

Volume 122
Issue 2 *Dickinson Law Review*

Winter 2018

The Language of Neutrality in Supreme Court Confirmation Hearings

Carolyn Shapiro
IIT Chicago-Kent College of Law

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlr>

 Part of the [Law and Philosophy Commons](#), [Law and Politics Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), [Legal Writing and Research Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICK. L. REV. 585 (2018).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss2/5>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

The Language of Neutrality in Supreme Court Confirmation Hearings

Carolyn Shapiro*

ABSTRACT

At Justice Neil Gorsuch's confirmation hearing, then-Judge Gorsuch repeatedly insisted that judging involves no more than examining the legal materials—like statutes and precedents—and applying them to the facts of the case. There is, he emphasized, no room for a Justice's "personal views," and he refused even to state his agreement (or disagreement) with such iconic cases as *Loving v. Virginia* and *Griswold v. Connecticut*. Instead, then Judge Gorsuch reiterated only that they were precedents of the Court and thus entitled to respect. Frustrating as his answers may have been to some senators, however, they differed from answers given by other recent nominees largely in degree and tone, not in kind. Indeed, all four most recent nominees before Gorsuch—but especially Chief Justice Roberts and Justice Sotomayor—made similar claims, of which Roberts's invocation of the neutral umpire is only the most famous.

Such forceful claims of neutrality and their attendant implication that there are necessarily right and wrong answers to difficult legal questions—answers that can be determined through deductive reasoning or by examining legal texts through the right lens—are not new, but their role and prominence in Supreme Court confirmation hearings have changed over the years. Using both qualitative and quantitative analysis, including empirical research on confirmation hearings already reported, this Article

* Associate Professor of Law and Co-Director of the Institute on the Supreme Court of the United States (ISCOTUS), IIT Chicago-Kent College of Law. I would like to thank Steven Heyman, Lori Ringhand, Mark Rosen, and Christopher Schmidt for helpful comments, as well as participants in workshops at Chicago-Kent College of Law, Northwestern Pritzker School of Law, Northwestern University Legal Studies Program, and Princeton University's Public Law Colloquium. Additional thanks to Tom Gaylord for outstanding library assistance and to Matthew Zarobsky, Danielle Tinkoff, Eun Nam, Catherine Lee, Ryan Janski, Luke Harriman, Emily Chase-Sarnoff, and Rachel Brady for their research and coding assistance. Thanks and appreciation also to Lori Ringhand and Paul Collins, who generously shared their data with me.

charts the history of such discussions in Supreme Court confirmation hearings from Justice Harlan's hearing in 1955 through Justice Gorsuch's hearing in 2017—the period of time during which all nominees have been expected to appear before the Senate Judiciary Committee. More specifically, the Article focuses on the extent to which nominees and Senators have claimed that there are objectively correct answers to the hard questions faced by the Supreme Court or, alternatively, have acknowledged and discussed the reality that textual and historical sources often do not provide clear answers and that Supreme Court Justices must balance competing interests, precedents, and constitutional principles and apply constitutional provisions and doctrines in new and complex factual circumstances.

Specifically, the Article establishes that during the Warren court years, claims of objectivity were often made by conservative senators, with relatively little discussion of alternative views of judging by either senators or nominees. By the late 1980s and 1990s, however, senators and nominees were having surprisingly candid conversations about the role of the Supreme Court, conversations that acknowledged the importance of judgment and judicial philosophy in resolving many difficult constitutional questions. Since 2000, however, nominees have largely eschewed such discussions and, along with Republican senators, have embraced claims of objectivity and neutrality.

As the Article demonstrates, however, such claims about the Court and its work are highly inaccurate, and they may have negative effects on the legitimacy of the Court as an institution. After all, when the Court announces its decisions in difficult cases, members of the public can plainly see that different Justices both approach those cases differently and often disagree about the result in predictable ways. News media regularly refer to the “liberal” and “conservative” Justices. So there is a significant disconnect between the claims made during confirmation hearings and the actions the Justices take—and research suggests that such a disconnect can undermine public confidence in the institution. The Article closes by proposing that senators use their questions during confirmation hearings to combat the myth that judging, especially on the Supreme Court, is necessarily about reaching objectively correct, logically deducible conclusions.

INTRODUCTION

The confirmation hearing for Judge Neil Gorsuch's nomination to the Supreme Court came at an awkward time. President Donald Trump announced Gorsuch's nomination shortly after he issued an Executive Order suspending the entry into the country of refugees

and of people from seven majority-Muslim countries.¹ Immediately, federal courts began to evaluate—and rule against—the Order.² In response to a federal district court in Seattle imposing a nationwide Temporary Restraining Order (TRO), the President tweeted a complaint about the “so-called judge,”³ expressed shock that the judge had “put our country in such peril,”⁴ and urged the American people to blame the judge “and the courts” if “something happens.”⁵ Around the same time, Trump-staffer Stephen Miller appeared on a series of Sunday morning talk shows to argue, in direct contradiction to the venerable precedent of *Marbury v. Madison*,⁶ that “[w]e do not have judicial supremacy in this country.”⁷ And only days before the hearing began, a district court judge in Hawaii issued a nationwide TRO against Trump’s new version of the Executive Order.⁸

1. Exec. Order No. 13767, 82 Fed. Reg. 8693 (Jan. 30, 2017); Press Release, Office of Press Sec’y, The White House, President Trump’s Nominee to the Supreme Court Neil M. Gorsuch (Jan. 31, 2017), <https://www.whitehouse.gov/nominee-gorsuch>.

2. See, e.g., Matt Zapposky, Lori Aratani, & Justin Jouvenal, *Federal Judge Temporarily Blocks Trump’s Entry Order Nationwide*, WASH. POST (Feb. 4, 2017), https://www.washingtonpost.com/world/national-security/federal-judge-temporarily-blocks-trumps-immigration-order-nationwide/2017/02/03/9b734e1c-ea54-11e6-bf6f-301b6b443624_story.html?utm_term=.310c9703f3f8.

3. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), https://twitter.com/realDonaldTrump/status/827867311054974976?ref_src=twsrc%5Etfw.

4. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800>.

5. *Id.*; see also, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4 (2017, 4:48 PM), <https://twitter.com/realDonaldTrump/status/828042506851934209> (accusing the judge of “open[ing] up our country to potential terrorists”).

6. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

7. Matthew Rozsa, *Stephen Miller Goes Kellyanne Conway: Trump Adviser Blasted for Dishonesty on Sunday Morning Shows*, SALON (Feb. 13, 2017, 8:40 AM), <http://www.salon.com/2017/02/13/stephen-miller-goes-kellyanne-conway-trump-adviser-blasted-for-dishonesty-on-sunday-morning-shows/> (reporting Miller’s remarks on Fox News Sunday). See also Aaron Blake, *Stephen Miller’s Authoritarian Declaration: Trump’s National Security Actions ‘Will Not Be Questioned’*, WASH. POST: THE FIX (Feb. 13, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/13/stephen-millers-audacious-controversial-declaration-trumps-national-security-actions-will-not-be-questioned/?utm_term=.2fcc4c684e87 (reporting Miller’s assertion that the President’s national security decisions “will not be questioned”); Jonathan Swan, *Best of Stephen Miller on the Sunday Shows*, AXIOS (Feb. 12, 2017), <https://www.axios.com/best-of-stephen-miller-on-the-sunday-shows-2257221562.html> (reporting Miller’s statement on CBS’s *Face the Nation* that “we have a judiciary that has taken far too much power and become in many cases a supreme branch of government”).

8. Order Granting Motion for Temporary Restraining Order, *State of Hawai’i v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017), available at <https://www.clearinghouse.net/chDocs/public/IM-HI-0004-0032.pdf>.

Unsurprisingly under these circumstances, at Judge Gorsuch's confirmation hearing, Democratic Senators asked him about judicial independence and supremacy, executive authority, and separation of powers. Equally unsurprisingly, Gorsuch was adamant about his independence as a judge.⁹ Although he refused to discuss any specific comments made by the President or his staffers, he reiterated a statement he had reportedly made privately to Senator Richard Blumenthal that disparaging comments about federal judges were "disheartening" and "demoralizing."¹⁰ But—also unsurprisingly—he shared no substantive views about the scope of executive authority or separation of powers, even when pressed.

Such opacity is to be expected. Indeed, conventional wisdom agrees with Elena Kagan, who—long before she herself was nominated to the Court—called the post-Bork confirmation hearings "a vapid and hollow charade."¹¹ As Senator and then-Senate Judiciary Committee Chairman Arlen Specter put it, the hearing is a "subtle minuet" in which "nominees answer about as many questions as they think they have to in order to get confirmed."¹² And while much of the criticism is aimed at the nominees, senators themselves are not immune. Observers accuse them of grandstanding for the TV cameras,¹³ and the entire confirmation process is viewed by many as overly politicized.¹⁴

Despite this conventional wisdom, recent scholarship has demonstrated both that the hearings have long involved discussion

9. At one point, for example, then-Judge Gorsuch asserted bluntly, "I am my own man" in response to Senator Al Franken's questions about White House Chief of Staff Reince Priebus's assurances to conservative activists about what kind of Justice Gorsuch would be. *Nomination of Neil Gorsuch to be Associate Justice of the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2017), 3/21/2017 Fed. News Serv. Transcripts, 2017 WLNR 8821289, at 107 [hereinafter *Gorsuch Hearing 3/21/17*].

10. Sean Sullivan, *Gorsuch Calls Attacks on Federal Judges 'Disheartening' and 'Demoralizing'*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-calls-attacks-on-federal-judges-disheartening-and-demoralizing/?utm_term=.6c2427cee3fa.

11. Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

12. *Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3 (2005) [hereinafter *Roberts Hearing*] (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

13. See, e.g., Paul E. Vaglica, Note, *Step Aside, Mr. Senator: A Request for Members of the Senate Judiciary Committee to Give Up Their Mics*, 87 IND. L.J. 1791, 1805–18 (2012).

14. STEPHEN L. CARTER, *THE CONFIRMATION MESS* 20–22 (1994) [hereinafter CARTER, *CONFIRMATION MESS*].

of substantive legal issues¹⁵ and that the nominees in fact answer most of the questions put to them by the members of the Senate Judiciary Committee.¹⁶ This Article adds additional evidence to support and refine those more recent conclusions, but its focus is different. This Article focuses primarily not on what nominees and senators say about substantive issues of law or on whether nominees answer the senators' questions, but instead on the ways that nominees and senators alike describe the role of the Supreme Court and its Justices. In particular, the Article highlights language like Chief Justice Roberts's claim that as a Justice, his job would be to "call balls and strikes" like "an umpire,"¹⁷ language that suggests that the questions the Supreme Court addresses have objectively correct and discernable answers and the Justices' job is simply to identify them.

At his hearing, Judge Gorsuch embraced a similar rhetoric of neutrality. Again and again, he refused to offer an opinion on precedents even as longstanding as *Brown v. Board of Education*¹⁸ (although he did eventually, if circuitously, admit that he believed *Brown* was correctly decided)¹⁹ and *Griswold v. Connecticut*,²⁰ insisting instead on describing decided cases as, for example, "a decision of the United States Supreme Court," and thus, "the law."²¹ He insisted that principles of *stare decisis* themselves are also "the law,"²² but gave little insight into how he would apply them.²³ And he insisted that "I don't view my colleagues as Republican judges or Democrat judges. I view them as judges"²⁴

15. PAUL M. COLLINS, JR. & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE 11, 63–99 (2013) [hereinafter COLLINS & RINGHAND, CONFIRMATION HEARINGS]; Lori A. Ringhand & 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 AM. U. L. REV. 589, 601–20 (2011) [hereinafter Ringhand & Collins, *May It Please the Senate*].

16. Dion Farganis & Justin Wedeking, "No Hints, No Forecasts, No Previews": An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan, 45 L. & SOC'Y REV. 525, 527, 540–42 (2011).

17. *Roberts Hearing*, *supra* note 12, at 55–56.

18. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

19. *Nomination of Neil Gorsuch to be Associate Justice of the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2017), 3/22/2017 Fed. News Serv. Transcripts, at 71–72 [hereinafter Gorsuch Hearing 3/22/17].

20. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

21. *Id.* at 72–73.

22. *Gorsuch Hearing* 3/21/17, *supra* note 9, at 135.

23. *Gorsuch Hearing* 3/22/17, *supra* note 19, at 72–74.

24. *Id.* at 78.

But this rhetoric of neutrality dramatically mischaracterizes what the Court does.²⁵ It matters who is on the Supreme Court precisely because different Justices have different philosophies about the law and judging; the language embraced at the hearings at best, obfuscates that reality. At the same time, the rhetoric overlaps with important and uncontroversial commitments to principles of impartiality and open-mindedness. But because it so mischaracterizes the work of the Supreme Court in hard and contested cases, while precluding any meaningful discussion of the principles and methods that the Justices do use, this rhetoric may undermine the Court's legitimacy.

Part I of the Article briefly reviews the popular critiques of confirmation hearings and describes the recent empirical research calling some of that conventional wisdom into question. Part I also evaluates recent proposals to address the widespread dissatisfaction with the hearings, but concludes that these proposals are unlikely to succeed in part because they are in tension with basic political and institutional features of Supreme Court nominations.

Part II takes a step back to discuss the role of the Supreme Court—a necessary first step in determining what confirmation hearings realistically can and cannot do. This Part emphasizes that the work of the Court frequently presents difficult questions to which answers cannot be logically deduced or definitively located in objective sources. Instead, Justices must make difficult, value-laden judgments in the face of factual complexity and uncertainty, and of competing constitutional priorities and values. Depending on their judicial philosophy and approach to judging, different Justices may reach different conclusions about the same legal issue, or may reach the same conclusion but through very different reasoning. This reality does not, however, mean that the Justices are unconstrained or lawless; the law, and the norms of lawyering and judging, impose limits. Thus, Part II also considers commitments we legitimately demand of Justices—some of which can be identified as forms of neutrality.

Part III turns to the content and history of confirmation hearings. Part III relies and builds on empirical work already completed, and it also engages in a qualitative analysis of the way that

25. Gorsuch's claims of neutrality appeared particularly infuriating to Democratic senators still angry about the Republican-led Senate's refusal to even consider President Obama's nominee to replace Justice Scalia, the widely respected Judge Merrick Garland. In response to one of Gorsuch's claims that he does not see Republican or Democrat judges, for example, Senator Al Franken asked, "If that's the case, what was Merrick Garland about?" *Id.* at 55.

nominees and senators describe the role of the Supreme Court and how those descriptions have evolved over time. More specifically, this Part divides the history of nominees' testifying at confirmation hearings into four major time periods. During the first period, from 1955 through 1968, hearings fell into one of two categories. Some of them, such as the hearings for Justices Charles Whittaker and Byron White, were brief and chummy formalities.²⁶ But in many hearings, segregationist senators took the opportunity to inveigh against *Brown v. Board of Education* and the Warren Court's criminal procedure jurisprudence. In doing so, they described the appropriate role of the Court as neutral and objective—noting, for example, that the Constitution had “a fixed and definite meaning when . . . adopted,”²⁷ complaining that the Court had improperly “taken unto itself legislative powers,”²⁸ or that the Court was “amend[ing]” or “rewrit[ing]” Acts of Congress.²⁹ The rhetoric these senators used thus rejected any legitimate role for value-laden judgments and for evaluating competing constitutional principles.

The second major period, from 1969 through 1975, focused largely on qualifications and ethics, and during this time, discussions of jurisprudence took a back seat. The third period, however, from 1981, when Justice Sandra Day O'Connor was nominated to the Court, through Justice Stephen Breyer's hearing in 1994, was—contrary to conventional wisdom—something of a golden age for confirmation hearings. Although nominees during this time often declined to disclose their views on particular legal issues, the hearings were marked by serious discussions about jurisprudence and judicial philosophy. And those discussions often acknowledged the appropriate and significant constraints of law and legal reasoning without denying that many of the questions that the Supreme Court

26. See *Nomination of Charles E. Whittaker, of Missouri, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 85th Cong.* 32–34 (1957) [hereinafter *Whittaker Hearing*]; *Nomination of Byron R. White, of Colorado, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 87th Cong.* 22–26 (1962) [hereinafter *White Hearing*].

27. *Nomination of William Joseph Brennan, Jr., of New Jersey, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 85th Cong.* 36 (1957) [hereinafter *Brennan Hearing*] (statement of Sen. James O. Eastland, Chairman, S. Comm. on the Judiciary).

28. *Nomination of Abe Fortas, of Tennessee, to be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 90th Cong.* 197 (1968) [hereinafter *Fortas/Thornberry Hearing*] (statement of Sen. Strom Thurmond, Member, S. Comm. on the Judiciary).

29. *Id.* at 129 (statement of Sen. Sam J. Ervin Jr., Member, S. Comm. on the Judiciary).

decides do not have objectively correct, logically deducible answers and, instead, require the exercise of judgment within the bounds of law.

Finally, after 2000, the rhetoric of the hearings returned to claims of neutrality and objectivity—most famously with Chief Justice Roberts’s analogy of the judge to an umpire calling balls and strikes.³⁰ During this time, however, it was the nominees, more than the senators, who turned away from the more nuanced discussions of the 1980s and 1990s. Instead, they tended to describe the job of a Justice as largely examining documents and engaging in deductive reasoning to come to objectively correct answers.

Part IV turns to questions of the potential effects of these misdescriptions. More specifically, this Part points to a significant disconnect between, on the one hand, the contemporary rhetoric of neutrality that we hear about during confirmation hearings—and the expectations such rhetoric can create among the general population—and, on the other hand, the observed reality of the Supreme Court’s work, with Justices who are also described as “liberal” or “conservative.” Because of that disconnect, the rhetoric of neutrality can actually work to undermine the institutional legitimacy of the Court, at least for some populations. And in our current political environment, this dynamic is particularly salient for the political Right because the Right has claimed the rhetoric of neutrality as a description of its preferred approaches to (and results of) the judicial process. Just as the segregationists tried to establish that the Court in *Brown* illegitimately imposed the Justices’ own political and social views, untethered to the Constitution or other legal sources, so too today, opponents of such decisions as *Roe* and *Obergefell* do the same.

Finally, Part V of the Article proposes that senators, in addition to asking nominees about their judicial philosophy and views about particular cases or issues (questions that the nominees may or may not answer)—ask nominees to acknowledge the inevitability of value-laden judgments in the work of the Court and to explain why, within some bounds, different Justices acting in good faith might well reach different conclusions. This approach is unlikely to be revelatory with respect to any particular nominee, nor is it likely to change the outcome of any particular nomination. Any effects would be both subtle and long-term, but such discussions could contribute to a more realistic public view of the Court and its work.

30. *Roberts Hearing*, *supra* note 12, at 55–56 (statement of Then-Judge John G. Roberts, Jr. J.).

I. CONFIRMATION MESSAGES

A. *Hearings and the Confirmation Process*

We all know the criticisms of confirmation hearings. The nominees refuse to answer questions,³¹ the senators grandstand,³² and the public learns nothing.³³ Or the process is highly politicized, and is sometimes a brutal, even dishonest, descent into efforts at personal destruction.³⁴ Focusing on the Breyer and Ginsburg hearings, for example, then-Professor Kagan complained in 1995 that the Senate, by not insisting on answers to substantive questions about law, had “abandon[ed] its role and function . . . ceas[ing] to engage nominees in meaningful discussion of legal issues,”³⁵ and she famously described the hearings as a “vapid and hollow charade.”³⁶ On the other hand, Professor Stephen Carter has argued that we should dispense with nominee testimony altogether.³⁷ And many observers assume that at some point in the past, things were different, with Judge Robert Bork’s unsuccessful nomination in 1987, a turning point.³⁸

31. Kagan, *supra* note 11, at 920.

32. See, e.g., Vaglica, *supra* note 13, at 1805–18.

33. Kagan, *supra* note 11, at 926–27 (lamenting Justice Ginsburg’s and Justice Breyer’s refusals to answer certain questions at their hearings); see also Edward M. Kennedy, Outlook, *Roberts and Alito Mised Us*, WASH. POST. (July 30, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/28/AR2006072801489.html> (criticizing Chief Justice Roberts and Justice Alito for not candidly discussing their views at their confirmation hearings).

34. CARTER, CONFIRMATION MESS, *supra* note 14, at 11.

35. Kagan, *supra* note 11, at 920.

36. *Id.* at 941. Not surprisingly, several senators reminded Kagan of this characterization during her hearing. See, e.g., *Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2010) [hereinafter *Kagan Hearing*] (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary); *id.* at 9 (statement of Sen. Herb Kohl, Member, S. Comm. on the Judiciary).

37. Stephen L. Carter, Opinion, *Let the Nominee Stay Home*, N.Y. TIMES (May 9, 2009), <http://www.nytimes.com/2009/05/10/opinion/10carter.html>. See also Stephen L. Carter, Opinion, *Disorder in the Court*, N.Y. TIMES (July 3, 2005), <http://www.nytimes.com/2005/07/03/opinion/disorder-in-the-court.html>.

38. See, e.g., Kagan, *supra* note 11, at 921 (citing CARTER, *supra* note 14) (noting that Carter’s critique of confirmation hearings arises from his negative views about the Bork hearings); *id.* at 929–30; Nina Totenberg, *Robert Bork’s Supreme Court Nomination ‘Changed Everything, Maybe Forever’*, NAT’L PUBLIC RADIO: ALL THINGS CONSIDERED (Dec. 19, 2012, 4:33 PM), <http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever> [hereinafter Totenberg, *Bork’s Nomination*] (quoting Tom Goldstein, founder and publisher of SCOTUSblog, as saying that the Bork hearings “legitimized scorched-earth ideological wars over nominations at the Supreme Court”).

Recently, however, empirical scholars have begun to go beyond these broad claims to investigate the actual content of the hearings, particularly the exchanges between the senators and the nominees. These scholars have concluded that the conventional wisdom about the evolution of the hearings is flawed. Lori Ringhand and Paul Collins, for example, found that senators have long asked questions of the nominees addressing substantive areas of law and that both the proportion and absolute number of such questions have increased over time.³⁹

Ringhand and Collins further argue that these substantive discussions perform an important democratic function, albeit one that does not focus primarily on the particular nominee. Instead, they claim that the hearings contribute to “ratifying the current constitutional consensus.”⁴⁰ For example, they chart the role that *Brown v. Board of Education* has played in the confirmation hearings over time.⁴¹ In *Brown*’s immediate aftermath, southern senators excoriated the case and its reasoning as illegitimate.⁴² But over time, *Brown* “shift[ed] from a contested case into one sitting in the center of our constitutional canon.”⁴³ A nominee who rejected *Brown* today would likely be unconfirmable.⁴⁴ The significance of the hearings, then, rests on their ability “to validate a gradually, but regularly shifting[,] constitutional consensus.”⁴⁵ This work calls into question the claim that nothing of substance happens during the hearings.

Ringhand and Collins acknowledge of course that nominees sometimes claim “the ‘privilege’ against answering . . . questions that [the nominees] believe raise issues likely to come before them if they are seated on the High Court.”⁴⁶ But such refusals to answer are less common than many assume. Two other researchers, Dion Farganis and Justin Wedeking, examined the extent to which nominees actually answer the senators’ questions. Farganis and Wedeking found that, contrary to popular perception, a willingness to

39. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 11, 63–99; Ringhand & Collins, Jr., *May It Please the Senate*, *supra* note 15, at 598–604.

40. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 4.

41. *Id.* at 162–76.

42. *Id.* at 163–65; *see also infra*, 32–36 & nn. 126–42.

43. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 173.

44. *See, e.g.*, COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 176; Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 390 (describing a desire to overrule *Brown* as so far outside the legal mainstream that it should preclude confirmation).

45. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 265.

46. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 235, 235 n.14.

respond, which they call “candor,” has remained more or less constant over time.⁴⁷ And Ringhand and Collins, using somewhat different methodology, reach similar results.⁴⁸

On the other hand, the Supreme Court nomination and confirmation process is unquestionably politicized.⁴⁹ Popular wisdom attributes this politicization to the defeat of Robert Bork’s nomination, but there is evidence to suggest that the Bork nomination was less seminal in this regard than often claimed.⁵⁰ Rehnquist’s nomination to be Chief Justice, for example, which predated Bork, exhibited a substantial increase in the number and nature of substantive questions about a nominee’s views.⁵¹ And Professor Carter begins his book on confirmation hearings by describing “the most vicious confirmation fight in our history”—the attempts by segregationists to defeat Thurgood Marshall’s nomination.⁵²

Regardless, the politicization is more intense than ever. As Geoffrey Stone details, the first four nominations of the new millennium—Roberts, Alito, Sotomayor, and Kagan—were all signifi-

47. Farganis & Wedeking, *supra* note 16, at 527, 540–42. They observe a decrease in candor from Bork through the Kagan hearings, but they attribute that decrease not to a change in nominees’ willingness to answer questions but to the fact that senators are asking more probing questions. *Id.* at 552. Moreover, levels of candor have ebbed and flowed over time, with two earlier periods of similar downward trends. *Id.* at 540–41.

48. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 255–57.

49. See, e.g., JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 1 (2009) [hereinafter GIBSON & CALDEIRA, CITIZENS, COURTS] (noting that “the preferences of the mass public have been influential in determining who goes on the Supreme Court”); *id.* at 2 (noting increased politicization of nomination process); Lee Epstein et al., *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 297 (2006); Lee Epstein, Jeffrey A. Segal, & Chad Westerland, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 615 (2008); Stone, *supra* note 44, at 453; Adam Liptak, *John Roberts Criticized Supreme Court Confirmation Process, Before There Was a Vacancy*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/us/politics/john-roberts-criticized-supreme-court-confirmation-process-before-there-was-a-vacancy.html>.

50. Farganis & Wedeking, *supra* note 16, at 532.

51. Frank Guliuzza, Daniel J. Reagan, & David M. Barrett, *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria*, 56 J. POL. 773, 785 (1994) (finding “no obvious shift” in nature of questions asked at confirmation hearings between the pre-Bork and post-Bork eras); Ringhand & Collins, *May It Please the Senate*, *supra* note 15, at 598–99. The Bork hearings were particularly lengthy and substantive, however. Kagan, *supra* note 11, at 940; Ringhand & Collins, *May It Please the Senate*, *supra* note 15, at 598.

52. CARTER, CONFIRMATION MESS, *supra* note 14, at 3.

cantly more contested than the nominees' levels of qualifications and ethics—and for Sotomayor and Kagan, their moderation—suggest they should have been based on historical comparisons.⁵³ Sotomayor and Kagan received an average of 34 negative votes, while prior nominees with similar characteristics had an average of four.⁵⁴ Alito was confirmed with 42 votes against him.⁵⁵

Chief Justice Roberts agrees. Alito, Sotomayor, and Kagan should have “sailed through,” and the “party line[]” votes against them don’t “make any sense.”⁵⁶ As Stone puts it, senators apparently “believe that the stakes in Supreme Court nominations have increased.”⁵⁷ The Republican refusal to consider President Barack Obama’s nomination of widely respected D.C. Circuit Judge Merrick Garland almost a year before his presidency ended certainly supports this view,⁵⁸ as does the nearly unanimous Democratic filibuster of Justice Gorsuch, followed by the Republican invocation of the “nuclear option,” eliminating the filibuster altogether for Supreme Court Justices.⁵⁹

B. *Proposed Fixes*

Just as there is no shortage of criticism of the confirmation hearings, so too are there plenty of commentators making recommendations about how to fix them. These commentators can be placed into three broad categories: the minimalists, the burden-of-proofers, and the debaters.

1. *The Minimalists.*

The minimalists argue that the Senate should primarily evaluate the nominee’s qualifications and ethics, largely avoiding their judicial philosophy and approach to judging, and in particular avoiding discussions of specific issues or cases.⁶⁰ These commentators see the purpose of the confirmation hearings—indeed the Sen-

53. Stone, *supra* note 44, at 453.

54. *Id.*

55. Liptak, *supra* note 49.

56. *Id.* (quoting Chief Justice Roberts).

57. Stone, *supra* note 44, at 445.

58. Burgess Everett & Glenn Thrush, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, POLITICO (Feb. 13, 2016), <http://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248>.

59. Wilson Andrews et al., *How Senators Voted on the Gorsuch Filibuster and the Nuclear Option*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/interactive/2017/04/06/us/politics/gorsuch-supreme-court-vote.html>.

60. See, e.g., CARTER, CONFIRMATION MESS, *supra* note 14, 121,161–62 (arguing that the hearings should focus almost exclusively on qualifications, with a mini-

ate's primary role in providing "advice and consent" to Supreme Court appointments—as limited to "ensuring the qualifications of the nominees." Although one can argue (and many have) about the historical accuracy and theoretical desirability of this approach,⁶¹ as a practical matter, it is impossible. Given the types of questions that the Supreme Court addresses, it blinkers reality to expect senators not to take a nominee's judicial philosophy into account, just as the President does.⁶² Even if the senators cannot extract information from the nominees themselves, information about the nominees' ideology can come from their prior political and professional activities. Regardless of desirability, a nominee's judicial philosophy is of enormous importance and, therefore, is and will continue to be an inevitable focus of the confirmation process, however much some nominees may attempt to avoid discussing it.

2. *The Debaters.*

In contrast, some commentators embrace a focus on the nominees' judicial philosophy. These commentators—the debaters—argue that discussions of "the values embodied in the Constitution and the proper role of judges in giving effect to those values" during confirmation hearings are important and appropriate democratic checks in the judicial appointment process.⁶³ To the debaters, the Bork hearings are not a cautionary tale so much as an example of the democratic process in action.⁶⁴ Justice Kagan herself made this argument 15 years before her own nomination, observing with approval that during Judge Bork's hearing, "[c]onstitutional law be-

mal check against extremism); Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 *GEO. J. LEGAL ETHICS* 127 (2001).

61. See, e.g., Stone, *supra* note 44, at 414; Ringhand & Collins, *May It Please the Senate*, *supra* note 15, at 594.

62. See, e.g., Epstein, Segal, & Westerland, *supra* note 49 at 611–12 (describing President Nixon's ideological concerns when nominating William Rehnquist) (citing JOHN W. DEAN, *THE REHNQUIST CHOICE* 16 (2001) (quoting memorandum from Assistant Attorney General William H. Rehnquist to Attorney General John N. Mitchell (May 29, 1969))).

63. Kagan, *supra* note 11, at 934. See also *id.* at 935–36, 940–42; Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 *HARV. L. REV.* 1213 (1988) [hereinafter Totenberg, *Confirmation Process*]; Linda Greenhouse, *2,691 Decisions*, *N.Y. TIMES* (July 13, 2008), <http://www.nytimes.com/2008/07/13/weekinreview/13linda.html?pagewanted=all> [hereinafter, Greenhouse, *2,691 Decisions*].

64. See, e.g., Kagan, *supra* note 11, at 940; Totenberg, *Confirmation Process*, *supra* note 63, at 1220 (describing the Bork hearings as "the first time the process worked properly"); Greenhouse, *2,691 Decisions*, *supra* note 63 ("Through televised hearings that engaged the public to a rare degree, the debate became a national referendum on the modern course of constitutional law.").

came . . . not a project reserved for judges, but an enterprise to which the general public turned its attention and contributed.”⁶⁵

But as Farganis and Wedeking have shown, although nominees are willing to answer many substantive questions, there is much they are unwilling to say. Senators and members of the public may want to have a robust debate over how potential Justices would do their jobs and about how they would decide or consider any number of legal questions, but the nominees do not. Since the early 1980s, nominees have increasingly declined to answer questions about matters that “could come before the court,”⁶⁶ even though those are the questions that the senators and the public most want answers to. All of the nominees have strong incentives to say as little as possible about anything remotely controversial.

Justice Kagan, herself, is a good example. At her hearing, Senator Lindsey Graham reminded her that she had criticized “the way the Senate conducted these hearings.”⁶⁷ He asked, “[a]re we improving or going backwards? And are you doing your part?”⁶⁸ Then-Solicitor General Kagan responded by complimenting the senators on “exercising your constitutional duties extremely well.”⁶⁹ But when Graham asked if it was only previous nominees who had been “too cagey,”⁷⁰ Kagan acknowledged that “it just feels a lot different from here” than from her prior vantage point.⁷¹ And indeed, she was not appreciably more candid than were Roberts, Alito, or Sotomayor.⁷²

There is little a nominee could say about his or her judicial philosophy or ideology, much less about his or her views about particular legal issues, that would not, at best, cause controversy, and at worst, cost them the nomination. Indeed, such controversy would likely arise even if the questions were only about cases that the Supreme Court has already decided, as Reva Siegel and Robert

65. Kagan, *supra* note 11, at 940.

66. Farganis & Wedeking, *supra* note 16, at 555.

67. *Kagan Hearing*, *supra* note 11, at 138 (statement of Sen. Lindsey Graham, Member, S. Comm. on the Judiciary).

68. *Id.*

69. *Id.* (statement of Elena Kagan, Solic. Gen. of the United States).

70. *Id.* (statement of Sen. Lindsey Graham, Member, S. Comm. on the Judiciary).

71. *Id.* (statement of Elena Kagan, Solic. Gen. of the United States). The exchange was very good-natured, as is evident from the video. See UsSenLindseyGraham, *Senator Graham Questions Supreme Court Nominee Elena Kagan*, YOUTUBE (Jun. 29, 2010), <https://www.youtube.com/watch?v=4ac0AcPQLt4>.

72. See Farganis & Wedeking, *supra* note 16, at 541 fig.3.

Post have suggested.⁷³ Supreme Court nominees are extremely intelligent, talented lawyers.⁷⁴ They will likely continue to handle the hearings in the way they think makes their confirmation most likely—by saying as little as possible about their views on controversial legal questions.

3. *The Burden-of-Proofers.*

Due to the concerns about nominee evasiveness, some commentators have proposed that the senators place a burden of proof on the nominee. In other words, these commentators argue, the senators should announce that they will not vote for the nominees who do not establish that their ideological commitments are within some bounds. These commentators, of course, do not agree with what those bounds might be. Christopher Eisgruber, for example, argues that Americans prefer moderates on the Supreme Court and so proposes that the senators place a burden of proof on the nominee to establish that he or she is a moderate, voting against nominees who fail to do so.⁷⁵ Geoffrey Stone, on the other hand, argues that the burden of proof should be placed on the nominee to establish that he or she is within the mainstream of legal thought.⁷⁶ Unlike Eisgruber, Stone argues that the Court benefits from having “among its members Justices who think boldly as well as carefully.”⁷⁷ He, therefore, proposes a very capacious understanding of “the mainstream of legal thought,” under which a nominee should fail “*only if most liberals and most conservatives would*” consider the nominee outside the mainstream.⁷⁸ But regardless of their disagreement about the appropriate standard, both Eisgruber and Stone want senators to engage in some investigation of nominees’ ideology and impose some kind of burden of proof on the nominee.

73. See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38 (2006).

74. Of course, they don’t have to be lawyers—see U.S. CONST. art. II, § 2, cl. 2—but today not being a lawyer would almost certainly be disqualifying.

75. CHRISTOPHER EISGRUBER, *THE NEXT JUSTICE*, 11–14 (2007). Steven Goldberg argues that Senators should distinguish between “ideology,” which is inevitable, and “agenda,” which is not. Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology Yes; Agenda No*, 17 GEO. J. LEG. ETHICS 175, 192 (2004).

76. Stone, *supra* note 44, at 390.

77. *Id.* at 460. Stone goes on to explain that “[i]t is in the clash of strongly-held opposing ideas that the Court is best able to engage the often complex and vexing issues that are central to its mission.” *Id.*

78. *Id.* at 390 (emphasis in the original). Stone adds that Bork, who stated that he agreed with the dissents in a number of landmark cases but not that he would overrule those cases, was within the mainstream under this definition. *Id.*

Even if theoretically appealing, however, Eisgruber and Stone's proposals are politically impractical in today's highly polarized political environment. Democratic senators will not hold Democratic nominees to any particular burden of proof; vice versa for Republicans. In other words, today, members of the President's party will virtually always vote to confirm.⁷⁹ Moreover, the terms of any test of moderation or mainstream legal thought are largely in the eye of the beholder. Without long-term bipartisan consensus and insistence on such burdens of proof, announcing them would be largely rhetorical and is unlikely to significantly change either the immediate incentives of the nominees or the nature of the discussions at the hearings.⁸⁰

79. See Stone, *supra* note 44, at 416 (showing that since the Bork nomination, senators have voted in favor of nominees of presidents of their party at a rate of 99%). This was not always as true as it is today. *Id.* For example, Southern Democrats voted against Thurgood Marshall and some Democrats voted against cloture for Justice Fortas's nomination to be Chief Justice, both nominated by Democratic President Lyndon Johnson. See 113 Cong. Rec. 24656 (Aug. 30, 1967), available at https://www.senate.gov/reference/resources/pdf/240_1967.pdf (listing "yea" and "nay" votes on Marshall nomination); HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 229–30 (5th ed. 2008) (describing Southern Democratic opposition to Marshall); *id.* at 227–28 (detailing demise of Fortas nomination, including defection of Democratic Senator Richard B. Russell. And some Republicans voted against Nixon's ill-fated nominations of Carswell and Haynsworth. See 115 Cong. Rec. 35396 (Nov. 21, 1969), available at https://www.senate.gov/reference/resources/pdf/154_1969.pdf (listing "yea" and "nay" votes on Haynsworth nomination); 116 Cong. Rec. 10769 (Apr. 8, 1970), available at https://www.senate.gov/reference/resources/pdf/122_1970.pdf (listing "yea" and "nay" votes on Carswell nomination).

80. Indeed, this reality has played out in recent Supreme Court nominations. When Justices Sotomayor and Kagan were nominated, for example, some Republicans and other conservatives complained that they were outside the mainstream. See, e.g., Robert Farley, *Schumer Claims No One Questioned That Sotomayor Was Out of the Mainstream*, POLITIFACT (Apr. 13, 2010, 12:19 PM), <http://www.politifact.com/truth-o-meter/statements/2010/apr/13/charles-schumer/schumer-claims-no-one-questioned-sotomayor-was-out/> (quoting Republican complaints that Sotomayor was "'out of the mainstream' of legal thought"); Ben Smith, *Conservatives Target Sotomayor; Kagan; Wood*, POLITICO (May 1, 2009, 9:40 AM) (noting complaints that Kagan, then one of Obama's potential nominees, was outside the mainstream). Likewise, some Democratic senators insisted that Gorsuch meet the burden of establishing that he is "within the legal mainstream." See, e.g., Mark Abadi, *Chuck Schumer Blasts Trump's Supreme Court pick, setting up lengthy Senate Battle*, BUS. INSIDER (Jan. 31, 2017, 9:18 PM), <http://www.businessinsider.com/chuck-schumer-neil-gorsuch-supreme-court-trump-2017-1>. But of course, all of these nominees were confirmed with the unanimous support of the party of the nominating president.

*** **

Although recent scholarship demonstrates that confirmation hearings have historically been more substantive than many believe, they are the subject of enormous dissatisfaction. And most proposals to address that dissatisfaction are impractical at best. But frustrating as that may be, the hearings are here to stay and, as Ringhand and Collins have shown, can serve important functions in our democracy. A focus on what they realistically can accomplish, therefore, might lead to a different set of recommendations. The next Part begins that analysis.

II. NEUTRALITY AND IDEOLOGY AT THE HEARINGS

Any meaningful analysis of how confirmation hearings can and should function must consider what we expect from the nominees once they become Supreme Court Justices. On the one hand, we expect them, like all judges, to be impartial and open-minded. We expect them to recognize the limits of the judicial role—which is why nominees of both parties regularly and appropriately avow that they will apply the law, not make it.⁸¹ And we expect them to accept the constraints of legal texts, doctrine, and reasoning as an essential part of the job.

But on the other hand, as individuals who have already had successful careers in law, politics, and/or academia, Supreme Court nominees come with attitudes and perspectives that inform their judicial philosophy. As then-Justice Rehnquist put it, “[p]roof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”⁸² Moreover, the nominee’s judicial philosophy, or general approach toward judging, will be central to the job of being a Supreme Court Justice. The cases do not decide themselves; they could not be decided by a computer; discretion and judgment are essential parts of the job. Indeed, it is for this very reason that Supreme Court appointments are so hard-fought and high-stakes. Especially at the Supreme Court, Justices must exercise discretion and judgment. But we must also try to

81. See, e.g., *Nomination of Stephen G. Breyer to be Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 103rd Cong. 119 (1994) [hereinafter *Breyer Hearing*] (statement of Stephen G. Breyer, J.); *Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009) [hereinafter *Sotomayor Hearing*] (statement of Sonia Sotomayor, J.).

82. *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J.).

identify *inappropriate* ideological commitments, bias, and overreach, and acknowledge appropriate judicial impartiality and open-mindedness. This Part takes on those tasks.

A. *The Inevitability of Discretion, Judgment, and Ideology*

Chief Justice Roberts's invocation of the umpire obscured important aspects of what a Supreme Court Justice does. While there are cases with relatively straightforward resolutions, as a general matter, such cases do not end up in the Supreme Court. Instead, the Court confronts cases that require the Justices to, for example, apply constitutional provisions or precedents in new, unforeseen, and sometimes very complex circumstances, and to weigh competing legal and constitutional principles. In such cases, there is no clear ball or strike to call. Instead, the Justices must bring to bear their own philosophies about the Constitution, the roles of, and interaction between, different parts of government, and the nature of fundamental rights. At the same time, Justices must understand and have a deep respect for the law and the constraints it imposes on the work they do. The law may rule out certain outcomes altogether, and it always requires that the Justices provide reasoned explanations for their decisions; it imposes frameworks of analysis and can render certain facts essential or, conversely, irrelevant.

Examples abound of cases in which there is not a logically deducible, "correct" resolution that can be gleaned from the legal materials, even when those legal materials are crucial to the analysis. In the recent case of *Whole Women's Health v. Hellerstedt*,⁸³ for example, the Court had to decide how to apply the "undue burden" test of *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁸⁴ to a set of restrictions on abortion access unlike any it had previously considered. No deductive reasoning could lead to an answer in this case. Instead, the Court not only had to apply the undue burden test in the context of a very detailed—and unique—evidentiary record, but more importantly, it had to decide how the balance struck in *Casey*, which upheld abortion restrictions justified by the State's interest in protecting fetal life, was relevant to restrictions that were instead justified by claims of protecting women's health. Agree with the majority, which struck down the Texas laws, or agree with the dissent (and I agree with the majority), the case required the Justices to consider how much deference to give to the Texas legislature, how broadly or narrowly to read *Casey*, and how

83. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

84. *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion).

those considerations interacted with the facts of the case, all in the context of a particularly contentious area of law. Those determinations required the exercise of judgment.

Indeed, Chief Justice Roberts implicitly conceded at his confirmation hearing that abortion rights present questions of law that do not have objectively “correct” answers. Asked whether he thought there were “intellectually honest approach[es]” on both sides of *Roe v. Wade*,⁸⁵ he acknowledged that “reasonable people can disagree about that decision.”⁸⁶ He was right. All of the questions that a Justice must consider in evaluating *Roe* are deeply value-laden. What does the word “liberty” in the Fourteenth Amendment mean?⁸⁷ Does it encompass a woman’s control over her own body? To the exclusion of other considerations? Should the understanding of those who drafted and enacted the Fourteenth Amendment, assuming it can be discerned, take precedence over current views and jurisprudence about women’s autonomy? If one does not agree with the original reasoning of *Roe v. Wade*, are there other constitutional principles—such as equality—that preclude the government from preventing a woman from terminating a pregnancy?⁸⁸ And even if a Justice believes that *Roe* was wrongly decided on any grounds, he or she must consider, as Justices Kennedy, O’Connor, and Souter famously did in their joint opinion in *Casey*, whether there are nonetheless important reasons not to overrule it outright.

To answer these questions, a Justice must consider the constitutional significance of women’s bodily autonomy, the importance of the state’s interest in protecting fetal life, the role of courts in making those judgments, and the societal and institutional effects of overruling a case as significant as *Roe*. Some of these questions involve predictive judgments about the world, and some are less about factual predictions than they are about constitutional principles and values: the relative role of the Courts and the legislatures,

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

86. *Roberts Hearing*, *supra* note 12, at 206 (statement of John G. Roberts, J.).

87. U.S. CONST., amend. XIV, § 1. See, e.g., Suzanna Sherry, *The Classical Constitution and the Historical Constitution: Separated at Birth*, 8 N.Y.U. J.L. & LIBERTY 991, 999–1004 (2014) (discussing RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014), and arguing that *Roe* is consistent with Epstein’s concerns about the burdens of economic regulation).

88. See, e.g., *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 205–08 (1993) [hereinafter *Ginsburg Hearing*] (statement of Ruth Bader Ginsberg, J.) (discussing equality principles and religious freedom as additional bases supporting constitutional recognition of a woman’s right to choose whether to bear a child).

the significance of fetal life, and whether control of her body is an essential part of a woman's liberty.

Nor do such questions end with abortion. What of access to contraception, which the Supreme Court held more than 40 years ago in *Griswold v. Connecticut*⁸⁹ that states could not prohibit? The text of the Constitution does not discuss birth control or even explicitly mention the types of privacy and self-determination that a ban on birth control would implicate. Even a Justice who believes, like Judge Bork, that this silence suggests no constitutional protection beyond the minimum requirement of rationality,⁹⁰ would have to grapple with the value-laden considerations of *stare decisis* before deciding whether to overrule *Griswold*.⁹¹

Even less hot-button areas of law are no different. Consider, for example, *United States v. Alvarez*,⁹² in which the Supreme Court held that the Stolen Valor Act, which criminalized misrepresentations about whether someone had received military decorations and medals, violated the First Amendment.⁹³ Six Justices reached that

89. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

90. See, e.g., *Nomination of Robert Bork, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 114–18 (1987) [hereinafter *Bork Hearing*] (statement of Robert Bork, J.). Bork did not outright deny that there was constitutional protection for access to birth control for married couples. Rather, he said that he had not heard an argument that would lead him to so conclude. *Id.* at 116.

91. Some argue that originalism and textualism allow a judge to reach conclusions without having to make value-laden judgments. See, e.g., Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN G. BREYER, *ACTIVE LIBERTY* (2005)) (arguing that textualism-originalism “is not an ideological position, but one that safeguards the distinction between law and politics” and that “in principle the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance”). See also, e.g., John O. McGinnis, *The Good Justice is Just a Judge by Another Name*, LIBRARY L. & LIBERTY (July 10, 2017) (arguing that Supreme Court cases can and should be addressed through “formalism”). Problems of *stare decisis* alone rebut this proposition. Cf. *Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 99th Cong. 46 (1986) [hereinafter *Scalia Hearing*] (discussing the “practical exercise” and “difficult question” of determining which precedents, even if wrong in the first place, “are so woven in the fabric of law that mistakes made are too late to correct, and which are not”); *Bork Hearing*, *supra* note 90, at 128–29 (statement of Robert Bork, J.) (discussing factors relevant to a decision to overrule precedent). But in fact, originalism and textualism do not and cannot live up to their promise of objectivity and judicial restraint. Establishing that proposition is beyond the scope of this Article, but fortunately, others have already done so. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

92. *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (plurality opinion).

93. *Id.*

conclusion, but there was a plurality opinion with four Justices, a concurrence in the judgment with two Justices, and three Justices who dissented. The disagreements between these opinions illustrate the ways that the Court must exercise judgment and weigh competing interests.

The *Alvarez* plurality held that the statute outlawed content-based speech, requiring the government to meet a particularly “exacting” standard to justify the law and concluding that the government had failed to show that the statute was “actually necessary”⁹⁴ to meet its compelling interest in “protecting the integrity of the Medal of Honor.”⁹⁵ Specifically, the plurality noted that “the [g]overnment has not shown, and cannot show, why counterspeech would not suffice to achieve its interest.”⁹⁶ Justice Breyer, joined by Justice Kagan, on the other hand, agreed with the outcome but took a less categorical approach, applying only intermediate scrutiny and suggesting ways that the statute could be rewritten or narrowed to survive constitutional challenge.⁹⁷ The two groups of Justices in the majority, then, were not in agreement about how to evaluate the burden the statute imposed. And the dissenters, who found the law justified by the government interests at stake, believed that the false statements at issue “inflict real harm.”⁹⁸ They expressly disagreed both with the two other opinions’ view that there were effective alternatives to protect the government’s legitimate interests in maintaining the integrity of military honors and with the concurrence’s concern that the false statements at issue should be protected prophylactically so as to avoid chilling other kinds of speech and to ward off an overbearing government.⁹⁹

The determinations and judgments that the Justices made in *Alvarez* simply cannot be deduced from the text of the Constitution or from the bodies of case law interpreting it. That the Justices in *Alvarez* disagreed with each other does not mean, however, that law played no role. Law structured the analysis of all three opinions, it required the Justices to take into account certain types of considerations, and it led even the dissenters to suggest that their conclusion could not easily be generalized to other contexts because it was based in part on the unique nature of the interest at stake.¹⁰⁰

94. *Id.* at 715.

95. *Id.*

96. *Id.* at 726.

97. *Id.* at 730–38 (Breyer, J., concurring in judgment).

98. *Id.* at 739 (Alito, J., dissenting)

99. *Id.* at 744–45, 750–52.

100. *Id.* at 753–54.

Sometimes legal texts themselves explicitly call for value-laden judgments. For instance, the Fourth Amendment itself provides: “The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated”¹⁰¹ When a judge (at any level of the judicial system) decides what is reasonable in a unique factual situation, he or she is exercising judgment and discretion. And it is likely that in exercising that judgment and discretion, a judge’s overall sense of how the police do their jobs, what ordinary people’s expectations of privacy are, and the likelihood and consequences of criminal conduct going undetected will all play a role.¹⁰² In other words, the judge must make a value-laden assessment of a very specific factual situation. And as the rich body of Supreme Court precedent in the Fourth Amendment context attests, there are a seemingly infinite number of factual contexts in which these assessments must be made.

Nor are such value-laden determinations or predictions about the world unique to constitutional law. Consider, for example, the question that faced the courts in *Brown v. Plata*.¹⁰³ In that case, a three-judge district court found that prison overcrowding in California violated the Eighth Amendment and ordered that some prisoners be released. As required by the Prison Litigation Reform Act, in crafting this order, the district court gave “substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”¹⁰⁴ The Supreme Court upheld the order. In his dissent, Justice Scalia objected to the majority’s deference to the district court’s factual findings on the public safety issue:

But the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. *Of course* they were relying largely on their own beliefs about penology and recidivism. And *of course* different district judges, of different policy views, would have “found” that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is

101. U.S. CONST., amend. IV (emphasis added). See also STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 160 (2010) (explaining why the language of Fourth Amendment requires judges to consider “values and proportionality” when applying it).

102. Compare, for example, the majority and dissenting opinions in *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

103. *Brown v. Plata*, 563 U.S. 493 (2011).

104. 18 U.S.C. § 3626(A)(1)(a) (2012).

impossible for judges to make “factual findings” without inserting their own policy judgments, when the factual findings *are* policy judgments.¹⁰⁵

Whether one agrees with the majority or with the dissent in *Plata*, Justice Scalia is correct about the nature of the policy judgments that are essential to the case. And what he says is also true of an enormous amount of the work of judges in general and Supreme Court Justices in particular.¹⁰⁶ Given the significance for the entire country of the decisions the Supreme Court makes, it is little wonder that the senators and the American people want to know about the nominees’ judicial philosophy, their overall approach to considering hard questions and balancing competing interests.

B. Proper and Improper Ideological Commitments, Impartiality, and Open-Mindedness

1. Ideology, or Judicial Philosophy, or Subjectivity.

Despite the reality that value-laden judgments are part of the job, Justices operate within important constraints and their discretion is not unbounded. All nominees understand that although the Court may decide cases in open areas, it is also constrained by all of the traditional sources of law, such as text and precedent. We expect all judges and Justices to accept and uphold the Constitution and our system of government. Such allegiance is inconsistent with an ideological commitment to an incompatible world view and political agenda, such as Marxism. Nor is nakedly partisan decision-making appropriate. One of the most persistent critiques of *Bush v. Gore*¹⁰⁷ is that the Justices voted as they did because they wanted Bush (or Gore) to win the election, a clearly inappropriate basis for a ruling.

Similarly, nominees are sometimes asked to disavow other types of behaviors or approaches to judging that we can all agree would be improper. Senators have sometimes asked Supreme Court nominees to disavow any role in their judging for “personal philosophy”¹⁰⁸ or “personal notions.”¹⁰⁹ To at least some senators

105. *Plata*, 563 U.S. at 557 (Scalia, J., dissenting) (emphasis in original).

106. For an extensive and illuminating discussion of this reality and its implications with particular attention to *Plata*, see Dan L. Kahan, *The Supreme Court 2010 Term: Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

107. *Bush v. Gore*, 531 U.S. 98 (2000).

108. See, e.g., *Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 92d Cong. 18–19 (1993)

and nominees, these concerns were understood as an insistence that personal sympathies for one party or one type of party could not be the basis of a constitutional decision. At his 1971 confirmation hearing, for example, William Rehnquist himself explained that he believed some of the Warren Court Justices (and their law clerks) had been motivated by their “sympathi[es] with the plight of unpopular groups, such as Communists.”¹¹⁰ At its most extreme, and most clearly improper, if a Justice believes that the government generally has too much power in relation to criminal suspects, he might vote in favor of all criminal defendants even in the absence of legal support for those outcomes. Conversely, it would be just as improper for a Justice who believed that criminality had run amok to vote against all criminal defendants regardless of the law.

But the line between legitimate and illegitimate subjectivity or ideology in judicial decision-making is not always so bright. The presence or absence of illegitimate ideological decision-making is often in the eyes of the beholder.¹¹¹ Whatever it is called, however, ideology is an inevitable and legitimate component of what the Supreme Court does.¹¹²

2. *Impartiality and Open-Mindedness*

Although we should acknowledge that value judgments and ideology play a role in judicial decision-making, we can and do legitimately demand certain types of neutrality. Judges must evaluate each claim before them without regard for the identity of the parties. As Justice Kagan explained in her confirmation hearings, Chief Justice Roberts’s umpire analogy aptly captures this form of neutrality.¹¹³ Just as we do not want an umpire to be secretly rooting for one team over another—and allowing that preference to affect his calls—so we expect the same of judges.¹¹⁴ Justice Sotomayor emphasized this type of neutrality repeatedly in her

[hereinafter *Rehnquist/Powell Hearing*] (statement of Sen. John L. McLellan, Member, S. Comm. on the Judiciary).

109. *Id.* at 22 (statement of Sen. Sam J. Ervin, Jr., Member, S. Comm. on the Judiciary).

110. *Id.* at 28.

111. See discussion, *infra* Part IV.

112. Some may choose to use different, perhaps less charged, language, to describe this aspect of the judicial role. Judge Posner, for example, likes the terms “open area” and “legal uncertainty.” RICHARD A. POSNER, *HOW JUDGES THINK* 9, 11 (2010). He uses more controversial language, however, when he describes judges as “occasional legislators” and calls the Supreme Court as a “political court.” *Id.* at 78–92, 269–323.

113. *Kagan Hearing, supra* note 11, at 202.

114. *Id.*

confirmation hearings. As senators asked her again and again to explain her remark that “a wise Latina” judge might reach a better decision than some other judges, then-Judge Sotomayor insisted again and again that her personal sympathies or prejudices had no bearing whatsoever on her rulings in cases.¹¹⁵ No response other than such assurances would have been appropriate. Indeed, virtually every nominee makes such claims.¹¹⁶ We can call this form of neutrality “impartiality.”

In addition, a good judge is one who is willing to consider new arguments, to consider the possibility that his or her initial impression of a case might be wrong. Many nominees describe their approach to judging in these terms. Rehnquist and Souter, for example, emphasized that they were “open-minded”¹¹⁷ and “willing to listen.”¹¹⁸ Then-Judge Alito described his decision-making process as “putting out of my mind any personal thoughts that I had on the matter and thinking about—listening to all the arguments and reading the briefs . . . and only at the end of that reach a conclusion about the issue.”¹¹⁹ This open-mindedness may be in some tension with a judge’s pre-existing judicial philosophy, but it is an important tension. In his 1986 confirmation hearings to be Chief Justice, then-

115. See *Sotomayor Hearing*, *supra* note 81, at 66, 70–73, 124–26, 392–93.

116. See, e.g., *Nomination of Abe Fortas, of Tennessee, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 89th Cong. 50 (1965) [hereinafter *Fortas Hearing I*] (promising that his relationship with the President could never “in any way enter into any judgment that [he] might make”); *Nomination of George Harrold Carswell, of Florida, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 91st Cong. 17 (1970) [hereinafter *Carswell Hearing*].

117. *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 205 (1986) [hereinafter *Rehnquist Hearing II*].

118. *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 177 (1990) [hereinafter *Souter Hearing*].

119. *Nomination of Samuel A. Alito, Jr. to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 386 (2006) [hereinafter *Alito Hearing*]; see also *id.* at 404–05 (describing judicial decision-making process in more detail). See also, e.g., *Nomination of Clement F. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 91st Cong. 76–77 (1969) [hereinafter *Haynsworth Hearing*] (declining to comment on issues that might come before the Court “where I haven’t read the briefs or haven’t heard the lawyers and in a field, too, which I think I should approach with an open mind when the case comes up, and not on the basis of some expression of a prior opinion”); *Fortas Hearing I*, *supra* note 116, at 53–54 (discussing possible implications of recent one-man-one-vote precedent); *id.* at 57; *Roberts Hearing*, *supra* note 12, at 238 (promising to “confront issues in [the abortion] area as any other area, with an open mind, in light of the arguments, in light of the record, after careful consideration of the views of my colleagues on the bench”).

Justice Rehnquist distinguished elegantly between the impartiality and open-mindedness that we demand and the reality that judicial philosophy inevitably plays a role in judging:

You know, that is not to say that I do not have ideas, which I have certainly followed; *I have a sense of what I think the Constitution means*. But it certainly is not a sense that is, fixed on concrete and all. I am one of the few members of our Court who can present both exhibit A and exhibit B in support of open-mindedness. On two separate instances since I have been on the Court, I have written opinions for the Court overruling earlier opinions that I have written, which is certainly some testimony to open-mindedness.¹²⁰

Here too, the umpire analogy can be helpful. An umpire should not decide before the pitch is thrown that this particular pitcher always throws balls in this situation. Each pitch must be evaluated on its own terms. Likewise, Justices must be willing to keep an open mind as they evaluate the facts and legal arguments in each case.

III. CONFUSING NEUTRALITY

Impartiality, open-mindedness, and disavowal of improper ideological commitments can all be seen as forms of neutrality, as can the vision of judging that the umpire metaphor most vividly evoked—seeking a single, objectively correct answer. The history of confirmation hearings is integrally tied to this latter, and, as already demonstrated, inaccurate vision of judging, especially on the Supreme Court. This Part explores that history, with a focus on the ways the nominees and senators alike have described the role of the Supreme Court Justice.¹²¹

Since 1955, the Senate Judiciary Committee has held confirmation hearings on 31 separate nominees, all of whom testified in per-

120. *Rehnquist Hearing II*, *supra* note 117, at 205 (emphasis added).

121. Statistics reported in this Part are drawn both from my own coding project, described in Carolyn Shapiro, *Claiming Neutrality and Confessing Subjectivity in Supreme Court Confirmation Hearings*, 88 CHI.-KENT L. REV. 455, 465–68 (2013) [hereinafter Shapiro, *Claiming Neutrality*], and from analysis of the dataset created by Ringhand and Collins. All reported statistics are significant at (at least) a $p > .05$ level and were generated using Stata12. As described in *Claiming Neutrality*, I recruited law students who coded the colloquies between senators and nominees through 2010. “Within each round, law students were instructed to identify . . . whether the nominee made claims that judging is a neutral or objective enterprise and whether he or she acknowledged the inevitable role of subjectivity.” *Id.* at 466. The students also coded the senators’ comments and questions in the same way. I then consolidated the data into 332 unique senator-nominee pairs. *Id.*

son.¹²² Out of these 31 nominees, ten were nominated by a Democratic president and 21 by a Republican president, and all but five were confirmed.¹²³ Although Republican presidents have made twice as many nominations as Democratic presidents, almost all of the nominations, by either party, were considered by a Senate under Democratic control. All ten of the Democratic nominees were made to Democratic-controlled Senates, and only five Republican nominees were made to a Republican Senate.¹²⁴ Table I provides basic information on the nominees.

These 31 hearings can be loosely grouped into four time periods:

1. The Segregationists' Last Stand, 1955–1968 (Harlan-Fortas/Thornberry)
2. Ethics, Background, and Qualifications, 1969–1975 (Burger-Stevens)
3. The Golden Age, 1981–1994 (O'Connor-Breyer)
4. The Age of the Umpire, 2005–2017 (Roberts-Gorsuch).¹²⁵

During the first period, rhetoric implying that there are objectively correct answers to difficult constitutional questions dominated the senators' substantive discussions. During the second period, this

122. Two individuals were nominated twice: Rehnquist and Fortas each appeared both when appointed to be an Associate Justice and later when nominated for Chief Justice. I count each nomination separately.

123. The failed nominations were Fortas in his bid to be Chief Justice, Thornberry, who was being nominated for Fortas's Associate Justice spot, Haynsworth, Carswell, and Bork. There have also been a few failed nominations—notably Douglas Ginsburg and Harriet Miers—where the nomination was withdrawn before a hearing could be held. These nominations are not considered in this Article.

124. These nominees were O'Connor, Scalia, Rehnquist (when nominated for Chief Justice), Roberts, and Alito. Note, then, that we have no examples of Democratic nominees being nominated to a Republican Senate. See Stone, *supra* note 44, at 386. Had he been given a hearing, Merrick Garland would have been the first such nominee.

125. These four periods are not scientifically determined, but there are solid bases for the distinctions. Periods Three and Four each begin after a number of years—and at least one complete four-year presidential term—during which there were no Supreme Court nominations. Six years (and the entire Carter presidency) passed between Justice Stevens's nomination in 1975 and Justice O'Connor's in 1981. And even more dramatically, between Justice Breyer's nomination in 1994 and Chief Justice Roberts's in 2005, 11 years went by, along with Bill Clinton's second term and George W. Bush's first. The division between Periods One and Two is somewhat more subjective, as there was no comparable chronological break. But there was a clear shift in tone following Justice Fortas's resignation under an ethical cloud and the transition in the presidency from President Johnson, a Democrat, to President Nixon, a Republican.

rhetoric faded. The third period provided surprisingly robust and candid discussions of judicial philosophy, although the nominees unsurprisingly maintained commitments to impartiality, open-mindedness, and the constraints of the judicial role. In the fourth period, however, the umpire analogy came to the fore, and the nominees—at least as much as the senators—came to embrace this inaccurate description of the job they were seeking. Put another way, in these hearings, nominees often made commitments to appropriate neutrality, while providing little-to-no insight into their judicial philosophies. As a result, the impression that emerges is that there are logically deducible correct answers and little-to-no room for discretion. And in the most recent hearing, Justice Gorsuch embraced this formalistic description of the job with particular fervor.

A. Period One: The Segregationists' Last Stand, 1955–1968

Only after the Supreme Court decided *Brown v. Board of Education* did it become standard practice for every nominee to personally testify before the Senate Judiciary Committee. This timing is no coincidence. In those early years, the hearings were dominated by ardent segregationists, including the committee chair, Senator James Eastland of Mississippi and his colleagues Senator John McClellan of Arkansas and Senator Sam Ervin of North Carolina. And by the mid-1960s, they were joined by Senator Strom Thurmond of South Carolina.¹²⁶ These four senators alone asked almost 65 percent of all of the questions posed to the nominees between the first hearing after *Brown* until Chief Justice Burger's confirmation hearings in 1969. If what Ringhand and Collins describe as "hearing administration and chatter" is omitted,¹²⁷ leaving only questions that could plausibly be related to substance, they asked 70 percent of the questions.¹²⁸ Indeed, most senators said nothing at all.

126. Eastland, McClellan, and Ervin were all Democrats. Thurmond, although originally a Democrat, had become a Republican by the time he joined the committee.

127. According to Ringhand and Collins, this category includes "[h]earing [a]dministration and [c]hatter; [c]haracter and [b]ackground, [e]thics of [n]ominee; [d]iscussion of [m]edia [c]overage or [s]pin [a]bout the [h]earings of the [n]ominee; [d]iscussions of [p]re-[h]earing [c]onversations or [c]oaching or [c]ontact [b]etween the [n]ominee and [e]xecutive [o]fficials or [o]thers." Ringhand & Collins, *May It Please the Senate*, *supra* note 15, at 638 app. B.

128. I initially found these results counterintuitive. Because Eastland was the chair, I assumed that omitting chatter would reduce the percentage of questions asked by segregationists. I suspect that the opposite is the case because many of the questions asked by the other senators were non-substantive: general declarations of support for the nominee, for example, or simply passing on the opportu-

The segregationist senators were deeply unhappy about *Brown*, and they seized the opportunity presented by the hearings to emphasize their view that *Brown* was illegitimate. During Potter Stewart's 1959 confirmation hearing, for example, Senator Ervin made a lengthy speech condemning *Brown* as "a most unfortunate decision from the standpoint of law, [c]onstitutional law in the United States."¹²⁹ As the 1960s wore on, complaints about *Brown* itself gave way to complaints about the Warren Court's criminal procedure jurisprudence.¹³⁰ Both before and after the shift away from *Brown*, however, these senators presented a remarkably consistent vision of the appropriate role of the Supreme Court, and that vision was couched in the language of neutrality and objectivity.

More specifically, these senators repeatedly argued that the Constitution's meaning was fixed when it was ratified. As Senator Ervin put it in his diatribe at the Stewart hearing, the Court "should have turned the clock back to 1868 when the [Fourteenth] Amendment was ratified"¹³¹ to consider what the ratifiers and drafters thought and did with respect to segregation in schools.¹³² When the Supreme Court "updated" the Constitution (as these senators claimed it had in *Brown*) or overruled constitutional precedent (likewise), it was imposing the policy preferences of unelected Justices on the rest of the country, making the Constitution itself meaningless or illegitimately amending it.¹³³ The legislative power is vested only in Congress, and the judicial branch should not "legislate from the bench." Judicial restraint requires recognizing all of

nity to ask questions. Moreover, although Eastland, McClellan, Ervin, and Thurmond were the most active questioners, they were not the only unhappy southerners on the committee. All told, segregationists asked 69 percent of the questions overall and more than 73 percent of the substantive questions.

129. *Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 86th Cong. 124–30 (1959) [hereinafter *Stewart Hearing*]. It was apparently a speech his colleagues had heard before. Senator Ervin announced that he "want[ed] to talk a little bit about the *Brown* case so folks can understand our position." *Id.* at 124. At this point, Senator Dirksen interjected with sarcasm that is apparent even from the cold transcript: "Sam, I haven't heard you talk about the *Brown* decision." *Id.*

130. See COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 167–68 (describing the evolution of discussions of *Brown* during the 1960s).

131. *Stewart Hearing*, *supra* note 129, at 124.

132. *Id.* at 125–28.

133. See, e.g., *id.* at 130; *Fortas Hearing I*, *supra* note 116, at 55 (statement of Sen. Sam J. Ervin, Jr., Member, S. Comm. on the Judiciary) (describing as "dangerous . . . the fact that judges can take the due-process clause and make it mean almost anything they want it to mean").

the above and acting accordingly. As Senator Ervin put it during Justice Marshall's confirmation hearings,

the road to destruction of constitutional government in the United States is being paved by the good intentions of the judicial activists, who, all too often, constitute a majority of the Supreme Court. A judicial activist, in my book, is a man . . . who is willing to add to the Constitution things that are not in it, and to subtract from the Constitution things which are in it.¹³⁴

These statements are not particularly surprising. Indeed, there is a long tradition of such complaints by commentators, politicians, activists, academics, and dissenting judges who are unhappy with Supreme Court decisions and complain about activist Justices.¹³⁵ Nor do these complaints always come from the Right. But a few things about this rhetoric are worth noting.

First, the rhetoric implies that there are objectively correct answers to constitutional questions, that finding those answers requires discerning the framers' intent, and that all other interpretations—or approaches to interpretation—are lawless and activist. Although no senator or nominee would attack *Brown* on these grounds today, that rhetoric is likely to be familiar to the modern reader.

Second, the Warren Court's opponents sometimes framed their questions so that there really was no right answer other than to agree. In other words, they couched their claims about the exclusive validity of a particular jurisprudential approach (and by extension, the invalidity of many of the holdings of the Warren Court), in language that also referenced improper considerations. Consider, for example, a question posed to Justice Harlan¹³⁶ by Senator Eastland, chairman of the committee—a question he said had been

134. *Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 155–56 (1967) [hereinafter *Marshall Hearing*].

135. See, e.g., Adam Liptak, *How Activist is the Supreme Court?*, N.Y. TIMES (Oct. 12, 2013), <http://www.nytimes.com/2013/10/13/sunday-review/how-activist-is-the-supreme-court.html?pagewanted=all>; THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004).

136. Harlan faced opposition, particularly by Southerners, who “contend[ed] that he was ‘ultra-liberal,’ hostile to the South, [and] dedicated to reforming the Constitution by ‘judicial fiat.’” ABRAHAM, *supra* note 79, at 206. See also Norman Dorsen, *The Selection of Supreme Court Justices*, 4 INT’L J. CONST. L. 652, 658 (2006) (noting that “the segregationist chairman of the Senate Judiciary Committee, James Eastland, delayed the confirmation of Justice Harlan for several months in 1955 because of the (correct) assumption that, as a Justice, Harlan would support civil rights”). Harlan’s pride that his grandfather had authored the famous

given to him by another, unnamed senator: “Do you believe the Supreme Court of the United States should change established interpretations of the Constitution to accord with the economic, political, or sociological views of those who from time to time constitute the membership of the Court?”¹³⁷

There is, of course, only one appropriate answer to the question as posed, and Justice Harlan gave that answer. He unsurprisingly pledged to set aside his “personal predilections so far as it is possible to do so and to decide issues before him according to the law and the facts and the Constitution.”¹³⁸ The rhetoric of these early hearings thus conflated rejection of a judicial activism no nominee could or should defend—the right to change the meaning of the Constitution at whim—with a particular approach to constitutional interpretation—the (purported) originalism promoted by the segregationists. And the nominees did not generally explain that the two ideas could be distinguished.

Third, not all the nominees during this period were subjected to the same types or amounts of questioning. Some received the full force of the segregationists’ displeasure with the Warren Court. As already mentioned, Senator Ervin seized the occasion of Justice Stewart’s hearing to make a speech about *Brown*. Justice Marshall’s hearing was especially notable in terms of both its length and its hostility. In particular, during Marshall’s hearing, Senator Thurmond was at his most vocal, and his questioning was “venemous.”¹³⁹ Other nominees who were challenged at some length to disclaim judicial activism and commit to not legislate from the bench, for example, included Justices Harlan, Brennan, and Goldberg. And in 1968, when Chief Justice Earl Warren announced his retirement and President Johnson nominated Associ-

dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), could not have helped his standing with the segregationists. See ABRAHAM, *supra* note 79, at 206-07.

137. *Nomination of John Marshall Harlan, of New York, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 84th Cong. 140 (1955) [hereinafter *Harlan Hearing*].

138. *Id.* at 141. Eastland responded: “Of course, I knew you would answer it that way.” He then followed with two other questions: Did Justice Harlan believe that the Court could change “established interpretations” of the Constitution, given the difficulty of amending it through the means delineated in, and “is the legislative power as effectually denied to the courts of the United States by the Constitution as it is to the Executive?” *Id.* As Justice Harlan drily noted about the last question, the question “ought to carry its own answer[s].” *Id.*

139. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 169. Among other things, Thurmond quizzed Marshall on historical trivia in an apparent attempt to humiliate him. See *Marshall Hearing*, *supra* note 134, at 161-72.

ate Justice Abe Fortas to take his place,¹⁴⁰ the hearing for Fortas's elevation was, in many ways, a classic example of the segregationists' approach. As a member of the Warren Court since 1965, Fortas was an appealing target for unhappy senators. Senators Ervin and Thurmond, for example, gave lengthy exegeses about what they deemed wrong with the Warren Court jurisprudence.¹⁴¹ Ervin complained about the Court "rewrit[ing] an act of Congress . . . which clearly violated the constitutional provision vested in the power of the legislating Congress [sic]."¹⁴² Thurmond asked Fortas repeatedly to explain his votes in various Supreme Court opinions including, for example, *Harper v. State Board of Elections*,¹⁴³ which held that poll taxes violate the Equal Protection Clause.¹⁴⁴ Fortas refused to respond to questions about specific cases.¹⁴⁵

But other nominees received different treatment. Justice Charles Whittaker's 1957 testimony takes up exactly three pages of transcript and consists largely of biographical information—some of it clearly designed to charm (he rode a pony to high school "through 6 miles of mud night and morning . . .")¹⁴⁶—along with some mild questioning about his decisions in a case brought by a frustrated attorney who appeared before the Committee to testify against Whittaker's appointment.¹⁴⁷ Justice White received similar treatment in 1962. The transcript of his committee appearance takes up four-and-a-half transcript pages.¹⁴⁸ And ironically in light of his treatment at his second hearing, Abe Fortas's hearing in 1965 to become an Associate Justice was extremely short. Including the testimony of other witnesses, the entire hearing lasted less than three hours, and there was virtually no discussion of judicial philosophy.¹⁴⁹

140. At the same time, Johnson also nominated Fifth Circuit Judge Homer Thornberry for the Associate Justice seat that Fortas would be vacating.

141. *Fortas/Thornberry Hearing*, *supra* note 28, at 126–68 (statements of Senator Sam J. Ervin, Jr., Member, S. Comm. on the Judiciary); *id.* at 180–224, 231–47 (statements of Senator Strom Thurmond, Member, S. Comm. on the Judiciary).

142. *Id.* at 129.

143. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

144. *Id.*

145. *Fortas/Thornberry Hearing*, *supra* note 28, at 181–82, 189.

146. *Whittaker Hearing*, *supra* note 26, at 32.

147. *Id.* at 32–33. In another quirk of the early hearings, this witness, Fyke Farmer, interjected several times during Whittaker's own testimony. *Id.* at 33.

148. *White Hearing*, *supra* note 26, at 22–26.

149. *Fortas Hearing I*, *supra*, note 116, at 1–57. The most substantive discussions involved some questions about Fortas's views on balancing the interests of the accused and the interests of society and about whether he believed that the recent decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), establishing the one-person-one-vote principle, called into question the allotment of two senators per state

Finally, during this period of time, there was remarkably little effort by other senators, or even by the nominees themselves, to articulate or discuss a different view. Such efforts existed,¹⁵⁰ but overall, between 1955 and 1968, there was only an 18 percent chance of a senator acknowledging room for judgment and subjectivity in colloquy with any particular nominee, compared to a 33 percent chance in all other periods combined. Some of the nominees did articulate an alternative view—Justice Goldberg, for example, explained that while a judge “would be derelict in [his] duty if [he] construed the Constitution to be such a broad document that anything is permitted,” still, “reasonable men may differ, and they do, about interpretation” of the Constitution.¹⁵¹ Overall, however, nominees, too, were less than half as likely to acknowledge the room for judgment during Period One than in the rest of the periods combined.¹⁵²

regardless of population. *Id.* at 51–54 (statements of Senator Hiram L. Fong, Member, S. Comm. on the Judiciary, Senator Sam J. Ervin, Jr., Member, S. Comm. on the Judiciary, and Abe Fortas).

150. See, e.g., *Nomination of William Joseph Brennan, Jr., of New Jersey, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 85th Cong. 39 (1957) [hereinafter *Brennan Hearing*] (statement of Sen. Arthur V. Watkins, Member, S. Comm. on the Judiciary) (arguing that a judge should decide a constitutional issue “in the best light [he] ha[s] and the best intelligence according to [his] conscience”); *id.* at 38, 40 (statements of Senator Alexander Wiley, Member, S. Comm. on the Judiciary) (arguing that “[t]he Constitution is a living thing, it is not meant to be a dead thing,” and that “[i]t is meant to keep America alive in the changing world in which we live . . . [i]t is meant to be a vital dynamic thing to preserve our rights”). Just as it may surprise some of today’s readers that the most ardent proponents of originalism were Democrats, it may be surprising that both Senator Watkins and Senator Wiley were Republicans.

151. *Nomination of Arthur J. Goldberg, of Illinois, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 87th Cong. 27 (1962) [hereinafter *Goldberg Hearing*]. See also, e.g., *id.* at 26 (noting that the Framers wisely “drafted the Constitution . . . in broad terms so that new conditions could be taken into account”); *Stewart Hearing, supra* note 129, at 16 (describing how much “the power over interstate commerce which was given in that document to the Federal Government, has in detail and specifically quite a different meaning from what the framers of that document could ever imagine that it could have because that was written before there were automobiles, before there steam boats, certainly before there were airplanes, or atomic energy,” and noting that “[t]he genius of the framers is that [the Commerce Clause] . . . is applicable to changing [sic] and growing society”).

152. Cf. *Shapiro, Claiming Neutrality, supra* note 121, at 468 (reporting that nominees became more likely to acknowledge subjectivity in judging over time, at least before 2000).

B. *Period Two: Ethics, Background, and Qualifications, 1969–1975*

Justice Fortas's 1968 nomination to become Chief Justice turned out to be highly controversial in part for reasons other than his jurisprudence—specifically because of ethical concerns. The very first questions he was asked at his confirmation hearing were about his conduct while a Justice: had he inappropriately helped people get jobs in the Executive Branch, and had he inappropriately consulted with the President on matters that would or could come before the Court.¹⁵³ Ultimately, Justice Fortas's nomination for Chief Justice fell to a filibuster in the Senate,¹⁵⁴ and about a year later, under an ethical cloud, he resigned from the Court altogether.¹⁵⁵

Additionally, President Nixon's 1969 nomination of Clement Haynsworth to fill Abe Fortas's vacated Associate Justice seat raised its own concerns about ethics, in particular Judge Haynsworth's recusal practices and business interests.¹⁵⁶ During that hearing, more than 80 percent of the senators who spoke raised questions related to ethics and background—almost twice the average of all other confirmation hearings—and almost 80 percent of the questions asked of Haynsworth involved such matters.¹⁵⁷ Haynsworth's nomination was defeated by a vote of 55 to 45.¹⁵⁸

The Haynsworth and Fortas nominations set an important precedent.¹⁵⁹ Indeed, senators continue to see the investigation of a

153. *Fortas Hearing I*, *supra* note 116, at 103–105 (colloquy with Senator James O. Eastland, Chairman, S. Comm. on the Judiciary). *See also id.* at 164–68 (similar questioning from Senator Ervin).

154. Judge Thornberry's nomination was therefore not considered further, and he never received a vote.

155. The ethical concerns included “revelations concerning his relationship with [a] convicted financier.” ABRAHAM, *supra* note 79, at 10.

156. COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 130.

157. *Id.*

158. Congressional concern about ethics was not Haynsworth's only problem. He was also seen as a foe of civil rights, demonstrating the reality that a consensus was forming around *Brown*. *Id.* at 171, 171 n.61. *See also* ABRAHAM, *supra* note 79, at 11 (noting opposition to Haynsworth due to “allegedly anti-civil libertarian and anti-civil rights stands”).

159. In the immediate aftermath of Haynsworth's defeat, some senators were explicit about their view that previous experience meant that they should at least make some basic ethics inquiries part of the confirmation process. *See, e.g., Carswell Hearing*, *supra* note 116, at 28 (statement of Sen. Edward M. Kennedy, Member, S. Comm. on the Judiciary) (asking about recusal decisions and noting that the committee had “gone through . . . in great depth and with substantial impact this whole question with a previous nominee”); *id.* at 32–33 (statement of Sen. Edward M. Kennedy, Member, S. Comm. on the Judiciary) (noting that “[t]he most serious

nominee's ethics and background as an important part of their job, and that continues to this day.¹⁶⁰ Not every nominee, however, is subjected to the same amount of questioning about their ethical background. Rather, the senators appear to be alert to ethical concerns and are presumably prepared to probe those issues if they arise.¹⁶¹ Likewise, after Nixon's next nominee, Judge G. Harold Carswell of Florida, turned out both to have endorsed white supremacy as a younger man and to be a mediocre judge at best,¹⁶² qualifications and background became and have remained a central issue for the Committee.

Notable for purposes of this Article, however, is that while ethics and background became a more significant focus of attention during Period Two, the tenor of the hearings changed in other ways as well. Although the segregationists remained on the Judiciary Committee, they asked only about 27 percent of the questions during Period Two, as opposed to nearly 70 percent in Period One. While individual senators were as likely to assert neutrality at least once per hearing during the two periods, the overall shift towards a focus on ethics and the proportional decrease in the participation of the segregationists meant that the use of the hearings as an opportunity to complain about the Warren Court largely dissipated.¹⁶³ Overall, then, there was less emphasis on the "objective" version of judging that the segregationists pushed during Period One.

The first and last hearings during this period help demonstrate the contrast with and transition from Period One. The first hearing was for Chief Justice Burger, who President Nixon nominated in 1969 to replace Chief Justice Warren. His hearing occurred in June,

problem we had during the last confirmation proceeding [Haynsworth] was the question of standards for a judge's disqualifying himself in certain cases").

160. The likelihood of a senator asking about ethics and background was about the same in Period Two as in Period Three, but that likelihood diminished in Period Four. There are several possible explanations for that change. For example, post-2000 nominees may have been vetted more extensively by the executive branch, for example, making such inquiries less necessary by the time the nominee has his or her hearing.

161. This is evident as much from the numbers of questions asked about ethics and background than the percentage of senators asking. According to the Ringhand/Collins database, which those authors shared with me, *see supra* note 119, Justice Breyer, for example, was asked 144 questions about ethics, while Justice Ginsburg was asked only 33. Justice Alito was asked 222, but Chief Justice Roberts was asked only 91. *See also* COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, Appendix (describing coding methodology).

162. ABRAHAM, *supra* note 79, at 11–12.

163. "By the late 1960s, *Brown* was widely accepted by the public and embraced by constitutional theorists." COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 171.

1969, months after Fortas's ill-fated nomination was withdrawn, and less than a month after his resignation. But Burger's hearing also occurred before the President nominated Judge Haynsworth to replace Justice Fortas.

At Burger's hearing, unlike the recent Fortas hearing, the Marshall hearing, and numerous others during the post-*Brown* years, the segregationist senators did not hold forth on and challenge the nominees about their views of *Brown* or the Warren Court. Senator Ervin did not ask any questions at all and instead announced his belief that Burger had already "manifested his devotion to the Constitution and devotion to the law."¹⁶⁴ Senator Thurmond, likewise, asked no questions and made a statement of support similar to Ervin's.¹⁶⁵ And the other previously vocal segregationists engaged with Burger about judicial philosophy only marginally more, asking a tiny number of easily-answered questions.¹⁶⁶ Overall, these previously oppositional senators were pleased with the Burger nomination—and indeed said so explicitly.

But if the tone of the hearing was different from many of those that had come before, it was also unlike those that came afterwards. Unlike the Haynsworth hearings, there were virtually no questions about Burger's ethical conduct or about his qualifications.¹⁶⁷ By

164. *Nomination of Warren E. Burger, of Virginia, to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 91st Cong. 7* (1969) [hereinafter *Burger Hearing*].

165. *Id.* at 20 (noting that Burger's judicial record indicated that he "believe[d] in a strict construction of the Constitution[,] in interpreting the law but not legislating, in strong enforcement of the law, in equal treatment for all with favoritism to none, and in preserving the structure of government provided in our Constitution").

166. Senator Eastland, the committee chairman, asked if "the Supreme Court has the power to amend the Constitution . . . through judicial interpretation . . . [or] to legislate judicial interpretations." *Id.* at 5. Burger said no. *Id.* And Eastland asked Burger if as Chief Justice he would "take special care to preserve to the State and local governments all of the rights, responsibilities, and powers reserved to them by the Constitution." *Id.* In response, Burger promised to "support and defend the Constitution." *Id.* Senator McClellan, for his part, asked two questions about "the proper balance between the rights of the accused and society," and quoted approvingly from a Burger dissent that declared the courts' job as "interpret[ing] the laws faithfully as Congress wrote them, not as we think Congress ought to have provided." *Id.* at 6. See also COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 171 (describing Burger hearing).

167. One senator asked Burger for "a list of all professional corporations, business firms or enterprises in which you have been an officer, director, or proprietor during the time that you have been on the bench," and said that he "should have asked [this] of the last nominee for Chief Justice [Fortas]." *Id.* at 8 (statement of Sen. Joseph D. Tydings, Member, S. Comm. on the Judiciary). But the conversation immediately moved on to a more extensive discussion of judicial management issues. *Id.*

the time of Justice Stevens's hearing in 1975, however, ethics and qualifications had become significant concerns. There were a fair number of questions about, for example, then-Judge Stevens's recusal practices¹⁶⁸ and about whether he received income from any non-judicial sources.¹⁶⁹ His health was discussed in some detail¹⁷⁰—ironically given that more than 40 years later, Justice Stevens is still with us.¹⁷¹

At Justice Stevens's hearing, although Senator Eastland remained chairman of the committee, and Senator McClellan and Senator Thurmond were still members, none of them asked probing or substantive questions. Senator Byrd of West Virginia, a former Ku Klux Klan member, picked up some of the slack, asking, for example, about Stevens's "view of the idea that the Constitution had a fixed and definite meaning when it was adopted and that the same fixed and definite meaning prevails today but that it must be applied to changing circumstances and interpreted and construed in the light of those circumstances."¹⁷² But Byrd's questioning was relatively mild and short-lived compared to what Fortas and Marshall had endured.

In response to Byrd, Stevens articulated a view of constitutional adjudication that incorporated the need for judgment. "The more fundamental the charter is," he said,

the more it must, necessarily, contain open areas that require construction and interpretation. And to the extent that open areas remain in our Constitution, and inevitably a large number do—I must say, I don't mean to digress too much, but I have been constantly surprised in my work how many questions have not yet been decided, statutes, Constitution, all the rest—where there are open areas, the judge, I think, has the duty, really, to do two things. One, to do his best to understand what was intended in this kind of situation, and yet to realize that our society does change and to try to decide the case in a context that was not completely understood and envisioned by those who drafted the

168. *Nomination of John Paul Stevens, of Illinois, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 94th Cong.* 31–32, 36, 70–71 (1975) [hereinafter *Stevens Hearing*].

169. *Id.* at 51–52.

170. *Id.* at 8–12.

171. Then-Judge Stevens pointed out that his "family has a history of longevity" and that his mother was then 94 years old. *Id.* at 10. Justice Stevens, of course, is now 97 years old. Biography of Justice John Paul Stevens (Ret.), <https://www.supremecourt.gov/about/biographies.aspx#JStevens>.

172. *Stevens Hearing*, *supra* note 168, at 41.

particular set of rules. So there is an open area within which the judge must work.¹⁷³

But there was very little further discussion of how the judge would operate in that open area. Senator Byrd did not press Stevens.¹⁷⁴ Period Two ended then, with a much different tone from Period One. The tension persisted (as it still does today) between those who claimed there are objectively correct answers to difficult legal questions and those who believed that there is often an unavoidable role for judgment, but those discussions were muted.

C. *Period Three: The Golden Age, 1981–1994*

Period Three, during which there were nine Supreme Court confirmation hearings,¹⁷⁵ began with a significant shift in media coverage. Starting with Justice O'Connor's 1981 hearing, the hearings were televised. And in an undoubtedly related development, O'Connor's hearing was also the first at which there was an assumption that every senator would ask questions of the nominee.¹⁷⁶ That development alone changed the dynamics of the hearing, because, unlike in Period One, the questioning was not dominated by a group of senators who had a particular axe to grind and a particular claim about how Supreme Court Justices should do their jobs. And unlike in Period Two, senators asked more substantive questions.

But it is the fourth of those hearings, for Robert Bork's failed nomination, that is widely viewed as seminal—although as discussed earlier, there is disagreement on precisely what it presaged. Some decry what they view as the beginning of the overpoliticization of the nomination process, as illustrated by Bork's defeat.¹⁷⁷

173. *Id.* at 42.

174. The other most persistent questioner was Senator Kennedy, who appeared to be concerned that Justice Stevens was too conservative and focused primarily on his views about particular issues, such as gender discrimination, *id.* at 15–17, and capital punishment, *id.* at 26–28, and much less on bigger questions of judicial philosophy. Stevens declined to answer many of Kennedy's specific questions about such issues. *See id.* at 15–17, 26–28.

175. The nominees were Sandra Day O'Connor (1981), William Rehnquist (as Chief Justice) (1986), Antonin Scalia (1986), Robert Bork (1987), Anthony M. Kennedy (1987), David H. Souter (1990), Clarence Thomas (1991), Ruth Bader Ginsburg (1993), and Stephen G. Breyer (1994).

176. *See Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 97th Cong. 59* (1981) [hereinafter *O'Connor Hearing*] (statement of Sen. Strom Thurmond, Chairman, S. Comm. on the Judiciary) (explaining that there would be two rounds of 15-minute questioning sessions).

177. *See, e.g., Totenberg, Bork's Nomination, supra* note 38.

Others argue that the nomination demonstrated the proper functioning of the democratic check on lifetime appointments.¹⁷⁸ Some argue that because Bork's relative candor led to his nomination's defeat, subsequent nominees have refused to provide meaningful information, although Farganis's and Wedeking's research suggests otherwise.¹⁷⁹ Regardless of the accuracy of that perception, however, Bork was more likely than all other nominees combined to claim neutrality. Indeed, he did so at least once with almost every senator (92 percent). During the 1990s in particular, commentators were very harsh about the proceedings and the lack of information the nominees shared, or for that matter, were asked for by the senators.¹⁸⁰

Ironically, however, after Bork, discussions of judicial philosophy intensified, ushering in something of a golden age. During this time, nominees and senators on both sides of the political spectrum acknowledged that there are often not objectively deducible correct answers to difficult legal questions, and thus—whether implicitly or explicitly—acknowledged a role for value-laden judgments.

1. *Before Bork.*

By the time of Justice O'Connor's hearing, the only remaining member of the segregationist old-guard still on the Judiciary Committee was its chair, Strom Thurmond.¹⁸¹ And one of Thurmond's first questions indeed echoed the segregationist complaints about the Warren Court. "[T]he phrase 'judicial activism,'" he said, "refers to the practice of the judicial branch substituting its own policy preferences for those of elected Representatives," and he asked then-Judge O'Connor for her views about the proper role of the courts.¹⁸² Not surprisingly, she rejected the notion that judges can impose their own policy preferences.¹⁸³

178. See, e.g., COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 197, 200; s. *supra* note 63, at 1221; Greenhouse, *2,691 Decisions*, *supra* note 63.

179. Farganis & Wedeking, *supra* note 16, at 527, 540–42.

180. See, e.g., Kagan, *supra* note 11, at 925, 941.

181. *O'Connor Hearing*, *supra* note 176, at ii.

182. *Id.* at 60.

183. Then-Judge O'Connor said:

It is the role and function, it seems to me, of the legislative branch to determine public policy; and it is the role and function of the judicial branch, in my view, to interpret the enactments of the legislative branch and to apply them, and insofar as possible to determine any challenges to the constitutionality of those legislative enactments. In carrying out the judicial function, I believe in the exercise of judicial restraint. *Id.*

But there was also some acknowledgment, by both O'Connor and by other senators, that conditions in the world might lead to new understandings of constitutional provisions—a possibility that inevitably requires judges to exercise some judgment. For example, Senator Arlen Specter noted that the reasoning of *Brown* rested on new understandings about the “effect of segregation on public education,”¹⁸⁴ and asked whether, however “strict a constructionist [one] may be, there is some latitude appropriately to consider public policy or social policy in interpreting the Constitution.”¹⁸⁵ Justice O'Connor agreed, with her caveats focusing primarily on the importance of the information coming to the Court through briefing rather than the Court “look[ing] outside the record.”¹⁸⁶ This kind of discussion was new to the hearings.

In addition, in 1981, neither *Brown* nor criminal procedure jurisprudence dominated discussions about judicial activism.¹⁸⁷ Instead, abortion and the appropriateness of *Roe v. Wade* had

184. *Id.* at 131.

185. *Id.* at 132.

186. *Id.* Initially, however, O'Connor struggled to articulate the nature of the decision-making in *Brown*. Senator Biden suggested that “when in fact the legislative bodies of this country have failed in their respon[s]ibilities—as they did in the civil rights area—to react to . . . the change in the mores of the times, and see to it that that is reflected in the law, on those rare occasions it is proper for the Court to step in.” *Id.* at 67 (statement of Sen. Joseph R. Biden, Jr., Member, S. Comm. on the Judiciary). Although O'Connor made clear that she believed *Brown* was correctly decided, she took issue with Biden's explanation. *Id.* Instead, she explained that “the Court ha[d] reached changed results based interpreting a given provision of the Constitution based on its research of what the true meaning of that provision is—based on the intent of the framers, its research on the history of that particular provision.” *Id.* See also *id.* at 84 (articulating this view of *Brown* in colloquy with Sen. Orrin G. Hatch, Member, S. Comm. on the Judiciary); *id.* at 102 (same, with Sen. Patrick J. Leahy, Member, S. Comm. on the Judiciary). Biden and others pressed her on this point. During his second round of questioning, for example, Biden quoted from *Brown*, pointing out that her description of what had happened in that case was inaccurate and that the Court had been explicit that it was responding to changed “social mores” and not a new historical understanding of the Fourteenth Amendment. *Id.* at 138. He continued:

I know you know that, and I know it is difficult for you to respond to that because as soon as you respond to me you are going to have 14 other men jumping on you to say something else, so I will not even ask you to answer it, but I hope you know that I know you know.

Id. By the second day of hearings, O'Connor had come around to agreeing with Biden, as indicated in the colloquy with Specter discussed above. *Id.* at 132.

187. It would be inaccurate to say that these issues were completely irrelevant. Sen. Laxalt, for example, asked O'Connor if she thought the exclusionary rule “may be too narrow, overprotecting the rights of defendants while impeding the ability of the law enforcement people to enforce the law,” *id.* at 79, and Sen. Grassley asked about busing, *id.* at 119.

become the focus of such concerns.¹⁸⁸ Several senators described *Roe v. Wade* as an extraordinarily activist decision,¹⁸⁹ and several of them expressed frustration at O'Connor's unwillingness to presage how she might vote in cases involving abortion.¹⁹⁰ But even one of those senators, Jeremiah Denton of Alabama, acknowledged that the answers to difficult constitutional questions were not necessarily objectively deducible. Quoting from a letter from "constitutional lawyer" William Bentley Ball, he stated:

Philosophy is everything in dealing with the spacious provisions of the first amendment, the due process clauses, equal protection, and much else in the Constitution. It is perfect nonsense to praise a candidate as a "strict constructionist" when in these vital areas of the Constitution there is really very little language to "strictly" construe.¹⁹¹

Similar acknowledgments of the role of judgment in judging—although a minor part of the colloquies—continued during the two other pre-Bork hearings—Rehnquist's hearing to be Chief Justice, and Scalia's hearing to fill Rehnquist's Associate Justice seat. Probably because Rehnquist had already been on the Court for 15 years and his views on many subjects—including his dissenting vote in *Roe* itself—were already known, much of his second hearing involved questions about management of the judicial system and the role of the Chief Justice on the Court.¹⁹² But even so, the issue of the role of judgment arose. Pressing Rehnquist on the different standards used to evaluate constitutionality under the Equal Protection Clause, for example, Senator Biden posited "that the rational basis test as well as the strict scrutiny test were in fact interpretive judgments made by sitting Justices as to the extent to

188. See, e.g., *id.* at 107 (statement of Sen. John P. East, Member, S. Comm. on the Judiciary); *id.* at 198 (same). *Roe* was decided in 1973, and after it came down, only one Period Two nominee—Stevens—was considered. At Stevens's hearing, *Roe* and abortion barely merited a mention.

189. *Id.* at 107 (statement of Sen. John P. East, Member, S. Comm. on the Judiciary); *id.* at 198 (same).

190. *Id.* at 249 (statement of Sen. Jeremiah Denton, Member, S. Comm. on the Judiciary).

191. *O'Connor Hearing*, *supra* note 176, at 249.

192. There were also many questions both about his conduct towards African-American voters during an election many years earlier and about a memo he had written while clerking for Justice Jackson stating the view that *Plessy v. Ferguson* had been correctly decided and should not be overruled. Rehnquist maintained that he had written the memo to express Jackson's views, not his own, and he was subjected to significant questioning about that claim. He did admit, however, that at the time, he thought that even if *Plessy* were wrongly decided, there were strong arguments against overruling. *Rehnquist Hearing II*, *supra* note 117, at 85–86, 223–224.

which the 14th amendment should go,”¹⁹³ and Rehnquist agreed.¹⁹⁴ Even Justice Scalia, testifying the week after Rehnquist, acknowledged that his focus on original meaning could not answer all constitutional questions and that “where the law has to be applied to circumstances that just did not exist at the time, you obviously have to decide as a judge what resolution would most comport with the application of that clause to the circumstances that did exist at the time and try to make it fit.”¹⁹⁵ In both hearings, these elements of the discussion were minor compared to other issues, but they represented the beginning of a more accurate description of judging than the claims of objectivity like those the segregationists had championed.

2. *Bork.*

Robert Bork was a judge on the D.C. Circuit when he was nominated, but he was also a longtime law professor and had written and spoken extensively. He was the first nominee to set forth a detailed set of theories about the Constitution and how it should be interpreted. (Although Justice Scalia became a famous champion of originalism and textualism, he did not take such strong positions at his hearing.)¹⁹⁶ Bork’s theories, and his writings and speeches, became the centerpiece of his hearing, as senators pushed him to explain what many considered his extreme views about the Constitution.

Bork believed that recognizing one person’s constitutional rights necessarily reduced the rights of others because it prevented those others from enacting laws or otherwise behaving in ways that infringed on the newly recognized right¹⁹⁷—a kind of “zero-sum” Constitution.¹⁹⁸ Indeed, he agreed, when asked, that “if you give slaves freedom . . . you then take away the freedom of slave own-

193. *Id.* at 355.

194. *Id.* (“No question about it.”).

195. *Scalia Hearing, supra* note 91, at 109.

196. Scalia explained that he did not have “a fully framed omnibus view of the Constitution,” although he did not like the term “living Constitution.” *Id.* at 48, 49. He went on: “What I think is that the Constitution is obviously not meant to be evolvable so easily that in effect a court of nine judges can treat it as though it is a bring-along-with-me statute and fill it up with whatever content the current times seem to require.” *Id.* at 48.

197. *Bork Hearing, supra* note 90, at 313 (colloquy with Sen. Paul Simon, Member, S. Comm. on the Judiciary).

198. Linda Greenhouse, *A Time to Choose for the Supreme Court*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/opinion/a-time-to-choose-for-the-supreme-court.html?_r=0.

ers.”¹⁹⁹ As a result, he claimed it was necessary to hew narrowly to the Constitution’s language and original intent, and in language that echoed some of the segregationists’ criticisms of the Warren Court, he condemned the use of the Due Process Clause as something “free-floating” the Court “makes [] up.”²⁰⁰ Bork did not believe, for example, that a court should recognize a constitutional right to marital privacy in the absence of a constitutional provision clearly protecting that privacy.²⁰¹

But Bork did not deny a role for judgment. Repeatedly, in fact, he described judicial decision-making that had no objectively deducible answer. He explored factors that would lead him to set aside *stare decisis* and overrule a case;²⁰² he suggested that even without intermediate scrutiny, “as culture changes and as the position of women in society changes,” many restrictions on women that “seemed reasonable now seem outmoded stereotypes and they seem unreasonable”²⁰³

Nonetheless, many senators challenged Bork’s approach to constitutional interpretation, and in doing so, made statements that implicitly promoted—and publicized, in a televised hearing that went on for days—a view of constitutional adjudication that requires judges to apply broadly-worded constitutional provisions to new situations or in light of new understandings about the world that the Framers might never have imagined. During an early discussion, for example, Senator Biden pressed Bork to explain why he did not believe that *Griswold’s* holding—that married couples could not constitutionally be denied access to birth control—could be justified.²⁰⁴ Similarly, Senator Kennedy asked him to explain why he had argued that heightened scrutiny under the Equal Protection Clause should not apply to gender discrimination.²⁰⁵ These lines of questioning implied the appropriate use of judgment in defining the scope of constitutional rights—a broader use of judgment than Bork was willing to accede to.

199. *Bork Hearing*, *supra* note 90, at 313 (describing freeing slaves as “a redistribution of liberties, commanded by the 13th amendment” and promising that “I certainly have no objection to a redistribution of liberties whenever the Constitution requires or authorizes it”).

200. *Id.* at 315.

201. *Id.* at 114–21.

202. *Id.* at 128–29.

203. *Id.* at 161.

204. *Id.* at 114–21. Bork argued that he had restricted his criticism to the reasoning of *Griswold*, not its result, and that although he did not know of a constitutional argument in support of its holding, he had not concluded that none could possibly exist. *Id.*

205. *Id.* at 159–61.

3. *Post-Bork.*

Substantive questioning of, and discussion by, subsequent nominees continued after Bork's nomination was defeated,²⁰⁶ and it is worth examining the hearing immediately following his—Justice Kennedy's—in some detail. During that hearing, which took place at the end of 1987, only a few months after Bork's nomination failed, Kennedy, along with numerous senators, repeatedly described the judicial role as requiring judgment. Early on, for example, Senator Biden, by then the chair of the Committee, explained that he was going to start his questioning “with the unenumerated rights question, which occupied a great deal of our time in the . . . prior hearing with Judge Bork.”²⁰⁷ More specifically, Biden asked Kennedy about his previous description of the Fifth and Fourteenth Amendments' liberty guarantee as “a spacious phrase.”²⁰⁸ Kennedy explained that “the words of the Constitution must be the beginning of our inquiry,” but he went on to describe a “line that is drawn where the individual can tell the Government: Beyond this line you may not go.”²⁰⁹ Moreover, he added, that line “is wavering; it is amorphous; it is uncertain. But this is the judicial function.”²¹⁰ Kennedy thus explicitly embraced a “judicial function” that encompasses questions of judgment,²¹¹ and he and Senator Biden went on to discuss the second Justice Harlan's statement that

206. Ringhand & Collins, *May It Please the Senate*, *supra* note 15, at 597–98.

207. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 85 (1987) [hereinafter *Kennedy Hearing*]. See also *id.* at 117 (statement of Sen. Dennis DeConcini, Member, S. Comm. on the Judiciary noting that “fundamental disagreement” about the Equal Protection Clause that emerged during the Bork hearing).

208. *Id.* at 85.

209. *Id.* at 86.

210. *Id.* See also *id.* at 122 (statement of then-Judge Kennedy noting, in agreement with Sen. DeConcini, that “the enforcement power of the judiciary is to insure that the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it”); *id.* at 134 (statement of then-Judge Kennedy noting that “the Court is struggling with [the tension between the Establishment Clause and the Free Exercise Clause] on a case-by-case basis”). Then-Judge Kennedy also stated:

I do not have an over-arching theory, a unitary theory of interpretation. I am searching, as I think many judges are, for the correct balance in constitutional interpretation. So many of the things we are discussing here are, for me, in the nature of exploration and not the enunciation of some fixed or immutable ideas. *Id.* at 154.

211. This view of the judicial function, in particular with respect to the scope of constitutional protections for privacy, recurred in Kennedy's testimony. See, e.g., *id.* at 166 (statement of then-Judge Kennedy noting that “with reference to the right of privacy, we are very much in a stage of evolution and debate” and that “the public and the legislature have every right to participate”); *id.* at 176 (“The

“no formula could serve as a substitute in this area for judgment and restraint, and that there were not any ‘mechanical yardsticks’ or ‘mechanical answers.’”²¹² In other words, Kennedy embraced an approach to determining the scope of constitutional protections that is both contingent and value-laden, albeit not boundless.

Biden and Kennedy’s colloquy set the tone for Kennedy’s two days of testimony. In a subsequent discussion with Senator Grassley, for example, Kennedy resisted embracing original intent as a methodology that “tell[s] us how to decide a case,” and instead described a more nuanced analysis in which determining the Framers’ “[i]ntention . . . is one of the objectives of our inquiry. If we know what the framers intended in the broad sense . . . then we have a key to the meaning of the document.”²¹³ Nor did Kennedy and the senators limit their acknowledgment of the role of judgment to constitutional law. In colloquy with Senator Thurmond, for example, Kennedy described the factors that the Supreme Court should take into account in deciding who should be able to recover in an antitrust lawsuit.²¹⁴ That the Court might have to make difficult judgments in doing so was apparently uncontroversial to both the senator and the nominee.²¹⁵

Subsequent nominees likewise spoke of the values and judgments involved in judging, sometimes explicitly and sometimes by implication. But all of the remaining nominees in this period provided insight into their judicial philosophies and the type of inquiries they think are necessary for answering difficult constitutional questions. Justice Souter, for example, offered a fairly substantive

law accommodates a certain amount of contradiction and duality while it is in a state of growth.”).

212. *Id.* at 86. At the same time, Kennedy repeatedly rejected the notion that a judge could simply impose his views of what was just on the country. *See, e.g., id.* at 155. The judicial role, in his view, was a constrained one. It was, nonetheless, so different from Bork’s view that Ringhand and Collins describe “read[ing] the transcripts of these hearings back-to-back . . . is like time traveling from one era into another.” COLLINS & RINGHAND, CONFIRMATION HEARINGS, *supra* note 15, at 221.

213. *Kennedy Hearing, supra* note 210. at 140. Some senators thought that Kennedy relied too much on original intent. In an extended colloquy between Kennedy and Sen. Arlen Specter, *id.* at 148–53, for example, Specter argued that the original intent of the framers of the Fourteenth Amendment could not support the outcome in *Brown v. Board of Education* and thus argued for a more “realis[t]” approach to constitutional adjudication. *Id.* at 153. Nothing like this discussion had occurred in any hearing before Bork.

214. *Id.* at 95.

215. *See id.* at 113 (statement of then-Judge Kennedy explaining courts should take a “pragmatic” and “workable” approach to protection of constitutional rights in criminal justice system); *id.* at 117–20 (agreeing that different approaches to Equal Protection Clause scrutiny may be valid).

description of his approach to unenumerated constitutional rights, pointing to the need for “a broader inquiry into the history and traditions of the American people as being the basis upon which a fundamental valuation or a finding of no fundamental valuation should rest.”²¹⁶ This hearing testimony not only is remarkably consistent with Justice Souter’s subsequent jurisprudence on substantive due process,²¹⁷ but it is explicit that the appropriate judicial inquiry sometimes involves making judgments about American traditions and values.

Justice Souter also addressed the Warren Court’s criminal procedure jurisprudence, and he did not condemn it. He explained, for example, that the Court in *Miranda* engaged in what he viewed as appropriate pragmatic experimentation, attempting to solve the judicial system’s problem of having to adjudicate a large number of unwieldy case-by-case claims about involuntary confessions.²¹⁸ Under those circumstances, Souter explained, the Court acted appropriately. This pragmatic approach recognizes a role for the judge’s exercise of judgment.

Justice Thomas, unlike Justice Souter, had a record of public positions, including numerous speeches. Because he had often spoken about the importance of natural law to the Founders, the senators questioned him extensively about his view of natural law in constitutional interpretation. Although he repeatedly denied that natural law would play a direct role in his constitutional adjudication, then-Judge Thomas explained that natural law was important as a way to understand what the Founders were thinking, and that one important source of information was the description of natural law set out in the Declaration of Independence.²¹⁹ Thomas even harshly criticized Justice Holmes for his refusal to consider the Declaration in his jurisprudence.²²⁰

Justice Ginsburg similarly had a lengthy public record as a scholar and activist, and she discussed the specifics of issues and cases that she had been involved in or had written about. But she also talked more generally about her belief in the way the Constitu-

216. *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 232 (1990) [hereinafter *Souter Hearing*].

217. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring in the judgment).

218. *Souter Hearing*, *supra* note 219, at 64.

219. *See, e.g., Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing before the S. Comm. on the Judiciary*, 102nd Cong. 168 (1991) [hereinafter *Thomas Hearing*].

220. *Id.* at 472.

tion should be interpreted. Like other nominees, she explained that what the Constitution meant at the Founding (even assuming it could be determined) was not necessarily enough, and that constitutional interpretation required identifying the broader principles of the document and determining how to apply them:

[In] trying to divine what the Framers intended, I must look at that matter two ways. One is what they might have intended immediately for their day, and the other is their large expectation that the Constitution would govern, as Cardozo said, not for the passing hour, but for the expanding future.²²¹

Ginsburg went on to provide a specific example: “Thomas Jefferson said: ‘Were our state a pure democracy, there still would be excluded from our deliberations women who, to prevent depravation in morals and ambiguity of issues, should not mix promiscuously in the gatherings of men.’ Nonetheless,” Justice Ginsburg argued, “I do believe that Thomas Jefferson, were he alive today, would say that women are equal citizens.”²²² Indeed, Justice Ginsburg’s career of successfully bringing sex discrimination cases to the Supreme Court, as well her position on *Roe*,²²³ was grounded in an understanding of women as equal citizens that would not have been familiar to the Framers of the Fourteenth Amendment, much less to Thomas Jefferson. Developing a constitutional jurisprudence of gender equality thus requires judges to make value-laden judgments about the scope and meaning of the Equal Protection Clause.

Justice Breyer’s testimony also, from the beginning, reflected his commitment to a well-functioning and democratically accountable government. Discussing the tension between constitutional protections of property and the need for health and safety regulation, for example, he argued that courts should seek “a practical accommodation. Of course, there is a compensation clause in the Constitution. Of course, property is given some protection. At the same

221. *Ginsburg Hearing, supra* note 88, at 127.

222. *Id.*

223. Justice Ginsburg had written about *Roe*, and gave a more candidly supportive answer than many nominees, although she was skeptical of substantive due process as the source of reproductive rights. In response to one senator, she explained:

[Y]ou asked me my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

Ginsburg Hearing, supra note 88, at 207.

time, one must not go too far, and what too far means is imposing significant practical obstacles.”²²⁴ And while agreeing with Senator Hatch that “a judge’s authority derives entirely from the fact that he or she is applying the law, not simply imposing his or her policy preferences,”²²⁵ Breyer also emphasized that the law may not provide objectively correct answers. “[I]t is difficult . . . [because] people disagree, often, about how, in vast, uncertain, open areas of law, where there are such good arguments on both sides of such important policy issues, of course people disagree about what the proper outcome of those issues is.”²²⁶ Breyer did not suggest, however, that a judge could simply impose what he viewed as the best policy. Instead, “the judge follows canons, practices, rules, cases, procedures, all those things that help define the role of the judge,”²²⁷ and is “bound by the words, the history, the precedents, the traditions, all of those things which in fact go up to make this great body of institutions, including legal advice and how businesses and labor unions interpret it and so forth, that we call law.”²²⁸

There is much to criticize about the conduct of confirmation hearings during this period. Certainly, senators and citizens alike have wanted substantially more information than most nominees have been willing to provide. But the caricature of nominees who simply refused to answer questions is, for the most part, inaccurate.²²⁹ Indeed, particularly in the post-Bork era, the hearings clearly revealed ways the nominees were in fact different from one another. They had different and fairly well-thought-out approaches to the project of judging. As a result, the commitments they made to impartiality, open-mindedness, and appropriate judicial restraint could not be confused with claims that in their role they would be doing no more than deducing the logically and objectively correct result from legal sources.

224. *Breyer Hearing*, *supra* note 81, at 115.

225. *Id.* at 119.

226. *Id.*

227. *Id.* at 120.

228. *Id.* at 119.

229. There were some exceptions. Then-Judge Scalia, who denied having an overarching judicial philosophy, was particularly close-lipped. Senator Biden, for example, expressed significant frustration with his refusal to answer questions about his position on even the most well-established and venerated precedents. *See Scalia Hearing*, *supra* note 91, at 47–53.

C. *Period Four: The Age of the Umpire, 2005–2017*

Nominees in the new millennium have taken a different approach. Rather than describe their judicial philosophies, even in general terms, they have, for the most part, promised to reach judicial conclusions solely by reference to “law,” as if the (uncontroversial) sources the nominees say they will look to—the text of the Constitution, statutory language, precedent—contain clear answers if only they look hard enough. This rhetoric hearkens back to the Warren Court hearings. But the senators who used such language in the 1950s and 1960s had very specific and well-known views about the legally right and wrong answers—*Brown* was wrong and the Warren Court criminal procedure jurisprudence overreached. Contemporary nominees, on the other hand, focus largely on mechanics and legal sources and some even deny a role for judgment at all.²³⁰

Most famously, Chief Justice Roberts invoked claims of constraint and objectivity, with his now well-known umpire metaphor,²³¹ and he also invoked the legal sources he claimed he would rely on exclusively:

We don't turn a matter over to a judge because we want his view about what the best idea is, what the best solution is. It's because we want him or her to apply the law. They are constrained when they do that. They are constrained by the words that you choose to enact into law in interpreting the law. They are constrained by the words of the Constitution. They are constrained by the precedents of other judges that become part of the rule of law that they must apply.²³²

He also spoke of modesty and restraint, explaining, for example, that “[j]udges need to appreciate that the legitimacy of their action is confined to interpreting the law and not making it.”²³³ And not only could all of these statements have been uttered by any other nominee, Roberts added little else. In other words, rather than describing a human enterprise requiring both discretion and con-

230. Many overlapping possibilities exist as to why the rhetoric shifted in the post-2000 era, including increased political polarization, a desire by nominees to portray the Court as a non-ideological institution in the wake of *Bush v. Gore*, and the increased threat of the filibuster. See Shapiro, *Claiming Neutrality*, *supra* note 121, at 465 n.50 (citing Stone, *supra* note 44, at 447-52); *id.* at 469.

231. *Roberts Hearing*, *supra* note 12, at 55–56.

232. *Id.* at 177. See also *id.* at 159 (colloquy with Sen. Hatch) (noting that some of the Constitution's broad phrases are not self-defining so a judge must look to “the cases and the precedents [and] what the Framers had in mind when they drafted that provision”).

233. *Roberts Hearing*, *supra* note 12, at 353.

straint, he described an occasionally imperfect but largely objective process.

Justice Alito likewise repeatedly described the importance of judicial restraint and the need for judges to guard against injecting their personal views into their work. In so doing, he emphasized the importance of “objective” sources of information:

[J]udges have to look to objective things, and if it’s a question of absolutely first impression . . . you would look to the text of the Constitution and you would look to anything that would shed light on the way in which the provision would have been understood by people reading it at the time.

You certainly would look to precedent, which is an objective factor, and most of the issues that come up in constitutional law now fall within an area in which there is a rich and often very complex body of doctrine that has worked out. Search and seizure is an example. Most of the issues that arise concerning freedom of speech is another example. There is a whole body of doctrine dealing with that, and that’s objective and you would look to that and you would reason by analogy from the precedents that are in existence.²³⁴

Justice Sotomayor’s testimony was remarkably similar to Roberts’s and Alito’s. In her opening statement, for example, Justice Sotomayor described her “judicial philosophy [as s]imple: fidelity to the law. The task of a judge is not to make law, it is to apply the law.”²³⁵ More specifically, she explained repeatedly that judging involves looking closely at the facts, looking closely at the relevant legal materials, and drawing a logical conclusion from those sources:

I don’t judge on the basis of ideology. I judge on the basis of law and my reasoning . . . When my colleagues and I [on the Circuit Court], in many cases, have initially come to disagreeing positions, we’ve discussed them and either persuaded each other, changed each other’s minds, and worked from the starting point of arguing, discussing, exchanging perspectives on what the law commands.²³⁶

In fact, it is surprisingly difficult to identify which passages come from Alito’s hearing and which from Sotomayor’s.

These three post-2000 nominees did acknowledge that judging is not a mechanical process. Chief Justice Roberts, for example,

234. *Alito Hearing*, *supra* note 119, at 357.

235. *Sotomayor Hearing*, *supra* note 81, at 59.

236. *Sotomayor Hearing*, *supra* note 81, at 437.

pointed out that when Congress has “deliberately or inadvertently [left questions] unanswered” in a statute, courts have no choice but to resolve those questions.²³⁷ And he acknowledged other areas where the legal sources do not yield a logically deducible answer, such as the challenge of applying the Bill of Rights in wartime or the scope of the right of privacy under the Constitution, but without providing any insight into the approach he would take to answering those questions beyond an uncontroversial list of sources he would look to.²³⁸

For her part, Justice Kagan repeatedly returned to the expression “it’s law all the way down” to describe the proper approach to judicial decision-making, and she elaborated on that idea several times during her hearings.²³⁹ Although she acknowledged that there are sometimes clashes of constitutional provisions that may require “judgment” and “wisdom” to resolve, she provided no sense of what the content of that judgment or wisdom might look like.²⁴⁰

And Judge Gorsuch’s conduct was, if anything, even more extreme than that of any of the other recent nominees, as the description of his testimony in the Introduction demonstrates. He resisted expressing views on venerable cases like *Griswold* and, to a lesser extent, even *Brown*, simply calling them “decision[s] of the United States Supreme Court,” and thus, “the law.”²⁴¹ And he said that principles of *stare decisis* themselves are also “the law,”²⁴² but would not discuss how he might take into account any particular principle such as reliance interests.²⁴³ He disavowed having a view about the constitutionality and viability of *Chevron*,²⁴⁴ despite having argued in an unnecessary separate opinion that it is a “behe-

237. *Roberts Hearing*, *supra* note 12, at 179. See also *Sotomayor Hearing*, *supra* note 81, at 437.

238. See, e.g., *Roberts Hearing*, *supra* note 12, at 241 (explaining in a discussion about civil liberties after September 11, 2001, that although the Bill of Rights itself does not change, “[t]here may be situations where demands are different and they have to be analyzed appropriately so that things that might have been acceptable in times of war are not acceptable in times of peace”); *id.* at 259–60 (discussing the right of privacy). See also *id.* at 298 (explaining that terms like “due process” and “equal protection” were written broadly because they were intended to apply for generations); *id.* at 304–05 (discussing balancing of interests in First Amendment challenges).

239. *Kagan Hearing*, *supra* note 11, at 103, 160, 173, 203, 299.

240. *Id.* at 203.

241. *Gorsuch Hearing* 3/22/17, *supra* note 19, at 72–74.

242. *Gorsuch Hearing* 3/21/17, *supra* note 9, at 135.

243. *Gorsuch Hearing* 3/22/17, *supra* note 19, at 73–74.

244. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

moth” that allows “executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”²⁴⁵ Instead of admitting that his originalism led him to have concerns about the size and scope of the administrative state, even if he had no conclusion about whether *Chevron* should actually be overruled, he simply promised not to “prejudge” the issue and to come at it “with an open mind.”²⁴⁶

At the same time that the post-2000 nominees refused to engage in any meaningful discussion of judicial philosophy, the senators, particularly Republican senators, also used language that hearkened back to the rhetoric of the hearings during the Warren Court years. Chief Justice Roberts and Senator Hatch, for example, had an extended discussion about the importance of a judge interpreting the law, not making it. Indeed, at the beginning of this colloquy, Senator Hatch echoed Senator Ervin’s question to Justice Harlan, asking Roberts if he believed that “unelected judges” should “us[e] the Constitution to effect cultural and political reform, or does the Constitution require that this be left to the people and their elected representatives?”²⁴⁷ Senator Sessions, then the ranking Republican on the committee, likewise began his questioning of Justice Sotomayor by raising repeated concerns about whether she believed that “judges do not make law, or [alternatively], that there is no real law.”²⁴⁸

There is only one correct answer to such questions. But just as during the 1950s and 1960s, these questions are not motivated by

245. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

246. *Gorsuch Hearing 3/21/17*, *supra* note 9, at 87.

247. *Roberts Hearing*, *supra* note 12, at 161. *See also id.* at 238 (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary) (“[W]ouldn’t you agree a judge should never make an opinion that is beyond what a fair interpretation of the Constitution would call for?”). Senator Jon Kyl stated:

One of the things that appeals to me from your approach to the law is that it appears to be a very traditional approach, which is that I am not sent there to make law, I am sent there to take whatever case comes before us and just decide the case . . . you have totally eschewed ideology here, saying that your own personal views or ideology do not have a place in your decisionmaking.

Id. at 333 (statement of Sen. Jon Kyl, Member, S. Comm. On the Judiciary. *See also id.* at 353 (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary) (“I frankly believe that one thing that causes divisiveness and frustration and angst is when the Supreme Court were to render an opinion that really is more a political or social policy decision rather than a legal decision.”).

248. *Sotomayor Hearing*, *supra* note 81, at 70.

abstract inquiries into separation of powers. They are predicated on an assumption that certain cases, whether *Brown* or *Roe*, have crossed the line into illegitimate “cultural and political reform.” Occasionally, the connection is even explicit. During the Roberts hearing, for example, Senator Brownback explained that “President [Bush]’s lead applause line the last election cycle, was ‘I will appoint judges who will be judges, not legislators.’ That it is an applause line at a political rally should say something about people’s angst towards what the courts have done, and particularly when it comes to this issue of abortion.”²⁴⁹ In other words, for some on the right, references to making, not applying law, or to the proper role of the Court, presupposes that some results are so wrong as to be illegitimate.

IV. NEUTRALITY AND LEGITIMACY

The historical shifts in confirmation hearing rhetoric is interesting in and of itself, but it may also have consequences for the Court and the country. Among other things, the renewed emphasis on a rhetoric of neutrality and objectivity—and its increased embrace by the nominees themselves without any leavening discussion of judicial philosophy—could harm the Court’s legitimacy.²⁵⁰

A. *Claimed Neutrality and Cultural Cognition*

Just as many decisions of the Supreme Court matter to the public, so too does the public’s view of the Court matter to it. As many people—scholars and judges alike—have explained, the Supreme Court itself has no ability to enforce its judgments. It has no army, no power of the purse. Its opinions are enforced as law by other branches of government and those branches are more directly accountable democratically. As a result, it is critical that the Court maintain its legitimacy with the American people. The Court can retain its authority only so long as the people give it that respect.

Moreover, there is evidence to suggest that inaccurate claims of neutral principles actually have the potential to diminish the Court’s legitimacy in the eyes of the public. This evidence, also inferential, arises from work being done by a team of researchers led by Professor Dan Kahan. These researchers explore the way that

249. *Roberts Hearing*, *supra* note 12, at 289. *See also id.* at 332 (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary) (referring to Sen. Brownback’s comments with approval).

250. I do not want to overstate my case here; I do not claim that there is at this time a measurable decline in legitimacy attributable to this shift in the language of neutrality.

cultural cognition influences the way people evaluate empirical evidence in legally salient situations.²⁵¹ Cultural cognition “is a form of motivated reasoning through which individuals’ group affiliations and social commitments color the conclusions they draw from empirical evidence.”²⁵² For example, when asked to determine whether a video-taped protest involved constitutionally protected speech or crossed the line into unprotected conduct, individuals’ responses varied predictably and systematically based on those values and affiliations on the one hand, and on the other hand, whether they were told that the protest involved abortion protesters outside a clinic or gay rights protesters objecting to “don’t ask don’t tell” outside a college placement facility where the military was interviewing students.²⁵³

In addition, people are good at seeing how differing worldviews can affect people’s perceptions and evaluations of events when it comes to people they disagree with, while remaining relatively unaware of this reality in themselves and those they tend to agree with. Kahan and others call this phenomenon “naïve realism.” People are realistic when it comes to the way others’ thoughts and conclusions are influenced by their values and commitments, but surprisingly naïve about themselves.²⁵⁴ As a result, people often fail to credit the good faith of those with whom they disagree.²⁵⁵ This feature of cultural cognition can cause humiliation among the losers in political conflicts, who may feel that their worldviews have been denigrated, and it can cause or exacerbate social division.

Kahan has explored how cultural cognition could shape public responses to the Supreme Court.

251. See, e.g., Dan Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) [hereinafter Kahan et al., *Whose Eyes*]; Dan Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) [hereinafter Kahan, et al., *Protest*].

252. Shapiro, *Claiming Neutrality*, *supra* note 121, at 470; see also Kahan et al., *Protest*, *supra* note 254, at 853, 859.

253. Kahan et al., *Protest*, *supra* note 254, at 863-64, 869-73 (explaining the experimental conditions); *id.* at 877-80 (explaining the results). The video actually depicted a protest by the Westboro Baptist Church and a counterprotest, but in the video they looked like a single protest. *Id.* at 872. The words on all of the signs were blurred so that the study participants could not read them, and a generic sound track was added. *Id.*

254. *Id.* at 860. See also Shapiro, *Claiming Neutrality*, *supra* note 121, at 469-70 (discussing cultural cognition).

255. Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 21-22 (2011) [hereinafter Kahan, *Foreword*].

As in other arenas, he says, people are likely to believe that the Justices with whom they agree are reaching carefully considered results, while those with whom they disagree are allowing their ideological views to dictate their conclusions. Particularly because the Supreme Court often decides cases on controversial and high-profile issues like abortion and gay rights, these reactions carry with them the threat of de-legitimizing the Court in the public's eyes.²⁵⁶

Kahan also argues that the neutral, authoritative voice of the classic judicial opinion may actually exacerbate this problem because a posture of neutrality can trigger skepticism among those who disagree.²⁵⁷ Instead, Kahan argues, the Justices should explicitly acknowledge the complexity and value-laden nature of many of the decisions they make, thus acknowledging that law and legal reasoning alone may not provide a path to a single "right" answer. This recognition of the inherently indeterminate nature of many of the issues confronted by the Court, which Kahan calls *aporia*, would not of course erase social divisions and disagreements. But it would, he argues, allow those on the losing side to feel that their position was actually considered, which might well help prevent erosion of the Court's legitimacy.²⁵⁸

Concern for the Court's legitimacy is not purely hypothetical. Although the American people's approval of the Supreme Court is consistently higher than their approval of the other branches of government, the Supreme Court's overall approval ratings have decreased steadily over time, along with the approval ratings of the other branches of government.²⁵⁹ And there is disagreement about the robustness of the Court's legitimacy. In a poll taken in the days after the Court announced its ruling on the Affordable Care Act in *National Federation of Independent Businesses v. Sebelius*,²⁶⁰ Ras-

256. Shapiro, *Claiming Neutrality*, *supra* note 121, at 470-71 (describing *Foreword*).

257. Kahan, *Foreword*, *supra* note 258, at 28-29.

258. Kahan, *Foreword*, *supra* note 258, at 62-63. *See also* Tom Tyler and Margaret Krochik, *Deference to Authority as a Basis for Managing Ideological Conflict*, 88 CHI.-KENT L. REV. 433, 449 (2013) (finding that individuals are more likely to accept adverse policy outcomes if they believe that their values or concerns were considered); Dan Simon and Nicholas Scurich, *Judicial Overstating*, 88 CHI.-KENT L. REV. 411, 429 (2013) (finding that in experimental settings, "lay participants seem to prefer [judicial] decisions that admit to complexity and open-endedness of the legal issue over ones that only acknowledge the strength of the winning side").

259. *See, e.g., Supreme Court's Image Declines as Nomination Battle Looms*, PEW RESEARCH CENTER: U.S. POLITICS & POL'Y (June 15, 2005), <http://www.pew-research.org/2005/06/15/supreme-courts-image-declines-as-nomination-battle-looms/>.

260. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

mussen Polling found that 28 percent of respondents rated the Court as “poor,” an 11 percent increase from the week before the case was announced.²⁶¹ During the same time period, the percentage of people rating the Court as “good” or “excellent” dropped from 36 percent to 33 percent. Perhaps unsurprisingly, those shifts had a decidedly partisan character. Republicans went from a 42 to 14 positive view of the Court to 20 to 43; Democrats shifted in the opposite direction.²⁶² Perhaps more alarming is a poll taken *before* the ACA decision was announced that found “a majority of respondents expressed concern that ‘the Supreme Court makes decisions based on a political agenda instead of the law,’ with only eleven percent of respondents expressing ‘a great deal of confidence that the Supreme Court puts politics aside and makes decisions based on the law.’”²⁶³

It is not only the Court’s decisions that have the potential to affect its image among the people, however. It is also the confirmation process. Indeed, the public follows Supreme Court nominations and confirmation hearings with surprising attentiveness. James Gibson and Gregory Caldeira found, for example, that 51.9 percent of their survey respondents followed the Alito confirmation process “either very or somewhat closely” and only 22.2 percent said that “they paid relatively little attention to the process.”²⁶⁴ Presidential candidates frequently talk about the types of Justices they would appoint if elected, as both Donald Trump and Hillary Clinton did during the 2016 election, and activist groups try, with varying degrees of success, to make Supreme Court nominations campaign issues.²⁶⁵ And confirmation hearings are, quite literally, the *only* substantive aspect of the business of the Supreme Court to be televised.

261. Brett LoGiurato, *POLL: The Supreme Court’s Approval Rating Plunges After The Obamacare Decision*, BUSINESS INSIDER (July 1, 2012, 12:57 PM), <http://www.businessinsider.com/supreme-court-approval-obamacare-decision-ruling-health-care-2012-7>.

262. A similar pattern was observed in the aftermath of *Bush v. Gore*. Although the Court’s overall approval ratings remained somewhat stable, that top-line number masks significant movement away from the Court by Democrats and towards the Court by Republicans.

263. Pam Karlan, *Supreme Court 2011 Term – Foreword: Democracy and Dismay*, 126 Harv. L. Rev. 1, 7 n.34 (2012) (quoting Memorandum from Geoff Garin et al., Hart Research Assocs., to Alliance for Justice, Views of the Supreme Court on Eve of the Health Care Ruling (June 11, 2012)), available at <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/hart-afj-scotus-attitudes.pdf>.

264. GIBSON & CALDEIRA, CITIZENS, COURTS, *supra* note 49, at 71.

265. TREVOR PARRY-GILES, THE CHARACTER OF JUSTICE: RHETORIC, LAW, AND POLITICS IN THE SUPREME COURT CONFIRMATION PROCESS 116-17 (2006) (describing role of judicial nominations in the 1980 presidential campaign).

Moreover, there is evidence that rhetoric about what happens during confirmation hearings can negatively affect the public's view of the Court. For people who were exposed to ads about then-Judge Alito—ads which, regardless of whether they supported or opposed him, uniformly emphasized Judge Alito's ideology as if he were a political candidate²⁶⁶—their overall respect for the Court diminished.²⁶⁷ And this effect was present regardless of whether the respondents themselves supported Alito. In other words, the portrayal of a potential Justice as a nakedly ideological actor diminished the Court's public support.²⁶⁸

These findings might be taken to suggest that claims of neutral principles during the confirmation hearings in fact help to support the Court's legitimacy. The evidence to the contrary is more inferential. First, Gibson and Caldeira found that their respondents actually had fairly subtle understandings of the role of ideology in the work of the Court. Respondents, by large margins, rejected the idea that a Supreme Court Justice should "give my ideology a voice," and overwhelmingly rejected the notion that a Justice should "base decisions on party affiliations."²⁶⁹ On the other hand, respondents who exhibited relatively high levels of "institutional loyalty" also indicated support for the notion that the nominee should exercise some discretion, without being overtly partisan or wildly ideological, an attribute that Gibson and Caldeira label "judiciousness."²⁷⁰

These findings forced an interesting shift in Gibson and Caldeira's own understanding of the effects of institutional loyalty and knowledge of democratic institutions. Rather than arguing (as they and other political scientists have in the past) that increased loyalty is consistent with the "myth of legality"—the belief that judging is entirely neutral—loyalty to the institution appears to be tied to a more nuanced understanding of the Court and its role.²⁷¹ Gibson and Caldeira concluded that:

[T]he American people might indeed be willing to recognize discretion in judicial decisionmaking—even accepting the inevitability that judges must make the law, not just interpret it—without threats to the legitimacy of courts. So long as the exercise of dis-

266. GIBSON & CALDEIRA, *CITIZENS, COURTS*, *supra* note 49, at 107.

267. *Id.* at 112.

268. Gibson and Caldeira do not know if this effect dissipates and if so, how quickly. *Id.* at 120.

269. *Id.* at 81.

270. *Id.* at 90-91.

271. *Id.*

cretion is principled (and, we suspect, grounded in concepts such as fairness and justice, the very important complements to legality), people may accept it as legitimate.²⁷²

And indeed, subsequent research has borne out that intuition. For example, Gibson and Caldeira found, in a survey of a representative nationwide sample, that “the American people seem to accept that judicial decisionmaking can be discretionary and grounded in ideologies, but also principled and sincere.”²⁷³ In other words, this research supports the intuition that acknowledging *aporia* can enhance, rather than undermine, the Court’s legitimacy.

All of this has implications for Supreme Court confirmation hearings and the way they are conducted. Just as the “neutral” judicial voice might trigger naïve realism and its consequent social division, so too might the repeated invocations of neutrality, disavowals of ideology, and claims that the Court only follows or interprets the law, but never makes it. The disconnect between these claims and the reality of what people observe once decisions are made can worsen what Kahan calls (perhaps prematurely) the Court’s “neutrality crisis.”

B. *Neutrality and Partisanship*

The effects of the ritual claims of neutrality, of following-not-making-law, of decrying activism, are not themselves ideologically neutral, despite the fact that nominees of both parties embrace them. The words “strict constructionist,” for example, can sound neutral; indeed, it could (possibly) describe the approach to judging that Justice Sotomayor articulated—looking carefully and deeply at the legal materials and factual record and deducing the correct legal answer. But the term “strict constructionist” also has a different connotation, at least to those in the know. As Rehnquist himself explained in an internal Nixon Administration memo: “[a] judge who is a ‘strict constructionist’ in constitutional matters will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs—the latter two groups having been

272. *Id.* at 91 n.20.

273. James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC’Y REV. 195, 214 (2011) [hereinafter Gibson & Caldeira, *Legal Realism*]. Even more recently, Gibson and another co-author have found that Americans’ views of the Supreme Court are negatively affected by what they perceive as the politicization of the Court, which is distinct from the appropriate role of principled discretion. James L. Gibson & Michael J. Nelson, *Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?*, 14 J. EMPIRICAL LEG. STUD. 592, 612–13 (2017).

the principal beneficiaries of the Supreme Court's 'broad constructionist' reading of the Constitution.²⁷⁴

So when conservative senators, conservative nominees like Bork and Gorsuch, and conservative Justices like Scalia all claim that their jurisprudential approaches are neutral and prevent the illegitimate use of the Justice's personal policy preferences, such questions and claims about neutrality, then, are signals, like other types of signals that Kahan and his co-authors discuss. For some groups of people, these claims signal a particular set of values and approaches to the kinds of questions that the court will decide—as Senator Brownback made clear when he equated judges legislating from the bench with abortion.²⁷⁵ Today, when a Republican president's nominee or a Republican senator makes these claims, they are heard by the President's supporters as one in-group member to another in-group member.

At the same time, however, because such claims are couched in the language of neutrality and lack of bias, because no one believes that judges or Justices should decide cases based on who they like better or because they have a political agenda they want to implement, because no one believes that judges or Justices are legislators, all nominees and many senators find themselves using some of the same or similar words. But when Democratic nominees use this language, they may set up the dynamic Kahan and his co-authors describe, so that the cognitive dissonance of the claimed neutrality with the observed ideological influences contribute to the neutrality crisis. Put another way, for some, conservative approaches to Supreme Court decision-making are defined as "neutral," meaning that less conservative approaches are, by definition, not neutral.²⁷⁶

274. Epstein, Segal, & Westlander, *supra* note 49, at 611-12 (describing President Nixon's ideological concerns when nominating William Rehnquist) (citing John W. Dean, *THE REHNQUIST CHOICE* 16 (2001) (quoting memorandum from Assistant Attorney General William H. Rehnquist to Attorney General John N. Mitchell (May 29, 1969))). *See also Roberts Hearing, supra* note 12, at 251 (describing the "Reagan revolution," with respect to law, as "a belief that we should interpret the Constitution according to its terms, that judges don't shape policy, that judges interpret the law, and that legislators shape policy"). Senator John Cornyn stated:

Judges are not in the business of picking winners and losers before they have actually heard the case, of course. I mean that is fundamental to our concept of justice, that a judge be openminded, be willing to listen to the facts and arguments of counsel, and then make a decision. And the process that you use is by applying neutral principles.

Id. at 269 (statement of John Cornyn, Member, S. Comm. On the Judiciary).

275. *See Roberts Hearing, supra* note 12, at 289.

276. *Cf.* David Fontana & Donald Braman, *Judicial Backlash or Just Backlash?: Evidence from a National Experiment*, 112 *COLUM. L. REV.* 731, 777-78

And this association of neutrality with a conservative ideology is evidenced by the fact that Democratic nominees are nearly twice as likely as Republican nominees to acknowledge that judgment or discretion can play a role in the work of the Supreme Court when they are in colloquy with any particular senator.²⁷⁷

This dynamic is not limited to confirmation hearings, of course. Consider, for example, one of the presidential debates during the 2004 presidential campaign. When asked about Supreme Court nominations, George Bush promised to seek “strict constructionists” who would not impose “personal opinion” on the Constitution as happened, he said, in *Dred Scott*.²⁷⁸ To many on the left, this discussion was, in the words of one commentator, “baffl[ing].”²⁷⁹ Just as *Brown* is universally hailed as correctly decided, *Dred Scott v. Sandford*,²⁸⁰ which held that African-Americans were not full citizens, is universally understood to be one of the Supreme Court’s greatest and most shameful mistakes. No one, on either side of the aisle, could or would disagree with a desire to reject it. But some people in the anti-abortion movement compare *Dred Scott* to *Roe*.²⁸¹ Thus, a promise that on its face anyone could agree with—no decisions like *Dred Scott*—was understood by some listeners as a promise to appoint pro-life Justices who would reject *Roe*.²⁸²

V. ACKNOWLEDGING JUDICIAL PHILOSOPHY

This state of affairs creates a bit of conundrum. Contemporary nominees evade discussions of ideology and judicial philosophy, making the discussions of judicial philosophy from the 1980s and 1990s a thing of the past. Nominees, in various ways, continue to pledge their neutrality and their respect for the rule of law, and they disavow activism and the use of their personal beliefs or policy preferences. All of this is uncontroversial and uninformative. The

(2012) (noting that Justices across the political spectrum “label[] their own approach fair and foolproof and the other approach biased and foolhardy,” describing their “view of the Court as obvious and neutral” and arguing that such discussions only “hid[e] our bias rather than resolv[e] it”).

277. Shapiro, *Claiming Neutrality*, *supra* note 121, at 467.

278. See Timothy Noah, *Why Bush Opposes Dred Scott*, SLATE (Oct. 11, 2004, 6:45 PM), www.slate.com/articles/news_and_politics/chatbox/2004/10/why_bush_opposes_dred_scott.html.

279. See *id.*

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

281. See Noah, *supra* note 282 (citing references).

282. In fact, Senator Grassley and Chief Justice Roberts had such a colloquy. Grassley used *Dred Scott* as a way to explore whether Roberts would be willing to overrule clearly erroneous and overreaching constitutional precedents. *Roberts Hearing*, *supra* note 12, at 179-81.

senators cannot effectively shift the nominees' incentives to promote more disclosure. And yet, despite those who would argue for hearings focused only on ethics and qualifications, the Senate—and many Americans more generally—want to know more about what kind of Justice a nominee will make.

The senators, however frustrated they may be with nominees' testimony, do have an important tool at their disposal: what they themselves say. Thinking about how to use this tool effectively, however, requires thinking about the confirmation hearings differently. Obviously, one purpose of the hearings is for the senators to vet and examine the President's choice. But that purpose does not have to be the only one.

Senators can take advantage of the unusual public attention focused on confirmation hearings to try to affect the national conversation about the Supreme Court. Thus, instead of imposing burdens of proof on the nominees, the senators should change the focus of the questioning to at least some degree. Specifically, they should engage in discussions about why there are not necessarily clear answers to important legal questions, focusing on the indeterminate nature of the issues that will face the nominee if he or she becomes a Justice.²⁸³ Such matters can be explored by senators regardless of who the President is and regardless of whether they are inclined to support or oppose any particular nominee. This line of questioning would not be about imposing a particular burden of proof on the nominee. It would be, rather, an attempt to have a more candid conversation about what the Court actually does.

Opportunities for this kind of discussion abound. At Justice Alito's confirmation hearing, for example, Senator Leahy asked him about two Fourth Amendment cases in which he, alone among the judges on the two panels, believed that the police officers involved should not be held liable for violating the Fourth Amendment. Both cases involved the question of whether the police had exceeded the scope of a warrant, in one case by strip searching a minor and her mother,²⁸⁴ neither of whom was a suspect, and in the other by the treatment of witnesses on the premises when a search warrant was executed.²⁸⁵ In both cases, Judge Alito would have held that the police were justified in their actions—or at least could have reasonably believed that they were, entitling them to qualified

283. Fontana & Braman, *supra* note 280, at 780 (arguing that “[r]ecognizing ambiguity causes people to confront it and confront the biases they use to resolve ambiguity”).

284. See generally *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004).

285. See generally *Baker v. Monroe Twp.*, 50 F.3d 1186 (3d Cir. 1995).

immunity. In both cases, the other two judges on the panel disagreed. (Of the four judges that Alito sat with in these two cases, three were appointed by Republican presidents.)²⁸⁶ Leahy explained that he was concerned about these cases because in them, Alito

settled all issues in a light most favorable . . . to law enforcement . . . And I worry about this because I always worry that the courts must be there to protect individuals against an overreaching government. In this case [sic], your position in the minority was that you protected what the majority felt was an overreaching government.²⁸⁷

In explaining his votes, Judge Alito said: “Now Judge Chertoff looked at it differently and there are cases where reasonable people disagree, and that is all that was going on.”²⁸⁸ After that exchange, Senator Leahy moved on to another subject.

It is highly unlikely, of course, that the types of questions that Senator Leahy was asking would have provoked any illuminating responses, even if he had continued the exchange. Surely, Judge Alito was not going to say that he did *not* want to protect individuals against an overreaching government. Nor would any specific explanation of his votes in those cases have been more illuminating than his written opinions.

Much more interesting than a discussion of why Alito voted the way he did in those particular cases, however, would have been a discussion of *why* reasonable people could disagree about them. What is it about the legal question presented to the Third Circuit in those cases that allowed for that kind of disagreement? Does Alito expect even more such cases at the Supreme Court—cases in which reasonable people can disagree? What factors does he take into account when reaching a conclusion in such a case? Such a discussion might help give lie to claims that judging, especially on the Supreme Court, is like neutral umpiring.²⁸⁹

286. The judges were Judge Michael Chertoff, appointed to the Third Circuit by President George W. Bush, Judge John R. Gibson, appointed to the Eighth Circuit (and sitting by designation) by President Ronald Reagan, and Judge Edward R. Becker, appointed to the district court by President Richard Nixon and to the Third Circuit by President Reagan. The lone Democratic appointee was Judge Thomas Ambro, appointed by President Bill Clinton.

287. *Alito Hearing*, *supra* note 119, at 332.

288. *Id.*

289. Senator Biden did attempt to have such a discussion with Roberts, explicitly taking issue with the umpire metaphor and pointing out that with respect to many issues, the Justices actually determine the strike zone and thus are not merely calling balls or strikes. *Roberts Hearing*, *supra* note 12, at 185-86. But

Chief Justice Roberts discussed another example of the need for judgment in judging during his confirmation hearings. Pressed by Senator Kohl as to whether there are “intellectually honest approach[es]” on both sides of *Roe v. Wade*,²⁹⁰ then-Judge Roberts conceded that “reasonable people can disagree about that decision”²⁹¹ A follow-up conversation about why reasonable people might disagree about *Roe* might have led to a discussion of the existence of different understandings of equality and liberty. Although Roberts would likely have declined to state a position, acknowledgment of these different perspectives could have a valuable effect on public discourse. Nor would this kind of discussion be limited to the confirmation hearings themselves.

The confirmation hearings are a particularly valuable opportunity, however, to affect the public discussion of the nature of the Court’s work. In part, the hearings carry this potential because so many people pay special attention to them. But in part, acknowledging the important role of judicial philosophy and judgment simply has the benefit of being an accurate description of the work of the Court. Moreover, exploring this reality does not have to depend on what the nominee says in response. That is, although nominees will undoubtedly seek the most non-controversial ways of answering the questions asked, the tenor of the discussion might nonetheless change. For example, senators might ask nominees what they think when their colleagues disagree with them, regardless of whether they are in the majority or the dissent. Do they consider those colleagues—or for that matter the district court judges they sometimes reverse—lawless, results-oriented, activist? If not, why not? The likely answers to these questions (“no, my colleagues are not lawless”) might themselves affect the public conversation about what judges and Justices do. Finally, such discussions might assist the senators—and the public—in evaluating the extent to which the nominees are truly open-minded. Do they recognize that different people might see the same set of facts differently, and how might that fact inform their jurisprudence? And again, the senators can initiate these conversations without making any declarations about what they expect nominees to prove to earn

rather than press Roberts on the accuracy of the description, Biden spent most of the rest of the colloquy trying, and failing, to get Roberts to talk about specific cases and issues and comparing the candor of his answers to that of Justice Ginsburg. *Id.* at 186–94.

290. *Roberts Hearing*, *supra* note 12, at 206.

291. *Id.*

their votes and without expecting nominees to act counter to their incentives.

CONCLUSION

No Supreme Court nominee will ever reveal what the senators and citizenry most want to know. (Will she vote to overrule *Roe v. Wade* or *Citizens United*? Would she have voted to uphold the Affordable Care Act?) And senators are constrained by significant political forces that make them unlikely to impose meaningful burdens of proof on nominees of their own party's President. But this state of affairs does not mean that confirmation hearings are useless or that nothing meaningful can emerge from them. The remarkable public focus on confirmation hearings gives senators an opportunity to affect the public's perception of the Supreme Court, perhaps to the benefit of the Court's own legitimacy. Insisting on discussions of the nature of the issues that the Supreme Court must decide would provide a more realistic picture of the Court's work to the general public and would encourage nominees to talk more openly about the role of judicial philosophy in the work of the Court.