roberts. At each of these hearings, more than 25% of all statements involved the analysis of the Court's precedents, ranging from 26% for Marshall, to 30% for Roberts, to a high of 39% for Fortas. Thus, while the discussion of precedent took some time to gain traction, once it did, precedential inquiries became a mainstay of hearing colloquy.

Second, it is evident that precedential dialogue has remained quite stable since O'Connor's hearing in 1981. Prior to that hearing, there was wide variation in attention to precedent, even in the post-Marshall era. For example, inquiries into a nominee's views of precedent constituted less than 2% of the Carswell

¹⁴ *Masses Publishing v. Patten*, 244 F. 535 (SDNY 1917) appeared at the hearings of Ginsburg and Roberts; *Ollman v. Evans*, 750 F.2d 970 (DC Cir. 1984) was featured at the hearings of Bork and Scalia; and *Richmond Medical Center for Women v. Gilmore*, 144 F.3d 326 (4th Cir. 1998) was discussed at the hearings of Alito, Roberts, and Sotomayor.

and Haynsworth hearings, compared to more than 25% at the Marshall and Fortas (for Chief Justice) hearings. Since 1981, however, attention to precedent has stabilized, typically constituting about 16% of hearing dialogue.¹⁵ Thus, in recent decades, we can expect about one-sixth of hearing discourse to be devoted to concrete examinations of Supreme Court precedents.

Finally, Figure 1 indicates that nominees engage in the discussion of precedent more often than do Senators. While the overall average of precedential statements is quite close for the two types of participants, 11% for nominees, and 10% for Senators, only nine hearings featured Senators referencing precedent more often than nominees. During the other 23 hearings, nominees discussed precedent in 18% of their comments, in contrast to 15% of statements for Senators. Though speculative, our impression is that this difference is largely attributable to the tendency of nominees to address specific cases in response to more general senatorial questions about a given issue. That is, Senators query nominees with respect to a general concept and nominees reply by informing the Senators how the Court has decided particular cases in the issue area. To illustrate, consider the following exchanges:

Senator TUNNEY. What do you consider to be the present state of the political question doctrine and do you see a trend?

Mr. STEVENS. We talked about that very briefly this morning and I pointed out what I am sure you are well aware of, Senator, that the term political question is used in two different senses: one, the jurisdictional sense and the other, the more or less popular sense. I think that really ever since *Baker v. Carr* the political question objection to Federal jurisdiction has been narrowed...¹⁶

* * *

Senator HUMPHREY. But I mean the question in more than the abstract sense. Is it your view that at times in our history, the Supreme Court has overreached, has exercised, rawly exercised political power?

¹⁵ From 1967-1975, statements involving precedent constituted an average of 11% of hearing dialogue, with a standard deviation of 12% and a range from 1.3% to 38.5%. From 1981-2010, comments relating to precedent comprised 16% of hearing colloquy, with a standard deviation of 7% and a range from 6.1% to 30.3%, clearly evincing the stabilization of the discussion of precedent since the O'Connor hearing.

¹⁶ Stevens Transcript, questioning by Senator Tunney (D-CA) at 68.

Judge KENNEDY. There are a few cases where it is very safe to say that they did, the *Dred Scott* case being the paradigmatic example of judicial excess.¹⁷

* * *

Senator SCHUMER. ...So I would like to find out a little bit more about modesty. So I would ask you—and these can be well settled, they could be 50 or 100 years ago, and please don't go on at length—can you give me a few Supreme Court cases that are modest, or represent modesty, is a better way to put it, at least in your view, and a few Supreme Court cases that would represent immodesty?

Judge ROBERTS. Sure. I guess I would think the clearest juxtaposition would be the cases from the *Lochner* era. If you take *Lochner* on the one hand and, say, *West Coast Hotel*, which kind of overruled and buried the *Lochner* approach on the other, and the immodesty that I see in the *Lochner* opinion is in its re-weighing of the legislative determination. You read that opinion, it's about limits on how long bakers can work. And they're saying we don't think there's any problem with bakers working more than 13 hours.¹⁸

As these examples make clear, it is not uncommon for Senators to question nominees on a somewhat broad issue, such as the political questions doctrine or judicial restraint, and have the nominees respond by bringing up specific Supreme Court precedents.

WHICH PRECEDENTS?

Having established the extent to which precedent is discussed at the confirmation hearings, we now turn to identifying exactly which precedents are most commonly featured at the hearings. Table 1 presents the Supreme Court precedents that generated 50 or more comments at the hearings, arranged by the total number of comments relating to each decision. The first column reports the name of the decision and the year it was decided. The second column indicates the total number of comments made by Senators and nominees regarding the decision, as well as the percentage of comments represented by each decision as a function of all statements pertaining to the Court's precedents (in parentheses). Thus, this column provides information on the overall extent to which each precedent appeared at the hearings. Because older cases have more opportunity to be raised at multiple confirmation hearings, this column risks

¹⁷ Kennedy Transcript, questioning by Senator Humphrey (R-NH) at 175.

¹⁸ Roberts Transcript, questioning by Senator Schumer (D-NY) at 408.

weighing older decisions more heavily than newer precedents. As such, the third column reports the percentage of hearings, since the decision was decided, that the precedent was discussed, in addition to the number of hearings, since the case was rendered, that each case was mentioned (in parentheses). The purpose of this latter column is to ascertain how frequently each case appears at hearings subsequent to the decision being handed down.

For example, *Roe v. Wade*,¹⁹ which established that the right to privacy protects a woman's decision to have an abortion, is the most frequently addressed Supreme Court case at the confirmation hearings, constituting 7.7% of all mentions of precedent (475 total comments). This decision appeared at 85.7% of the hearings since it was handed down (12 of the 14 hearings subsequent to the decision). The only hearings at which *Roe* was not discussed since its issuance in 1973 were those of Stevens and Rehnquist (for Chief Justice).

***** Table 1 About Here *****

Several notable findings emerge from Table 1. First, with one exception, each of these cases falls into one of five issue areas: reproductive rights, racial discrimination, institutional powers, criminal rights, and the First Amendment. The lone aberration is *District of Columbia v. Heller*, in which the Court established that the Second Amendment right to keep and bear arms is an individual, rather than a collective, right. Though *Heller* was decided in 2008, it nonetheless is the ninth most frequently addressed precedent at the hearings, and it made appearances at each of the two hearings following its establishment: Sotomayor and Kagan. As a whole, treatments of *Heller* constituted 1.6% of all the precedents discussed at the hearings since their inception in 1939. Thus, while *Heller* is a relatively green precedent, it is evident that it is a particularly significant case that will no doubt continue to generate substantial attention at future hearings.

Decisions related to reproductive rights constitute the most frequently addressed precedential issue area at the hearings, with four cases embodying 15% of all named precedents. In addition to *Roe*, these

¹⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

cases include *Griswold v. Connecticut*, *Planned Parenthood v. Casey*,²⁰ and *Eisenstadt v. Baird*. *Griswold*, decided eight years before *Roe*, set the stage for reproductive freedom by, first, establishing that the Constitution provides a right to privacy, and, second, determining that the right to privacy protects the ability of married couples to be counseled regarding the use of contraception. Given the paramount importance of this case, it is not surprising that it is the third most frequently addressed precedent at the hearings, encompassing more than 4% of all mentions of precedent and appearing at almost 60% of hearings since it was decided.

Planned Parenthood v. Casey is the third most commonly addressed reproductive rights decision, making up 2.5% of all precedents and appearing at every subsequent hearing since it was handed down. This decision affirmed the central holding in *Roe* (that the right to privacy protects the abortion decision), but rejected the trimester framework established in *Roe* regarding the ability of states to regulate access to abortion. In its place, the Court's majority established the undue burden test: that state regulations regarding abortion are constitutional so long as they do not place a substantial obstacle in the path of a woman seeking the abortion of a nonviable fetus.

The fourth most frequently addressed reproductive rights precedent is *Eisenstadt v. Baird*. This decision constitutes 0.8% of all precedents named at the hearings and it made appearances at 31% of the hearings since it was decided. In *Eisenstadt*, the Court struck down a Massachusetts law that prohibited the distribution of contraceptive materials to unmarried couples on the grounds that the law violated the Equal Protection Clause of the Fourteenth Amendment. To reach this conclusion, the Court determined that the state did not have a legitimate interest in enacting the legislation prohibiting access to contraceptive materials to non-married couples, but allowing their distribution to married couples (which the Court compelled in *Griswold*).

That four cases involving reproductive rights represent 15% of all precedents discussed at the hearings is particularly interesting given earlier findings regarding the extent to which abortion rights are

²⁰ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

addressed at the hearings.²¹ Abortion rights were not raised at the hearings until 1981 – eight years after *Roe* was decided. Even since that date, comments regarding abortion have constituted less than 5% of all hearing dialogue. Nonetheless, precedents touching on abortion rights and reproductive rights regularly make their way into hearing discourse. This seeming dichotomy is largely explained by the fact that when the Senators and nominees debate reproductive rights, they almost always do so through discussion of widely known precedents. This is different than the way other popular constitutional issue areas are discussed. For example, references to the Court’s precedents occur in 54% of comments related to abortion rights, compared to 35% of statements involving racial discrimination and 29% of comments implicating gender and sexual orientation discrimination.

Thus, while Senators and nominees routinely converse about other civil rights and liberties issues in broad terms, their attention to reproductive rights is much more case specific, often revolving around the Court’s reproductive rights precedents, such as *Roe*, *Griswold*, *Casey*, and *Eisenstadt*. This may well explain why anecdotal accounts of the hearings suggest (incorrectly) that abortion rights constitute a focal point of hearing dialogue.²² Abortion appears to play a larger role in the hearings than it actually does because it is discussed in widely recognized terms – typically involving seminal decisions, such as *Roe* and *Griswold* – rather than couched in abstract or more technical legal jargon that is less accessible (and memorable) to casual observers.

While not as common as reproductive rights cases, Table 1 indicates that precedents related to racial discrimination often make their way into hearing colloquy. Three such cases account for 8% of all named precedents. This is not astonishing given that, for much of the twentieth century, constitutional debate centered largely on racial issues. *Brown v. Board of Education*, in which the Court declared that racially

²¹ Lori A. Ringhand and Paul M. Collins, Jr., “May It Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939-2009,” 60 *American University Law Review* 589 (2010).

²² See, e.g., “Abortion Shouldn’t Be Only Issue,” *Wisconsin State Journal*, July 24, 2005; Hasani Gittens, “Thomas: Anita Who? Abortion was Key,” *New York Post*, September 28, 2007; Jesse J. Holland, “Senators Say Alito Respects *Roe v. Wade*,” *Houston Chronicle*, November 9, 2005; “Judge Alito and Abortion,” *New York Times*, December 3, 2005; Neil A. Lewis, “The Supreme Court: Ginsburg Affirms Right of a Woman to Have an Abortion,” *New York Times*, July 22, 1993; Margaret Talev and Michael Doyle Bee, “Senators Will Share in Roberts’ Spotlight,” *Sacramento Bee*, September 12, 2005.

segregating public schools by law violated the Equal Protection Clause, is the most commonly scrutinized racial discrimination precedent and the second most frequently addressed decision overall. *Brown*, the evolution of which is discussed in detail in the next section, comprised 5% of all mentions of precedent and appeared at 73% of hearings held since it was decided in 1954. *Plessy v. Ferguson*,²³ which was overruled by *Brown*, comes next, constituting 2% of precedents and making a showing at half of the hearings since their inception (*Plessy* is much older than the hearings; it was decided in 1896, four decades before the hearings began). The infamous 1856 case of *Dred Scott v. Sandford*,²⁴ in which the Court determined that even freed slaves were not citizens within the meaning of the Constitution, rounds out this category. *Dred Scott* was debated at 31% of all hearings, embodying 1% of all mentions of precedent.

The third most commonly addressed precedential issue area involves the institutional powers of the three branches of government. Since these cases often involve disputes about the scope of Congress' own powers, it makes sense that Senators show a great deal of interest in this issue area. Five of the most frequently debated precedents fit into this category, constituting 6% of all precedents. Of these, *Katzenbach v. Morgan*,²⁵ a 1966 case in which the Court determined the scope of congressional power under the enforcement provision of the Fourteenth Amendment, received the most attention at the hearings. In it, the Court adjudicated whether Section 4e of the Voting Rights Act of 1965, which prohibits states from imposing literacy tests as a condition of voting, was a constitutional exercise of congressional power. New York State argued that Section 4e intruded upon state sovereignty, while the federal government claimed that it was a constitutionally acceptable way of enforcing the substantive components of the Fourteenth Amendment's Equal Protection Clause (the federal government won). *Katzenbach* makes up 2% of all of the precedents discussed at the hearings and appeared at 17% of hearings since it was decided.

²³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁴ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

²⁵ *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Two additional congressional powers cases show up regularly at the hearings, each constituting about 1% of all named precedents. *Morrison v. Olson*²⁶ upheld the ability of Congress to pass legislation establishing a special court and authorizing the Attorney General to appoint independent counsel to investigate allegations of criminal activity on the part of federal government officials. *Morrison* appeared at 50% of hearings since it was decided. In *U.S. v. Lopez*,²⁷ the Court struck down the Gun Free School Zones Act as beyond congressional authority on the grounds that the possession of a gun in a school zone is not economic activity and thereby was beyond the reach of the Commerce Clause. As this case was the first time since 1937 that the Court struck down a law as exceeding Congress' power to regulate interstate commerce, it is not surprising that it has been discussed at every hearing since it was decided in 1995.

The two remaining institutional powers cases in Table 1 relate to the powers of the judicial and executive branches. *Marbury v. Madison*,²⁸ the seminal 1803 case asserting the Supreme Court's power to declare laws unconstitutional and thus void, makes up 1.4% of all named precedents and appeared at half of all confirmation hearings. While mentions of *Marbury* tend to be somewhat ritualistic, Antonin Scalia astonished the Committee at his hearing by refusing to comment on whether it had been properly decided.²⁹ *Youngstown Sheet and Tube Company v. Sawyer*,³⁰ in which the Court limited the President's ability to seize and transfer the operation of steel mills to the Secretary of Commerce during the Korean War, was discussed at 20% of hearings since it was decided, comprising 0.8% of all precedents. Because *Youngstown* provided the framework through which the Court evaluates claims of presidential authority, it is not unexpected that it, like the other cases in this issue area, is of great concern to the Senators and is regularly debated at the confirmation hearings.

Decisions involving the rights of the criminally accused constitute the next most common category of precedents discussed at the hearings. Three decisions in this area make up 6% of precedents debated at

²⁶ *Morrison v. Olson*, 487 U.S. 654 (1988).

²⁷ *U.S. v. Lopez*, 514 U.S. 549 (1995).

²⁸ *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁹ Scalia Transcript at 33-34.

³⁰ *Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952).

the hearings: *Miranda v. Arizona*,³¹ *Stovall v. Denno*,³² and *Escobedo v. Illinois*.³³ *Miranda* required that law enforcement officials make criminal suspects aware of their constitutional rights prior to questioning. It was a hotly debated decision when it was handed down in 1966, and has subsequently become one of the most widely known Supreme Court precedents, owing in no small part to police procedural television shows such as *Dragnet* and *Law & Order*.³⁴ It is no bombshell, therefore, that it is the fourth most commonly mentioned precedent at the hearings. *Miranda* accounts for 4% of all precedential statements and appeared at 74% of hearings since it was rendered.

Stovall v. Denno follows *Miranda* as the second most frequently canvassed criminal rights decision and the twelfth most commonly mentioned precedent overall. In *Stovall*, the Court determined that the pretrial identification of a criminal suspect, absent counsel, did not violate the defendant's due process rights based on the claim that the identification was unnecessarily suggestive that the suspect committed the crime. (The case also involved complicated questions of the retroactive effect of Supreme Court decisions.) While *Stovall* accounts for 1.2% of all of the discussion of precedent at the hearings, it only appeared at two hearings, those of Thurgood Marshall and Abe Fortas (for Chief Justice). At the Marshall hearing, it constituted 15% of all Supreme Court cases mentioned, compared to only 2.5% for Fortas. The reason so much attention was devoted to this case at the Marshall hearing was almost certainly due to the fact that Marshall sat on the original three-judge Court of Appeals panel that handled the appeal. Consequently, rather than representing a case that ingrained itself into the fabric of American constitutional discourse, *Stovall* is an excellent example of how Senators occasionally interrogate nominees on their previous judicial opinions, frequently focusing on those decisions that were subsequently adjudicated by the Supreme Court.

The third most referenced criminal rights case, accounting for almost 1% of all discussion of precedent, is *Escobedo v. Illinois*. This case was debated at 21% of the hearings since it was decided. In

³¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

³² *Stovall v. Denno*, 388 U.S. 293 (1967).

³³ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

³⁴ Todd S. Purdum, "Miranda as a Pop Cultural Icon," *New York Times*, July 2, 2000.

Escobedo, the Court determined that criminal suspects have a Sixth Amendment right to an attorney during police interrogations. Decided a year after *Gideon v. Wainwright*,³⁵ in which the Court established the right to counsel for indigent defendants, *Escobedo* extended this right to the point at which an individual becomes a suspect in a crime.

A set of three First Amendment cases round out the most frequently discussed Supreme Court precedents, collectively constituting more than 4% of all named precedents. Despite having only being decided in 2010, *Citizens United v. Federal Election Commission*³⁶ is the most commonly addressed First Amendment decision, accounting for 2% of all precedents mentioned at the hearings. In *Citizens United*, the Court struck down provisions of the Bipartisan Campaign Reform Act of 2002 that limited the ability of corporations to spend general corporate revenue on electioneering activities that specifically endorse or oppose a particular candidate for political office. The law also barred labor unions from spending unsegregated funds on this type of advocacy. The Court held that these restrictions violated the First Amendment. Interestingly, while *Citizens United* was decided in January of 2010, it actually made an appearance at the Sotomayor hearing six months earlier. Senator Russell Feingold (D-WI), one of the primary architects of the law, used the hearing to express to Sotomayor his concerns about the Court's intervention in this area.³⁷ Those concerns were even more pronounced after the case was actually decided: *Citizens United* was addressed in 115 statements at the Kagan hearing, making up 27% of all of the precedents broached at that hearing. Like *Heller*, we predict that *Citizens United* will generate substantial attention at future confirmation hearings.

Brandenburg v. Ohio,³⁸ in which the Court concluded that the government may not criminalize inflammatory speech unless that speech is likely to incite immediate lawless action, appeared at 21% of hearings since it was decided, encompassing 1.4% of all precedential statements. The final First Amendment case (and first religion case) among the most frequently debated precedents is *Lemon v.*

³⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³⁶ *Citizens United v. Federal Election Commission*, 175 L.Ed.2d 753 (2010).

³⁷ Sotomayor Transcript at 3.60-3.61.

³⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Kurtzman.³⁹ *Lemon* articulated the three pronged “*Lemon* test” used to evaluate claimed violations of the Establishment Clause. Under this test, governmental engagement with religion will survive constitutional scrutiny if: 1) the statute has a secular purpose; 2) the statute’s primary effect neither advances nor inhibits religion; and 3) the statute does not result in an excessive entanglement with religion.⁴⁰ *Lemon* comprises 1.1% of all precedents, appearing at 50% of the hearings since it was handed down.

***** Table 2 About Here *****

Having established the most commonly addressed precedents at the hearings overall, we now turn to the hearings of individual nominees. Table 2 presents the most frequently debated Supreme Court decision at each confirmation hearing. The first column indicates the nominee’s name and hearing year; the second column reports the most commonly referenced precedent at each nominee’s hearing; and the third column reveals the number of comments pertaining to the precedent at each hearing, along with the percentage of comments represented by each case (in parentheses). Our purpose in presenting this information is to show how precedents are used over time. As such, this analysis provides the opportunity to shed additional light on those precedents that are firmly entrenched into hearing colloquy in comparison to those that are more short-lived.

Table 2 reveals several important findings with respect to the role of precedent at the confirmation hearings. First, while this table reports the most commonly referenced precedent at each hearing, it is clear that these high profile cases do not absolutely dominate the discussion of precedent at each nominee’s hearing. On average, each case represents 28% of all precedents debated at the hearings, ranging from a high of 67% (*Brown v. Board of Education* at the Carswell hearing) to a low of 7% (*DeGregory v. Attorney General of New Hampshire*⁴¹ at the Fortas hearing for Chief Justice). Thus, it is clear that nominees are regularly grilled on a *variety* of precedents, demonstrating the precedential pluralism that is a staple of the confirmation hearings.

³⁹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁴⁰ *Lemon v. Kurtzman*, 403 U.S. 602 (1971) at 612-613.

⁴¹ *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966).

Second, the majority (61%) of the most commonly scrutinized cases at each hearing also appear in Table 1, which reports the most frequently addressed precedents overall. *Roe v. Wade* received the highest number of comments at seven hearings; *Brown v. Board of Education* at six hearings; *Griswold v. Connecticut* and *Miranda v. Arizona* at two hearings each; while *Citizens United v. Federal Election Commission*, *District of Columbia v. Heller*, and *Youngstown Sheet and Tube Company v. Sawyer* generated the most precedential inquiries at one hearing each. This overlap between the two tables shows there is a reasonable amount of stability with respect to several of the precedents Senators and nominees explore at the hearings. This supports our theoretical assertion, developed in the next section, that confirmation litmus tests develop and validate judicial choices over time.

Notably, though, almost 40% of the cases listed in Table 2 are *not* present among the most debated precedents overall, indicating that some precedents are more short-lived than others. For example, *South Carolina v. U.S.*,⁴² in which the Court upheld the ability of the Internal Revenue Service to tax state liquor agents, accounted for 40% of the discussion of precedent at the Goldberg hearing. This case made its first appearance at the Stewart hearing in 1959, was broached at the hearings of Goldberg, Marshall, and Fortas (for Chief Justice), and then disappeared. Further evincing the short-lived nature of some precedents, seven decisions in Table 2 appeared at only a single hearing: *DeGregory v. Attorney General of New Hampshire* (Fortas for Chief Justice), *Kent v. United States*⁴³ (Burger), *Textile Workers Union v. Darlington Manufacturing*⁴⁴ (Haynsworth), *Minnesota Mining v. New Jersey Wood Finishing*⁴⁵ (Blackmun), *Konigsberg v. State Bar of California*⁴⁶ (Rehnquist for Associate Justice), *Yamashita v. Styer*⁴⁷ (Stevens), and *Dolan v. City of Tigard*⁴⁸ (Breyer).

⁴² *South Carolina v. U.S.*, 199 U.S. 437 (1905).

⁴³ *Kent v. U.S.*, 383 U.S. 541 (1966).

⁴⁴ *Textile Workers Union v. Darlington Manufacturing*, 380 U.S. 263 (1965).

⁴⁵ *Minnesota Mining v. New Jersey Wood Finishing*, 381 U.S. 311 (1965).

⁴⁶ *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

⁴⁷ *Yamashita v. Styer*, 327 U.S. 1 (1946).

⁴⁸ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

On average, the 12 precedents listed in Table 2, but not Table 1, appear at two hearings each, while those listed in both Tables 1 and 2 are discussed at 10 hearings each. (Two cases, *Heller* and *Citizens United*, were only available for discussion at two hearings.⁴⁹) Only two cases reported in Table 2, but not Table 1, were advanced at five or more hearings: *Baker v. Carr*⁵⁰ and *Reynolds v. Sims*.⁵¹ *Baker*, in which the Court determined that the redistricting of legislatures was no longer a political question, and thus open to judicial review, appeared at nine hearings – Fortas (for Chief Justice), Burger, Stevens, O’Connor, Bork, Kennedy, Souter, Thomas, Ginsburg – a span of 25 years. *Reynolds*, which established the one person, one vote standard with respect to the reapportionment of legislative districts, was discussed at the hearings of Fortas (for Associate Justice), Marshall, Burger, Bork, and Souter, also covering a quarter century of confirmation hearings.

Thus, it is evident that, even though some cases may not find themselves among the most frequently addressed Supreme Court precedents overall, they are still capable of achieving confirmation longevity. As we illustrate in the next section, another such case is *Lochner v. New York*.⁵² In *Lochner*, the Court struck down a state law that established the maximum number of hours that bakers could work on the grounds that the law violated the liberty to contract found in the Fourteenth Amendment. While this case addresses a seemingly mundane issue, it has nonetheless become one of the most significant, and assailed, Supreme Court decisions.⁵³ In fact, this case gave its name to an entire epoch in the Court’s history – the *Lochner* era – used to denote the period from about 1890 to 1937 in which the Court regularly invalidated state and federal social welfare legislation.⁵⁴ Though it took *Lochner* until 1971 to be addressed by name at the hearings, the issues surrounding the *Lochner* era appeared much sooner and the case was

⁴⁹ Recall that, while *Citizens United* was decided in 2010, it nonetheless was discussed at the Sotomayor hearing in 2009.

⁵⁰ *Baker v. Carr*, 369 U.S. 186 (1962).

⁵¹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁵² *Lochner v. New York*, 198 U.S. 45 (1905).

⁵³ See, e.g., Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993); William H. Rehnquist, “The Notion of a Living Constitution,” 54 *Texas Law Review* 693 (1976); David A. Strauss, “Why Was *Lochner* Wrong?,” 70 *University of Chicago Law Review* 373 (2003).

⁵⁴ See, e.g., Lewis F. Powell, Jr., “*Carolene Products* Revisited,” 82 *Columbia Law Review* 1087 (1982); Stephen A. Siegel, “Understanding the *Lochner* Era: Lessons from the Controversy over Railroad and Utility Rate Regulation,” 70 *Virginia Law Review* 187 (1984).

subsequently debated by name at seven hearings – Rehnquist (for Associate Justice), Bork, Thomas, Ginsburg, Breyer, Roberts, and Alito – spanning more than three decades. Overall, *Lochner* is the 31st most frequently addressed Supreme Court precedent at the hearings.

CONFIRMATION LITMUS TESTS

Having provided an empirical foundation for understanding the use of precedent at Supreme Court confirmation hearings, we now turn to the heart of our story about the role of the confirmation process in validating constitutional change. In this section, we show how both nominees and Senators employ Supreme Court precedents to construct a democratically accepted set of constitutional commitments capable of changing over time. Based on our empirical data, we have identified a variety of confirmation litmus tests. Here we discuss four such tests: *Brown v. Board of Education*, the constitutionalization of gender equality,⁵⁵ *Lochner v. New York*, and (almost certainly) *District of Columbia v. Heller*. As we illustrate, nominees are repeatedly expected to affirm their allegiance to, or rejection of, these decisions as a condition of Senate confirmation. This is so despite the fact that many of these cases embody what were once contested constitutional meanings. In so doing, these avowals transform formerly disputed meanings of the Court’s decisions into part of our constitutional fabric, a fabric that is truly accepted by “We the People.”

THE EVOLUTION OF *BROWN*

The paradigmatic example of a constitutional choice that today’s nominees are expected to accept if they hope to be confirmed is *Brown v. Board of Education*. *Brown* has become so essential to our constitutional self-identity that it is easy to forget that when the case was first decided it was *legally*, not just socially, controversial. The “colorblind” reading of the Equal Protection Clause advocated by today’s constitutional formalists was soundly *rejected* by the constitutional formalists of 1954. Professor Herbert Wechsler of Harvard Law School famously deemed it an insufficiently “neutral principle” on which to rest

⁵⁵ As we discuss below, because it took the discussion of gender equality decades to appear at the hearings, no cases involving gender discrimination appear in Table 1. Nonetheless, gender equality provides an excellent example of changing norms regarding the development of a confirmation litmus test.

constitutional lawmaking.⁵⁶ In contrast, the “separate but equal” doctrine invalidated by *Brown* was, in 1954, seen as fully consistent with most accepted modes of constitutional interpretation: it was supported by precedent, compatible with the text of the Constitution, and almost certainly was consonant with the intentions held by most of the post-Civil War Americans who ratified the Fourteenth Amendment.⁵⁷

The dispute over *Brown* was on vivid display during the confirmation hearings of John Marshall Harlan II and Potter Stewart, who were among the first nominees to face the Senate Judiciary Committee after *Brown* was decided. Harlan’s 1955 hearing – the first post-*Brown* hearing – was short, but *Brown* hung over the proceeding. The questions of Senator Eastland (D-MS), who engaged in public battles with the Court since *Brown* was announced, nicely illustrate how *Brown* was viewed by its opponents. Eastland repeatedly asked Harlan questions such as whether he agreed that “the Supreme Court should change established interpretations of the constitution to accord with the.... personal views of the judges who from time to time constitute the membership of the Court.”⁵⁸ He then queried Harlan (reading from a list of questions submitted by a different, unnamed Senator) whether he believed that “the difficulty of amending the Constitution or the delay which is incident to the use of the amendment process prescribed in the Constitution ever justif[ied] the Supreme Court in changing established interpretations or provisions in the Constitution.”⁵⁹ He followed this by asking whether Harlan agreed that “the Constitution den[ies] legislative powers to the courts as well as it does to the Executive.”⁶⁰ To be sure, the rhetoric demonstrated by Eastland’s questions regarding judicial lawmaking and the “personal views” of judges were a core component of segregationist critiques of *Brown*.⁶¹

⁵⁶ Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” 73 *Harvard Law Review* 1 (1959).

⁵⁷ See, e.g., Alexander M. Bickel, “The Original Understanding and the Segregation Decision,” 69 *Harvard Law Review* 1 (1955); Michael J. Klarman, “*Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell,” 81 *Virginia Law Review* 1881 (1995); Mark V. Tushnet, “Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,” 96 *Harvard Law Review* 781 (1983). But see, e.g., Michael W. McConnell, “Originalism and the Desegregation Decisions,” 81 *Virginia Law Review* 947 (1995).

⁵⁸ Harlan Transcript, questioning by Senator Eastland (D-MS) at 140-141.

⁵⁹ Harlan Transcript, questioning by Senator Eastland (D-MS) at 141.

⁶⁰ Harlan Transcript, questioning by Senator Eastland (D-MS) at 141.

⁶¹ See, e.g., Gerald D. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Clive Webb, “A Continuity of Conservatism: The Limitations of *Brown v. Board of Education*,” 70 *Journal of Southern History* 327 (2004).

The questioning of Potter Stewart four years later was more direct. *Brown* had by this point become the flashpoint of Southern hostility to the Court, and Stewart was interrogated extensively by the Senators about his opinion of the case. Senator McClellan (D-AR) informed Stewart that he “wholly disagree[d] with” the *Brown* decision and needed to know Stewart’s opinion on it in order to do his duty “with respect to [Stewart’s] confirmation.”⁶² Senator Eastland was only slightly more subtle: “Before May 1954,” he pointed out, “the Supreme Court in a number of cases held that the [separate but] equal doctrine met the test of the 14th Amendment. That was changed after that date, in *Brown vs. Board of Education*. Was that an amendment of the Constitution?”⁶³ Eastland went on a moment later, asking whether Stewart agreed that “the courts should be bound by precedent that is a century old.”⁶⁴

Stewart also was grilled about the methodology used by the Court in *Brown*. “Do you think,” Eastland asked, “that the courts should cite as authority for decisions, textbooks, or documents written by individuals that have never been part of the record in the case. ... Let us take the *Brown* case. There was a book written by a man named Murdock. I don’t think Mr. Murdock could stand a security investigation. It was cited as an authority in that case. Do you think that is proper?”⁶⁵ Senator McClellan again jumped in, asking Stewart if he agreed with “the view, the reasoning and the logic applied or the lack of application of either or both, as the case may be, and the philosophy expressed by the Supreme Court in arriving at its decision in the case of *Brown vs. Board of Education* on May 17, 1954?”⁶⁶ McClellan, plainly, did not.

Senator Ervin (D-NC) joined in the critique of *Brown*’s methodology. Arguing that *Brown* was based on factual assumptions “which are not really true,”⁶⁷ Ervin posed this question to Stewart:

In my judgment those same words [factual assumptions which are not true] can be applied to the statement of the Court to the effect that history left this question inconclusive because the debates in the Congress which drafted the Amendment clearly showed that it was the purpose of Congress to embody in the Equal Protection of the laws clause of the Fourteenth

⁶² Stewart Transcript, questioning by Senator McClellan (D-AR) at 40.

⁶³ Stewart Transcript, questioning by Senator Eastland (D-MS) at 15.

⁶⁴ Stewart Transcript, questioning by Senator Eastland (D-MS) at 15-16.

⁶⁵ Stewart Transcript, questioning by Senator Eastland (D-MS) at 17-18.

⁶⁶ Stewart Transcript, questioning by Senator McClellan (D-AR) at 36.

⁶⁷ Stewart Transcript, questioning by Senator Ervin (D-NC) at 125.

Amendment the provisions of the Civil Rights Act of 1866. The debates in Congress showed that the Civil Rights Act of 1866 was amended by its own sponsors in order to make it clear that it was not intended to require mixed students.⁶⁸

Senator Ervin was equally explicit in his closing statement:

I think the *Brown v. Board of Education* was a most unfortunate decision from the standpoint of law, constitutional law, in the United States. ... [t]he Court said that it couldn't turn the clock back to 1868 when *Plessy v. Ferguson* was decided, and yet since constitutional provisions are to be interpreted to ascertain and give effect to the intention of the people who drew them and approved them, that is exactly what the Supreme Court should have done. They should have turned the clock back to 1868 when the Amendment was ratified.⁶⁹

As these statements make clear, *Brown* was, to the questioning Senators, an unsupportable usurpation of state power by an out of control judiciary hell bent on imposing its personal preferences in lieu of constitutional law. Constitutional law, in turn, was seen as perfectly ascertainable through the standard interpretive tools of precedent, original intent, and text. And those tools clearly did not, in these Senators' view, support *Brown*.

In the face of this type of questioning, Stewart balked at giving an opinion of the case. Unlike today's nominees, who cannot say enough good things about *Brown*, Stewart avoided a direct answer for some time. His comments about the case, in fact, are much more reminiscent of the manner in which more recent nominees respond to contested cases such as *Roe v. Wade* than the way they respond to *Brown*. Stewart said that of course courts ought to give a very great deal of weight to precedent,⁷⁰ that the Court cannot amend the Constitution and should not legislate from the bench,⁷¹ and that he did not necessarily agree with "all of the grammar, and the footnotes, and everything" in *Brown*.⁷² In the end, Stewart went only so far as to inform the Senators that "I would not like you to vote for me for the top position that I

⁶⁸ Stewart Transcript, questioning by Senator Ervin (D-NC) at 125.

⁶⁹ Stewart Transcript, questioning by Senator Ervin (D-NC) at 124.

⁷⁰ Stewart Transcript at 15-16.

⁷¹ Stewart Transcript at 15-16.

⁷² Stewart Transcript at 36.

am dedicated to because I am for overturning that decision, because I am not. I have no prejudgment against that decision.”⁷³

A nominee who waffled this much on *Brown* would not be expected to secure confirmation today. Yet only 17 Senators – all from former Confederate states – voted against Stewart’s appointment.⁷⁴ At the time of Stewart’s hearing, the country was still debating *Brown* and the future of civil rights.⁷⁵ Opposition to *Brown* was not strong enough to make its *rejection* a condition of Justice Stewart’s confirmation, but nor was it essential for confirmation that a nominee unequivocally embrace the case. Instead, in 1959, *Brown* was a case on which no constitutional consensus had been reached and therefore no specific answer was required.

The next stage of *Brown*’s evolution did little to change its unsettled status. At the hearings of Johnson appointees Byron White, Arthur Goldberg, Abe Fortas (for Associate Justice), and Thurgood Marshall, *Brown* went largely underground. Unlike at the Stewart hearing, *Brown* was not discussed directly with any great frequency at these hearings. In fact, it appeared by name at only two of these hearings, those of Fortas and Marshall.⁷⁶ But the rhetoric developed in the wake of *Brown* was on full display.

White, nominated in 1962, was asked very few questions (and, as discussed below, an unfortunate amount of his hearing dialogue was about his prowess on the football field). He was, however, pressed on his thoughts regarding “the Supreme Court attempting to legislate”⁷⁷ and the extent of congressional

⁷³ Stewart Transcript at 63.

⁷⁴ Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments* (Washington: CQ Press, 1994) at 289; Lori A. Ringhand, “‘I’m Sorry, I Can’t Answer That’: Positive Legal Scholarship and the Supreme Court Confirmation Process,” 10 *University of Pennsylvania Journal of Constitutional Law* 331 (2008) at note 91.

⁷⁵ See, e.g., Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004); Gerald D. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

⁷⁶ Fortas Transcript at 53; Marshall Transcript at 168.

⁷⁷ White Transcript at 23.

authority under the Exceptions Clause to pass bills restricting the Supreme Court's appellate jurisdiction,⁷⁸ a flurry of which had been introduced in Congress after *Brown*.⁷⁹

The use of *Brown* at the Goldberg hearing was similarly opaque. Senator McClellan, who made his dislike of *Brown* clear cut at the Stewart hearing, employed typical anti-*Brown* rhetoric to ask Goldberg whether he would “side with those who prefer so to interpret the Constitution as to permit them to actually write new law.”⁸⁰ McClellan went on by citing an unnamed commentator to ask whether Goldberg would lean toward “that reformist experimentation and innovation, that thirst to legislate the law and amend the Constitution from the High Bench rather than to referee the law as written by Congress, and the Constitution as written by the Founders.”⁸¹ Would Goldberg, McClellan continued, allow the Senators to “indulge the hope that you will oppose making the Supreme Court a third legislative body?”⁸²

While *Brown* was mentioned by name once at the Fortas Associate Justice hearing in 1965, the case itself failed to play a meaningful role. Instead, it was referenced by Senator Ervin, who was chiming in on a line of questioning from Senator Fong (R-HI) regarding whether the one-person, one-vote standard established in *Reynolds v. Sims* could be interpreted to infer that the Fifth or Fourteenth Amendments supersede the Seventeenth Amendment, which grants each state two Senators. (Fong's concern appeared to be that, if this was the case, smaller states, such as Hawaii, would lose representation in the Senate if it was apportioned based on population). Ervin “briefed” Fong on his own position on the subject, expressing his displeasure with the Court's logic in *Bolling v. Sharp*,⁸³ which was handed down the same day as *Brown*.⁸⁴ In *Bolling*, the Court used the Fifth Amendment to desegregate public schools in the nation's capital since the Fourteenth Amendment only applies to the states. Ervin opined that, if the Court could

⁷⁸ White Transcript at 24-25.

⁷⁹ See, e.g., Theodore Eisenberg, “Congressional Authority to Restrict Lower Federal Court Jurisdiction,” 83 *Yale Law Journal* 498 (1974); Wilfred Feinberg, “Constraining ‘The Least Dangerous Branch’: The Tradition of Attacks on Judicial Power,” 59 *New York University Law Review* 252 (1984); Walter F. Murphy, *Congress and the Court: A Case Study in the American Political Process* (Chicago: University of Chicago Press, 1962); C. Herman Pritchett, *Congress Versus the Supreme Court, 1957-1960* (Minneapolis: University of Minnesota Press, 1961).

⁸⁰ Goldberg Transcript, questioning by Senator McClellan (D-AR) at 7.

⁸¹ Goldberg Transcript, questioning by Senator McClellan (D-AR) at 9.

⁸² Goldberg Transcript, questioning by Senator McClellan (D-AR) at 9.

⁸³ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁸⁴ Fortas Associate Justice Transcript, questioning by Senator Ervin (D-NC) at 53-54.

use the Fifth and Fourteenth Amendments interchangeably, it was only logical that the Senate would have to be reapportioned following *Reynolds*. While Fortas did not directly address *Brown* (or *Bolling*), Ervin followed up with his by now familiar sermon: “I might add, more dangerous than that, though, is the fact that judges can take the due-process clause and make it mean almost anything they want it to mean. I think the Senators here learned that they do that on many occasions, and I hope you will not do so.”⁸⁵

This type of questioning – using the rhetoric deployed in response to *Brown* but not calling out nominees on the case itself – continued throughout the Thurgood Marshall and Warren Burger hearings. Thurgood Marshall led the NAACP Legal Defense and Education Fund’s litigation team during *Brown*. He was the first African American nominated to the Supreme Court and his hearing was laced with thinly disguised racism.⁸⁶ Yet, the ground around *Brown* had shifted enough that his opponents dared not criticize the case directly, even with its primary architect sitting in front of them. In fact, the only specific mention of *Brown* at the hearing was made by Marshall, not the Senators.⁸⁷ Once again, *Brown* was attacked by the Senators through the rhetoric of judicial law making, which by this point had been even further inflamed by the Warren Court’s criminal procedure revolution.⁸⁸

Senator Ervin led the attack. Ervin introduced a resolution of state supreme court justices, circulated in 1958, stating that the Supreme Court was encroaching upon the areas reserved by the Constitution to the states.⁸⁹ Pegging his question to that resolution, Ervin asked whether Marshall agreed that the Supreme Court “has failed in recent years to confine itself to its allotted constitutional sphere, that of interpreting the Constitution rightly?”⁹⁰ Ervin then went on to talk about methods of constitutional interpretation. “Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of the Constitution and the people who ratified the Constitutionit is the duty of the Supreme

⁸⁵ Fortas Associate Justice Transcript, questioning by Senator Ervin (D-NC) at 55.

⁸⁶ See, e.g., Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New York: Basic Books, 1994).

⁸⁷ Marshall Transcript at 168.

⁸⁸ See, e.g., Jerold H. Israel, “Criminal Procedure, the Burger Court, and the Legacy of the Warren Court,” 75 *Michigan Law Review* 1319 (1977).

⁸⁹ Marshall Transcript, questioning by Senator Ervin (D-NC) at 25.

⁹⁰ Marshall Transcript, questioning by Senator Ervin (D-NC) at 27.

Court, is it not, to interpret the Constitution according to its true intent?”⁹¹ The Constitution, Senator Eastland helpfully interjected, “cannot mean one thing today and another thing tomorrow, can it?”⁹² Since “changes” to the Constitution are amendments to it, Ervin continued, and because the sole method of amending the Constitution is found in Article V of the Constitution, then no Justice is “ever authorized by any provision of the Constitution to change its meaning while professing to interpret it, is he?”⁹³

Questioning continued in this vein for some time. McClellan chimed in to ask Marshall how Supreme Court justices can be seen as complying with the law of the land when they are “free to reverse previous decisions that involve constitutional questions.”⁹⁴ Such “changing of the law,” he said, “is bringing chaos and confusion to our system of justice.”⁹⁵ Senator Strom Thurmond (R-SC) grilled Marshall on the history of the Fourteenth Amendment.⁹⁶ Thurmond went on to ask Marshall how the original understanding of the Equal Protection Clause could be reconciled with Supreme Court cases “forbidding discrimination in State laws rendered since 1954?” – an obvious reference to *Brown*.⁹⁷

Opponents of *Brown*, however, were fighting a losing battle. By the late 1960s, *Brown* was widely accepted by the public and embraced by constitutional theorists.⁹⁸ Warren Burger’s 1969 hearing featured just a few cryptic references to *Brown*. He was asked the standard set of post-*Brown* questions about whether the Supreme Court can “amend” the Constitution through interpretation, whether the Court has the power to “legislate,” and whether the Court has an obligation to take “special care” to preserve the “rights and responsibilities” of state and local governments.⁹⁹ Senator Byrd (D-WV) also asked Burger if it was the “proper function” of federal judges to “incorporate their personal notions of what is socially,

⁹¹ Marshall Transcript, questioning by Senator Ervin (D-NC) at 49.

⁹² Marshall Transcript, questioning by Senator Eastland(D-MS) at 49.

⁹³ Marshall Transcript, questioning by Senator Ervin (D-NC) at 50.

⁹⁴ Marshall Transcript, questioning by Senator McClellan (D-AR) at 156.

⁹⁵ Marshall Transcript, questioning by Senator McClellan (D-AR) at 156.

⁹⁶ Marshall Transcript, questioning by Senator Thurmond (R-SC) at 175.

⁹⁷ Marshall Transcript, questioning by Senator Thurmond (R-SC) at 166.

⁹⁸ See, e.g., David G. Barnum, “The Supreme Court and Public Opinion: Judicial Decision Making in the Post- New Deal Period,” 47 *Journal of Politics* 652 (1985); William E. Nelson, “*Brown v. Board of Education* and the Jurisprudence of Legal Realism,” 48 *St. Louis University Law Journal* 795 (2004); Brad Snyder, “How the Conservatives Canonized *Brown v. Board of Education*,” 52 *Rutgers Law Review* 383 (2000); Gerald D. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

⁹⁹ Burger Transcript at 5.

economically, or politically desirable” into judicial opinions.¹⁰⁰ But the direct attacks on *Brown* were gone. *Brown* was evolving from a hotly contested case that a nominee would be wise to avoid discussing to a consensus case that a nominee would be wise to embrace.

This transformation continued at the unsuccessful hearings of Clement Haynsworth in 1969 and Harrold Carswell in 1970. While both of these nominees were defeated in the Senate in part due to their opposition to civil rights,¹⁰¹ *Brown* failed to play a major role at either hearing. In fact, the Senators only referenced *Brown* once at Haynsworth hearing, and the decision itself was never mentioned by name. In the middle of a line of questioning regarding whether Haynsworth agreed with the decisions of “Earl Warren,”¹⁰² Senator Hart (D-MI) engaged the nominee in the following brief exchange:

Senator HART: I am speaking now of what he [Warren] did in terms of leading that Court in the direction that history will reflect was very timely, in the best long term interests of the country. He got into trouble because he said, among other things, that “separate but equal” wasn’t equal and wasn’t constitutional.

Do you agree with him?

Judge HAYNSWORTH: I certainly do.¹⁰³

With that, the Senator moved on, following up with a question regarding the right to counsel.

The fact that *Brown* garnered so little attention at the Haynsworth hearing is of particular interest in that Haynsworth, as a Fourth Circuit Court of Appeals judge, had a less than stellar record of enforcing *Brown*.¹⁰⁴ Indeed, at his hearing, representatives from the Black American Law Students Association, the Congressional Black Caucus, the Leadership Conference on Civil Rights (made up of 125 civil rights organizations), and the NAACP all testified against the nominee, largely on the basis of his failure to

¹⁰⁰ Burger Transcript, questioning by Senator Byrd (D-WV) at 15-16.

¹⁰¹ See, e.g., John P. Frank, *Clement Haynsworth, the Senate, and the Supreme Court* (Charlottesville: University Press of Virginia, 1991); John Anthony Maltese, *The Selling of Supreme Court Nominees* (Baltimore: Johns Hopkins University Press, 1995); Richard E. Vatz and Theodore Otto Windt, Jr., “The Defeats of Judges Haynsworth and Carswell: Rejection of Supreme Court Nominees,” 60 *Quarterly Journal of Speech* 477 (1974).

¹⁰² Haynsworth Transcript, questioning by Senator Hart (D-MI) at 75.

¹⁰³ Haynsworth Transcript, questioning by Senator Hart (D-MI) at 75.

¹⁰⁴ See, e.g., Brad Snyder, “How the Conservatives Canonized *Brown v. Board of Education*,” 52 *Rutgers Law Review* 383 (2000) at 421-426.

properly enforce *Brown*. Yet, the Senators did not press the nominee on *Brown*. It had not yet developed into a confirmation litmus test.

Following Haynsworth's defeat in the Senate by a 55-45 vote, President Nixon appointed Harrold Carswell to the Court. Like the Haynsworth hearing four months earlier, *Brown* played only a minor role. Senator Scott (R-PA) asked Carswell: "The support of *Brown v. Board of Education* as a standing precedent of the Court does not give you any concern, does it?" To which the nominee responded, "No, sir."¹⁰⁵ Neither the Senator, nor the nominee elaborated or followed up on the question. *Brown* was also addressed by Senator Burdick (D-ND): "In such areas covered by the *Brown* decision and some other areas, at the present time, at least, in your opinion, the law is pretty well set in that area." Carswell replied "I don't think there is any question about it."¹⁰⁶ Again, no follow up; no elaboration.

As with Haynsworth, the discussion (or lack thereof) of *Brown* at the Carswell hearing is especially interesting given that Carswell, like Haynsworth, was far from a champion of civil rights, particularly involving desegregation.¹⁰⁷ For example, as a U.S. Attorney, he helped privatize a public golf course to evade complying with the Court's desegregation precedents.¹⁰⁸ As a district court judge, he was frequently reversed by the Fifth Circuit in desegregation cases.¹⁰⁹ As Joseph Rauh, who testified on behalf of the 125-organization Leadership Conference on Civil Rights against Carswell, put it: "Judge Carswell is Judge Haynsworth with a cutting edge. He is Haynsworth with a bitterness and a meanness that Judge Haynsworth never had."¹¹⁰ In spite of his Haynsworth-like record on civil rights and willingness to impede desegregation efforts, the Senators did not interrogate Carswell on *Brown* with any frequency or force. *Brown* had not yet fully entered our constitutional canon.

¹⁰⁵ Carswell Transcript, questioning by Senator Scott (R-PA) at 63.

¹⁰⁶ Carswell Transcript, questioning by Senator Burdick (D-ND) at 65.

¹⁰⁷ See, e.g., Brad Snyder, "How the Conservatives Canonized *Brown v. Board of Education*," 52 *Rutgers Law Review* 383 (2000) at 426-430.

¹⁰⁸ Jake C. Miller, "The NAACP and the Confirmation of Supreme Court Justices, 1930-1991," in *Contemporary Patterns of Politics, Praxis, and Culture*, ed. Georgia A. Persons (New Brunswick: Transaction Publishers, 2005).

¹⁰⁹ Brad Snyder, "How the Conservatives Canonized *Brown v. Board of Education*," 52 *Rutgers Law Review* 383 (2000) at 428.

¹¹⁰ Carswell Transcript at 305.

This shift of *Brown* from a contested case to a confirmation litmus test became evident a year later at the 1971 Associate Justice hearing of William Rehnquist. Suspicious of Rehnquist's position on civil rights issues, Senator Edward Kennedy (D-MA) asked Rehnquist what the country should expect of him in this area, if he were confirmed. Rehnquist took the opportunity to say of *Brown* what numerous prior and subsequent nominees have said of sensitive cases: that it was the "established constitutional law of the land," and that he had no desire to revise it.¹¹¹ Arguments from precedent, which for more than a decade had been used against *Brown*, would now, it appeared, be given as a reason to support the case.

Senator Bayh (D-IN) was explicit about the importance of this change, as was Rehnquist in his answer to Bayh's question:

Senator BAYH. Are you aware that probably few cases in history have provoked louder cries of anguish from some members of this committee than *Brown versus Board of Education*, and that there is probably not a better example that they would use to support the contention that you should not support "lawmaking" as a Supreme Court judge as symbolized in their minds in *Brown versus Board of Education*?

Mr. REHNQUIST. Of course, I do not support lawmaking as a Supreme Court judge; but as I stated yesterday, if nine Justices, presumably of the same varying temperaments that one customarily gets on the Supreme Court at the same time, all address themselves to the issue and all unanimously decide that the Constitution requires a particular result, that, to me, is very strong evidence that the Constitution does, in fact, require that result. But that is not lawmaking. It is interpretation of the Constitution just as was contemplated by John Marshall in *Marbury versus Madison*.¹¹²

This statement, as Senator Bayh clearly recognized, was extraordinary. In seventeen years, *Brown* had gone from being the quintessential example of judicial overreaching and lawless decision making – the rallying cry of "strict constructionists" – to a valued precedent and act of constitutional interpretation worthy of John Marshall.

Brown was not yet fully canonized, however. That transformation took fifteen more years, not coming into fruition until the *next* time William Rehnquist sat before the Senate Judiciary Committee, as a

¹¹¹ Rehnquist Associate Justice Transcript, questioning by Senator Kennedy (D-MA) at 76.

¹¹² Rehnquist Associate Justice Transcript, questioning by Senator Bayh (D-IN) at 167.

nominee for the Chief Justice position. Rehnquist was a clerk for Supreme Court Justice Robert Jackson at the time *Brown* was decided. As Jackson's clerk, Rehnquist penned a memo supporting *Plessy* that urged Jackson to decline to overturn the "separate but equal" doctrine *Plessy* endorsed. The language of the memo is jarring. "Regardless of the Justice's individual views on the merits of segregation," it said, "it quite clearly is not one of those extreme cases which commands intervention from anyone of conviction." "I realize," the memo went on, "that it is an unpopular and unhumantarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed."¹¹³

The memo was made public on December 5, 1971, a month after Rehnquist's hearing before the Judiciary Committee ended, but before the full Senate began debating his nomination.¹¹⁴ As such, the memo was not discussed during his Associate Justice hearing. His Chief Justice hearing, held in 1986, was different and Rehnquist was grilled relentlessly about the memo. By 1986, opposition to *Brown* was enough to disqualify a nominee and he was repeatedly required to disavow the language contained in the memo. Rehnquist told the Committee that the memo was written to reflect Justice Jackson's views, not his own (Justice Jackson voted with the unanimous Court in *Brown*). He acknowledged that he, as Jackson's clerk, had some hesitation about overturning *Plessy*, but attributed it to concerns about *stare decisis* and original intent, not to the merits of the argument presented in *Brown* itself.¹¹⁵ For our purposes, the point is not whether these assertions are accurate. Rather, the point is that by 1986, a Supreme Court nominee testifying before the Senate Judiciary Committee was compelled to make them. *Brown* had entered our constitutional cannon.

¹¹³ Rehnquist Chief Justice Transcript at 325.

¹¹⁴ The memo first appeared in an article in *Newsweek* that was released on December 5, a week before it was published in print: "Supreme Court: Memo from Rehnquist," *Newsweek*, December 13, 1971. See Brad Snyder, "What Would Justice Holmes Do (WWJHD)? Rehnquist's *Plessy* Memo, Majoritarianism, and *Parents Involved*," 69 *Ohio State Law Journal* 873(2008) at note 2. See also Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton and Company, 2005) at 20.

¹¹⁵ Rehnquist Chief Justice Transcript at 137-138: "Yes; that I thought *Plessy* had been wrongly decided at the time, that it was not a good interpretation of the equal protection clause to say that when you segregate people by race, there is no denial of equal protection. But *Plessy* had been on the books for 60 years; Congress had never acted, and the same Congress that had promulgated the 14th amendment had required segregation in the District schools."

Attesting to this, Justice Scalia, who answered very few specific questions at his hearing,¹¹⁶ nonetheless felt it necessary to reject the separate but equal doctrine overturned by *Brown*.¹¹⁷ The canonization of *Brown* was even more evident a year later, when Robert Bork, who aggressively defended an interpretive method that he readily acknowledged would rewind much of the work of the Warren Court, nonetheless felt compelled to explain in great detail how that interpretive approach could be made consistent with the outcome in *Brown*.¹¹⁸ By the time Justice Ginsburg was confirmed in 1993, the rhetoric about *Brown* had been turned completely on its head. Far from decrying the case as judicial activism run amok, Senator Orin Hatch (R-UT), one of the more conservative members of the Senate Judiciary Committee, defended *Brown* as a case in which the Court properly applied a *conservative* interpretive method, describing it as one in which the Court was “actually interpreting the laws in accordance with the original meaning which, of course, under the 14th Amendment meant equal protection, equal rights, equality.”¹¹⁹ *Brown* had come full circle.

Today, glowing endorsements of *Brown* are standard fare at confirmation hearings, regardless of the political inclinations of the nominee.¹²⁰ Methods of constitutional interpretation are judged by whether they can accommodate *Brown*, and proponents of competing interpretive methods fight to claim *Brown* as an example of their preferred methodology at work.¹²¹ The country, in short, has embraced the constitutional proposition made by the Court in *Brown*. Adherence to that proposition, while previously contested, is now expected and may even be demanded of Supreme Court nominees. Any nominee who spoke out against *Brown* today would not and should not be confirmed, and any Senator who voted for such a nominee would do so at his or her immediate electoral peril. *Brown* is part of our current constitutional consensus, and its use as a litmus test for confirmation is expected and accepted.

¹¹⁶ See, e.g., Lori A. Ringhand, “I’m Sorry, I Can’t Answer That’: Positive Legal Scholarship and the Supreme Court Confirmation Process,” 10 *University of Pennsylvania Journal of Constitutional Law* 331 (2008); Nina Totenberg, “The Confirmation Process and the Public: To Know or Not to Know,” 101 *Harvard Law Review* 1213 (1988) at 1219.

¹¹⁷ Scalia Transcript at 86.

¹¹⁸ Bork Transcript at 132, 284-286.

¹¹⁹ Ginsburg Transcript, questioning by Senator Hatch (R-UT) at 126.

¹²⁰ See, e.g., Roberts Transcript at 178 ; Alito Transcript at 452; Sotomayor Transcript at 3.53; Kagan Transcript at 96.

¹²¹ See, e.g., Brad Snyder, “How the Conservatives Canonized *Brown v. Board of Education*,” 52 *Rutgers Law Review* 383 (2000).

Many things, of course, contributed to this canonization. What the validation of *Brown* through the confirmation process adds is a mechanism through which the changes that *Brown* embodies were specifically debated and accepted as *constitutional* changes. Nor is *Brown* unique in this regard. Similar transformations have occurred in other areas, including the issue of gender equality.

GENDER DISCRIMINATION

The Senate Judiciary Committee's treatment of gender issues did not undergo the dramatic, high profile metamorphosis enjoyed by *Brown*. Gender, unlike race, snuck up on the Senators. Once it took root, however, the constitutional norm of gender equality was embraced just as fully. The earliest hearings in our dataset do not discuss gender issues at all; issues of gender discrimination were not broached until the Carswell hearing in 1970. The language used by the Senators and the nominees in these hearings, not surprisingly, is not the language of gender equity.

Byron White's hearing illustrates this. Prior to his nomination, White had a successful and impressive legal career. He graduated with honors from Yale Law School, worked in private practice, and served in the Kennedy Administration's Justice Department where he was, among other things, a vocal defender of the Freedom Rider's efforts to integrate transportation in the Jim Crow South. He also, and perhaps more famously, was a professional football player for the Pittsburgh Pirates (now Steelers) and the Detroit Lions.¹²²

White's entire hearing testimony consists of only 46 comments, taking up just four and a half pages in the bound version of the hearing transcripts compiled by Mersky and Jacobstein.¹²³ One and a half of those pages are dedicated to senatorial gushing about White's athletic and physical prowess. The Senators talked about how wonderful it would be to have someone on the Court who understands professional football and baseball (why this would be so wonderful is not entirely clear, although apparently some of the Senators were at the time working on some sports-related legislation). Senator Hart (D-MI) chimed in

¹²² Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (New York: Free Press, 1998).

¹²³ 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).

to say how “anybody charged with the responsibility, and everybody has at least an indirect responsibility in trying to raise children, male children, will find the job enormously helped by being able to point to an outstanding male such as Mr. White.”¹²⁴ To which Senator Long (D-MO) helpfully replied that he was raising girls and that they too “can look with great admiration toward physical prowess.”¹²⁵

Senator Hruska (R-NE), practically alone among the chorus of admiring Senators, did make some effort to focus his enthusiasm on White’s impressive legal career. The comment he made in doing so, however, may be even more revealing of the gender norms of the era than were those of the other Senators. “I do believe,” Hruska said, “every lawyer in the land does rejoice when his ranks of the practicing attorney are called upon to fill the vacancy on the Supreme Court. It means one of their boys has made it.”¹²⁶ As indeed it did.

Gender discussions at the hearings became more serious over time. Rehnquist received a few questions about gender equity at his Associate Justice hearing. The Equal Protection Clause, Rehnquist said, “protects women just as it protects other discrete minorities.”¹²⁷ As he went on to point out, however, no case decided by the Court to that date actually found that a gender distinction violated the Constitution.¹²⁸ John Paul Stevens, nominated four years later, was asked a similar question, and gave a similar answer: women are “covered” by the Equal Protection Clause, but had not yet achieved full equality.¹²⁹

The issue of gender equity was percolating into the hearings, however. The National Organization of Women (NOW) testified at the Stevens hearing, against his confirmation. NOW President Margaret Drachsler put the subject squarely on the table:

...NOW wishes to express the feelings of millions of women and men today, it is time to have a woman on the Supreme Court. After 200 years of living under laws written, interpreted, and enforced exclusively by men. We

¹²⁴ White Transcript, questioning by Senator Hart (D-MI) at 22-23.

¹²⁵ White Transcript, questioning by Senator Long (D-MO) at 22-23.

¹²⁶ White Transcript, questioning by Senator Hruska (R-NE) at 24.

¹²⁷ Rehnquist Associate Justice Transcript at 163.

¹²⁸ Rehnquist Associate Justice Transcript at 163.

¹²⁹ Stevens Transcript at 15.

have a right to be judged by a court which is more representative of all people, more than half of whom are women. The president owes us duty to begin to eliminate the 200 years of discrimination against women. In our judicial system, this could be partially accomplished by appointing a woman to the Supreme Court. He has failed us.¹³⁰

President Reagan would succeed where President Ford failed. Reagan's nomination of Sandra Day O'Connor's in 1981 finally brought the first woman to the high Court. The members of the Senate Judiciary Committee enthusiastically celebrated this milestone, and O'Connor (unlike Thurgood Marshall) was treated by the Committee with the respect such a trailblazer deserves.¹³¹ Despite this celebration of her appointment, O'Connor was asked relatively few *substantive* questions about gender discrimination and the Constitution. Senator Denton (R-AL) broached the topic, asking about women in combat positions. "Would you," he asked O'Connor, "give your present personal position with respect to women serving in actual military combat or ships and planes which would likely become involved in combat?" "Mr. Chairman," O'Connor responded, "speaking as a personal matter only, I have never felt and do not now feel that it is appropriate for women to engage in combat if that term is restricted in its meaning to a battlefield situation, as opposed to pushing a button someplace in a missile silo."¹³² The exchange then continued as follows:

Senator DENTON. In other words, you would not want them to be in a position to be shot?

Judge O'CONNOR. To be captured or shot? No, I would not. [Laughter]

Senator DENTON. Well, it may astound this audience, but at the Naval Academy not too many months ago there were young ladies standing up and demanding to be placed in just that position, and saying that that was their right to do so because they were accepted into the Naval Academy, so it really is not all this laughable, you know. I am glad to hear that is your opinion, Judge O'Connor.¹³³

¹³⁰ Stevens Transcript at 78-79.

¹³¹ Senator Eastland, alone among the questioning Senators, repeatedly referred to O'Connor as "Mrs. O'Connor" rather than "Judge O'Connor," which was the address routinely used in other hearings in which a sitting judge was being questioned. While we have no reason to think that Eastland did this to show intentional disrespect, we do note that it is unlikely that such a thing would happen today, or go unremarked if it did. O'Connor Transcript, at 106-107, 198-199, 200.

¹³² O'Connor Transcript, questioning by Senator Denton (R-AL) at 88.

¹³³ O'Connor Transcript, questioning by Senator Denton (R-AL) at 128.

Senator Metzenbaum (D-OH) later asked O'Connor if it was "inappropriate judicial activism" for the Burger Court in *Reed v. Reed*¹³⁴ to say that discrimination on the basis of sex was unconstitutional. *Reed*, a case Metzenbaum clearly supported, had for the first time found that a gender distinction in a state law violated the Equal Protection Clause. O'Connor gave a limited reply, saying only that "it was in my view an appropriate consideration of the problem of gender based discrimination."¹³⁵

Hearing dialogue about gender evolved a bit further by 1986. Rehnquist and Scalia both faced hearings that year, Rehnquist for Chief Justice and Scalia for an Associate Justice position. Both nominees were pushed on the appropriate standard of review for gender discrimination claims, an issue that was obscured in *Reed*. Interestingly, both of these nominees (who would later go on to support the application of strict scrutiny in "reverse" discrimination situations such as affirmative action¹³⁶) drew a distinction in their answers with regard to gender between "invidious" (i.e., causing harm or malice) and "non-invidious" discrimination.

Defending an intermediate standard of review, Rehnquist noted that:

Women and men are virtually equal in our population. And much of the traditional discrimination against women by virtue of labor laws and so forth, while very unfair to them, nonetheless, does not have the – there are many situations in which distinctions between men and women are not genuinely invidious in the way that – it is not felt that it was the same thing to say, for example, that we do not hire blacks for heavy labor, which is a violently offensive thing, or to say we do not hire women for heavy labor. One may be as wrong as the other, but there is not the same invidious context.¹³⁷

Scalia, asked the same question, gave an almost identical answer. Like Rehnquist, he began by acknowledging the Court's regime of tiered equal protection review, noting that discrimination against what he identified as the "so-called suspect classes" received heightened judicial scrutiny.¹³⁸ Scalia was not specifically asked additional questions about gender discrimination and the Equal Protection Clause, but he

¹³⁴ *Reed v. Reed*, 404 U.S. 71 (1971).

¹³⁵ O'Connor Transcript, questioning by Senator Metzenbaum (D-OH) at 160.

¹³⁶ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹³⁷ Rehnquist Chief Justice Transcript at 361.

¹³⁸ Scalia Transcript at 57.

was asked about the propriety of a judge belonging to a men's-only club, as Scalia had prior to his nomination. Like Rehnquist, Scalia invoked the invidious/non-invidious distinction. Judges, Scalia said, should not be members of clubs that practice invidious discrimination, but the issue was whether the exclusion of women from his club was invidious. Drawing a distinction between race and gender, Scalia said he would not belong to a club that practiced racial discrimination, because such discrimination is clearly invidious: "I regard the two as quite different," he said, "and I would think that a club that discriminates on the basis of race or on the basis of religion, that would be invidious discrimination. I think the jury's out on whether it's invidious discrimination to have a men's club."¹³⁹

Justice Scalia was correct of course: in 1986, the jury was very much still out on both the propriety and constitutionality of gender distinctions. By the time Ruth Bader Ginsburg appeared before the Committee in 1993, however, the issue had gained more constitutional traction, in large part because of the efforts of Ginsburg herself. Ginsburg (who replaced Justice White) spent much of her legal career litigating – and winning – major gender discrimination cases such as *Reed v. Reed*, *Frontiero v. Richardson*,¹⁴⁰ and *Weinberger v. Wiesenfeld*.¹⁴¹

At her hearing, this history was roundly celebrated. The Senators praised Ginsburg's accomplishments. Addressing the audience assembled in the hearing room, Ginsburg herself noted how far women had come in the past few decades. "It may be astonishing to some of the young people sitting behind you," she said, "that laws like [those challenged in *Reed v. Reed*] were on the books in the States of the United States in the early 1970s, but they were. And there were lots of them."¹⁴² Talking about how "shocked" some men were when she talked about laws restricting the role of women as discrimination, she described her role as "trying to educate the judges that there was something wrong with the notion 'sugar

¹³⁹ Scalia Transcript at 100.

¹⁴⁰ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹⁴¹ *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

¹⁴² Ginsburg Transcript at 121.

and spice and everything nice, that's what little girls are made of.” That very notion, she said, “was limiting the opportunities, the aspirations of our daughters.”¹⁴³

Such a sentiment may not have been abhorrent to the men sitting on the Senate Judiciary Committee in earlier decades, but it also, self-evidently, had not struck them as worthy of discussion in a constitutional context. By 1993, it was. Senator DeConcini's (D-AZ) comments in this regard are typical. Questioning Ginsburg, he pointed out how the “heightened scrutiny test has made an enormous difference in combating laws that discriminate against women” and invited Ginsburg to opine on whether the standard of review should be even higher.¹⁴⁴ Subsequent nominees have embraced *Reed v. Reed* and the application of at least intermediate review to gender distinctions; several recent nominees, in fact, have gone further, stating or implying that strict scrutiny review may be more appropriate.¹⁴⁵ Gender equity, like racial equity, has been embraced as a core part of our constitutional understanding.

It is true – in gender as well as in race – that the cases addressed at the hearings are often accepted or rejected as much for the *symbolic* principles they have come to stand for as the legal weight they currently carry. This is particularly true the further in time a given hearing is from the date on which the case being discussed was decided. This hardly renders the affirmation of these cases at the hearings meaningless, however. The repeated validation of *Brown*, for example, tells us that our constitutional consensus now requires that we accept people of color as full and equal citizens under law, and that state-sanctioned race-based subordination is constitutionally prohibited. Our affirmation of heightened scrutiny for gender discrimination likewise tells us that women are now seen as entitled to constitutional protection against the grossest forms of state sanctioned discrimination. Neither of these basic principles begin to answer *currently* contested race and gender related issues, such as affirmative action, state sanctioned integration efforts, and abortion. That fact does not, however, reduce the significance of the profound change represented by the adoption of the basic principles of racial and gender equity into the constitutional cannon. It is

¹⁴³ Scalia Transcript at 122.

¹⁴⁴ Ginsburg Transcript, questioning by Senator DeConcini (D-AZ) at 164.

¹⁴⁵ See, e.g., Kennedy Transcript at 118; Souter Transcript at 75-76; Thomas Transcript at 204; Breyer Transcript at 179; Roberts Transcript at 191.

important to remember that the principles these cases stand for, which today seems too abstract to be of much practical use, were *not* part of our constitutional consensus prior to and immediately after *Brown*, *Reed*, and *Frontiero*. Acceptance of them had real constitutional bite, and our distance from their original controversies should not mask that fact.

THE PATH NOT TAKEN

There are numerous cases and issues areas that, like *Brown* and the gender discrimination cases, have gained constitutional validation through repeated affirmation at the confirmation hearings. Precedents also, however, can be used at the confirmation hearings to *reject* constitutional paths tentatively forged by the Supreme Court. These cases form the anti-cannon: cases that a nominee is expected to *renounce* in order to be confirmed. In recent decades, such cases have included *Plessy v. Ferguson*, *Dred Scott v. Sandford*, and *Korematsu v. United States*.¹⁴⁶ Indeed, nominees appearing in the past three decades have routinely rejected these decisions by name.¹⁴⁷ These cases thus show how the confirmation process takes off the table what were once legally acceptable constitutional outcomes. In each of these cases, the Court used generally accepted tools of interpretation to reach what the justices saw at the time as acceptable – indeed constitutionally compelled – outcomes. Those outcomes, however, have been rejected by the American people. Over time, they have been rejected so soundly that nominees expecting to be confirmed are obliged to voice their opposition to them. Regardless of their original legal validity, they are no longer constitutionally plausible because the people governed by the Constitution have deemed them unacceptable understandings of the Constitution. They are, in short, outside of our constitutional consensus.

¹⁴⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁴⁷ On *Plessy*, see Rehnquist Chief Justice Transcript at 226; Bork Transcript at 104; Kennedy Transcript at 149; Souter Transcript at 303; Thomas Transcript at 469; Breyer Transcript at 357; Roberts Transcript at 241; Alito Transcript at 379; Sotomayor Transcript at 3.53; Kagan Transcript at 153. On *Dred Scott*, see Bork Transcript at 315; Kennedy Transcript at 175; Thomas Transcript at 464; Ginsburg Transcript at 126, 188; Breyer Transcript at 357; Roberts Transcript at 241. On *Korematsu*, see Bork Transcript at 314; Ginsburg Transcript at 210; Breyer Transcript at 226; Roberts Transcript at 241; Alito Transcript at 418; Sotomayor Transcript at 2.60.

That consensus, however, is always in flux. The confirmation career of *Lochner v. New York* is an interesting illustration of this. Open, transcribed confirmation hearings begin in 1939, just two years after the Supreme Court got out of the business of aggressively reviewing economic regulations enacted by state legislatures and Congress.¹⁴⁸ As we illustrated in Figure 1, very few cases were broached during the first two decades of hearings in which the nominees testified. The Senators discussed a wide array of constitutional issues at these early hearings, but they did not use cases as the vehicles for doing so.

That changed after *Brown*. Beginning with the Stewart hearing in 1959, all but one of the hearings (that of Byron White) involved the discussion of Supreme Court cases. *Lochner v. New York* was one of those cases. *Lochner* involved a state law governing the working hours of bakers. The case survives in our legal lexicon, however, because it gave its name to the era – the *Lochner* era – in which the Court was seen as inappropriately using its power of judicial review to invalidate a host of state and federal laws involving various economic regulations.¹⁴⁹

Justice Stewart, testifying in 1959, was not asked about *Lochner* by name, but was probed quite explicitly about the extent to which the Court should review economic regulations passed by Congress. Senator Dirksen (R-IL) framed the issue as follows:

Senator DIRKSEN. ...pending in another committee on which I serve is a bill which proposes to bring the service trades at the local level within the purview of the Fair Labor Standards Act, and I will tell you now I have got some difficulty in getting myself into a frame of mind that a clerk in a grocery store in my home town is in commerce because he reaches up and pulls a can of corn off the shelf that they brought from some wholesaler across the State line over in a neighboring State, and this is far from an academic matter when it comes to expanding, stretching the commercial clause of the Constitution, and sooner or later we are going to have to fight that one out. ...¹⁵⁰

¹⁴⁸ See, e.g., Robert G. McCloskey, “Economic Due Process and the Supreme Court: An Exhumation and Reburial,” 1962 *Supreme Court Review* 34 (1962); Stuart S. Nagel, “Court-Curbing Periods in American History,” 18 *Vanderbilt Law Review* 925 (1964).

¹⁴⁹ See, e.g., Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993); William H. Rehnquist, “The Notion of a Living Constitution,” 54 *Texas Law Review* 693 (1976); David A. Strauss, “Why Was *Lochner* Wrong?,” 70 *University of Chicago Law Review* 373 (2003).

¹⁵⁰ Stewart Transcript, questioning by Senator Dirksen (R-IL) at 104-105.

The Senators then engaged in a little friendly joking about the Court's retreat from the realm of economic regulation:

Senator KEATING: Would the Senator yield?

Senator ERVIN: Yes.

Senator KEATING: If such legislation should be enacted and it was not within the purview of the Constitution, the then Supreme Court would so decide.

Senator Dirksen: You say the Supreme Court would so decide? [Laughter]

Senator KEATING: Well, it would be their duty to decide that issue. That perhaps would be a more accurate way to put it.¹⁵¹

Justice Stewart, wisely, said nothing.

Lochner made its inaugural hearing appearance by name relatively late in the day, showing up for the first time at the 1971 Rehnquist Associate Justice hearing. Rehnquist's treatment of *Lochner* is typical of how most nominees have approached the case: he placed it firmly in the anti-cannon. Asked by Senator Kennedy to distinguish the conservatism of Justice Felix Frankfurter from that of the Justices who had stuck down economic regulations during the *Lochner* era, Rehnquist replied as follows:

Well, I would say that the series of freedom of contract cases, *Lochner v. New York*, *Adkins v. Children's Hospital*, by the objective judgment of historians, represented an intrusion of personal political philosophy into the constitutional doctrine which the framers had never intended, and that Frankfurter had criticized that from outside of the Court.¹⁵²

A few exchanges later, Rehnquist elaborated, saying that the "sense of legal historians objectively evaluating it has been that the so-called nine old men were wrong, at least a majority of them were wrong, in reading in freedom of contract."¹⁵³

Nominees following Rehnquist repeatedly said the same thing: *Lochner* was wrong, and my interpretative method will not yield the same type of error. Bork, for example, repeatedly used *Lochner* as

¹⁵¹ Stewart Transcript, questioning by Senator Keating (R-NY) at 105.

¹⁵² Rehnquist Associate Justice Transcript, questioning by Senator Kennedy (D-MA) at 160.

¹⁵³ Rehnquist Associate Justice Transcript at 160.

an example of the dangers of the Court's use of the substantive due process doctrine.¹⁵⁴ Justice Thomas declared at least twice at his hearing that the post-*Lochner* cases were correctly decided, and that it was the role of Congress, not the courts, to make complex decisions about health, safety, and work standards. The Court, Thomas went on, should not sit as a super-legislature to second guess Congress on such issues.¹⁵⁵ Senator Hatch, who like many Senators uses *Lochner* as a vehicle to criticize *Roe v. Wade*'s reliance on substantive due process, immediately agreed, adding that "I too think that it would be wrong for judges to strike down economic regulation, just like you do."¹⁵⁶

Later nominees were just as clear on this point. Ginsburg, also questioned by Senator Hatch, denounced *Lochner*, agreeing with the Senator that the Court had exceeded its authority in the *Lochner* era cases.¹⁵⁷ Breyer,¹⁵⁸ Roberts,¹⁵⁹ and Alito¹⁶⁰ each made similar comments. Whatever our Constitution stood for between 1971 and 2006, it decidedly did not embrace the type of judicial oversight of economic regulation embodied in *Lochner v. New York*.

Lochner's story, however, has taken an interesting turn. In the most recent confirmation hearing, that of Elena Kagan, the dialogue surrounding *Lochner* appears, ever so slightly, to have shifted. Reacting to the enactment of the federal Patient Protection and Affordable Care Act (the comprehensive health insurance legislation passed early in President Obama's first term), some Senators on the Judiciary Committee began, ever so carefully, to broach the possibility that perhaps judicial oversight of economic regulation is not quite as off limits as the typical *Lochner* dialogue suggests. In large part, this change has been motivated by the controversy surrounding the Act's minimum coverage provision that requires Americans to purchase health care insurance or pay a tax penalty for failing to do so. Consider this exchange between Senator Cornyn (R-TX) and Kagan:

¹⁵⁴ Bork Transcript at 182, 717.

¹⁵⁵ Thomas Transcript at 115, 173.

¹⁵⁶ Thomas Transcript, questioning by Senator Hatch (R-UT) at 174.

¹⁵⁷ Ginsburg Transcript, questioning by Senator Hatch (R-UT) at 270.

¹⁵⁸ Breyer Transcript at 112.

¹⁵⁹ Roberts Transcript at 144, 162, 270.

¹⁶⁰ Alito Transcript at 390.

CORNYN: And would you agree with me that if the Supreme Court of the United States is not going to constraint the power grabs of the federal government and constrain Congress in terms of its reach down to people's everyday lives, that there remain only two constitutional options available?

One is either to pass a constitutional amendment – for Congress to pass them and then to have that ratified by three-quarters of the states; or for a constitutional convention to be convened for purposes of proposing constitutional limits on Congress, which would then have to be ratified by three-quarters of the states. Do you agree with me that's the only other recourse of the people to a limitless reach of the federal government, assuming the Supreme Court won't do it?

KAGAN: Well, I do think that there are limits on Congress' commerce power. They're the limits that were set forth in *Lopez* and *Morrison*, and they're basically limits saying that Congress can't regulate under the Commerce Clause where the activity in question is non-economic in nature. I think that that's the limit that the Court has set. But within that, you're quite right that Congress has broad authority under the Commerce Clause to act. To the extent that you or anybody else thinks that Congress ought not to have that authority under the Commerce Clause to act, an amendment to the Commerce Clause would be a perfectly appropriate way of changing the situation.¹⁶¹

Senator Coburn (R-OK) later picked up where Cornyn had left off:

COBURN: Let me go to one other thing. Senator Cornyn attempted to ask this, and I think it's a really important question. If I wanted to sponsor a bill and it said, Americans, you have to eat three vegetables and three fruits every day, and I got it through Congress and it's now the law of the land, you've got to do it, does that violate the Commerce Clause?

KAGAN: Sounds like a dumb law. [Laughter.]

COBURN: Yes. I've got one that's real similar to it I think it equally dumb. I'm not going to mention which it is.

KAGAN: But I think the question of whether it's a dumb law is different from whether the question of whether it's constitutional, and—and—and I think that courts would be wrong to strike down laws that they think are—are senseless just because they're senseless.¹⁶²

Coburn went on to say that “we find ourselves in trouble as a Nation because the judiciary and the executive branch has not slapped Congress down on the massive expansion of the Commerce Clause.”¹⁶³

¹⁶¹ Kagan Transcript, questioning by Senator Cornyn (R-TX) at 79.

¹⁶² Kagan Transcript, questioning by Senator Coburn (R-OK) at 92.

¹⁶³ Kagan Transcript, questioning by Senator Coburn (R-OK) at 93.

Kagan responded by citing the anti-*Lochner* rationale: it is inappropriate for the judiciary to second guess legislative policy judgments in the economic realm. The national deficit (which Coburn had invoked as an example of runaway congressional power), she said, “may be an enormous problem. It may be an enormous problem, but I don’t think it’s a problem for courts to solve. I think it’s a problem for the political process to solve.”¹⁶⁴ Coburn was having none of it. “You missed my whole point,” he said, “we’re here because the courts didn’t do their job in limiting our ability to go outside of original intent on what the Commerce Clause was supposed to be. Sure, you can’t solve the problem now, but you help create it as a Court because you allowed something other than what our original founders thought.”¹⁶⁵

In one sense, this line of questioning is not unusual. Concerns about the proper scope of congressional power under the Commerce Clause have recurred throughout the hearings, and do not in and of themselves repudiate the perceived overreaching of the *Lochner* Court’s substantive due process cases. On the second day of Kagan’s testimony, however, Coburn went further. Referencing the above discussion, Coburn specifically invoked 1937, the year the Court famously disavowed the *Lochner* doctrine and retreated from the realm of economic regulation:

...this very expansive view of it as held by the Supreme Court, which is counter to what our founders wrote, there’s nobody that – it started in 1937. It’s counter to what our founders wrote. And as it has expanded, liberty has declined. And we’ve seen that rapidly increase.

And it’s not just Republican or Democratic institutions – administrations – that have overseen that. They’ve both been guilty.

So I just wanted to – whether you’d ever contemplated that. Because I think that can give you some insight into what America is concerned about.¹⁶⁶

It seems America, at least in Senator Coburn’s eyes, may be getting ready for *Lochner* to step out of the anti-cannon and for the judicial protection of economic liberty to wiggle its way back into the contested zone of constitutional meaning.

¹⁶⁴ Kagan Transcript, questioning by Senator Coburn (R-OK) at 94.

¹⁶⁵ Kagan Transcript, questioning by Senator Coburn (R-OK) at 94.

¹⁶⁶ Kagan Transcript, questioning by Senator Coburn (R-OK) at 168.

THE RIGHT TO KEEP AND BEAR ARMS: A NEW CONSENSUS?

As our discussion of *Brown* illustrates, Supreme Court precedents can take decades to evolve from contested cases to confirmation litmus tests. Yet, other cases or issues may quickly develop into litmus tests that nominees are expected to accept or reject in order to win confirmation. Though it may be too early to say for sure, it is likely that the right to keep and bear arms is an example of the latter, following the Court's landmark decisions in *District of Columbia v. Heller* and *McDonald v. Chicago*.¹⁶⁷ In *Heller*, the Court determined that the Second Amendment protects an individual's right to possess a firearm, regardless of one's connection to an organized militia. In *McDonald*, the Court incorporated this right against the states. The Court's position in these cases was strongly supported by the American public – a Gallup Poll conducted four months before the *Heller* decision revealed that 73% of Americans believed the Second Amendment guarantees the right of individuals to own guns.¹⁶⁸

The Second Amendment was on full display at the confirmation hearings of Sonia Sotomayor and Elena Kagan, with both Democratic and Republican Senators probing the nominees on the issue. A full 11% of the Sotomayor hearing was devoted to the Second Amendment, while almost 4% of the Kagan hearing focused on the right to keep and bear arms. Senator Leahy (D-VT) was first to address gun rights at the Sotomayor hearing: “And is it safe to say that you accept the Supreme Court's decision [in *Heller*] as establishing that the Second Amendment right is an individual right? Is that correct?” Sotomayor responded, “Yes, sir.”¹⁶⁹ Leahy further pressed Sotomayor on this issue, particularly with regard to the possibility of incorporating the Amendment against the states (*McDonald* would be decided a year later). The nominee indicated that she would have an “open mind” with respect to incorporation and further stated, “Like you, I understand that – how important the right to bear arms is to many, many Americans.

¹⁶⁷ *McDonald v. Chicago*, 177 L. Ed. 2d 894 (2010).

¹⁶⁸ Jeffrey M. Jones, “Americans in Agreement With Supreme Court on Gun Rights,” accessed November 3, 2010, <http://www.gallup.com/poll/108394/americans-agreement-supreme-court-gun-rights.aspx>.

¹⁶⁹ Sotomayor Transcript, questioning by Senator Leahy (D-VT) at 2.7.

In fact, one of my godchildren is a member of the NRA, and I have friends who hunt. I understand the individual right fully that the Supreme Court recognized in *Heller*.”¹⁷⁰

Sotomayor continued to demonstrate her support for *Heller* in the face of more contentious questioning by Senator Hatch, who appeared more skeptical than Leahy as to the nominee’s willingness to endorse the individual right interpretation of the Second Amendment. While Sotomayor refused to directly address whether she would vote to incorporate the Second Amendment should she be confirmed,¹⁷¹ she did state that she would “bring an open mind to every case.”¹⁷² Moreover, Sotomayor, discussing *Heller*, said, “once there’s Supreme Court precedent... then the Supreme Court has to look at that.”¹⁷³

Sotomayor further illustrated her appreciation of *Heller* in the face of questions from Senator Feingold (D-WI): “Senator, the Supreme Court did hold that there is in the Second Amendment an individual right to bear arms. And that is its holding and that is the court’s decision. I fully accept that.”¹⁷⁴ Similarly, when asked by Senator Kyl (R-AZ) whether she would consider herself bound by *Heller*, Sotomayor responded “Absolutely.”¹⁷⁵ Sotomayor likewise affirmed *Heller* and her willingness to bring an open mind to the incorporation issue in the face of questions from Senators Klobuchar (D-MN),¹⁷⁶ Sessions (R-AL),¹⁷⁷ Graham (R-SC),¹⁷⁸ and Coburn.¹⁷⁹

Just as Sotomayor did before her, Kagan also vocally endorsed *Heller*, as well as *McDonald*, which was decided the day before her testimony began. Again, Senator Leahy opened the questioning: “Is there any doubt after the court’s decision in *Heller* and *McDonald* that the Second Amendment to the Constitution secures a fundamental right for an individual to own a firearm, use it for self-defense in their home?” “There is no doubt, Senator Leahy, that is binding precedent entitled to all the respect of binding

¹⁷⁰ Sotomayor Transcript, questioning by Senator Leahy (D-VT) at 2.8.

¹⁷¹ Sotomayor Transcript, questioning by Senator Hatch (R-UT) at 2.26-2.31.

¹⁷² Sotomayor Transcript, questioning by Senator Hatch (R-UT) at 2.26.

¹⁷³ Sotomayor Transcript, questioning by Senator Hatch (R-UT) at 2.28.

¹⁷⁴ Sotomayor Transcript, questioning by Senator Feingold (D-WI) at 2.57.

¹⁷⁵ Sotomayor Transcript, questioning by Senator Kyle (R-AZ) at 2.61.

¹⁷⁶ Sotomayor Transcript, questioning by Senator Klobuchar (D-MN) at 3.24.

¹⁷⁷ Sotomayor Transcript, questioning by Senator Sessions (R-AL) at 3.50.

¹⁷⁸ Sotomayor Transcript, questioning by Senator Graham (R-SC) at 4.10.

¹⁷⁹ Sotomayor Transcript, questioning by Senator Coburn (R-OK) at 4.29.

precedent in – in – in any case. So that is settled law,”¹⁸⁰ Kagan responded. She similarly affirmed her support of *Heller* and *McDonald* in the face of questions from Senators Feinstein (D-CA),¹⁸¹ Feingold,¹⁸² Grassley (R-IA),¹⁸³ Cornyn,¹⁸⁴ and Coburn.¹⁸⁵ In one of her final comments touching on the issue, Kagan summarized her position on *Heller* as follows: “Senator Coburn, I very much appreciate how deeply important the right to bear arms is to millions and millions of Americans. And I accept *Heller*, which made clear that the Second Amendment conferred that right upon individuals, and not simply collectively.”¹⁸⁶

As the use of the Second Amendment at the hearings in the post-*Heller* era demonstrates, the right to keep and bear arms may well already be a confirmation litmus test. The notion that the Amendment protects an individual right to own a gun is supported by a reasonable interpretation of the Second Amendment, and is endorsed by Senators from both political parties and an overwhelming majority of the American public. As such, like *Brown*, it seems that the American citizenry expects nominees to affirm the individual right to bear arms in order to win confirmation.¹⁸⁷ But, unlike *Brown*, it did not take decades for this litmus test to develop. Whereas the Court may have been the leader in establishing the constitutional consensus involving *Brown*, which was legitimized over a series of confirmation hearings, the public already supported the constitutional proposition in *Heller* and the decision appears to have immediately established itself as a confirmation litmus test.

CONCLUSIONS

One of the central roles played by Supreme Court confirmation hearings is legitimizing or delegitimizing Supreme Court decisions. Legitimization takes place when nominees and Senators affirm

¹⁸⁰ Kagan Transcript, questioning by Senator Leahy (D-VT) at 6.

¹⁸¹ Kagan Transcript, questioning by Senator Feinstein (D-CA) at 29.

¹⁸² Kagan Transcript, questioning by Senator Feingold (D-WI) at 43-44.

¹⁸³ Kagan Transcript, questioning by Senator Grassley (R-IA) at 49-50.

¹⁸⁴ Kagan Transcript, questioning by Senator Cornyn (R-TX) at 81.

¹⁸⁵ Kagan Transcript, questioning by Senator Coburn (R-OK) at 170.

¹⁸⁶ Kagan Transcript, questioning by Senator Coburn (R-OK) at 170.

¹⁸⁷ That said, we have little doubt that more complicated questions involving the Second Amendment, particularly regarding the extent to which governments may place restrictions on the right to keep and bear arms, will generate substantial discussion at the hearings of future nominees. Thus, while the proposition that the Second Amendment protects an individual right to own a gun is likely a settled constitutional issue, questions as to the extent to which governments may restrict such a right are contestable.

and reaffirm previously contested precedents, absorbing them into our constitutional fabric. To secure confirmation, nominees are expected to embrace these decisions. Delegitimization occurs when nominees and Senators repeatedly reject precedents, forcing them out of our constitutional canon. To win confirmation, nominees are expected to rebuff these decisions. Through the process of validating or rejecting cases, the hearings provide a unique function by acting as a democratic forum in which the Court's precedents are welcomed into, or shut out of, a constitutional consensus that is truly accepted by "We the People."

This paper began with an empirical examination into the extent to which hearing dialogue focuses on the concrete discussion of Supreme Court precedents. Our data reveal that it took some time for the discussion of precedent to take foothold at the hearings. While many of the early hearings involved discussions of constitutional issues, they did not do so through the lens of the Court's decisions. Indeed, it was not until the hearing of Thurgood Marshall in 1967 that debates about the Court's precedents became a mainstay of hearing colloquy. Today, we can expect about one-sixth of hearing dialogue to devote itself to the specific discussion of the Supreme Court's decisions. Thus, it is apparent that reliance on the Court's decisions at the hearings has increased over time as the importance of confirmation litmus tests developed.

To shed light on the significance of this development, we demonstrated the use of four confirmation litmus tests: *Brown v. Board of Education*, gender equality, *Lochner v. New York*, and *District of Columbia v. Heller*. When it was decided in 1954, *Brown* was a hotly contested decision and controversy surrounding the case continued at the first post-*Brown* hearings. Slowly, however, *Brown* was transformed from a contested case into a confirmation litmus test. By 1986, public opinion was firmly in favor of *Brown* and nominees were all but required to praise the decision before they could hope to win confirmation.

Unlike *Brown*, issues of gender discrimination were completely absent from the hearings until 1970 and, even after that date, gender failed to play a significant role in hearing dialogue for another two decades. In fact, it was not until the Ginsburg hearing in 1993 that nominees were expected to endorse

gender equality as a confirmation litmus test. Since that hearing, nominees have regularly embraced both gender equality at the application of at least the intermediate standard of review in the adjudication of controversies involving gender distinctions.

Lochner represents a case that nominees were initially expected to reject to win confirmation. In hearing after hearing following the 1905 decision, nominees and Senators regularly rebuffed *Lochner* as an example of judicial overreach into the area of economic regulation. Thus, *Lochner* represented the anti-cannon: those cases nominees renounce as falling outside of our constitutional consensus. Yet, the tide may be turning with respect to *Lochner*: during the Kagan hearing, several Senators, reacting to the passage of the Patient Protection and Affordable Health Care Act in 2010, suggested that the Court has retreated too far from the oversight of economic regulation. As such, *Lochner* may have moved out of the anti-canon into the contested zone of Supreme Court precedents.

Finally, *Heller* appears to represent the almost immediate development of a litmus test. The Court's holding that the Second Amendment protects an individual right to gun ownership was endorsed by the vast majority of the American public when it was constitutionalized, and the decision was quickly embraced by both nominees and Senators. Though it may be too soon to reach a firm conclusion, it seems likely that avowing the individual right interpretation of the Second Amendment is the latest litmus test nominees are expected to pass in order to win confirmation.

As these examples make clear, there are varying paths by which cases develop into confirmation litmus tests. Some take decades to evolve, such as the issues of racial segregation and gender quality. Some develop almost immediately, such as the individual right to keep and bear arms. Some litmus tests call for affirmation (*Brown*), while others call for rejection (*Lochner*). And even those tests that appear to necessitate a firm answer, such as *Lochner*, may subsequently be transformed at the hearings into contested constitutional propositions.

This research has demonstrated that confirmation hearings are, and should be recognized as, prized opportunities for vigorous and effective democratic discussions about what we want the

Constitution to mean. These hearings are the point at which an independent judiciary confronts its political accountability. They are the point at which the citizenry, acting through its elected officials on the Judiciary Committee, accept, refute, and passionately argue about the decisions of our most revered federal institution. Supreme Court confirmation hearings, in short, provide a means for “We the People” to take ownership of the Constitution by deciding who is allowed to interpret it on our behalf.

Table 1. The Most Frequently Addressed Supreme Court Precedents at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2010

Decision (Year)	Number of Comments	Percent of Hearings Since Case Was Decided
Roe v. Wade (1973)	475 (7.7%)	85.7% (12)
Brown v. Board of Education (1954)	322 (5.3%)	73.3% (22)
Griswold v. Connecticut (1965)	259 (4.2%)	58.3% (14)
Miranda v. Arizona (1966)	246 (4.0%)	73.9% (17)
Planned Parenthood v. Casey (1992)	150 (2.5%)	100.0% (6)
Katzenbach v. Morgan (1966)	125 (2.0%)	17.4% (4)
Plessy v. Ferguson (1896)	121 (2.0%)	50.0% (16)
Citizens United v. Federal Election Commission (2010)	117 (1.9%)	100.0% (1)
District of Columbia v. Heller (2008)	99 (1.6%)	100.0% (2)
Brandenburg v. Ohio (1969)	84 (1.4%)	21.1% (4)
Marbury v. Madison (1803)	84 (1.4%)	50.0% (16)
Stovall v. Denno (1967)	71 (1.2%)	8.7% (2)
Lemon v. Kurtzman (1971)	67 (1.1%)	50.0% (7)
Dred Scott v. Sandford (1856)	60 (1.0%)	31.3% (10)
Escobedo v. Illinois (1964)	57 (0.9%)	20.8% (5)
Morrison v. Olson (1988)	54 (0.9%)	37.5% (3)
U.S. v. Lopez (1995)	52 (0.9%)	100.0% (4)
Eisenstadt v. Baird (1972)	51 (0.8%)	31.3% (5)
Youngstown Sheet and Tube Company v. Sawyer (1952)	50 (0.8%)	20.0% (6)

This table lists the 19 Supreme Court cases addressed 50 or more times at the confirmation hearings. The Number of Comments is the total number of statements involving an individual decision. The numbers in parentheses in column two indicate the percentage of comments pertaining to each decision as a function of all statements regarding Supreme Court decisions at the hearings. As a whole, Senators and nominees made 6,138 statements that addressed 578 unique Supreme Court precedents. The Percent of Hearings Since Case Was Decided is the percentage of hearings, since the case was handed down, at which a decision was addressed. The numbers in parentheses in column three report the number of hearings, since the case was decided, at which the case was discussed.

Table 2. The Most Frequently Addressed Supreme Court Precedents for Each Nominee at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2010

Nominee Name (Year)	Decision (Year)	Number of Comments
Frankfurter (1939)	No Supreme Court cases discussed	
Jackson (1941)	No Supreme Court cases discussed	
Harlan (1955)	Youngstown Sheet and Tube Company v. Sawyer (1952)	5 (38.5%)
Brennan (1957)	No Supreme Court cases discussed	
Whittaker (1957)	No Supreme Court cases discussed	
Stewart (1959)	Brown v. Board of Education (1954)	16 (24.2%)
White (1962)	No Supreme Court cases discussed	
Goldberg (1962)	South Carolina v. U.S. (1905)	2 (40.0%)
Fortas (1965)	Reynolds v. Sims (1964)	6 (54.6%)
Marshall (1967)	Miranda v. Arizona (1966)	131 (31.6%)
Fortas (1968)	DeGregory v. Attorney General of New Hampshire (1966)	32 (7.2%)
Thornberry (1968)	Breedlove v. Suttles (1937)	11 (40.7%)
Burger (1969)	Baker v. Carr (1962)	1 (16.7%)
	Brown v. Board of Education (1954)	1 (16.7%)
	Kent v. U.S. (1966)	1 (16.7%)
	Lucas v. Forty-Fourth General Assembly (1964)	1 (16.7%)
	Miranda v. Arizona (1966)	1 (16.7%)
Haynsworth (1969)	Reynolds v. Sims (1964)	1 (16.7%)
	Textile Workers Union v. Darlington Manufacturing (1965)	9 (45.0%)
	Brown v. Board of Education (1954)	6 (66.7%)
	Minnesota Mining v. New Jersey Wood Finishing (1965)	8 (36.4%)
	Brown v. Board of Education (1954)	14 (21.2%)
Rehnquist (1971)	Konigsberg v. State Bar of California (1961)	17 (19.8%)
Stevens (1975)	Yamashita v. Styer (1946)	5 (27.8%)
O'Connor (1981)	Roe v. Wade (1973)	24 (16.0%)
Rehnquist (1986)	Brown v. Board of Education (1954)	45 (21.7%)
Scalia (1986)	Roe v. Wade (1973)	17 (20.7%)
Bork (1987)	Griswold v. Connecticut (1965)	143 (18.4%)
Kennedy (1987)	Brown v. Board of Education (1954)	10 (10.5%)
	Griswold v. Connecticut (1965)	10 (10.5%)
Souter (1990)	Roe v. Wade (1973)	82 (22.3%)
Thomas (1991)	Roe v. Wade (1973)	78 (16.1%)
Ginsburg (1993)	Roe v. Wade (1973)	36 (7.8%)
Breyer (1994)	Dolan v. City of Tigard (1994)	15 (8.1%)
Roberts (2005)	Roe v. Wade (1973)	104 (12.1%)
Alito (2006)	Roe v. Wade (1973)	48 (11.1%)
Sotomayor (2009)	District of Columbia v. Heller (2008)	57 (14.5%)
Kagan (2010)	Citizens United v. Federal Election Commission (2010)	115 (26.7%)

This table represents the most frequently addressed Supreme Court decisions at each nominee's confirmation hearing. The numbers in parenthesis in column three indicate the percentage of comments represented by the most frequently addressed Supreme Court precedent at each hearing as a function of all statements addressing Supreme Court decisions at each hearing.

Figure 1. The Percentage of Comments Discussing Supreme Court Precedent at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2010

