

PUBLIC OPINION, PRECEDENTS, AND SUPREME COURT CONFIRMATION HEARINGS

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ABSTRACT

We argue that the Senate Judiciary Committee hearings of Supreme Court nominees act as a mechanism by which the public, through its representatives on the Committee, shapes, debates, and changes constitutional meaning. To evaluate this perspective, we investigate the extent to which the issues addressed at the hearings track both public opinion and Supreme Court precedents from 1955-2006. In so doing, we contribute to two literatures. First, we expand on our knowledge of how public opinion is communicated to the justices by analyzing the extent to which the issues raised at hearings reflect the salient political topics of the day. Second, we advance our understanding of the impact of Court decisions by exploring how recent Supreme Court precedents influence the dialogue at confirmation hearings. Our results indicate that both public opinion and Supreme Court precedents play an important role in shaping the dialogue at confirmation hearings, highlighting the roles of the citizenry and the Supreme Court in directing the future of constitutional change.

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2008 was a watershed year for the Second Amendment.¹ On June 26, the Supreme Court addressed the meaning of the Second Amendment for the first time in almost 70 years.² In *District of Columbia v. Heller*, a 5-4 majority held that the Second Amendment is broad enough to encompass an individual's right to possess a firearm, regardless of whether that individual is connected to a government recognized militia. In so doing, the Court struck down a District of Columbia law that outlawed the possession of a handgun within District limits. Moreover, the Court's decision presaged the incorporation of the Second Amendment to the states, which would take place two years later in *McDonald v. Chicago* (2010).³

The Court, of course, was not the lone actor in the Second Amendment debate during 2008. A Gallup Poll conducted in February indicated that 73% of Americans believed the Second Amendment guarantees the rights of individuals to own guns (Jones 2008a). That October, another Gallup Poll revealed that only 44% of Americans felt that firearm sales should be subject to more strict regulation, down 34% from the first time this question was asked in 1990 (Jones 2008b). In part reacting to the public debate regarding gun rights, members of congress introduced numerous bills regarding the right to keep and bear arms, including the Second Amendment Enforcement Act, the National Crime Gun Identification Act, and the End Gun Trafficking Act of 2008. What is more, discussions of gun rights permeated the media. For example, the *New York Times* ran more than a dozen stories involving the Second Amendment. In addition to discussions of *Heller*, the *Times* reported on a variety of topics related to guns, including covering the decision of New Orleans officials to return handguns confiscated in the aftermath of Hurricane Katrina to their owners

¹ "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

² In *United States v. Miller* (1939), the Court determined that a national law, prohibiting the possession of sawed-off shotguns and similar firearms, did not run afoul of the Second Amendment on the grounds that possessing such weapons did not have a reasonable relationship to the efficacy of a militia.

³ Incorporation is the process by which provisions in the Bill of Rights are made binding on state governments. Because the District of Columbia is a federal enclave, as opposed to a state, the *Heller* decision did not focus on this point.

(Associated Press 2008) and presenting a detailed analysis of the relationship between guns and crime (Liptak 2008).

On the one hand, given the hearty debate regarding the meaning of the Second Amendment throughout the American polity, one could imagine that the right to keep and bear arms would become a focal point of the nomination hearing of President Obama's first pick to join the Court. On the other hand, discussions of the Second Amendment are relatively rare at Supreme Court confirmation hearings. For example, from 1939-2006, dialogue involving the Second Amendment constituted less than 0.1% of all discourse at the hearings and did not even make an appearance until O'Connor's hearing in 1981. Even at that hearing, the right to keep and bear arms comprised only 0.5% of discussion. Thus, from a historical standpoint, the Second Amendment has been largely missing from the hearings. But, as noted above, 2008 was a big year for the Second Amendment. Would members of the Senate Judiciary Committee follow tradition by largely ignoring the Second Amendment during the hearing of Obama's first nominee to the Court? Or would they reflect public opinion and Supreme Court precedent and focus a substantial amount of attention on the meaning of the right to keep and bear arms?

On May 1, 2009, Supreme Court Justice David Souter formally advised Obama of his intent to retire from the Court, effective at the beginning of the Court's summer recess. Within a month, Obama nominated Second Circuit Court of Appeals Judge Sonia Sotomayor to fill Souter's position. During her confirmation hearing, Sotomayor faced a host of questions familiar to previous nominees. For example, more than a fifth of the dialogue at the Sotomayor confirmation hearing involved matters of judicial philosophy, while about a quarter of her hearing focused on civil rights, broadly defined. Of chief importance to this narrative, almost 9% of Sotomayor's hearing implicated discussions of the Second Amendment.

The issue was first raised by the Committee Chair, Senator Leahy (D-VT):

Chairman LEAHY. Let me talk to you about another decision, *District of Columbia v. Heller*. In that case, the Supreme Court held that the Second Amendment guarantees to Americans the right to keep and bear arms and that it is an individual right. I have owned firearms since my early teen years. I suspect a large number of Vermonters do. I enjoy target shooting on a very regular basis at our home in Vermont, so I watched that decision rather carefully and found it interesting.

Is it safe to say that you accept the Supreme Court's decision as establishing that the Second Amendment right is an individual right? Is that correct?

Judge SOTOMAYOR. Yes, sir.⁴

Leahy continued to press Sotomayor on her views of the Second Amendment in light of the *Heller* decision, asking her three more questions on the topic and appearing generally satisfied by her stated commitment to upholding the spirit of *Heller*. Follow up questions regarding the Second Amendment were made by Senators Hatch (R-UT), Kyl (R-AZ), Sessions (R-AL), Coburn (R-OK), Feingold (D-WI), and Klobuchar (D-MN).

Hatch engaged Sotomayor in a particularly pointed discussion of *Heller*, devoting almost 30% of his questions to the Second Amendment and coming across as much more doubtful than Leahy as to Sotomayor's commitment to *Heller*. This is evident in the dialogue stemming from Hatch's second comment at the hearings:

Senator HATCH. Now, I want to begin here today by looking at your cases in an area that is very important to many of us, and that is the Second Amendment, the right to keep and bear arms, and your conclusion that the right is not fundamental.

Now, in the 2004 case entitled *United States v. Sanchez-Villar*⁵, you handled the Second Amendment issue in a short footnote. You cited the Second Circuit's decision in *United States v. Toner* for the proposition of the right to possess a gun is not a fundamental right.

⁴ Sotomayor Transcript, questioning by Senator Leahy (D-VT) at 67.

⁵ *United States v. Sanchez-Villar* (2004) involved the appeal of an individual convicted of cocaine possession with the intent to distribute and the possession of a firearm by an illegal alien. The Second Circuit panel upheld the conviction.

Toner in turn relied on the Supreme Court's decision in *United States v. Miller*. Last year, in the *District of Columbia v. Heller*, the Supreme Court examined *Miller* and concluded that, "The case did not even purport to be a thorough examination of the Second Amendment," and that *Miller* provided "no explanation of the content of the right." You are familiar with that.

Judge SOTOMAYOR. I am, sir.

Senator HATCH. Okay. So let me ask you, doesn't the Supreme Court's treatment of *Miller* at least cast doubts on whether relying on *Miller*, as the Second Circuit has done for this proposition, is proper?

Judge SOTOMAYOR. The issue——

Senator HATCH. Remember, I am saying at least cast doubts.

Judge SOTOMAYOR [continuing]. Well, that is what I believe Justice Scalia implied in his footnote 23, but he acknowledged that the issue of whether the right, as understood in Supreme Court jurisprudence, was fundamental. It's not that I considered it unfundamental, but that the Supreme Court didn't consider it fundamental so as to be incorporated against the states.⁶

Regardless of one's position on the Second Amendment or the wisdom of the *Heller* decision, it is plainly evident that the members of the Senate Judiciary Committee viewed gun rights as a pressing issue of the day. Thus, rather than following historical trends and generally ignoring the topic, the senators' questions reflected both public opinion and Supreme Court precedent.

The purpose of this paper is to delve into a systematic investigation of the extent to which public opinion and precedent influence the issues debated at the senate confirmation hearings of Supreme Court nominees. In so doing, we further our knowledge of both the influence of public opinion on the judiciary and the impact of Supreme Court precedent on American society. Such knowledge is sorely lacking in the existing literature. While there is a voluminous body of scholarship that examines how public opinion influences the Supreme Court, it is overwhelmingly focused on how public mood is translated to justices once they are on the Court (e.g., Dahl 1957;

⁶ Sotomayor Transcript, questioning by Senator Hatch (R-UT) at 86.

Friedman 2009; Giles, Blackstone, and Vining 2008; Marshall 2008; McGuire and Stimson 2004).

While we do not deny the importance of understanding the mechanisms by which public opinion is communicated to sitting justices, we believe that it is also vital to comprehend how public opinion manifests itself through the confirmation process. It is after all during the confirmation hearings that the American people, through their representatives on the Senate Judiciary Committee, take ownership of Constitution. Throughout the question and answer sessions featured at the hearings, senators relay their constituents' concerns about the future of constitutional change, pressing nominees to answer questions regarding the salient political topics of the day. Indeed, the hearings represent the best opportunity for members of congress to share their understandings of the meaning of the Constitution with the individuals who will greatly influence the interpretation of the Constitution for decades to come.⁷

This paper also contributes to our understanding of the impact of Court decisions themselves. To be sure, we have amassed an impressive understanding of how Supreme Court precedents affect American society. This research, however, focuses primarily on how precedents are interpreted by lower courts (e.g., Canon and Johnson 1999; Klein 2002; Sanders 1995), influence societal change (e.g., Klarman 1994; Rosenberg 1991), and shape congressional policy (e.g., Eskridge 1991; Hausegger and Baum 1999). We know practically nothing about the role of the *Court* in shaping the dialogue that takes place at confirmation hearings. We remedy this by presenting the Court as an active participant in defining the issues discussed at confirmation hearings. That is, through its precedents, the Court alters the national dialogue regarding the interpretation of the Constitution, igniting debate regarding constitutional change among the American public and in congress. The confirmation hearings provide members of the Senate Judiciary Committee the occasion to query nominees about those judicially proposed alternatives by asking the nominees

⁷ Other mechanisms include filing amicus curiae briefs, chastising the Court's decisions in the media, and debating altering or overriding the Court's decisions in chamber.

about their understanding and willingness to accept precedents. The hearings also offer senators the opportunity to present future members of the Court with their own preferred interpretations of recently decided cases. As such, confirmation hearings afford us with additional insight into how Supreme Court precedents are capable of impacting constitutional discourse.

Taken as a whole, this research contributes to our understanding of the factors that shape the constitutional colloquy that transpires during confirmation hearings. While a casual consideration of confirmation hearings might lead one to believe that hearing dialogue is motivated primarily by idiosyncratic events specific to each nominee, our evidence indicates that this is not the case. Instead, we demonstrate that the issues discussed at the hearings closely track both public opinion and Supreme Court precedent. As such, it is clear that the confirmation hearings are in fact providing a key forum for a constitutional dialogue shaped by both the issues most important to the citizenry at large and the Court's recently decided cases.

In order to shed light on the factors that influence the issues discussed at the confirmation hearings, we begin by presenting our theoretical account of the how public opinion shapes the dialogue at the hearings, as well as our expectations for the role of precedent at the hearings. Next, we present our research design and methodology, followed by the empirical results. We close with a discussion of our findings and their implications for understanding the process of constitutional change.

PUBLIC OPINION AND SUPREME COURT CONFIRMATION HEARINGS

One of the most significant normative and empirical debates regarding the Supreme Court is the extent to which it operates as a countermajoritarian institution (e.g., Dahl 1957; Friedman 2009; Giles, Blackstone, and Vining 2008; Kramer 2004; Marshall 2008; McGuire and Stimson 2004). On the one hand, it is clear that Supreme Court justices have ample opportunity to subvert the public will, replacing it with their preferred policy preferences or idiosyncratic methods of constitutional

interpretation. Indeed, this is reflected by the very means by which the Court is staffed. Rather than undergo democratic election, the justices are appointed by the president, with the advice and consent of the senate (e.g., Abraham 2008). What is more, because they can only be removed from office through the exceptionally rare and cumbersome impeachment process, they effectively enjoy life tenure. In part, the framers' motivation in enacting this institutional setup was to ensure that the Court could provide a counterbalance to the potential for a tyrannical majority to limit the rights and liberties of unpopular segments of American society (e.g., Dahl 1957).

On the other hand, the Court is not entirely free to substitute its will for that of the American public or its duly elected counterparts in the legislative and executive branches. Possessing neither the purse nor the sword, the justices must rely on the executive branch to enforce its decisions, and the goodwill of the American people to follow those decisions (e.g., Collins 2004; Epstein and Knight 1998). Should the Court step too far out of line with public opinion, the president might react by indifferently implementing the Court's decisions. Similarly, when faced with unpopular decisions, the citizenry might reject the justices' dictates, thus reducing the Court's institutional legitimacy and potentially undermining its authority. Congress also has several formal ways to punish a Court that strays too far away from public mood. For example, the legislative branch can override statutory decisions (e.g., Eskridge 1991), strip the Court of its jurisdiction to hear particular types of cases (Chutkow 2008), and freeze the justices' salaries (e.g., Rehnquist 2002).

Given this, numerous scholars have argued that the justices will seek to avoid potentially negative repercussions by rendering decisions that generally reflect the will of the American public (e.g., Collins 2004; Dahl 1957; Epstein and Knight 1998; Friedman 2009; Giles, Blackstone, and Vining 2008; Kramer 2004; Marshall 2008; McGuire and Stimson 2004). Of course, in order for the justices to follow public mood, they must be made aware of the attitudes of the American citizenry. There are a variety of means by which such information is communicated to the justices. For

example, inasmuch as members of congress and the president are elected by the American public, these actors' ideological orientations provide a rough gauge of public opinion that is easily comprehended by the justices (e.g., Epstein and Knight 1998; Giles, Blackstone, and Vining 2008). Furthermore, the justices can obtain information regarding public opinion as a function of their everyday life experiences. Such sources include newspapers, radio, television, as well as occasional exchanges with their neighbors (e.g., Epstein and Knight 1998). Interest groups provide yet another means by which public mood is translated to the justices. Through the filing of amicus curiae briefs, organizations supply the justices with information regarding their constituents' positions on particular disputes facing the Court (e.g., Collins 2004).

Each of these methods for the transmission of public opinion to the justices has garnered substantial attention from both scholars and the popular press. The evidence indicates that the justices' decisions, to at least some extent, reflect popular will (e.g., Dahl 1957; Epstein and Knight 1998; Friedman 2009; Giles, Blackstone, and Vining 2008; Kramer 2004; Marshall 2008; McGuire and Stimson 2004).

Yet, our understanding of the means by which the justices become acquainted with public mood is limited by the focus on mechanisms for the transmission of public mood to the justices only after they have joined the Court. While this represents an important contribution to our comprehension of the democratic nature of the judiciary, it is only a piece of the puzzle. We posit that it is equally essential to understand how public opinion is conveyed to the justices before they are allowed to join the Court. We argue that a central purpose of the confirmation hearings is to enable the American public to have their voices heard and positions known regarding the direction of the Constitution. In so doing, the hearings provide us with a novel perspective on how the citizenry contributes to the national dialogue regarding constitutional change.

Of course, the American public does not have the opportunity to directly question Supreme Court nominees. Although representatives from interest groups frequently testify at the hearings, they are not authorized to engage nominees in face-to-face questioning. Instead, they typically present written and oral testimony regarding a nominee's virtues or faults (e.g., Bell 2002: 150). Thus, the primary means by which public opinion is translated to nominees is through the publics' elected representatives on the Senate Judiciary Committee. Senators, highly aware of the importance of reelection and accountable to a wider range of voters than their counterparts in the house of representatives, must stay in tune with their constituents' desires in order to secure reelection (e.g., Mayhew 1974). One way in which they can signal their desire to do this is by sharing with nominees their constituents' positions regarding the salient legal and political issues of the day.

It is precisely during confirmation hearings that future members of the Court receive some of their primary lessons on the public's view of the Constitution. In this sense, members of the Senate Judiciary Committee act as schoolteachers, educating nominees on their preferred positions on the direction of constitutional change, while at the same time relaying their constituents' views of current law. Indeed, senators recognize the significance of the hearings in this regard, as evidenced by the fact they frequently beseech nominees to recall lessons learned from the hearings, as illustrated in the following comments:

Senator BROWN. I hope also, Judge Thomas, that you and the other judges who sit on the Supreme Court will understand clearly and firmly that amending the Constitution and legislating are not the province of the Court, are not now and never should be the province of the Court, but that these are reserved under our Constitution to others and ultimately to the people that they serve.⁸

⁸ Thomas Transcript, opening statement by Senator Brown (R-CO) at 76.

Senator THURMOND. We have got to remember the victims as well as the criminals. Too much sympathy, I think, sometimes goes to a criminal.⁹

Senator FEINGOLD: Ms. Kagan, if you're confirmed, I hope you'll keep this in mind. I hope you'll tread carefully and consider the reputation of the court as a whole when evaluating whether to overturn longstanding precedent in ways that will have such a dramatic impact on our political system.¹⁰

Senator METZENBAUM. All I am hoping to do in these hearings is maybe sensitize you enough, and when you get on the Supreme Court, maybe you will remember, gee, I remember those questions I had when I was appearing before the Judiciary Committee, maybe the milk of human kindness will run through you and you will not be so technical.¹¹

Some senators take this even further, anticipating that nominees will recall lessons learned from the hearings, regardless of whether they are confirmed:

Chairman SPECTER. We don't extract promises, but when Senator Leahy very adroitly asks you about the rule of four on granting cert, four Justices say the cert is granted but it takes five to stay an execution in a capital case, how ridiculous can you be? Senator Leahy wondered if you would remember that. Well, I predict you will, if confirmed, remember that. In fact, I predict you will remember it even if you are not confirmed.¹²

Through the question and answer sessions that are the heart of the confirmation process, the hearings work to communicate public opinion to future members of the Court, acting as a mechanism through which the citizenry shapes, debates, and changes constitutional meaning. Over time, as these constitutional propositions gain or lose support, a new constitutional consensus emerges, one which the public has actively helped shape. Senate confirmation hearings play a key

⁹ Souter Transcript, questioning by Senator Thurmond (R-SC) at 334.

¹⁰ Kagan Transcript, opening statement by Senator Feingold (D-WI) at 16.

¹¹ Breyer Transcript, questioning by Senator Metzenbaum (D-OH) at 149.

¹² Alito Transcript, questioning by Senator Specter (R-PA) at 587.

part in this process by presenting a forum in which to have this type of constitutional conversation, thus enabling the public, acting through our elected officials, to validate or reject constitutional change.

We argue that there are three primary mechanisms through which this happens. First, we believe that senators will be responsive to the public's view of the most pressing issues of the day. As the importance of issues to the American public rises and falls, this should be reflected in the dialogue at confirmation hearings. Insofar as senators must be responsive to the citizenry's perceptions of the pressing issues of the day to enhance their reelection prospects, they should be especially likely to address these topics in confirmation hearings. This provides two benefits to senators. First, it illustrates to their constituents that they are sensitive to the public's views of the issues facing society, thereby promoting their reelection (e.g., Mayhew 1974). In this sense, it allows senators to identify with their constituents by demonstrating their connection to the American public (e.g., Fenno 1978). Second, it provides the American public, through their elected representatives on the Judiciary Committee, the opportunity to contribute to the dialogue regarding the direction of constitutional change. The citizenry has only limited means to participate directly in the constitutional colloquy regarding the future of American law. If senators genuinely wish to express their constituents' views as to the direction of constitutional change, therefore, it is vital they share these views during the confirmation hearings.

Hypotheses 1: As the public's perception of an issue's importance increases, so too will the dialogue involving that issue at confirmation hearings.

The second means by which we believe the connection between public opinion and hearing dialogue will be evidenced involves the role of the media. As media coverage of an issue increases or decreases, the amount of discussion that issue receives at the hearings should also increase or decrease. One of the primary roles of the media is to illustrate to the American people the

importance of particular issues through the topics it chooses to cover (or not to cover). In this way, the media are capable of setting a national agenda (e.g., Baumgartner and Jones 1995; McCombs and Shaw 1972). For example, when the media devote substantial attention to civil rights policy, we expect not only that the American public's attention to this issue will heighten, but also that civil rights will become an increasingly discussed issue at the hearings. In addition to bringing issues to forefront of political discourse, the media are also capable priming issues (e.g., Iyengar and Kinder 1987).¹³ Consistent media attention primes an issue by heightening the public's awareness of the issue, causing the public to evaluate political actors and policies in light of the primed issue. Turning again to civil rights as an example, priming takes place when constant media attention to civil rights policies causes Americans (and senators) to evaluate nominees in light of their position on civil rights policy. Given the media's important roles in both setting the national agenda and priming the way the public evaluates political actors, we expect that increased media attention to an issue area will be reflected in the treatment of that issue area at the hearings.

Hypothesis 2: As media coverage of an issue increases, so too will the dialogue involving that issue at confirmation hearings.

Third, we believe that public opinion will manifest itself at the hearings as a function of congressional attention to an issue area. As legislation related to an issue area increases, we contend that this will result in enhanced attention to that issue during the hearings. While there are a variety of explanations for why members of congress devote attention to legislation, it is clear that public opinion constitutes one significant causal force (e.g., Erikson, MacKuen, and Stimson 2002; Manza and Cook 2002; Monroe 1998). After all, members of congress run on platforms that will appeal to their voting publics. Should they ignore the public's desires once in office, their reelection hopes are

¹³ The media also play a role in framing issues for the American public; that is, informing the citizenry how to think about a particular issue (e.g., Iyengar and Kinder 1987). Because we are interested in whether particular issues are on the radar of the American public, and not the public's views of the desirability of particular positions attached to those issues, framing is orthogonal to our analysis.

diminished (e.g., Mayhew 1974). What is more, legislation often reflects the desires of the attentive publics that members of congress might be particularly receptive to pleasing in order to enhance their electoral prospects (e.g., Almond 1950; Fenno 1978; Zaller 1992), including organized interests (e.g., Kollman 1998). Thus, congressional legislation should generally reflect public opinion, albeit the opinion of a more informed and organized public than the citizenry as a whole. As such, we expect that enhanced congressional attention to an issue area will influence the extent to which that issue area is discussed at the hearings.

Hypothesis 3: As legislation involving an issue increases, so too will the dialogue involving that issue at confirmation hearings.

PRECEDENT AND SUPREME COURT CONFIRMATION HEARINGS

Another significant debate regarding the Supreme Court involves the extent to which the Court's decisions actively affect the American political system. Teasing this out is particularly tricky, because the effect of Supreme Court decisions is largely indirect since the Supreme Court has no means to enforce its decisions. As such, it is compelled to rely on other actors to ensure its decisions are implemented. For example, because there are no "Supreme Court Police," the justices must depend on executive branch agents at the state and federal levels to enforce the Court's dictates (e.g., Canon and Johnson 1999). Similarly, since the Court cannot review every lower court decision, it must entrust lower federal and state courts to act as faithful agents by correctly applying the Court's precedents (e.g., Klein 2002; Sanders 1995). Moreover, because the public is generally inattentive to the Court's decisions, the justices must rely on the media to inform the citizenry of the significance of the Court's decisions (e.g., Greenhouse 1996; Slotnick and Segal 1998).

Scholarship regarding the impact of the Court's decisions abounds. For example, a substantial amount of research has been devoted to how the Court's precedents affect American society. Frequently, the focus is on seminal decisions, such as *Brown v. Board of Education* (1954), in

which the Court declared public school racial segregation unconstitutional (e.g., Bell 2005; Garrow 1994; Klarman 1994; Rosenberg 1991; Schultz 1998), and *Roe v. Wade* (1973), in which the Court determined that the right to privacy protected a woman's decision to have an abortion (e.g., Donohue and Levitt 2001; Hansen 1980; Rosenberg 1991). Other rich avenues of study involve the extent to which lower courts comply with Supreme Court precedents (e.g., Klein 2002; Sanders 1995), how the Court's decisions influence other branches of government (e.g., Eskridge 1991; Ignagni and Meernik 1994; Spriggs 1996), and the means by which the Court's decisions are implemented (e.g., Baum 1976; Birkby 1966; Canon and Johnson 1999). In addition, scholars have explored the influence of the Court's precedents on public opinion (e.g., Franklin and Kosaki 1989; Hoekstra 2003) and media coverage of the Court (e.g., Clawson, Strine, and Waltenburg 2003; Greenhouse 1996; Slotnick and Segal 1998).

While we have made tremendous inroads in our understanding of how Supreme Court precedents impact American society, our knowledge is circumscribed by the fact that virtually no attention has been paid to comprehending the role of Supreme Court precedent at confirmation hearings.¹⁴ This is most unfortunate. Confirmation hearings represent an ideal opportunity to engage in a national dialogue about the future of constitutional change, and the Court's own precedents are expected to play a key role in this discussion. After all, it is through its precedents that the Court shapes the direction of American legal and social policy. By way of its decisions, the Court defines new constitutional rights, alters existing policy, and provides guidelines for the behavior of other actors in government, including the president, congress, state and local legislatures, and the lower courts.

¹⁴ A recent exception to this is Williams and Baum (2006), who examine the questions nominees faced regarding their previous judicial decisions. While most of these questions involved the decisions nominees rendered in the lower federal and state courts, for nominees elevated to the position of chief justice or sitting on the Court as a result of a recess appointment, Supreme Court precedents were occasionally discussed.

Our view is that the Court itself actively shapes the constitutional conversation that takes place at confirmation hearings. Specifically, we posit that senators will be attentive to recent Supreme Court precedents and engage nominees in discussions of the wisdom of those decisions at the hearings. When the Court renders a decision, that precedent influences national dialogue regarding constitutional change, particularly among attentive publics who follow the Court's decisions (e.g., Caldeira and Gibson 1992; Hoekstra 2003). For example, in 1966 the Court handed down its landmark decision, *Miranda v. Arizona*. *Miranda* held that statements made while in police custody were inadmissible in court unless a suspect had been informed of his or her constitutional rights. A year later, Thurgood Marshall was nominated to the high Court. Discussions of *Miranda* were ubiquitous at the Marshall hearing, constituting more than 9% of the confirmation dialogue.

Senator McClellan (D-AR) was first to acknowledge the relevance of the Court's decision at the hearing:

Senator MCCLELLAN. Do you subscribe to the philosophy, as expressed by a majority of the Court in the *Miranda* case, that no matter how voluntary a confession or incriminating statement by a defendant might be, it must be excluded from evidence unless the prescribed warnings of that opinion were given?¹⁵

Clearly, members of the Senate Judiciary Committee at the Marshall hearing were especially in touch with the business of the Supreme Court. This example is far from anomalous; over and over again, we see senators use the hearings to press nominees on whether they agree or disagree with the wisdom of the Court's precedents.

We argue that there are two primary means by which the Court's precedents will influence the dialogue at confirmation hearings. First, we posit that senators will be responsive to the overall workload of the Court. As the Court hears more cases regarding a particular issue, we expect that issue will be the focus of an increasingly large amount of discussion at subsequent hearings. This

¹⁵ Marshall Transcript, questioning by Senator McClellan (D-AR) at 9.

follows from the fact that, while individual decisions are important, it is through a series of decisions that the Court directs the development of constitutional law (e.g., Canon 1973). When the Court hands down a sequence of decisions relating to an issue area, it is these decisions as a group that shape the decision making of lower courts (e.g., Songer, Segal, and Cameron 1994; Songer and Sheehan 1990) and executive branch agencies charged with implementing the Court's decisions (e.g., Spriggs 1996). Moreover, when the Court adjudicates a series of decisions involving a particular issue area, those decisions contribute to the national dialogue regarding constitutional change. For example, during the 1950s and 60s, the Warren Court set a variety of precedents expanding on the rights of the criminally accused. These decisions then played a prominent role in broader public discussions of criminal rights – discussions that included pointed criticisms of the Court's criminal justice cases (e.g., Kamisar 1995).

Hypothesis 4: As the percentage of Supreme Court precedents involving an issue increases, so too will the dialogue involving that issue at confirmation hearings.

In addition, we believe that particularly salient decisions are likely to influence discussion at confirmation hearings. When the Court hands down landmark precedents in an issue area, we expect that issue area to receive substantial attention at the hearings. While the run of the mill decisions might occasionally capture the attention of the American public and members of congress, salient decisions figure most prominently into media coverage of the Court (e.g., Epstein and Segal 2000). By devoting attention to the Court's landmark decisions, the media highlights the role of the Court's decisions in the American political landscape, illustrating how the Court's decisions affect the polity. Because space is scarce in media outlets, the Court's decisions must fight with a variety of other potential newsworthy sources for coverage (e.g., Benesh and Spaeth 2001; Brenner and Arrington 2002). When the Court's precedents figure prominently into the newsworthy stories of the day, this sends a reliable signal that those decisions will have broad legal and societal impact. As such, they

are likely to ignite constitutional debate among the American public, causing the citizenry and senators to evaluate future justices in light of the Court's recent contributions to major shifts in constitutional development.

Hypothesis 5: As the percentage of salient Supreme Court precedents involving an issue increases, so too will the dialogue involving that issue at confirmation hearings.

DATA AND METHODOLOGY

To subject our hypotheses to empirical testing, we examine the dialogue at all Senate Judiciary Committee confirmation hearings from 1955-2006 involving the 19 issue areas identified in Table 1, which were adopted from the Policy Agendas Project (Baumgartner and Jones 2010). These issue areas represent the major topics in American political discourse in the post-World War II era, thus allowing us to track political dialogue over time. The unit of analysis is the hearing-issue dyad, meaning that each observation in the data represents each of the issues identified in Table 1 tagged to each hearing. As such, because there are 28 nomination hearings in the data, and because each hearing is tied to each of 19 issue areas, the number of observations in the dataset is 532.

*** Table 1 About Here ***

The dependent variable represents the percentage of discussion at each hearing for each issue area, based on an original data collection effort. We coded every statement made by both nominees and senators at the hearings, using the Policy Agendas Project coding rules (Baumgartner and Jones 2010).¹⁶ We then transformed the data such that the hearing-issue dyad is the unit of analysis. Note that we also used two other dependent variables: 1) the percentage of senatorial

¹⁶ While the issue areas in the Policy Agendas Project are capable of tracking the major policy areas in the American political system, we included two additional topics that pertain to hearing-specific information in our original data collection effort: chatter, which includes routine administrative announcements and discussions of nominee background and qualifications, and judicial philosophy, which is based on treatments of the nominee's preferred methods of constitutional interpretation. Because these issues do not appear in the Policy Agendas Project data, which provides the basis for the coding of our independent variables, we excluded chatter and judicial philosophy in the creation of the dependent variable.

dialogue at each hearing for each issue area; and 2) the percentage of nominee dialogue at each hearing for each issue area. These three dependent variables are correlated at over 0.99. This exceptionally high correlation should be expected, given that the hearings take place in a question and answer format, with senators setting the agenda through their questions, followed by the nominees responding in turn. When we use the two alternative dependent variables in place of the dependent variable that captures the total percentage of discussion, we obtain consistent results.

The most commonly discussed issue at the hearings is civil rights, minority issues, and civil liberties, which constituted an average of 53.6% of discussion at the hearings; followed by law, crime, and family (30.0%); and government operations (10.5%). Three issues appearing in Table 1 were not discussed at any hearing: agriculture, foreign trade, and transportation. Although these issues were never addressed at the hearings, they could have theoretically appeared at any of the hearings and they do vary within the independent variables. As such, we include these issues in our analysis. Note that if we exclude these three issue areas from our dataset, our results remain substantively unchanged.

Because our dependent variable ranges from 0 to 100, it is both left and right censored in that it cannot fall below 0 or above 100. As such, we utilize a Tobit model to capture the factors that influence the dialogue at the confirmation hearings (e.g., Breen 1996). In order to account for the non-independence of observations, in that each hearing appears in the data 19 times, we employ robust standard errors, clustered on hearing.¹⁷ It is not essential to understand the technicalities of the Tobit model in order to comprehend the empirical results. This is because, in addition to reporting the independent variables' coefficients and standard errors, we graphically plot the independent variables against the predicted value of the dependent variable, thus providing the

¹⁷ We obtain substantively similar results using a random effects Tobit model (in which the panel units are hearings), as well as through the estimation of a Dirichlet multinomial distribution per Guimareas (2005).

reader with an intuitive, graphical understanding of the factors that influence the dialogue at confirmation hearings.

We employ five independent variables to test our hypotheses. To determine whether public opinion influences the dialogue at the confirmation hearings (hypothesis one), we use a *Public Opinion* variable. This variable indicates the percentage of the American public that identified each of the 19 issues as the most important problem facing the country in Gallup Polls during the year preceding the hearing (Baumgartner and Jones 2010). We expect this variable will be positively signed, indicating that, as the percentage of the citizenry responding that a given issue area is the nation's most important problem increases, so too will attention to that issue at the hearings.

To test whether media coverage influences attention to an issue at the hearings (hypothesis two), we use a *Media Coverage* variable. This variable represents the percentage of stories appearing in a random sampling of the *New York Times* index involving each of the 19 issue areas in the Policy Agendas dataset, lagged one year (Baumgartner and Jones 2010).¹⁸ As such, it provides a proxy of media attention to an issue area. We expect this variable will be positively signed, indicating that, as media coverage of an issue increases, so too will dialogue involving that issue at the hearings.

Our third hypothesis involves the role of congressional legislation. We posit that when congress devotes increased attention to an issue area that increased interest will be reflected at the hearings. To test this hypothesis, we utilize a *Legislation* variable, which captures the percentage of legislative initiatives in each of the 19 issue areas, as reported in the *Congressional Quarterly Almanac*, during the year preceding the hearing (Baumgartner and Jones 2010).¹⁹ These initiatives include bills

¹⁸ Although the *New York Times* is widely regarded as a national newspaper, because it is situated in New York state, it frequently covers stories that focus on issues pertaining to New York, such as state government (Baumgartner and Jones 2010). To ensure this does not bias our findings, we created an alternative specification of this variable by excluding stories involving only New York state. We obtain substantively identical results when we remove coverage of New York state from the coding of this variable.

¹⁹ As an alternative, we used a variable that captures the percentage of public laws passed by congress in each issue area during the year preceding the hearing. That variable is correlated with our measure at the 0.68 level and multicollinearity

introduced into congress that both became law and failed to gain congressional support. We expect this variable will be positively signed, revealing that increased congressional attention to an issue area will be reflected in the amount of dialogue involving that issue area at the hearings.

Our fourth and fifth hypotheses involve the role of Supreme Court precedent. To test whether the overall amount of precedents in an issue area influences the discussion at the hearings (hypothesis four), we use a *Supreme Court Precedent* variable. This variable is the percentage of precedents in each issue area set by the Court during the calendar year before the hearing. This information was obtained from Baumgartner and Jones (2010) and is based on the Spaeth database (2007). Baumgartner and Jones (2010) coded each of the cases decided by the Court to fit into the 19 issue areas in the Policy Agenda Project codebook. We expect this variable will be positively signed, revealing that the discussion at the hearings is influenced by the amount of Supreme Court precedents involving each issue area.

Hypothesis five involves the role of landmark Supreme Court precedents. Our *Salient Supreme Court Precedent* variable represents the percentage of salient precedents decided by the Court in each issue area during the calendar year preceding the hearings. To create this measure, we identified salient precedents as those appearing as the lead case on stories present on the front page of the *New York Times* on the day after the decision (Epstein and Segal 2000). Such a measure is particularly useful in that it captures those cases that are most likely to attract substantial discussion among the American public, which should translate to increased attention by senators. We then merged the *New York Times* data with the aforementioned Baumgartner and Jones (2010) data on the Supreme Court to create this variable. We anticipate that this variable will be positively signed,

tests reveal that both variables should not be utilized in the same model specification. Substituting it for the variable we use here does not significantly change the results.

indicating that, as the percentage of salient Court precedents in an issue area increases, so too will the dialogue involving that issue area at the hearings.²⁰

The reader will note that all of our independent variables are lagged one year. That is, they capture public opinion, media coverage, legislation, and Supreme Court precedents during the calendar year immediately preceding the hearing. We have opted to lag our variables one year for both theoretical and methodological reasons. Theoretically, it makes good sense to lag the variables a year in that it gives senators some time to “catch up” to the various factors we posit will influence hearing discourse. Perhaps more importantly, from a methodological standpoint, because these measures represent yearly summations of public opinion, media coverage, and legislative and judicial activities, it is imperative that we calculate them based on information amassed before the hearings begin to account for the temporal relationship between these variables and our dependent variable (e.g., Giles, Blackstone, and Vining 2008; McGuire and Stimson 2004). Note that when we employ contemporary measures of our independent variables, our empirical results do not substantively alter.

EMPIRICAL RESULTS

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

Table 2 reports the factors that influence the dialogue at the confirmation hearings. Recall that the dependent variable is the percentage of discussion, per hearing, for each of the 19 issue areas under analysis. As such, the independent variables offer leverage over the factors that contribute to increased (or decreased) discussion of a given issue area.

Turning first to the variables that capture the role of public opinion, Table 2 provides support for our first hypothesis. We find that, as public attention to an issue area increases, so too

²⁰ While our independent variables should theoretically be correlated, in that each is intended to measure a different concept that contributes to American political discourse, this does not translate to multicollinearity in our empirical models. The variance inflation factor does not exceed 2.50 for any of the variables in the model and the tolerance never drops below 0.40 (e.g., Allison 1999: 50).

does discussion of that issue area at the hearings. More specifically, when the public identifies an issue as the most important problem facing the nation, senators take note and press nominees as to their positions on that issue area. In addition, we find that congressional attention to an issue area results in increased discussion of that issue at the hearings. For example, when members of congress introduce a relatively large number of legislative initiatives involving a particular topic, members of the Senate Judiciary Committee are increasingly likely to address that issue area at the hearings, thus supporting hypothesis three. Note, however, that our second hypothesis fails to garner support. That is, our model reveals that there is no statistically significant relationship between media coverage of a given issue and the amount of dialogue involving that issue at the hearings. As such, while it is clear that members of the Senate Judiciary Committee cue off of public mood as reflected in public opinion polls and the goings-on in congress, the media does not appear to play a key role in setting the hearing agenda.

Table 2 also evinces the role of precedent at the hearings, thus supporting hypotheses four and five. First, it is clear that the number of Supreme Court precedents in a given issue area influences hearing discourse. When the Court decides a relatively large number of cases in an issue area, that issue area receives increased attention at the hearings. The senators, in other words, ask more questions about issue areas in which the Court has been active.

Beyond the overall number of precedents set, however, it also is evident that senators respond to landmark precedents. As the number of salient precedents within a given issue area increases, so too does attention to that issue area at the hearings. This illustrates that particularly salient precedents within an issue area, as well as increased judicial attention to a particular area, influence the constitutional colloquy that is the hallmark of confirmation hearings.

Taken as a whole, our theory for why some issue areas garner more attention than others at the hearings is supported by the data. Indeed, as summarized above and shown in Table 2, we find

support for four of our five hypotheses. Table 2, however, does not show the substantive influence of each variable on the issues discussed at confirmation hearings. Figure 1 provides this information. This figure plots the influence of the significant variables in Table 2 on the predicted percentage of dialogue involving each issue at the hearings.²¹ The x-axis, aligned horizontally, indicates the percentage of the public identifying an issue as the nation's most important problem (short dash line), as well as the percentage of congressional initiatives (solid line), Supreme Court precedent (long dash line), and salient Supreme Court precedent (long dash dot dot line) involving an issue area. The y-axis, aligned vertically, represents the predicted percentage of discussion of an issue area at the confirmation hearings.

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

This graph allows us to evaluate the relative strength of each of the independent variables on the issues discussed at confirmation hearings. For example, because each of the independent variables are on the same scale (in that they indicate the percentage of public opinion, legislation, and precedent involving an issue area), even a quick glance at this figure reveals that congressional legislation has the largest relative impact on the issues discussed at the hearings, followed by Supreme Court precedent, salient precedent, and public opinion, which has the smallest relative effect.

Figure 1 also allows us to provide a substantive understanding of the influence of each variable. For example, this figure shows that a 15% increase in congressional legislation in an area will generate a 22% increase in dialogue concerning the issue area. To put it more concretely, in 1954, only 1.3% of congressional legislation involved law, crime, and family issues. Our model predicts that discussion of this issue at a hearing in 1955 would be 30%. By 1974, however, 9.1% of

²¹ More specifically, this figure plots the marginal effects for each of the significant variables in Table 2 on the censored expected value of the dependent variable (that is, the predicted value for issue areas falling within the range of the dependent variable), while holding all other variables at their mean values.

congressional initiatives involved law, crime, and family. Our model predicts that dialogue involving this issue area at a hearing in 1975 would be 39%, an increase of 9%. Thus, it is clear that members of the Senate Judiciary Committee are responsive to the issues featured in congressional legislation, addressing those issues in the hearings.

Figure 1 also illustrates the role of Supreme Court precedent in shaping hearing discourse. Compared to an issue area that constituted 5% of the Court's precedents during the year before the hearings, an issue area that comprised 20% of the Court's docket leads to a 16% increase in hearing dialogue. With regard to landmark precedent, we find that a 15% increase in salient precedents translates to a 9% increase in hearing dialogue. The combined effects of these variables are particularly interesting. For example, in 1968, civil rights cases made up only 8.4% of the Court's docket and constituted only 15.1% of salient decisions. Our model predicts that dialogue at a 1969 hearing involving this issue would be 40%. A year later, civil rights cases represented 27.8% of the Court's docket, making up 44.8% of salient precedents. We predict that 92% of the discussion at a hearing in 1970 would involve civil rights.

Finally, the figure also indicates that public opinion, as reflected in Gallup Polls, shapes the constitutional debate at the hearings, although it evinces the weakest influence of all the variables in the model. For example, compared to an issue that 5% of the American public identified as the nation's most important problem, an issue that 20% of the citizenry indicated was the country's most important problem results in a 2% increase in hearing discussion. More concretely, in 1958, only 0.8% of the public identified law, crime, and family issues as the most important problems facing the country. The model predicts that 9% of the dialogue at a hearing in 1959 would involve this issue area. A decade later, 19% of the public indicated that this issue was the nation's most important problem. Our model predicts that 12% of a hearing in 1969 would involve discussions of law, crime, and family issues.

A CLOSER LOOK: THE ECONOMY AND NATIONAL DEFENSE

While our empirical results indicate that public opinion influences hearing dialogue, it is also evident that that our most direct measure of public opinion, the percentage of Americans identifying an issue as the most important problem facing the nation, exerts the smallest substantive effect on hearing discussion among the variables under analysis. This suggests that senators might take their cues on the pressing issues facing society, not primarily from the general public, but instead from attentive publics that shape legislative priorities (as revealed by the strong effect of the *Legislation* variable). This is potentially troubling for our theoretical perspective. It indicates that, while the public at large does shape hearing dialogue, the substantive influence of general public opinion on the issues brought up at the hearings is rather limited.

We believe, however, that the substantive effect of the *Public Opinion* variable is being depressed by a disconnect between two issues the public identifies as especially pressing and the limited role of the Supreme Court in shaping policy related to those issues: the economy and national defense. That is, while the public regularly identifies both the state of the economy and national security as the country's most important problems, these issues are rarely discussed at confirmation hearings. Instead, senators press nominees on substantive topics most relevant to the judiciary, including civil rights and liberties, criminal procedure, and government operations. Rather than evidence a theoretical flaw, therefore, we believe this slight disconnect between hearing dialogue and Gallup Poll results reflects instead the Court's limited role in these two specific issue areas.

*** Figure 2 About Here ***

Figure 2 illustrates this with regard to macroeconomics. This figure plots the percentage of the public identifying the economy as the nation's most important problem and the percentage of hearing dialogue related to macroeconomics, alongside of the unemployment rate, as reported by the

Bureau of Labor Statistics (2010).²² The left vertical axis is the percentage of the public stating that the economy is the nation's most pressing problem and the percentage of hearing discussion related to the economy, while the right vertical axis is the unemployment rate. Two significant points emerge. First, it is evident that hearing dialogue does not track public opinion on the economy very closely. In fact, the correlation between these two variables is -0.05 ($p = 0.80$). The only nominee who received a good deal of questioning on economic concerns was Arthur Goldberg in 1962. During the Goldberg hearing, 20% of the discussion involved macroeconomics. This dialogue consisted entirely of a conversation with Senator Wiley (R-WI) involving Goldberg's views of the economic system in America and whether, due to his background as the Secretary of Labor, he was biased against business interests.²³

Second, it is clear that public opinion on the economy very closely follows the unemployment rate: the correlation between these two variables is 0.78 ($p < 0.001$). This figure indicates that the state of the economy motivates American's economic concerns, particularly when the economy is in such rough shape that the citizens' very well being is threatened, such as during periods of prolonged unemployment (e.g., Smith 1976, 1985; Wlezien 2005).²⁴ Yet, the senators do not cue off economic conditions when grilling nominees at the hearings, presumably because the Court has a very limited role in setting the country's economic agenda.²⁵ Instead, it is a reactionary institution, evaluating the constitutionality of economic programs established by the elected branches of government years after those programs have been implemented (e.g., Baird 2007).

***** Figure 3 About Here *****

²² Consistent with our empirical models, we lag the unemployment rate one year to account for the temporal relationship between the unemployment rate and hearing discussion.

²³ Goldberg Transcript, questioning by Senator Wiley (R-WI), at 64.

²⁴ The correlation between the percentage of the public identifying the economy as the nation's most significant problem and the annual change in the consumer price index, capturing inflation, is 0.37 ($p = .06$).

²⁵ Recall that Senate Judiciary Committee hearings featuring open nominee testimony began in 1939, two years after the Court's 1937 retreat from the economic realm (e.g., McCloskey 1962; Nagel 1964). It was not until 1955, the time period marking the beginning of the empirical analyses in this paper, that all nominees testified before the Committee.

Figure 3 reveals that a similar picture emerges with regard to national defense. This figure plots the percentage of the public identifying national defense as the nation's most important problem and hearing debate involving defense. As with the economy, there is a minimal correlation between public opinion and hearing dialogue relating to national defense: 0.08 ($p = 0.70$). And, similar to the economy, public opinion on national defense closely tracks events that are exogenous to the Court (e.g., Smith 1976, 1985; Wlezien 2005). In particular, the increase in public attention to defense in the 1950s and early 1960s corresponds to the escalation of the Cold War, while its accession during the 1965-1971 era reflects the Vietnam War. The enhanced public attention to defense during the 1980s coincides with the Second Cold War, while the increase in the post-September 11th (2001) era is related to the war on terrorism. As with the economy, because the Court does not play a major role in formulating the country's national security policies, hearing discussion does not closely track public attention to defense.

Taken as a whole, 25% of Americans in the Gallup Poll sample identified the economy as the nation's most important problem, while 23% viewed national defense as the most pressing issue facing the country. These two topics are thus the most frequently cited problems in the public opinion polls in our data. That the public views these issues as the nation's most pressing problems should not be surprising. These two issues hit Americans closest to home in that they implicate their safety (defense) and economic well being (macroeconomics). But, cumulatively, these issues make up less than 1% of hearing dialogue from 1955-2006. This suggests that there may be a different set of dynamics in play with regard to how senators approach issues generally considered relevant to the judiciary, versus those that are not. In other words, senators appear to acknowledge the fact that the Court has a minimal role in setting the nation's defense and economic policy agendas, and that it therefore is not a prudent use of their time to interrogate nominees on these issues. Senators thus appear to filter public opinion through their understanding of the issues most relevant to the

Supreme Court, such as civil rights and liberties, criminal procedure, and intergovernmental relations.

This is not, of course, to say that the Court does not adjudicate disputes involving economic concerns or national security. To be sure, the Court has handed down hundreds of decisions in these issue areas (e.g., Baumgartner and Jones 2010; Brennan, Epstein, and Staudt 2009; Epstein et al. 2005; King and Meernik 1999; Spaeth 2007). But, relative to its influence in other areas, the Court's role in formulating the nation's economic and national security policies is limited (Brennan, Epstein, and Staudt 2009; Epstein et al. 2005; Fix and Randazzo 2010; Randazzo 2005; Young and Blondel 2009). With regard to economic affairs, the Court has, at least since 1937, been quite deferential to congress's economic prerogatives (e.g., Caporale and Winter 2002; McCloskey 1962; Nagel 1964; Spiller and Gely 1992). As it relates to defense, the Supreme Court and lower federal courts have determined that some controversies involving national security are not open to judicial review, relying on the political questions and act of state doctrines (e.g., Fix and Randazzo 2010). Moreover, when the Court adjudicates disputes involving national defense, it is traditionally deferential to the president's foreign policy priorities (e.g., King and Meernik 1999). Thus, at least in the province of economic and national defense policy, the Court has a more limited role than in the other issue areas contained in our dataset.

Moreover, when the average American thinks about the most important problems facing the nation, it is unlikely that he or she does so primarily with an eye toward the constitutionality of government programs related to these issues. Instead, responses to the "most important problem" question track broad issues of general importance to society as a whole or to the individual survey respondent (e.g., Smith 1976; 1985; Wlezien 2005: 558). With regard to the economy and national defense, a number of questions may cross a respondent's mind. For those Americans who view the question in broad, national terms, the following might motivate their responses: Will the country

recover from the recession? Will the dollar be devalued? Will the nation face a nuclear attack from the Russians? Will the events of September 11th happen again? For those citizens who view the question at a more personal level, the following might contribute to their responses: Will I be able to feed my family? Will I be able to send my children to college? Will my son return home safely from Vietnam? Will my family be safe from terrorist attacks if I move to a major city? When Americans search for answers to such questions, it is doubtful they turn to the Supreme Court.

***** Table 3 About Here *****

To more rigorously evaluate whether the influence of public opinion is being diminished by the inclusion of economic and national security issues in the empirical model, we re-estimated our statistical model excluding these topics, the results of which appear in Table 3. This model provides strong support for our contention that the inclusion of economic and national security issues dampens the substantive impact of the *Public Opinion* variable. When we exclude these issues from the dataset, the coefficient for the *Public Opinion* variable nearly triples in size. With this exception, the results in Table 3 remain generally consistent with those of Table 2. That is, we provide evidence that hearing dialogue reflects public opinion, legislation, Supreme Court precedent, and salient Supreme Court precedent, while there is no statistically significant influence of media attention to an issue area on hearing discussion.

***** Figure 4 About Here *****

To more clearly see the substantive effects of this model, Figure 4 plots the influence of the significant variables in Table 3 on the predicted percentage of dialogue involving each issue at the hearings, excluding macroeconomics and defense. As before, the *Legislation* variable has the strongest relative impact on hearing discussion. In contrast to an issue area in which there was 5% of legislation in the year before the hearing, an issue area constituting 20% of legislative activity results in a 38% increase in attention to that issue at the confirmation hearings. Most significantly, however,

we find that public opinion now exerts the second strongest influence on hearing discussion, followed by Supreme Court precedent and salient Supreme Court precedent.

Compared to an issue that 5% of the American public identified as the nation's most important problem, an issue that 20% of citizens indicated was the country's most pressing problem leads to a 15% increase in attention to that issue area at the hearings. Thus, there now is a roughly 1:1 ratio in terms of how public opinion translates to hearing dialogue. That is, for every 1% increase in the percentage of the public identifying an issue as the country's most important problem, there is, after accounting for the Court's reduced role in economic and national defense issues, approximately a 1% increase in attention to that issue area at the hearings.

As before, we continue to find that hearing dialogue tracks Supreme Court precedent. Compared to an issue that comprised 5% of the Court's docket, an issue that constituted 20% of the Court's docket is predicted to have an 12% increase in hearing dialogue. With regard to landmark precedent, we find that a 5% to 20% increase in salient precedents decided by the Court results in a 9% increase in hearing dialogue. Taken as a whole, it is clear that the senators involved in confirmation hearings are responsive to both public opinion and Supreme Court precedent, especially evident once the Court's limited role in economic and national defense policy is recognized.

CONCLUSIONS

A casual observer of Supreme Court confirmation hearings might be tempted to think that the hearings are so nominee-specific that they cannot be explained through a general theoretical framework. For example, one might point to the questions lobbed at Sonia Sotomayor involving her "wise Latina" remark; the interrogation of William Rehnquist about the "*Brown* memo," suggesting that *Plessy v. Ferguson* (1896) should not have been overturned; and the grilling Elena Kagan endured regarding her clerkship for Thurgood Marshall and conclude that such situation-specific events drive

the bulk of the confirmation dialogue. The data, however, show otherwise. Although some of the topics addressed at the hearings are idiosyncratic to the specific nominee, we have demonstrated that the issues addressed at confirmation hearings are in fact quite predictable, and that they closely track both public opinion and Supreme Court precedent.

Because we believe that confirmation hearings are the point at which “We the People” take ownership of the Constitution, we expected senators to question nominees on the salient political issues of the day and they do: Our empirical models reveal that senators’ questions closely reflect contemporary legal and political debates relevant to the Court’s role in the American political system. As such, we have provided a novel window into how the public influences constitutional change.

This influence of public opinion on constitutional development is of course not immediate, nor should it be – it is not the job of the Court to replicate the public’s passing political preferences. Rather it occurs only over time (and multiple confirmation hearings) as we as a nation ponder the constitutional propositions presented to us by political actors, evolving circumstances, and the Court itself. When new vacancies on the Court arise, the confirmation process provides the nation with the opportunity to shape constitutional meaning by evaluating whether nominees are fit to play a role in shaping the course of American constitutional change.

In addition, we have investigated the extent to which Supreme Court precedents influence confirmation dialogue. We proposed that the Court’s precedents will contribute to the constitutional colloquy that takes place during the hearings since the hearings provide an opportunity for the American public, acting through their representatives on the Senate Judiciary Committee, to accept, refute, and debate the wisdom of the decisions of our high Court. As with the role of public opinion, we found that confirmation dialogue closely reflects the Court’s precedents. Thus, we have provided additional insight into the impact of the Court’s decisions on the functioning of

government. Though some question whether the courts can contribute to social change (e.g., Rosenberg 1994), our findings reveal that the Court's precedents play a major role in how we evaluate and judge future members of our most revered federal institution. As such, it is clear that the Court's decisions are capable of shaping the public dialogue regarding constitutional development.

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Table 1. The Issues Under Analysis

Issue	Examples
Macroeconomics	inflation, unemployment, taxation
Civil Rights, Minority Issues, and Civil Liberties	racial discrimination, free speech, voting rights
Health	health care, regulation of drugs, medical liability
Agriculture	agricultural trade, government subsidies, agricultural research and development
Labor, Employment, and Immigration	worker safety, fair labor standards, immigration
Education	higher education, secondary education, specialized education
Environment	water safety, air pollution, species protection
Energy	nuclear energy, natural gas, energy conservation
Transportation	mass transportation, highway construction, airlines
Law, Crime, and Family Issues	court administration, white collar crime, death penalty
Social Welfare	poverty assistance, elderly issues, social services
Community Development and Housing Issues	urban economic development, rural housing, housing assistance
Banking, Finance, and Domestic Commerce	banking regulation, insurance, corporate mergers
Defense	national defense, military intelligence, homeland security
Space, Science, Technology and Communications	science technology, telecommunications regulation, computer industry
Foreign Trade	trade negotiations, competitiveness of U.S. business, tariff restrictions
International Affairs and Foreign Aid	U.S. foreign aid, international finance and economic development, human rights
Government Operations	intergovernmental relations, presidential impeachment, federal government branch relations
Public Lands and Water Management	national parks, Native American affairs, territorial issues

Source: Baumgartner and Jones (2010).

Table 2. The Influence of Public Opinion and Precedent on the Issues Discussed at Supreme Court Confirmation Hearings, 1955-2006

Variable	Expected Direction	Coefficient
Public Opinion	+	0.466*** (0.137)
Media Coverage	+	-0.297 (0.256)
Legislation	+	1.55*** (0.439)
Supreme Court Precedent	+	1.320*** (0.365)
Salient Supreme Court Precedent	+	1.038*** (0.213)
Constant		-44.256*** (8.767)
McKelvey and Zavoina R-squared		0.396
F-test		12.39***
N		532

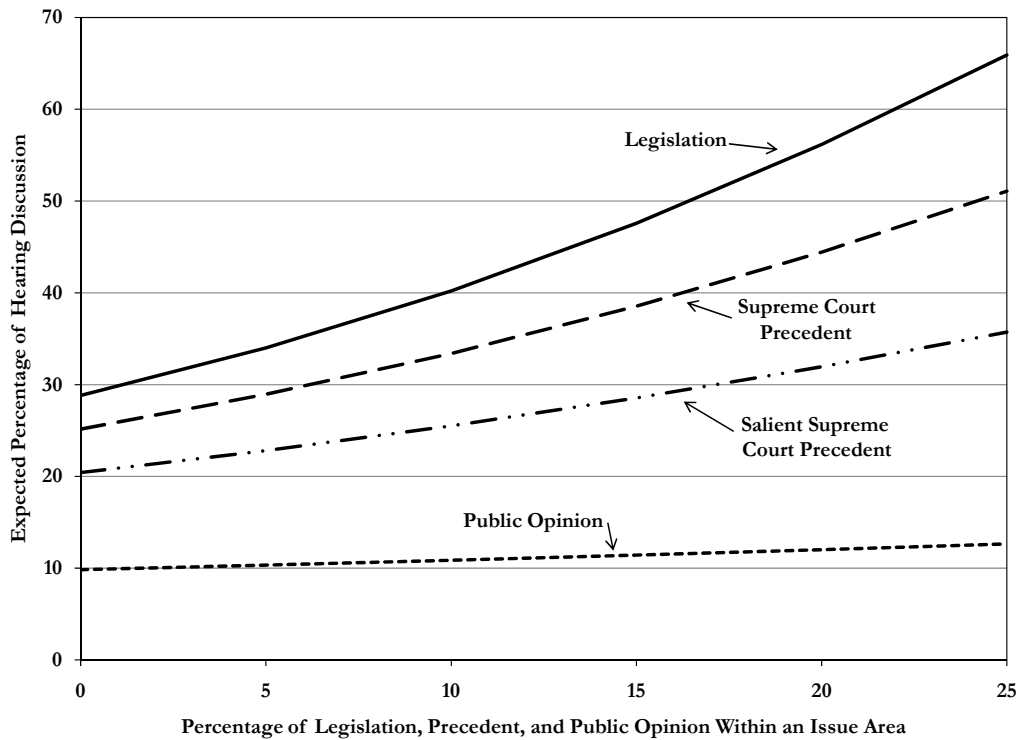
The dependent variable is the percentage of discussion at each nominee's confirmation hearing involving each of nineteen issue areas identified in Table 1. Entries are Tobit coefficients. Numbers in parentheses are robust standard errors, clustered on hearing. *** $p \leq .01$ (two-tailed tests).

Table 3. The Influence of Public Opinion and Precedent on the Issues Discussed at Supreme Court Confirmation Hearings, Excluding Macroeconomics and Defense, 1955-2006

Variable	Expected Direction	Coefficient
Public Opinion	+	1.269*** (0.311)
Media Coverage	+	-0.315 (0.251)
Legislation	+	1.904*** (0.431)
Supreme Court Precedent	+	1.143*** (0.378)
Salient Supreme Court Precedent	+	0.998*** (0.216)
Constant		-45.887*** (8.754)
McKelvey and Zavoina R-squared		0.439
F-test		25.31***
N		476

The dependent variable is the percentage of discussion at each nominee's confirmation hearing involving the issue areas identified in Table 1, excluding macroeconomics and defense. Entries are Tobit coefficients. Numbers in parentheses are robust standard errors, clustered on hearing. *** $p \leq .01$ (two-tailed tests).

Figure 1. Influences on the Issues Discussed at Supreme Court Confirmation Hearings, 1955-2006



Note: The figure represents the marginal effects of the Public Opinion, Legislation, Supreme Court Precedent, and Salient Supreme Court Precedent variables on the predicted value of the dependent variable, holding all other variables at their mean values.

Figure 2. Public Opinion, Unemployment, and Hearing Dialogue Involving Macroeconomics, 1955-2006

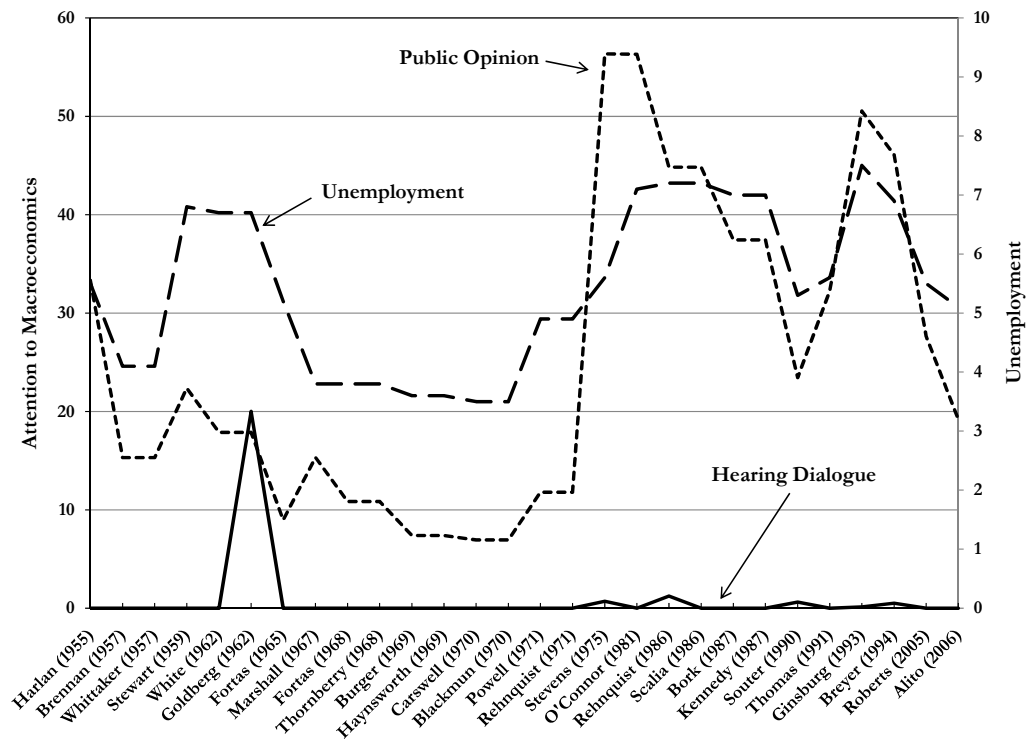


Figure 3. Public Opinion and Hearing Dialogue Involving Defense, 1955-2006

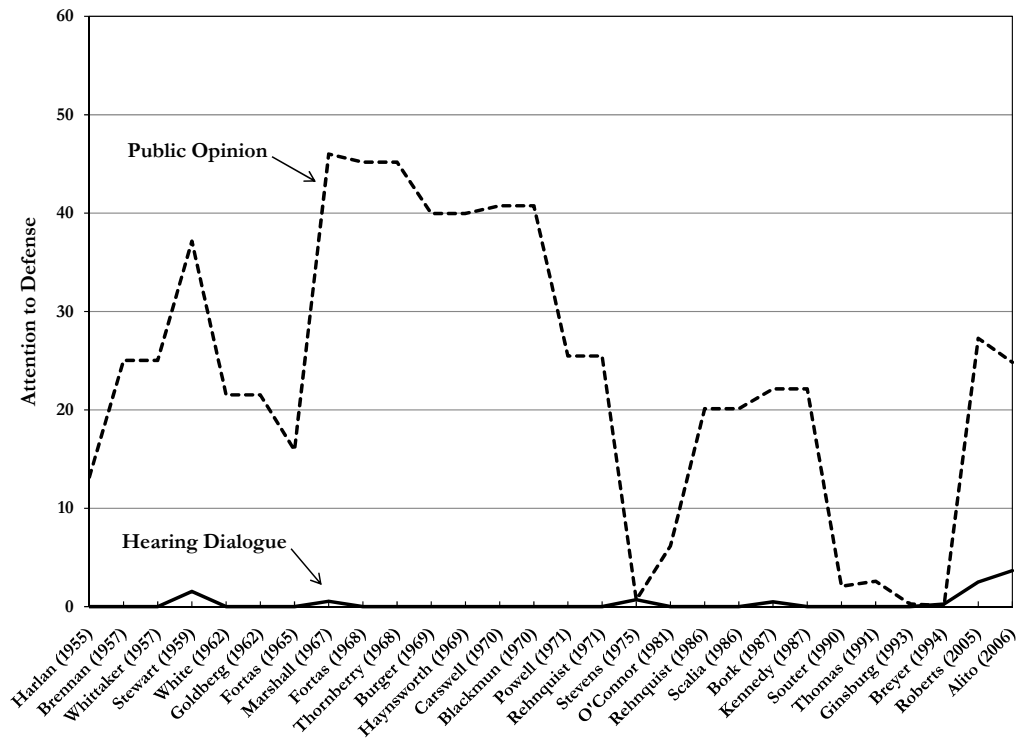
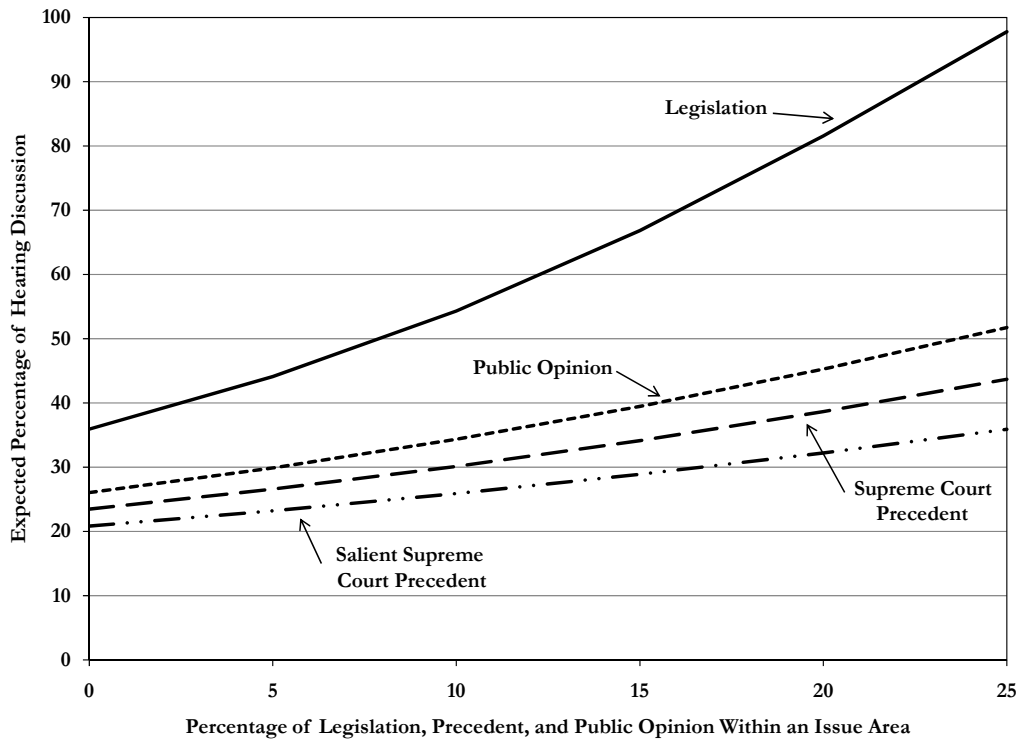


Figure 4. Influences on the Issues Discussed at Supreme Court Confirmation Hearings, Excluding Macroeconomics and Defense, 1955-2006



Note: The figure represents the marginal effects of the Public Opinion, Legislation, Supreme Court Precedent, and Salient Supreme Court Precedent variables on the predicted value of the dependent variable, excluding macroeconomics and defense, holding all other variables at their mean values.