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**May It Please the Senate: An Empirical Analysis of the Senate
Judiciary Committee Hearings of Supreme Court Nominees,
1939-2009**

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MAY IT PLEASE THE SENATE: AN EMPIRICAL ANALYSIS OF THE SENATE JUDICIARY COMMITTEE HEARINGS OF SUPREME COURT NOMINEES, 1939-2009

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This paper examines the questions asked and answers given by every Supreme Court nominee who has appeared to testify before the Senate Judiciary Committee since 1939. In doing so, it uses a new dataset developed by the authors. This database, which provides a much-needed empirical foundation for scholarship in emerging areas of constitutional law and political science, captures all of the statements made at the hearings and codes these comments by issue area, subissue area, party of the appointing president, and party of the questioning senator. The dataset allows us to quantify for the first time such things as which issues are most frequently discussed at the hearings, whether those issues have changed over time, and whether they vary depending on the party of the appointing president and the party of the questioning senator. We also investigate if questioning patterns differ depending on the race or gender of the nominee. Some of our results are unsurprising: for example, the hearings have become longer. Others, however, challenge conventional wisdom: the Bork hearing is less of an outlier in several ways than is frequently assumed, and abortion has not dominated the hearings. We also discover that there is issue area variation over time, and that there are notable disparities in the issues addressed by Democratic versus Republican senators. Finally, we find that female and minority nominees face a significantly different hearing environment than do white male nominees.

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Supreme Court confirmation hearings have been called many things over the years: a “mess,” a “subtle minuet,” and, most colorfully, a “kabuki dance”¹ We, however, believe that they are – and should be – more than this. The confirmation hearings held before the Senate Judiciary Committee are an essential part of the checks and balances system built into the United States Constitution. These hearings are the point at which an independent judiciary confronts political accountability. They are the point at which we as a nation, acting through our elected officials, accept, refute, and debate decisions of our high Court. Supreme Court confirmation hearings, in short, are the way in which “We the People” take ownership of the Constitution by deciding who we will allow to interpret it on our behalf.

Despite the importance of the hearings, there has been very little empirical research examining exactly what happens when nominees appear before the Senate Judiciary Committee. Political scientists have explored the dynamics of the confirmation process, but have rarely examined the hearings themselves.² Work that has focused on the hearings directly has done so in only limited ways for the purpose of answering discrete research questions.³ The lack of a

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¹ ABA Magazine, “*No More Kabuki Nominations*,” Oct. 2009 (citing former Senator and Chair of the Senate Judiciary Committee, and now Vice President, Joseph Biden).

² Political scientists have examined the confirmation process, but much of this work has focused on its political dynamics rather than on the hearings themselves. See, e.g., P. S. Ruckman, Jr., *The Supreme Court, Critical Nominations, and the Senate Confirmation Process*, 55 J. OF POLITICS 793 (1993); Jeffrey A. Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. OF POLITICS 998 (1987); Jeffrey A. Segal, Charles M. Cameron & Albert D. Cover, *A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations*, 36 AM. J. POL. SCI. 96 (1992); Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When and How Important?*, 101 NORTHWESTERN U. L. REV. 1483 (2007).

³ Williams and Baum, for example, explored to what extent the substantive differences in terms of the questions posed to nominees are attributable to Bork’s failed confirmation by coding all post-1953 hearings by the length and type of question. Margaret Williams & Lawrence Baum, *Questioning Judges About Their Decisions: Supreme Court Nominees Before the Senate Judiciary Committee*, 6 JUDICATURE 73 (2006). They provide evidence that both the length of senatorial questions and the number of questions focusing on the nominee’s prior judicial record have increased. Guliuzza, Reagan and Barrett undertook a project similar to that of Williams and Baum. Frank Guliuzza, III, Daniel J. Reagan & David M. Barrett, *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of the Confirmation Criteria*, 56 J. OF POLITICS 773 (1994). They coded confirmation hearing transcripts for what they called “constitutional commentaries” by categorizing senatorial questions as involving either character, competency or constitutionalism. They determined that Bork was not asked more

broad empirical foundation in this area is surprising, particularly given the value such work would have to the emerging field of positive constitutional scholarship. Scholars working in this growing area, such as Larry Kramer, Barry Friedman and Neil Siegel, are striving to create a realistic, empirically grounded understanding of the dynamic relationship between public opinion and constitutional development – a relationship that is on vivid display at Supreme Court confirmation hearings. Scholarship among these authors varies. Kramer, for example, argues that the public should reassert control over constitution meaning through “popular constitutionalism.”⁴ Friedman in turn hypothesizes that constitutional development already tracks public opinion over time,⁵ while Siegel argues that that individual justices play a significant role in shaping our constitutional values.⁶ Despite their differences, however, each of these scholars – and many others working in this area – would benefit from an empirically grounded understanding of how the confirmation process contributes to the interplay of public opinion and constitutional law.

Empirical information quantifying what actually happens at the confirmation hearings is also useful to scholars advocating *changing* the process. Whether the confirmation process is or is not working properly, and how it should be fixed if it is not, has been the subject of endless legal, political, and popular debate. Much of this angst is framed, explicitly or implicitly, by a yearning for a bygone era – usually thought to be sometime before Robert Bork’s failed 1987 hearing – when confirmations are believed to have been more civilized affairs, rather than the

questions about constitutionalism than were other nominees, although he was asked more questions about character, and that post-Bork and pre-Bork questioning patterns were more similar to each other than they were to the patterns seen at Bork’s confirmation hearing. Finally, Czarnezki, Ford, and Ringhand used nominee hearing statements to ascertain each nominees’ commitment – as expressed at his or her Senate hearing – to three issue areas: *stare decisis*, originalism as an interpretive method, and the protection of criminal defendants. Jason J. Czarnezki, William K. Ford & Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CON. COMMENT. 127 (2007). They then compared those commitment levels to decisions rendered by the nominees once on the bench. This research indicated that the statements about originalism and *stare decisis* had little correlation with subsequent rulings, while statements about the protection of criminal defendants had some predictive value. Ringhand followed up on this project with an article examining how often nominees answer questions about particular named cases. Lori A. Ringhand, “*I’m Sorry, I Can’t Answer That*”: *Positive Scholarship and the Supreme Court Confirmation Process*, 10 UNIV. OF PENN. J. OF CONST. L. 331 (2008).

⁴ LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁵ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009).

⁶ Neil Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. (forthcoming 2010).

partisan ruckus they are seen as today.⁷ This belief that the process has changed – and changed for the worse – has led to a chorus of calls for reform. Some reformers propose that senatorial questioning stay clear of substantive issues areas and be limited to inquiries regarding a nominee’s “judicial philosophy.”⁸ Others have gone the opposite direction, advocating more robust and wide-reaching exchanges between the senators and the nominees.⁹ Still others have called for the imposition of super-majority rules on Supreme Court confirmations,¹⁰ and even for the abolishment of the confirmation process entirely.¹¹

These reform proposals, like the growing body of positive constitutional scholarship discussed above, clearly would benefit from empirical data quantifying *what actually happens* at Supreme Court confirmation hearings. Empirical work in both of these areas, however, has been stymied by a lack of basic data. What do the senators ask about and what do the nominees talk about? Do these things vary depending on partisan affiliations of the senators and nominees? Do they vary depending on the race or gender of the nominee? Have they changed over time?

Until now, scholars working in these areas have had no comprehensive empirical information with which to answer questions such as these. The Supreme Court Confirmation Hearings Database introduced here remedies that situation. It content analyzes and codes every senatorial question asked and every nominee response given at every open public hearing held by the Senate Judiciary Committee at which a nominee for the Supreme Court testified. In introducing the database, we also present a description of the patterns underlying the dialogue that transpires at the hearings: we determine whether the quantity and type of questions asked of nominees has

⁷ For a review of the literature in this area, see, e.g., Jeff Yates & William Gillespie, *Supreme Court Power Play: Assessing the Appropriate Role of the Senate in the Confirmation Process*, 58 WASHINGTON & LEE L. REV. 1053 (2001).

⁸ See Carter, *supra* note 2. See also Robert F. Nagel, *Advice, Consent, and Influence*, 84 NORTHWESTERN. U. L. REV. 858, 863 (1990).

⁹ See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, YALE L.J. (THE POCKET PART), Jan. 2006, http://www.thepocketpart.org/2006/01/post_and_siegel.html.

¹⁰ John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Confirmation Process*, 26 CARDOZO L. REV 543 (2010).

¹¹ Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 99 CAL. L. REV. 299 (2004).

changed over the years, which issues have generated the most discussion at the hearings, whether the issues discussed vary depending on the party of the appointing president and that of the questioning senator, and whether different issues are presented to female and minority nominees.

Our findings are wide-ranging. Some simply provide empirical validation of conventional wisdom about the hearings (the hearings have, for example, gotten longer). Others challenge that wisdom: the Bork hearing is less of an outlier in several ways than is frequently assumed, and abortion has not dominated the dialogue between the senators and the nominees. We also present findings that will help scholars tease out the complex mechanisms through which the confirmation process connects public opinion to constitutional law. For example, we find that there is substantial variation over time in the issues discussed at the hearings, and that there are notable disparities in the issues addressed by Democratic versus Republican senators. Finally, we present evidence that speaks directly to the fairness of the process itself: for example, we find that women and minority nominees face a significantly different hearing environment than do white male nominees.

The paper has three parts. Part I provides some background on the Senate confirmation hearings and describes the new data introduced here. Part II analyses that data and presents our findings. Part III sets forth some tentative conclusions about what the data examined in Part II tell us about the confirmation process, and discusses how future research can build on the empirical foundation we establish with this work.

I. THE SUPREME COURT CONFIRMATION HEARINGS DATABASE

Article 2, Section 2 of the U.S. Constitution states that the President, with the advice and consent of the Senate, has the power to appoint justices to the Supreme Court of the United States. To assist in its part of this process, the Senate in 1816 established the Committee on the

Judiciary as a standing committee.¹² For the first hundred years or so of its history, the Committee did its work quietly: it discussed the nominees in private, did not ask them to appear in person, and rarely took public testimony about them.¹³ This changed in 1925, when nominee Harlan Stone, at the request of President Calvin Coolidge, took the unprecedented step of agreeing to appear before the Committee. Stone's appearance was limited, however, to defending himself against charges (stemming from the Teapot Dome scandal) involving his earlier work as Attorney General.¹⁴

In 1939, Felix Frankfurter became the first nominee to take unrestricted questions in an open, transcribed, public hearing. Between Frankfurter's hearing in 1939 and John Harlan's testimony in 1955, nominees appeared only intermittently. Some notable jurists nominated in this time frame – such as Chief Justice Earl Warren – did not appear. Since 1955, however, every Supreme Court nominee other than those whose names were withdrawn before hearings began (e.g., Douglas Ginsburg and Harriet Miers) has appeared and testified before the Committee.

The dataset introduced in this paper includes every hearing since 1939 at which a nominee appeared to testify. Nominees who underwent separate confirmation hearings for an associate justice and then a chief justice nomination are coded separately for each appearance. The dataset also includes nominees who appeared to testify but were not confirmed (e.g., Robert Bork and Nixon nominees Harrold Carswell and Clement Haynsworth). It does not, however, include the portion of the Clarence Thomas hearing that was re-opened solely for the purposes of taking testimony regarding the accusations of sexual harassment made by law professor Anita

¹² United States Senate Committee on the Judiciary, *History of the Senate Committee on the Judiciary*, available at <http://judicial.senate.gov/about/history/index.cfm> (as accessed June 14, 2010).

¹³ *Id.*

¹⁴ *Id.*

Hill. Nominees included in the dataset, along with their appointing president and confirmation outcome, are listed in Appendix A.

When possible, the data have been collected from the official Senate Judiciary Committee transcripts as available either online at the Committee's webpage,¹⁵ or in THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1975 (compiled by Roy M. Mersky and J. Myron Jacobstein). The Sotomayor hearing was coded from the transcript available at the NEW YORK TIMES webpage.¹⁶

The unit of analysis in the dataset is a change of speaker, meaning that a new observation begins whenever the speaker changes. For example, the following discussion between Sonia Sotomayor and Senator Hatch represents two observations, one for Hatch and one for Sotomayor:

SEN. HATCH: Okay. All right. In what way does the court's observation that the Second Amendment codified a preexisting fundamental right to bear arms affect your conclusion that the Second Amendment does not protect a fundamental right?

JUDGE SOTOMAYOR: My conclusion in the *Maloney* case or in the *U.S.-Sanchez-Villar* was based on precedents. And the holding of precedents of the 2nd Circuit did not apply to the states.¹⁷

Each comment is coded by both its primary issue and any relevant subissues. Senatorial comments and nominee comments are coded separately and therefore need not (although usually do) involve the same issue and subissue(s). A single unit of analysis can have only one issue, but may have multiple subissues. So, for example, a senatorial comment asking about the nominee's opinion on race and gender discrimination would have one issue ("civil rights") and two subissue

¹⁵ http://www.senate.gov/pagelayout/reference/one_item_and_teasers/Supreme_Court_Nomination_Hearings.htm

¹⁶ <http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html> (as accessed January 10, 2010).

¹⁷ http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?pagewanted=20&_r=1 (as accessed June 14, 2010)

codes (“race” and “gender”). Subissue codes are unique to their issue in that the same subissue does not appear in multiple issue codes.

The issue and subissue codes used in the project are based on the Policy Agendas Project,¹⁸ with some confirmation-specific codes added. The issue codes include areas such as “civil rights,” “criminal justice,” and “judicial philosophy.” Subissues include such topics as “gender discrimination,” “racial discrimination,” and “religion: free exercise” (in the civil rights issue area); “Miranda warnings” and “white collar crime” (in the criminal justice issue area); and “precedent” and “original intent” (in the judicial philosophy issue area). We also have created an issue code for “chatter.” The purpose of this code is to capture non-substantive discussion, such as the scheduling of breaks and other social chitchat that occurs frequently among the senators and nominees. Chatter also includes discussions of the nominee’s education, family and background. A complete list of the issues and subissues coded is available in Appendix B.

Each comment also is coded for identification variables, such as the name of the questioning senator, the questioning senator’s political party, the party holding majority control in the Senate at the time of the hearing, and the party of the nominating president. Political party variables are coded as of the date of the hearing. So, for example, a senator such as Arlen Specter, who served on the Judiciary Committee as both a Republican and a Democrat, will appear in the data as both a Republican and a Democrat, with his party affiliation depending on the date of the hearing being coded.

We subjected the data to extensive reliability testing. The data are, overall, very reliable. The average agreement rate between coders for all variables is 91.2% and the average kappa is

¹⁸ Frank R. Baumgartner & Bryan Jones, *Policy Agendas Project*, available at <http://www.policyagendas.org/>.

0.89, which is “almost perfect” by one commonly used metric.¹⁹ While some variables exhibit weaker intercoder agreement, no variable does worse than “moderate” in terms of kappa and almost all exhibit “substantial” to “almost perfect” intercoder agreement rates. A full reliability analysis report is available in Appendix C.

II. DATA ANALYSIS

This section analyzes the data described above. Specifically, we examine four aspects of Supreme Court confirmation hearings: (1) the quantity of comments over time; (2) the issues and subissues addressed, and the extent to which those issue areas and subissues have changed over time; (3) the significance of the party affiliation of the appointing president and the questioning senators in the topics addressed at the hearings; and (4) whether the issues raised at the hearings vary with respect to nominee race and gender.

Our findings are notable. First, we find that the number of comments at the hearings has increased, but that this increase, contrary to common assertions,²⁰ did not begin with the Bork hearings. Second, we find that the issue areas addressed at the hearings have varied over time, but that discussions of civil rights issues have been dominate since 1970. We also find that the topics addressed within the civil rights area itself have changed over time; most notably, comments about racial discrimination have ebbed while comments about gender and sexual orientation discrimination have increased. Each of these findings, as we explain in Part III, have implications for our understanding of how the confirmation hearings help to shape the development of constitutional law.

¹⁹ J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159 (1977).

²⁰ See, e.g., Stephen J. Wermeil, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 L. & CONTEMP. PROB. 121 (1993).

We also make additional findings that will facilitate a richer appreciation of the confirmation process. We find, for example, that there is significant variation in the questions asked by Democratic and Republican senators: Democrats ask more questions about criminal justice issues, while Republicans dominate questioning about judicial philosophy, statutory interpretation, and national security. We also find that abortion has not played as important a role in the hearings as is often assumed, even after accounting for the fact that *Roe v. Wade*²¹ was not decided until quite late in the time period covered by the dataset. Finally – and perhaps most importantly – we find that women and minority nominees face a different hearing environment than do white male nominees. They are asked more substantive questions overall, and more questions about their judicial philosophy. Minority nominees also are asked more questions about criminal justice.

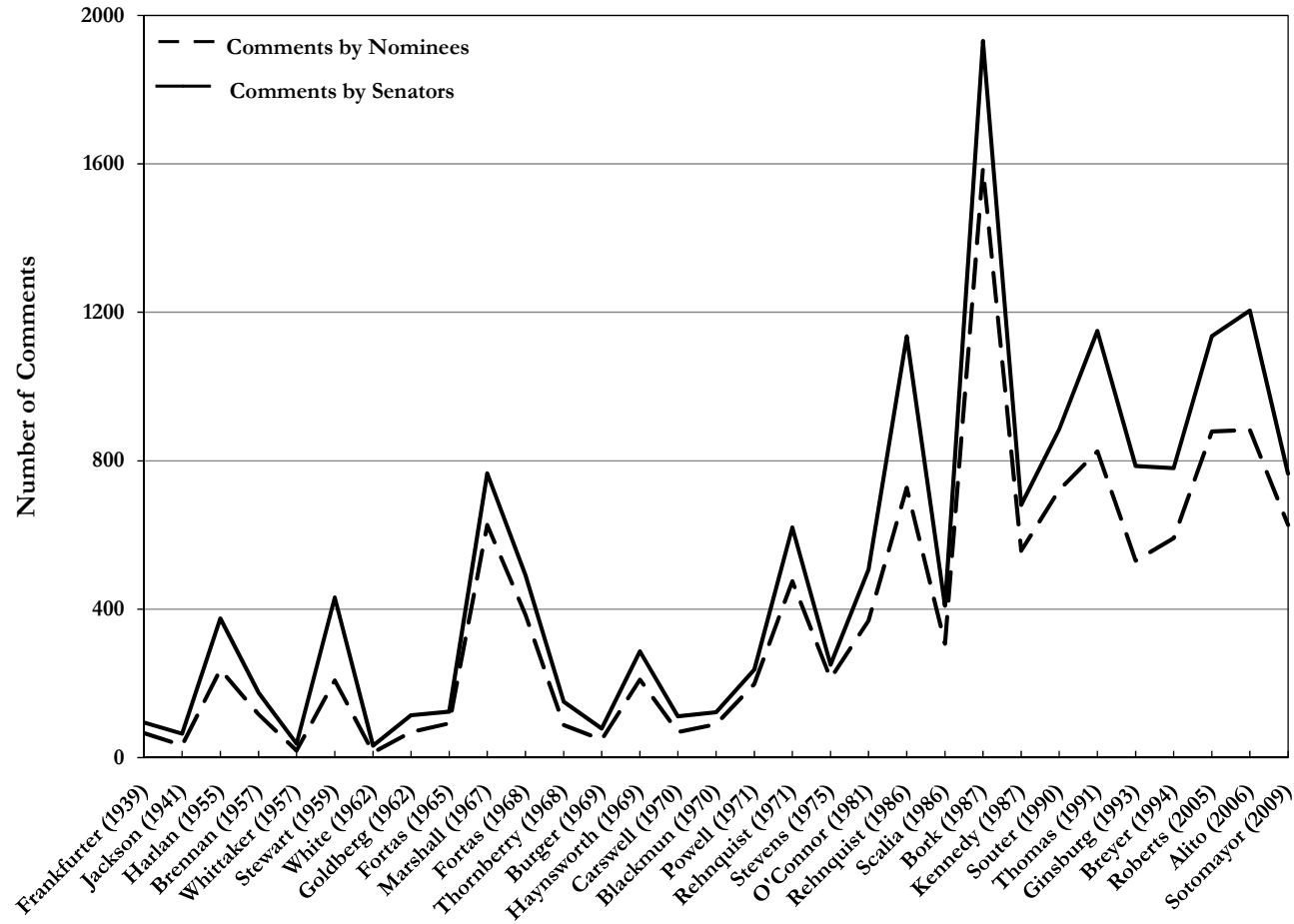
A. THE QUANTITY OF COMMENTS OVER TIME

Figure 1 reports the number of comments made by nominees and senators at Senate Judiciary Committee confirmation hearings from 1939 to 2009. The nominees are aligned along the x-axis, while the y-axis reports the total number of comments made by nominees (the dashed line) and senators (the solid line). This figure reveals two significant things. First, note the strong association between the number of comments made by nominees and senators. Using the hearing as the unit of analysis, the correlation between the number of comments made by nominees and senators is 0.992 ($p < 0.001$). As such, it is evident that our data reflect the fact that confirmation hearings take place in a question and answer format, with senators traditionally moving first by asking questions, followed by the nominees responding in turn.

Second, the number of comments made by both nominees and senators has increased rather dramatically over time. For example, from 1939-1981, the average number of comments

²¹ 410 U.S. 113 (1973).

Figure 1. The Number of Comments Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



made by nominees was 181, while the average number of comments made by senators was 253. Since Rehnquist's Chief Justice hearing in 1986, however, the average number of comments made by nominees was 749 and the average number of comments made by senators was 987.

While the Bork hearings represent the greatest number of comments, with 1,587 statements made by Bork and 1,931 remarks made by senators, it is notable that the increase in the number of statements made at the hearings began not with Bork, but with Rehnquist's nomination for Chief Justice in 1986. During that hearing, Rehnquist made 727 statements and senators contributed 1,135 questions and comments. Thus, while the Bork hearing certainly stands out as an outlier in terms of the number of statements made, Bork's nomination does not represent the point at which the number of comments made at confirmation hearings saw its most radical transformation. Rather, Figure 1 reveals that the increase in the number of comments made at confirmation hearings was initiated at Rehnquist's hearing for the position of Chief Justice.

B. ISSUES AND SUBISSUES

Table 1 reports the issues addressed by senators and nominees who appeared before the Senate Judiciary Committee from 1939 to 2009. As this table illustrates, a plurality of comments (35.2%) at the Senate Judiciary Committee hearings of Supreme Court nominees involve confirmation chatter. The bulk of the chatter category (57.1%) is made up of miscellaneous talk among the senators, including non-substantive clarifications such as "excuse me," or "could you repeat that," as well as senatorial discussions of scheduling and social chitchat. About a quarter of the chatter category (24.3%) involves discussions of the nominees' background and education, while the remainder involves discussion of media coverage of the nominations and pre-hearing coaching. Note that this category does not include senatorial statements posing as questions (a

Table 1. The Issues Addressed by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Issue	Senators	Nominees	Total
Hearing Administration/Chatter	41.8% (6,658)	26.4% (3,134)	35.2% (9,792)
Civil Rights	26.8% (4,266)	33.8% (4,003)	29.8% (8,269)
Judicial Philosophy	11.2% (1,777)	14.1% (1,667)	12.4% (3,444)
Criminal Justice	7.7% (1,231)	9.8% (1,161)	8.6% (2,392)
Government Operations	3.3% (521)	4.1% (485)	3.6% (1,006)
Court Administration	2.9% (466)	3.8% (446)	3.3% (912)
Federalism	1.1% (177)	1.5% (177)	1.3% (354)
Statutory Interpretation	0.8% (127)	1.1% (127)	0.9% (254)
Banking and Finance	0.8% (123)	1.0% (120)	0.9% (243)
Labor and Employment	0.6% (98)	0.8% (96)	0.7% (194)
Standing/Access to Courts	0.6% (91)	0.7% (85)	0.6% (176)
Best/Favorite Justices	0.4% (58)	0.5% (58)	0.4% (116)
National Defense	0.4% (59)	0.5% (55)	0.4% (114)
Other Issues	1.7% (276)	2.1% (247)	1.9% (523)
Totals	100.1% (15,928)	100.2% (11,861)	100% (27,789)

The unit of analysis is the change of speaker. The column entries represent the percentage of comments regarding each issue area. The percentages do not necessarily sum to 100% due to rounding. The numbers in parentheses indicate the total number of comments pertaining to each issue area. Issue areas representing less than 0.4% of the column totals are combined into the “Other Issues” category. The data contain information on Supreme Court nominees, both confirmed and unconfirmed, who appeared in front of an open session of the Senate Judiciary Committee since 1939.

common practice), requests for clarifications that have a substantive component, or single word comments (such as “yes”) that carry substantive meaning when considered in context.

Looking at Table 1, it is tempting to note that the members of the Judiciary Committee could cut the number of comments made at the hearings by more than a third simply by engaging in less chatter. We admit to considering making such a suggestion. But two things about the chatter issue area compel us to resist this urge, and to treat the category with more respect.

First, the largest contributors to the senatorial chatter category are the committee chairs, who make up almost half of all chatter. Although only speculative, our impression as coders is that most of these comments consist of necessary discussions of hearing logistics and other scheduling matters, in addition to the introductory exchanges in which the nominee discusses his or her education and background. Second, as we discuss below, the percentage of chatter at the hearings appears to be leveling off rather than increasing, suggesting that the senators themselves

are moving toward viewing their role as a more substantive one. This also assures us that the practice of televising the hearings, which began in 1981 with the O'Connor hearing, has not increased chatter among the senators.²²

Table 1 also reveals that three issues have dominated the substance of the hearings: civil rights, judicial philosophy and criminal justice. The most common substantive issue area addressed at the hearings is civil rights. Civil rights dialogue constitutes 26.8% of all senatorial comments and 33.8% of all nominee comments contained in the dataset. Taking senatorial and nominee comments together, statements about civil rights thus comprise 29.8% of all of our observations. Judicial philosophy, which includes comments about methods of constitutional interpretation, the role of the Court, and judicial activism, is a distant second, constituting only 12.4% of all comments. Criminal justice, including discussions of criminal procedure, capital punishment and juvenile justice, rounds out the top three substantive areas with 8.6% of the total comments. The remaining issue areas reported in Table 1 are discussed relatively infrequently, with no single issue area representing more than 4% of commentary.

Table 2 reports the most frequently addressed non-chatter issue area by nominee. This table reveals that civil rights, judicial philosophy, and criminal justice have dominated the hearings not just overall, but since their inception. Civil rights has been the most frequently discussed issue area at all of the hearings since 1971. It was also the most frequently addressed issue area in 21 of the 31 hearings in the dataset as a whole. Judicial philosophy, in contrast, was the most discussed issue at only four of the hearings, while criminal justice dominated an additional four. Only two hearings, that of Byron White (1962) and Warren Burger (1969) were dominated by issues other than these three: White's hearing focused on issues of standing and

²² Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J. L. & POLITICS 1 (1999).

Table 2. The Most Frequently Addressed Non-Chatter Issue by Senators and Nominees, per Nominee, who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Nominee Name (Year)	Most Frequently Addressed Issue	
	Senators	Nominees
Frankfurter (1939)	Civil Rights (24.5%)	Civil Rights (31.8%)
Jackson (1941)	Criminal Justice (21.9%)	Criminal Justice (97.0%)
Harlan (1955)	Judicial Philosophy (15.6%)	Judicial Philosophy (15.6%)
Brennan (1957)	Civil Rights (48.0%)	Civil Rights (58.6%)
Whittaker (1957)	Civil Rights (21.6%)	Civil Rights (21.1%)
Stewart (1959)	Judicial Philosophy (29.7%)	Judicial Philosophy (49.0%)
White (1962)	Standing/Access to Courts (25.0%)	Standing/Access to Courts (42.9%)
Goldberg (1962)	Judicial Philosophy (29.8%)	Judicial Philosophy (46.4%)
Fortas (1965)	Criminal Justice (16.9%)	Criminal Justice (19.6%)
Marshall (1967)	Criminal Justice (46.7%)	Criminal Justice (52.5%)
Fortas (1968)	Criminal Justice (21.4%)	Criminal Justice (23.9%)
Thornberry (1968)	Civil Rights (40.4%)	Civil Rights (58.0%)
Burger (1969)	Judicial Administration (25.6%)	Judicial Administration (41.7%)
Haynsworth (1969)	Civil Rights (4.9%)	Civil Rights (6.7%)
Carswell (1970)	Civil Rights (45.1%)	Civil Rights (49.3%)
Blackmun (1970)	Judicial Philosophy (12.3%)	Judicial Philosophy (15.6%)
Powell (1971)	Civil Rights (47.7%)	Civil Rights (54.6%)
Rehnquist (1971)	Civil Rights (31.6%)	Civil Rights (38.5%)
Stevens (1975)	Civil Rights (22.0%)	Civil Rights (23.9%)
O'Connor (1981)	Civil Rights (23.5%)	Civil Rights (27.9%)
Rehnquist (1986)	Civil Rights (24.3%)	Civil Rights (33.4%)
Scalia (1986)	Civil Rights (25.2%)	Civil Rights (31.6%)
Bork (1987)	Civil Rights (36.9%)	Civil Rights (45.2%)
Kennedy (1987)	Civil Rights (24.7%)	Civil Rights (28.0%)
Souter (1990)	Civil Rights (29.9%)	Civil Rights (36.8%)
Thomas (1991)	Civil Rights (32.0%)	Civil Rights (44.9%)
Ginsburg (1993)	Civil Rights (28.6%)	Civil Rights (39.7%)
Breyer (1994)	Civil Rights (21.5%)	Civil Rights (27.2%)
Roberts (2005)	Civil Rights (37.7%)	Civil Rights (44.0%)
Alito (2006)	Civil Rights (21.9%)	Civil Rights (26.5%)
Sotomayor (2009)	Civil Rights (23.0%)	Civil Rights (29.5%)

The numbers in parenthesis indicate the percentage of comments represented by the most frequently addressed issue area. The data contain information on Supreme Court nominees, both confirmed and unconfirmed, who appeared in front of an open session of the Senate Judiciary Committee since 1939.

access to courts, while Burger's hearing for Chief Justice devoted a substantial amount of attention to issues implicating judicial administration.

While the tables examined above provide a great deal of information regarding the issues discussed in the Senate Judiciary Committee, they do not speak to whether there have been changes over time in the percentages of comments addressing each issue at each hearing.

Identifying such temporal changes is key to exploring connections between public opinion (as

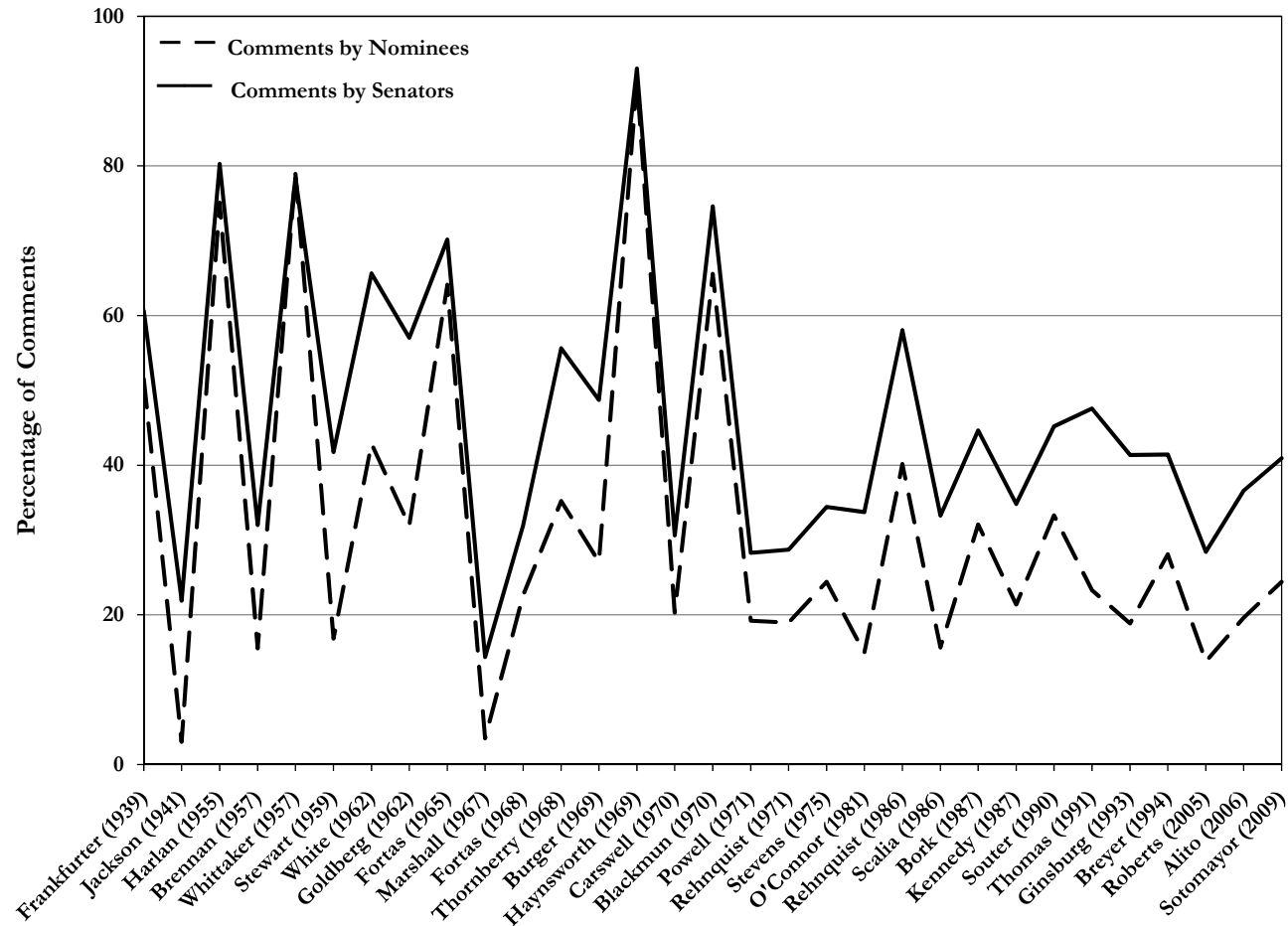
evidenced through senatorial questioning) and constitutional change. As such, we provide below a more fine grained analysis of temporal changes within the chatter, civil rights, criminal justice, and judicial philosophy issues areas. We also break down the broad civil rights category and examine temporal changes in several of the subissues included within that issue area.

1. Hearing Administration and Chatter

Figure 2 presents the percentage of comments regarding hearing administration and chatter made by senators and nominees from 1939-2009. The nominees in this figure, and in those that follow, are arranged along the x-axis, while the y-axis represents the percentage of comments involving hearing administration and chatter. Comments by nominees are indicated by the dashed line, while comments from senators are denoted by the solid line.

As Figure 2 makes clear, there has been substantial temporal variation with respect to the percentage of comments involving hearing administration and chatter. For example, more than 90% of the comments made by nominees and senators during the Hansworth (1969) hearing involved chatter. Similarly, about 80% of the comments proffered by nominees and senators at the Harlan (1955) and Whittaker (1957) hearings were chatter. In more recent years, however, chatter levels dropped. For example, the percentage of chatter from senators prior to 1971 was 46.1%, compared to 40.6% in the post-1970 era. While this supports commonly made assertions that confirmations hearings used to be more chummy affairs, it also makes clear that senators and

Figure 2. The Percentage of Comments Regarding Hearing Administration and Chatter Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



nominees have striven to be more substantive in recent hearings, at least in terms of the issue areas they choose to address. Opinions may differ, but we do not rue this development.

2. Civil Rights

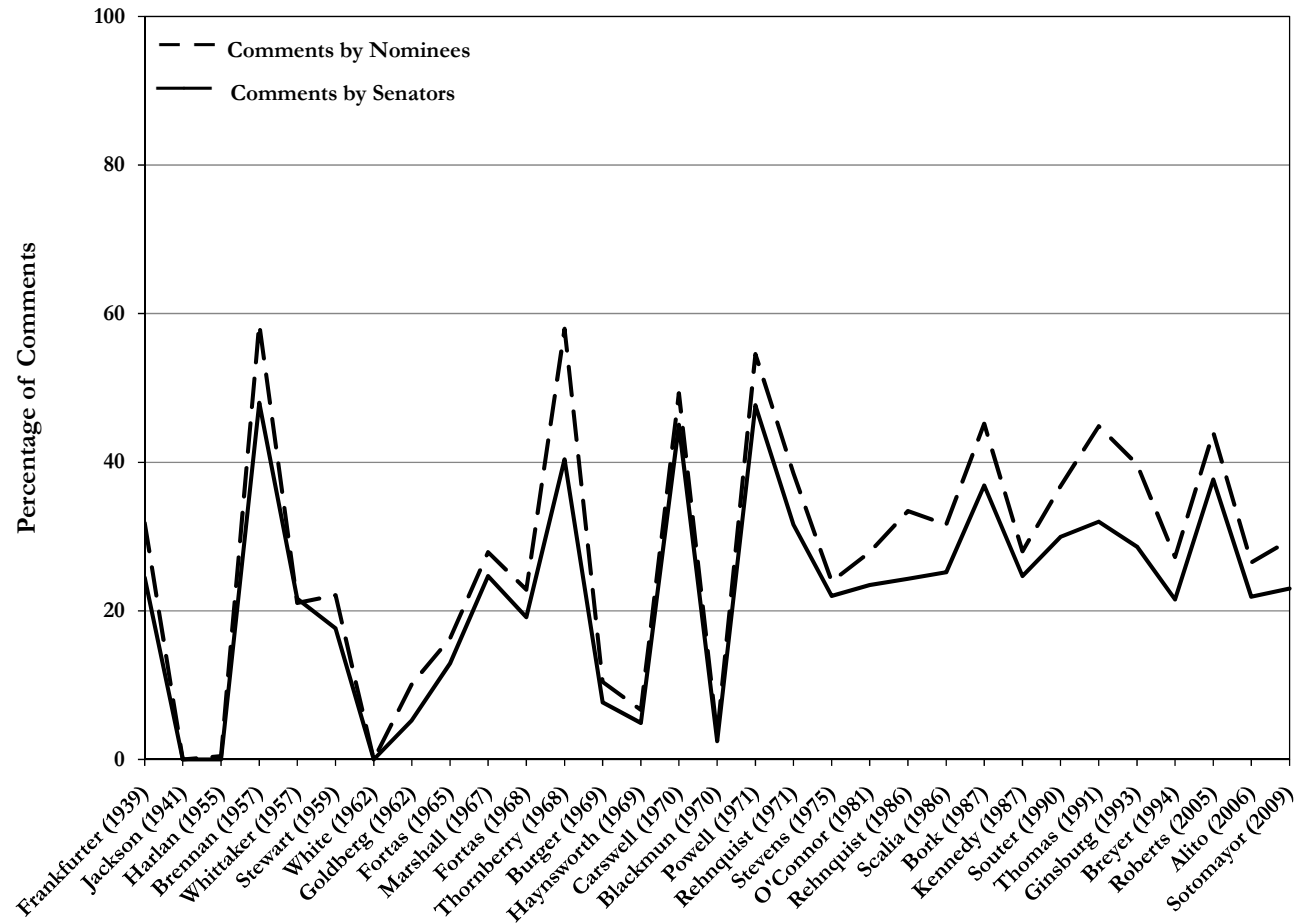
As shown in Figure 3, civil rights has dominated the substantive issue areas covered at the hearings overall, and has done so with particular force since 1970. This figure plots the percentage of comments made regarding civil rights from 1939-2009. While there was notable variation in the pre-1970 era, with the Jackson (1941) and White (1962) hearings containing no discussion of civil rights, it is apparent that civil rights has become an essential part of the confirmation hearings. In fact, since 1971, interrogation by senators regarding a nominee's views of the pressing civil rights issues of the day has never represented less than 20% of all questions asked at the hearings.

The dominance of civil rights comments is particularly notable given that the number of comments likely to have been motivated by civil rights concerns may be somewhat *understated* in the data. It is not unusual for Senators to present substantive concerns about an issue area in comments that are, under our coding rules, coded as “judicial philosophy.” This is particularly so in the civil rights issue area. The most obvious example of this is the 1959 hearing of Potter Stewart. Stewart was nominated just five years after the Court's landmark *Brown v. Board of Education*²³ decision and his hearing was held at a time in which the federal courts were still sorting out how aggressively they would oversee school desegregation. In this political environment, Stewart was bombarded with questions from Southern Democrats about the dangers of judges replacing “the law” with their “personal notions” of good policy, the problem of judges trying to “amend” the Constitution, and the importance of *stare decisis*.²⁴ It seems

²³ 347 U.S. 483 (1954).

²⁴ See, for example, Stewart Transcript, questioning by Senator Erwin (D-North Carolina) at 115, 124.

Figure 3. The Percentage of Comments Regarding Civil Rights Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



unlikely that these comments, coming at the time and from the senators that they did, were unrelated to *Brown*. Indeed, the Senators at the Stewart hearing often made the connection with *Brown* explicit. Consider, for example, the following comment by Senator Ervin of North Carolina:

I think the *Brown v. Board of Education* was a most unfortunate decision from the standpoint of law, Constitutional law, in the United States...In the first place, the Court said that it couldn't turn the clock back to 1868 when the Amendment was ratified or even to 1869 when *Plessy v. Ferguson* was decided, but since Constitutional provisions are to be interpreted to ascertain and give effect to the intention of the people who drew them and approved them, that is exactly what the Supreme Court should have done. They should have turned the clock back to 1868 when the Amendment was ratified.

Often, however, the senators did *not* link their opinions about *Brown* so directly to their comments about judicial philosophy. Consider this question by Senator Johnston of South Carolina:

Do you consider yourself what is termed a "creative judge" or do you consider yourself a judge that follows precedent?

Under our coding rules, Senator Ervin's comment would be coded as involving civil rights, while Senator Johnston's would be coded as one of judicial philosophy. This is so despite the fact that Senator Johnston's statement is highly likely to have been as motivated by *Brown* (which he discussed shortly after the exchange in which the above comment appears) as was Senator Ervin's. We cannot presume to accurately perceive senatorial motivations, however, so comments such as Johnston's which are not *articulated* as civil rights issues are coded in our data as raising issues of judicial philosophy rather than civil rights.²⁵ Thus, the actual number of

²⁵ Sonia Sotomayor's hearing provides additional examples of this. Many of the comments from her hearing coded as "judicial philosophy" involved whether she would allow her personal experiences to influence how she decided cases. To those familiar with her nomination, such comments likely appear to have been based on concerns of racial bias allegedly revealed in a series of speeches Sotomayor had given before her nomination.

Table 3. The Civil Rights Issues Addressed by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Issue	Senators	Nominees	Total
Racial Discrimination	23.5% (1,001)	22.4% (897)	23.0% (1,898)
Freedom of Speech/Religion	16.1% (686)	16.9% (676)	16.5% (1,362)
Right to Privacy (non-abortion)	14.7% (626)	14.7% (590)	14.7% (1,216)
Gender/Sexual Orientation Discrimination	12.7% (542)	12.7% (507)	12.7% (1,049)
Abortion Rights	12.5% (534)	11.9% (477)	12.2% (1,011)
Voting Rights	9.1% (388)	9.2% (369)	9.2% (757)
Anti-Government Activities	4.1% (176)	3.8% (153)	4.0% (329)
Right to Keep and Bear Arms	1.6% (70)	1.8% (72)	1.7% (142)
Handicap/Disease Discrimination	1.4% (59)	1.2% (49)	1.3% (108)
Age Discrimination	0.5% (22)	0.5% (21)	0.5% (43)
Other Civil Rights Issues	11.8% (505)	12.4% (495)	12.1% (1,000)
Totals	108% (4,609)	107.5% (4,306)	107.9% (8,915)

The unit of analysis is the change of speaker. The column entries represent the percentage of comments regarding each civil rights issue area. The percentages exceed 100% because a single comment by a senator or nominee can fall within multiple civil rights issue areas (e.g., abortion and freedom of speech). The numbers in parentheses indicate the total number of comments pertaining to each issue area falling within the civil rights category. Miscellaneous civil rights issue areas and civil rights issue areas representing less than 0.4% of the column totals are combined into the “Other Civil Rights Issues” category. The number of comments exceeds the number of civil rights comments reported in Table 1 because a single statement by a senator or nominee can touch on multiple civil rights issues. The data contain information on Supreme Court nominees, both confirmed and unconfirmed, who appeared in front of an open session of the Senate Judiciary Committee since 1939.

comments motivated in fact by concerns about civil rights may be higher than is reflected in our findings.

Regardless, civil rights issues clearly have, even under our conservative coding regime, dominated the hearings at which the nominees have testified. Civil rights, however, is a broad issue area. It includes, among other things, race, gender, age and disability discrimination; speech and religious freedom; and the right to keep and bear arms. To more fully understand the role this issue area has played in the hearings, it is therefore worth examining the prevalence and distribution of the subissues within it.

As Table 3 illustrates, statements involving discrimination constitute a plurality of comments within the civil rights issue area. Specifically, discussions of racial discrimination comprise 23% of civil rights comments. Gender and sexual orientation discrimination constitute an additional 12.7%, while age and disability discrimination add 1.8%. Combined, dialogue

involving discrimination thus constitutes 37.5% of the comments within the civil rights issue area. Freedom of speech/religion is the next most commonly mentioned civil rights subissue, followed by non-abortion privacy and, at only 12.2% of the issue area, abortion rights. Dialogue implicating voting rights represents 9.2% of the civil rights category, while treatments of anti-government activities constitute 4% this issue. Debates concerning the Second Amendment, first appearing at O'Connor's hearing in 1981 and constituting 8.8% of all dialogue at the Sotomayor hearing in 2009, make up only 1.7% of civil rights discourse. Below, we provide a detailed treatment of the five most frequently occurring subissues involving civil rights.

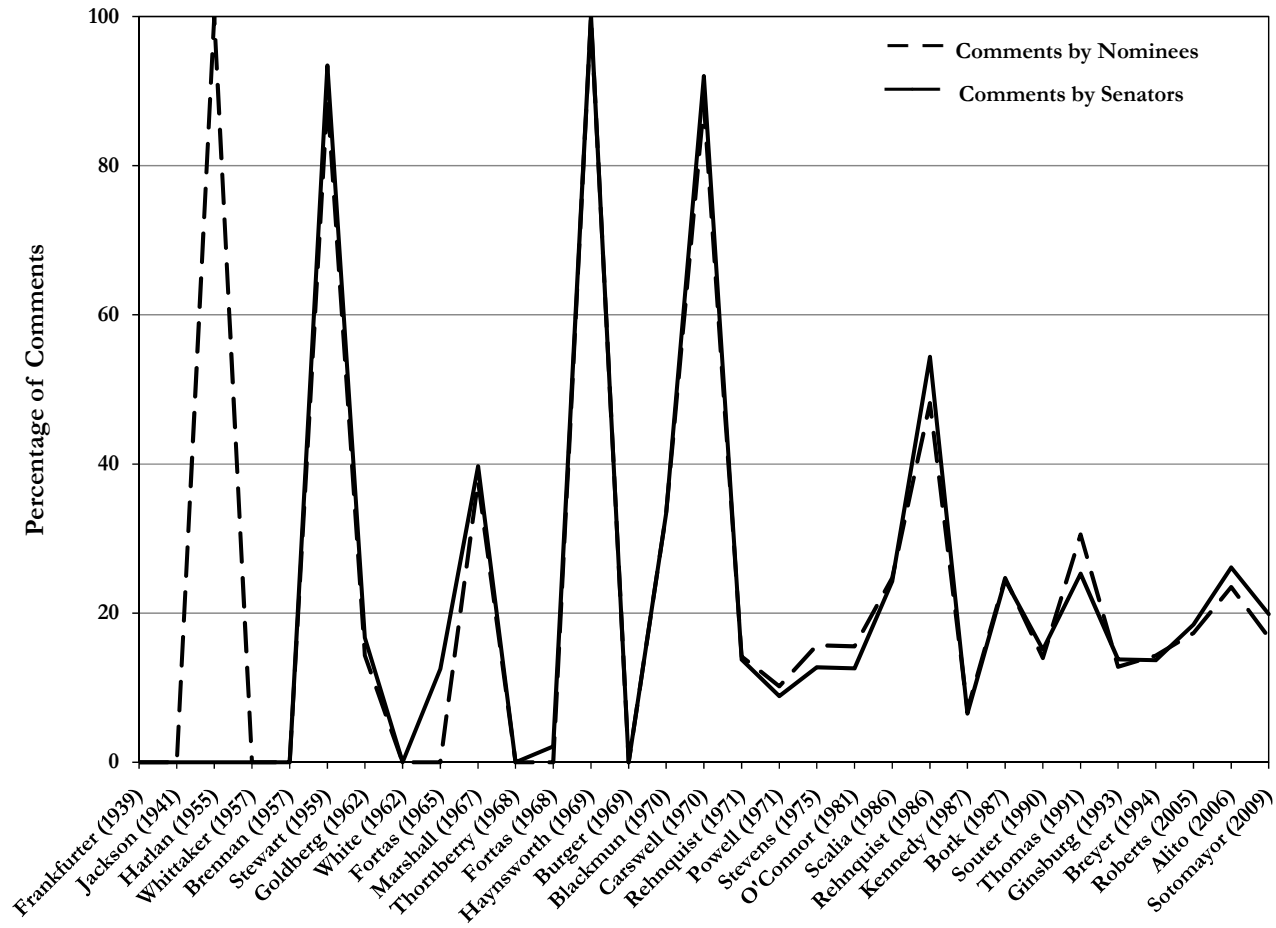
a. Race and Gender/Sexual Orientation Discrimination

The prevalence of racial discrimination comments is not surprising, given the importance of racial justice issues within constitutional law, as well as the fact that all but two of the hearings contained in the dataset occurred after the Supreme Court's *Brown* decision.²⁶ Conflicts about racial issues, prevalent in society throughout much of the time period covered in the dataset, plainly infiltrated the confirmation hearings.

Interestingly, however, the dominance of race discrimination comments may be on the wane. While remaining the most frequently mentioned subissue within the civil rights issue area, the percentage of civil rights comments involving racial discrimination has actually declined since the mid-1980s. Figure 4 plots the percentage of civil rights commentary involving racial discrimination. As this figure makes clear, discussions of racial discrimination dominated the civil rights category for several nominees, most notably Harlan (1955), Stewart (1959), and

²⁶ A new paper speculates that nominee testimony became the norm after 1955 precisely *because of Brown*. Dion Fargabis & Justin Wedeking, *Is the Ginsburg Rule Real? Assessing Nominee Candor in the Supreme Court Confirmation Hearings, 1955-2009*, (paper on file with authors).

Figure 4. The Percentage of Civil Rights Comments Regarding Racial Discrimination Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



Haynesworth (1969), but questions regarding racial discrimination have tapered off since the mid-1980s.

This decline may well reflect a mid-1980s “constitutional consensus”²⁷ that the Constitution proscribes (and allows Congress to penalize) intentional discrimination against racial minorities. A comparison of Rehnquist’s 1986 Chief Justice hearing, Bork’s failed 1987 hearing, and Kennedy’s subsequent 1987 hearing illustrates this point.

Rehnquist, the first of these nominees to face the Judiciary Committee, was confirmed as Chief Justice, but only after repeatedly disavowing a memo written when he was a law clerk that appeared to endorse *Plessy v. Ferguson*²⁸ (the 1896 case that had validated segregation and the “separate but equal” doctrine).²⁹ A year later, in 1987, Robert Bork told the Committee that *Brown* (which overturned *Plessy*) had been correctly decided, but appeared ambivalent about the constitutionality of poll taxes, racial covenants, and landmark civil rights legislation.³⁰ Bork was not confirmed. Justice Kennedy, nominated for the seat Bork failed to acquire, affirmed both *Brown* and The Civil Rights Act of 1964, and spoke strongly in favor of the federal government’s power to prohibit racial discrimination.³¹ Since Kennedy, no nominee has seriously refuted *Brown* or the legitimacy of federal anti-discrimination laws, and racial discrimination, perhaps consequently, has become less dominate in the hearings.

As comments regarding racial discrimination declined, comments about gender and sexual orientation discrimination arrived to fill the gap. As shown above in Table 3, discussions about gender and sexual orientation discrimination constitute 12.7% of the civil rights comments in the dataset, making this the fourth most frequently commented upon civil rights subissue in

²⁷ See Ringhand, *supra* note 3.

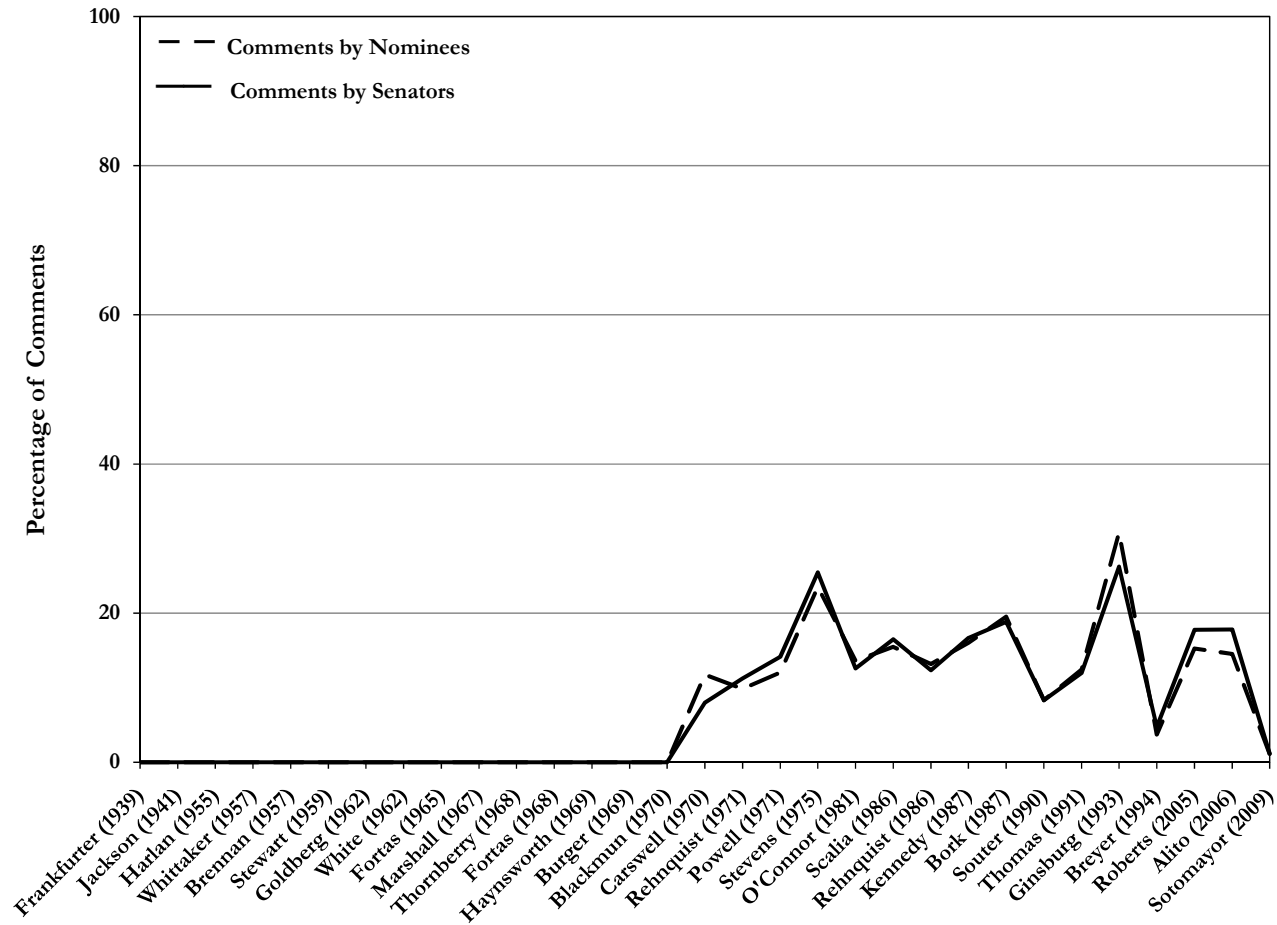
²⁸ 163 U.S. 537 (1896).

²⁹ Rehnquist, Chief Justice Transcript at 161-62.

³⁰ Bork Transcript at 152, 155, 253-54 and 348-349.

³¹ Kennedy Transcript at 152-53, 182-83.

Figure 5. The Percentage of Civil Rights Comments Regarding Gender and Sexual Orientation Discrimination Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



the dataset. As shown in Figure 5, however, all of the activity in this area has occurred since 1970, with most of it coming after 1975.

The emergence of these issues in the 1970s is not surprising. The 1970s were pivotal for both the women's rights and the gay rights movements. The National Organization of Women marched on Washington, the Equal Rights Amendment was re-introduced in Congress, and Gloria Steinman founded Ms. Magazine.³² Gay rights activists also gained momentum in the '70s. The Stonewall Riot, widely considered the birth of the gay rights movement, occurred in New York City in 1969.³³ The country's first gay pride parades, organized in remembrance of Stonewall, followed in 1970, and Ann Arbor, Michigan passed the first gay-rights ordinance in 1972.³⁴ As with racial conflicts, it would be surprising if societal changes as revolutionary as these were not reflected in the confirmation hearings.

b. Speech and Religious Freedoms

As noted in Table 3, speech and religious freedom is the second most frequently occurring subissue within the civil rights area, constituting 16.5% of all observations. This subissue includes discussions of, among other things, flag burning, school prayer, obscenity, free exercise of religion, and campaign finance regulation.

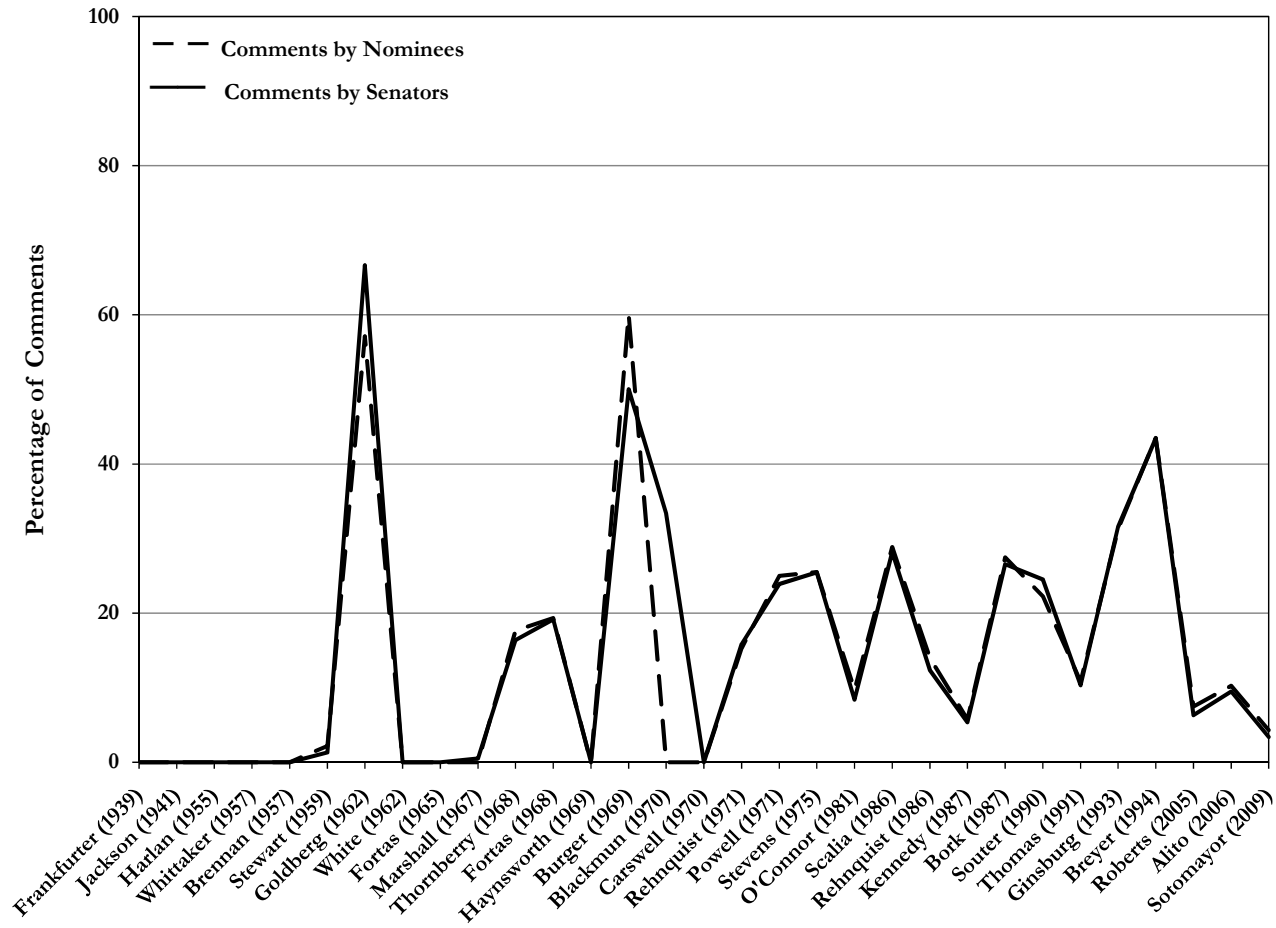
Unlike the dialogue concerning race and gender/sexual orientation discrimination, comments involving speech and religious freedoms have been relatively evenly dispersed over time, particularly since the late 1960s, as reported in Figure 6. While not every hearing involved substantial discussions of these issues, there was no time period in the last forty years in which this subissue did not play a relatively important role. Rather, its prevalence has remained quite stable over time, constituting about 10% to 20% of civil rights comments for most nominees.

³² <http://countrystudies.us/united-states/history-131.htm> (as accessed on June 16, 2010).

³³ DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2004).

³⁴ *Id.*

Figure 6. The Percentage of Civil Rights Comments Regarding Freedom of Speech and Religion Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



Comments in this subissue, as shown above, were most prominent in the Goldberg, Burger, and, to a lesser extent, Breyer hearings. Most of the Goldberg hearing comments within this subissue occurred within an exchange between Goldberg and Senator Ervin in which Ervin (continuing his post-*Brown* assault on the Court) asked Goldberg questions such as whether he agreed that “every American citizen has a right to think and to speak his own honest thoughts concerning all things under the sun, including the decisions of Supreme Court majorities?”³⁵ (Goldberg agreed).

The comments made at Justice Burger’s hearing were more representative of the direction this subissue would take in future hearings. Burger, confirmed in 1969, was asked very few questions overall (see Figure 1), but the ones he was asked within this subissue area focused on a school prayer case in which the Court had just denied certiorari.³⁶ Despite prodding from the senators, Burger refused to speculate on why the Court declined to hear the case.³⁷ Justice Breyer, the most recent nominee for whom this subissue constituted an unusually high percentage of civil rights comments, was likewise asked several questions about school prayer and the religion clauses, as well as numerous speech related questions. Breyer was somewhat more forthcoming than Burger had been, expressing general agreement with the Court’s Establishment Clause jurisprudence as set forth in *Lemon v. Kurtzman*,³⁸ but refusing to give an opinion about Free Exercises cases such as *Sherbert v. Verner*³⁹ and *Employment Division v. Smith*.⁴⁰

³⁵ Goldberg Transcript at 23-25.

³⁶ Burger Transcript at 18-19.

³⁷ *Id.* at 19.

³⁸ 411 U.S. 192 (1973).

³⁹ 374 U.S. 398 (1963).

⁴⁰ 494 U.S. 872 (1990). For Breyer’s discussion of these cases at his hearing, see Breyer Transcript at 153 and 223-224.

c. The Right to Privacy

Discussions of privacy unrelated to abortion follow comments involving racial discrimination and First Amendment freedoms as one of the most commonly raised subissues in the civil rights issue area, while abortion-related privacy placed fifth, after gender and sexual orientation discrimination. Non-abortion privacy discussions constitute 14.7% of the civil rights comments, while abortion rights comments comprise 12.2% of that issue area.

The temporal variation involving non-abortion-related and abortion-related privacy comments appears in Figures 7 and 8. Figure 7 reports the percentage of civil rights commentary involving privacy unrelated to abortion, while Figure 8 illustrates the percentage of civil rights commentary that touched on abortion rights. Note that the delineation of abortion and non-abortion privacy comments is important here. Because of the nominees' (and perhaps the senators') reluctance to address abortion-related questions directly, abortion as an issue is frequently addressed through proxy debates, usually involving contraception or *Griswold v. Connecticut*⁴¹ (establishing a right of married couples use contraception). To ensure that abortion-related comments were not thereby undercounted in the data, we coded comments involving contraception and *Griswold* as involving abortion rights. Non-abortion privacy, consequently, consists primarily of comments involving personal or informational privacy, such as police wiretapping, employee drug testing, and privacy of medical records.

This distinction between the two types of privacy comments explains the prevalence of privacy as a subissue at Justice Rehnquist's first confirmation hearing in 1971 – two years before *Roe* was decided – as reported in Figure 7. Also of note is that abortion and non-abortion privacy comments constitute a relatively small percentage of the civil rights comments at the Bork hearing: the distribution of civil rights comments at that hearing was fairly even (as among the

⁴¹ 381 U.S. 479 (1965).

Figure 7. The Percentage of Civil Rights Comments Regarding the Right to Privacy (non-abortion) Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

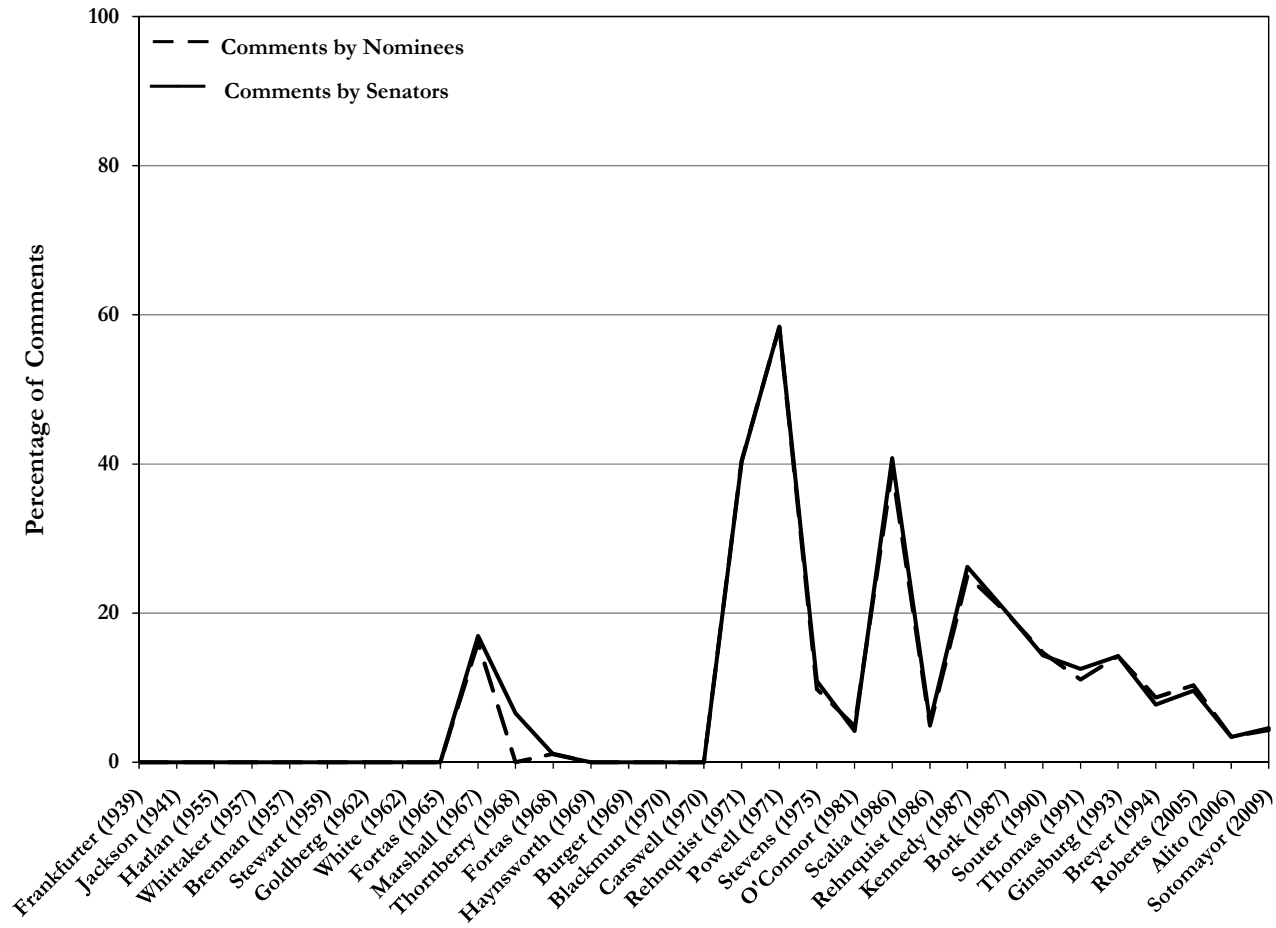
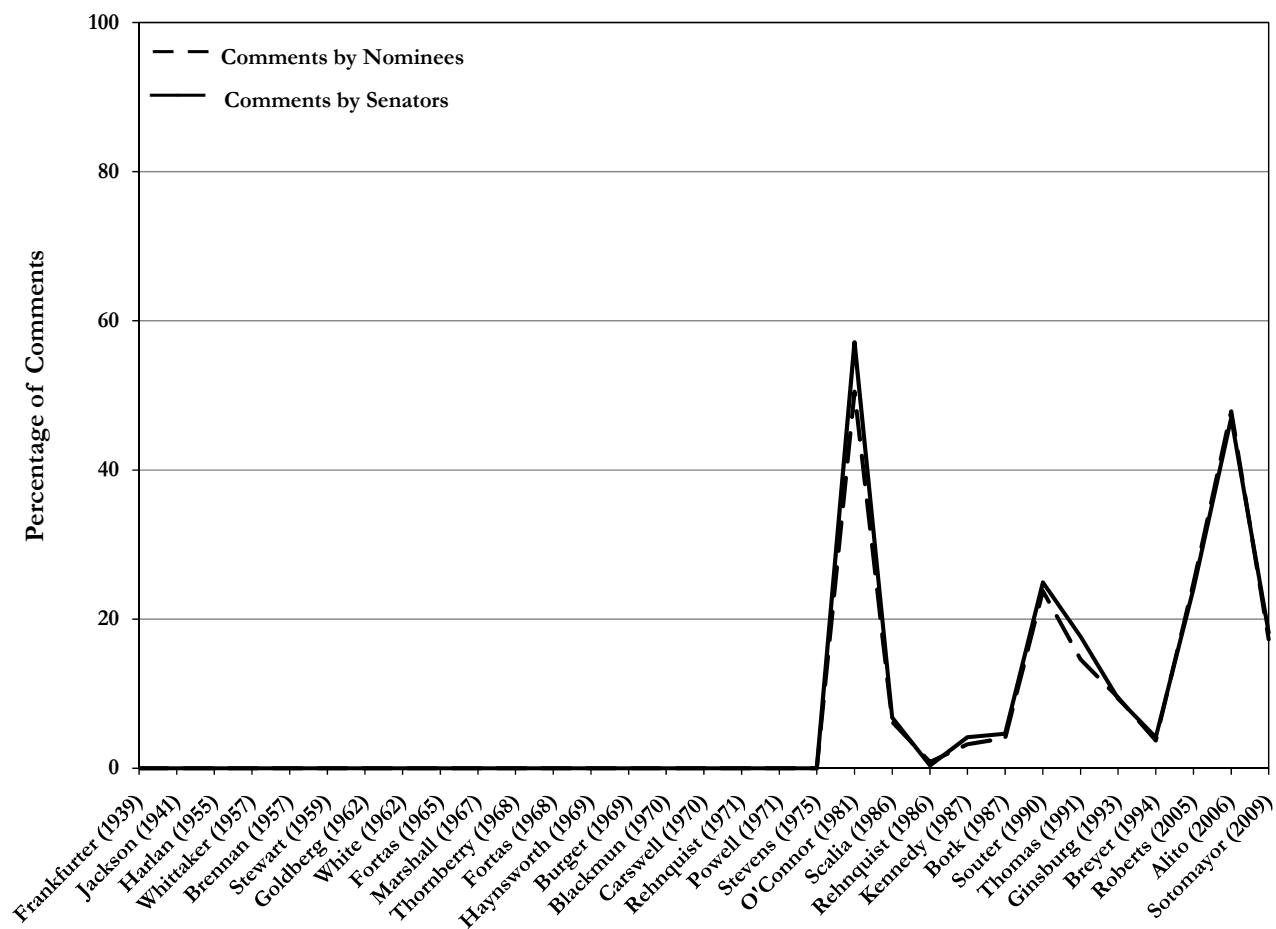


Figure 8. The Percentage of Civil Rights Comments Regarding Abortion Rights Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



category's subissues). Abortion and privacy concerns, in other words, did not dominate that hearing. Issues of race discrimination, gender discrimination, speech and religious freedoms, and non-abortion privacy all played roughly equivalent roles.

That abortion rights comments constitute a relatively small percentage (12.2%) of the civil rights observations in the dataset may be less surprising than it initially appears. Our dataset goes back to 1939, and abortion only became a controversial constitutional issue after 1973, the year *Roe v. Wade* was decided. What is more surprising than the relative scarcity of abortion comments overall, therefore, may be the fact that such comments have not played a larger role even in the post-*Roe* era. As shown in Figure 8, abortion rights comments have constituted more than 20% of the civil rights observations in only four of the thirteen post-*Roe* hearings: those of O'Connor, Souter, Roberts and Alito. Moreover, even though *Roe* was decided in 1973, abortion did not become an issue in the hearings until the 1981 O'Connor hearing. Post-*Roe*, dialogue concerning abortion rights constituted 15.6% of all civil rights discussions, comprising only 5% of all post-*Roe* comments in the dataset. Clearly, abortion as a hearing issue both took some time to gain traction and failed to dominate the hearings even after it did.

3. Judicial Philosophy

Judicial philosophy is the third most frequently occurring issue following chatter and civil rights. Comments about judicial philosophy, which include such things as discussions of constitutional interpretation, *stare decisis* and judicial activism, constitute 12.4% of the comments in the dataset.

Figure 9. The Percentage of Comments Regarding Judicial Philosophy Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

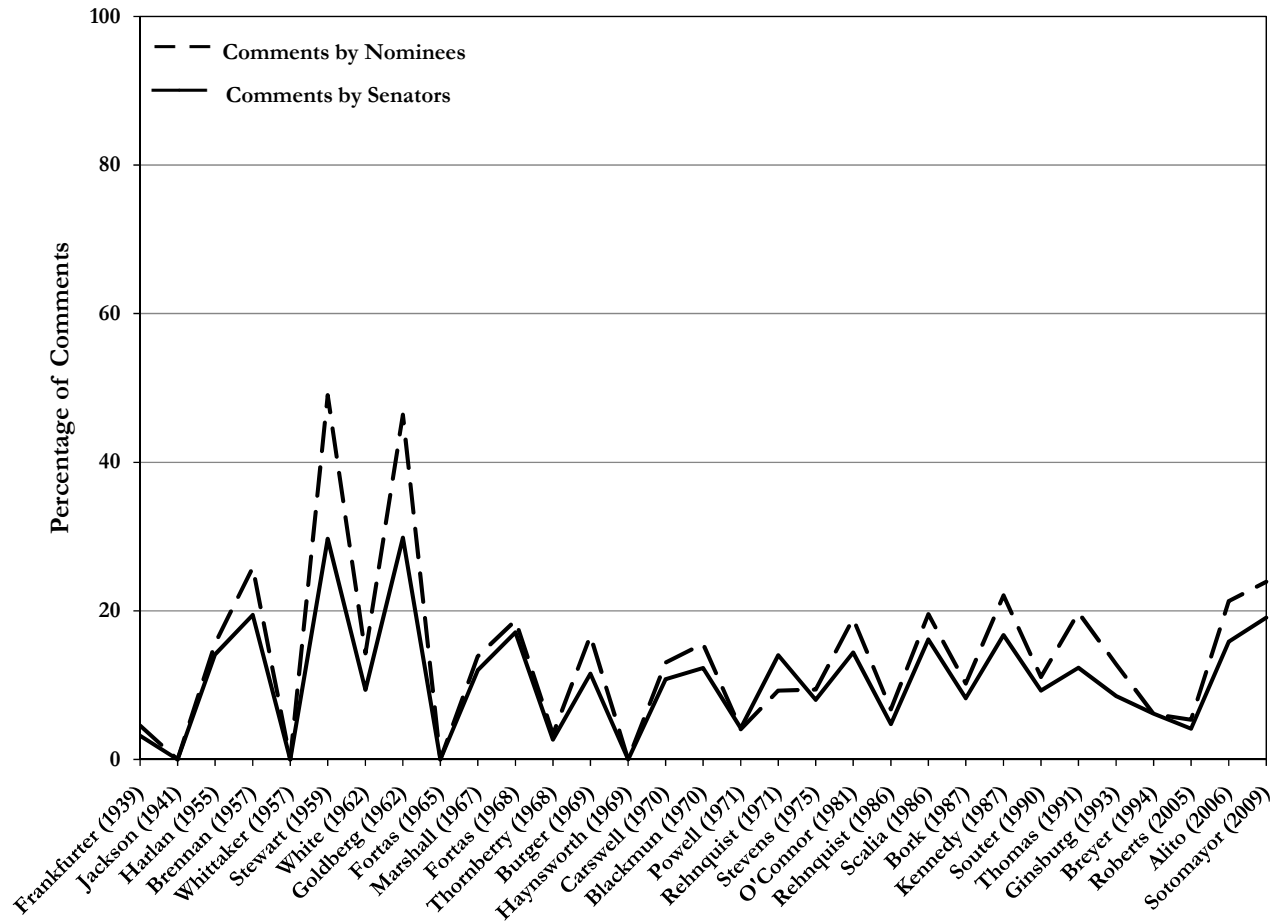


Figure 9 reports the percentage of comments involving judicial philosophy for each nominee in the data. Our findings regarding judicial philosophy are particularly noteworthy, in that many commentators, senators, and legal scholars argue that this should be the primary area of senatorial questioning.⁴² Clearly, neither the senators nor the nominees have conformed to such a practice: the substantive area of civil rights comprises more than twice as many comments in our dataset than do comments about judicial philosophy.⁴³ Moreover, this focus on less esoteric issues than judicial philosophy has been remarkably consistent over time.

With the exception of the White and Goldberg hearings, the percentage of comments involving judicial philosophy at the hearings has rarely exceeded 20% and has consistently been in a range of approximately 10% to 20% of hearing comments. This is consistent with Guliuzza, Reagan, and Barrett’s finding that Judge Bork was not asked more questions about what they labeled “constitutionalism” than were other nominees.⁴⁴ It is, however, as noted above, inconsistent with much of the rhetoric about how hearings “should” be conducted.⁴⁵

Note that the judicial philosophy issue area is limited to observations in which the comment is specifically about constitutional interpretation and/or the nominee’s preferred method thereof. When interpretive concerns are raised in the context of discussion about a particular substantive issue, coders were instructed to code by that issue. So, for example, a comment such as that cited above by Senator Ervin, in which he asks Justice Stewart about interpretive methods *within* a discussion of *Brown*, would be coded as a civil rights comment. As pointed out in the above discussion, however, this coding rule in practice probably *over* rather than *under* counts judicial philosophy comments because comments in which the substantive

⁴² See, for example, Stephen Carter, *The Confirmation Mess*, 101 HARVARD L. REV. 1185 (1988); and *The Confirmation Mess Revisited*, 84 NORTHWESTERN U. L. REV. 962, 965 (1990).

⁴³ Republican senators, as discussed in Part C below, asked more questions about judicial philosophy than did Democratic senators.

⁴⁴ See *supra* note 3.

⁴⁵ See *supra* note 7.

issue area is not raised will be coded as comments about judicial philosophy regardless of the senator's motivation in asking the question. Clearly, therefore, the hearings are and have since their inception been more focused on substantive, policy laden issues of constitutional law rather than on abstracted debates about theories of constitutional interpretation.

4. *Criminal Justice*

Criminal justice is the last of the top four issue areas addressed at the hearings.

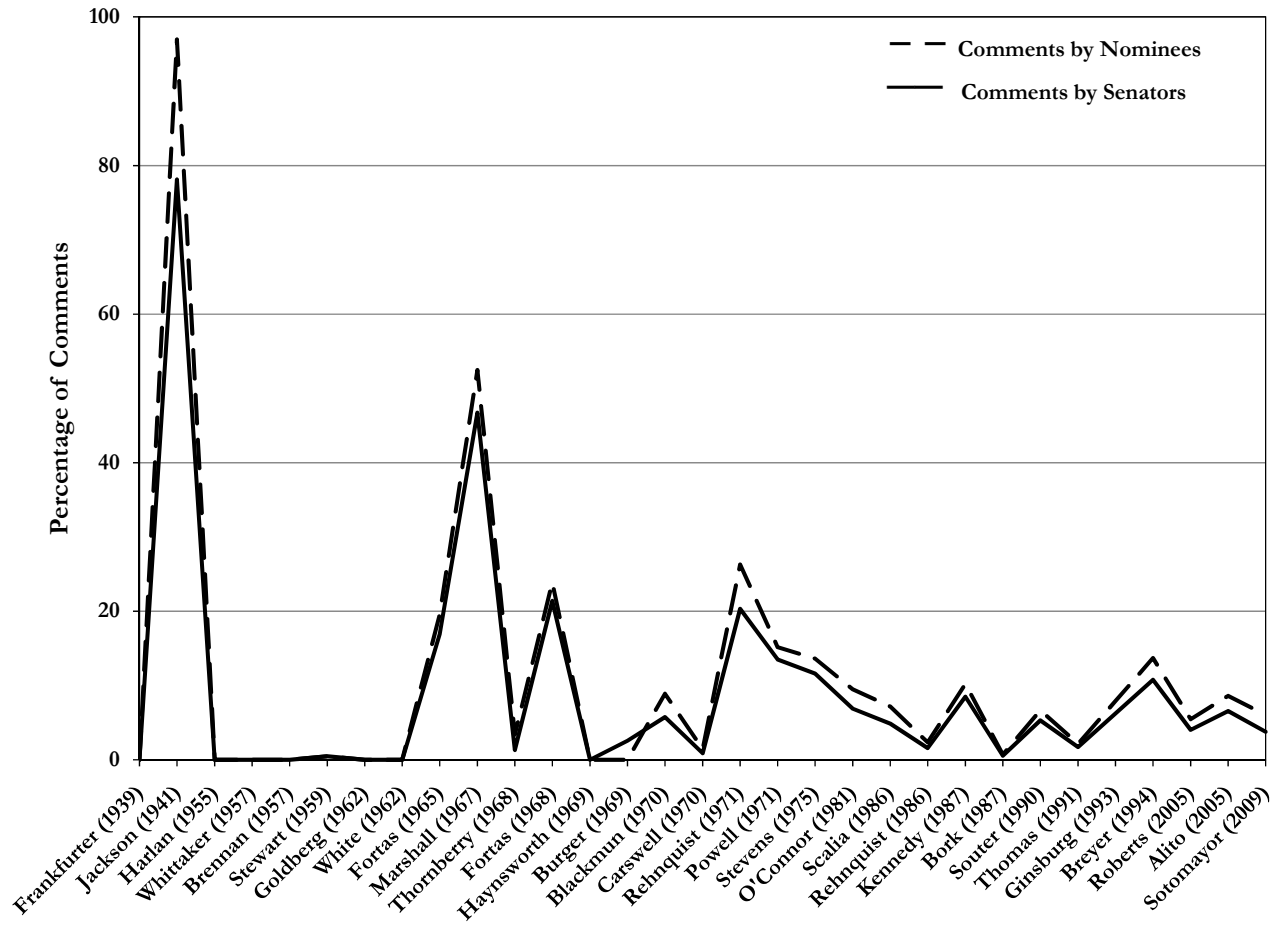
As shown on Table 1, dialogue involving criminal justice issues comprises 8.6% of the comments in the dataset. This issue area includes topics such as the rights of criminal defendants, organized crime, and juvenile justice. Figure 10 indicates the percentage of comments dedicated to criminal justice issues by nominee. Justice Jackson, who had been Attorney General at the time of his nomination, faced the highest percentage of questions within this issue area, and made the most comments about it. It also was a frequently occurring issue in both Fortas hearings (associate and chief justice) and the Marshall hearing, as well as Rehnquist's associate justice hearing. Yet, debates involving criminal justice policy have constituted only a small percentage of civil rights dialogue in more contemporary hearings.

C. ISSUE AREAS AND PARTISAN AFFILIATION

Partisanship plays a central role in the American political system. Within the electoral realm, voters overwhelmingly support candidates who share their party identification.⁴⁶ In the legislative arena, partisan affiliation remains an excellent predictor of voting behavior among

⁴⁶ See, e.g., Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AM. J. POL. SCI. 35 (2000); ANGUS CAMPBELL, PHILIP E. CONVERSE, WARREN E. MILLER & DONALD E. STOKES, *THE AMERICAN VOTER* (1960).

Figure 10. The Percentage of Comments Regarding Criminal Justice Made by Senators and Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009



senators and representatives.⁴⁷ Of course, the judiciary is no different. Indeed, study after study reveals the paramount importance of partisanship in influencing the choices judges make.⁴⁸

Despite the voluminous body of scholarship devoted to examining the affect of partisanship throughout the American political and legal arenas, we know very little about how partisanship affects the questions senators ask at confirmation hearings of Supreme Court justices. We rectify this state of affairs by exploring below the issues that Democratic and Republican senators and nominees address, in addition to examining whether Democratic senators ask different questions of Republican nominees (and vice versa). Taken as a whole, we find that there are substantial differences involving the types of questions asked and answered by Democrats and Republicans.

1. The Effect of Partisan Affiliation

We begin by assessing the issues addressed by Democratic and Republican senators and nominees, which appears in Tables 4 and 5. The first two columns in these tables report the percentage of comments representing each issue area. The third columns indicate the p-values corresponding to two-tailed, unpaired difference of means tests. This allows us to establish whether there are statistically significant differences between the issue areas Democratic and Republican senators and nominees address. For ease of interpretation, p-values appearing in bold denote that the difference of means is statistically significant at $p < 0.05$ using two-tailed tests.

Table 4 reports the issues addressed by Democratic and Republican senators. Several notable differences emerge. First, Democratic senators more often engaged nominees in chatter than did Republican senators. In part, this reflects the fact that 71% of the comments made by

⁴⁷ See, e.g., Gregory L. Hager & Jeffery C. Talbert, *Look for the Party Label: Party Influences on Voting in the U. S. House*, 25 LEG. STUDIES Q. 75 (2000); Samuel C. Patterson & Gregory A. Caldeira, *Party Voting in the United States Congress*, 18 BRITISH J. POL. SCI. 111 (1988).

⁴⁸ See, e.g., Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 J. SYS. J. 219 (1999); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

Table 4. The Issues Addressed by Democratic and Republican Senators at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Issue	Democratic Senators	Republican Senators	P-value for t-test
Hearing Administration/Chatter	43.3% (4,258)	39.4% (2,400)	<0.001
Civil Rights	26.5% (2,601)	27.3% (1,665)	0.223
Judicial Philosophy	9.4% (923)	14.0% (854)	<0.001
Criminal Justice	8.9% (878)	5.8% (353)	<0.001
Government Operations	3.1% (304)	3.6% (217)	0.105
Court Administration	3.1% (304)	2.7% (162)	0.115
Federalism	1.0% (98)	1.3% (79)	0.079
Statutory Interpretation	0.4% (39)	1.4% (88)	<0.001
Banking and Finance	0.9% (89)	0.6% (34)	0.015
Labor and Employment	0.8% (74)	0.4% (24)	0.005
Standing/Access to Courts	0.6% (56)	0.6% (35)	0.968
Best/Favorite Justices	0.3% (33)	0.4% (25)	0.447
National Defense	0.2% (24)	0.6% (35)	0.001
Other Issues	1.6% (153)	2.0% (123)	0.030
Totals	100.1% (9,834)	100.1% (6,094)	

The unit of analysis is the change of speaker. The entries in columns one and two represent the percentage of comments regarding each issue area. The percentages do not sum to 100% due to rounding. The numbers in parentheses indicate the total number of comments pertaining to each issue area. The entries in column three report the p-values corresponding to two-tailed, unpaired difference of means tests. P-value entries appearing in bold indicate that the difference of means is statistically significant at $p < .05$ (two-tailed tests). Issue areas representing less than 0.4% of the column totals in Table 1 are combined into the “Other Issues” category. The data contain information on Supreme Court nominees, both confirmed and unconfirmed, who appeared in front of an open session of the Senate Judiciary Committee since 1939.

senators occurred during periods of Democratic control of the Senate Judiciary Committee, in which a Democratic senator served as chair. Second, Republican senators more often asked nominees about judicial philosophy and statutory interpretation than did Democratic senators. With regard to judicial philosophy, 14% of the questions from Republican senators involved the nominees’ preferred method of constitutional interpretation, compared to only 9.4% of questions from Democrats. As it involves statutory interpretation, 1.4% of the questions from Republican senators queried nominees as to issues involving legislative intent and history, while Democrats only addressed this issue in 0.4% of questions. Third, Democratic senators focused more attention on criminal justice than did their Republican counterparts. While 8.9% of questions from Democrats touched on criminal justice issues, only 5.8% of questions from Republicans did so.

Table 5. The Issues Addressed by Democratic and Republican Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Issue	Democratic Nominees	Republican Nominees	P-value for t-test
Hearing Administration/Chatter	21.8% (681)	28.1% (2,453)	<0.001
Civil Rights	29.3% (914)	35.4% (3,089)	<0.001
Judicial Philosophy	14.5% (453)	13.9% (1,214)	0.398
Criminal Justice	20.3% (635)	6.0% (526)	<0.001
Government Operations	2.2% (68)	4.8% (417)	<0.001
Court Administration	1.9% (59)	4.4% (387)	<0.001
Federalism	1.0% (32)	1.7% (145)	0.012
Statutory Interpretation	1.6% (49)	0.9% (78)	0.002
Banking and Finance	1.7% (53)	0.8% (67)	<0.001
Labor and Employment	0.6% (19)	0.9% (77)	0.144
Standing/Access to Courts	0.6% (18)	0.8% (67)	0.279
Best/Favorite Justices	0.4% (12)	0.5% (46)	0.328
National Defense	0.4% (12)	0.5% (43)	0.446
Other Issues	3.8% (118)	1.5% (129)	<0.001
Totals	100.1% (3,123)	100.2% (8,738)	

The unit of analysis is the change of speaker. The entries in columns one and two represent the percentage of comments regarding each issue area. The percentages do not sum to 100% due to rounding. The numbers in parentheses indicate the total number of comments pertaining to each issue area. The entries in column three report the p-values corresponding to two-tailed, unpaired difference of means tests. P-value entries appearing in bold indicate that the difference of means is statistically significant at $p < .05$ (two-tailed tests). Issue areas representing less than 0.4% of the column totals in Table 1 are combined into the “Other Issues” category. The data contain information on Supreme Court nominees, both confirmed and unconfirmed, who appeared in front of an open session of the Senate Judiciary Committee since 1939.

Several additional differences are apparent from our data. For example, Democratic senators focused more attention on banking and finance and labor and employment than did Republicans, while Republicans asked three times as many questions regarding national defense than did Democrats. For all of the other issues reported in Table 4, the differences between the issues raised by Democratic and Republican senators fails to attain statistical significance.

Table 5 provides information on the issues addressed by Democratic and Republican nominees. Interestingly, while Democratic senators more often engaged nominees in chatter as compared to Republican senators, Republican nominees partook in 6% more chatter than Democratic nominees. Also note that Republican nominees spoke more to civil rights issues than Democratic nominees. Specifically, Republican nominees addressed civil rights issues in 35.4% of their comments, while Democratic nominees touched on civil rights issues only 29.3% of the

time. This may evidence an effort on the part of Republican nominees to respond to skepticism from Democratic senators regarding their commitment to preserving constitutional protection for various civil rights.

The biggest difference in terms of the issue areas addressed by Democratic and Republican nominees, however, involves criminal justice. More than one-fifth of the comments made by Democratic nominees involved criminal justice, compared to only 6% of the comments made by Republican nominees. Notably, while Democratic nominees spoke to statutory interpretation more often than Republican nominees, there is no statistically significant difference in terms of comments regarding the nominees' preferred methods of judicial interpretation. Thus, while it is evident that Republican senators asked more questions about judicial philosophy than did Democratic senators, the nominees themselves addressed this issue in more or less equal terms.

There are additional differences that emerge from Table 5. In particular, Republican nominees commented on government operations, court administration, and federalism roughly twice as often as Democratic nominees, while Democratic nominees more frequently addressed issues involving banking and finance.

2. The Interaction of the Partisanship of Senators and Nominees

Thus far, we have provided information regarding comments addressed by Democratic and Republican senators and nominees. We have not, however, presented a description of the variation in the issues addressed in confirmation hearings by the party affiliation of the senator *and* that of the nominee. This is vital information in that it affords us an opportunity to determine if, for example, Democratic and Republican senators ask different questions of Democratic nominees. Inasmuch as party affiliation is a vital component of Senate confirmation hearings,

such an analysis allows us to delve deeper into the partisanship that permeates the Senate confirmation process.

Table 6 reports the issues addressed by Democratic and Republican senators by nominee partisanship. Columns one, two, four, and five represent the percentage of comments in each issue area, while columns three and six report the p-values corresponding to two-tailed, unpaired difference of means tests. As before, to aid in interpretation, we have bolded p-values denoting that the difference of means between Democratic and Republican senators is statistically significant at $p < 0.05$ using two-tailed tests.

Beginning with hearing administration and chatter, Table 6 reveals that Democratic senators engaged in substantially more non-substantive questioning of Democratic nominees than did Republican senators. Specifically, 42.6% of the comments made by Democratic senators to Democratic nominees involved hearing administration and chatter, while only 28.5% of comments made by Republican senators to Democratic nominees involved non-substantive discussions. However, there is no statistically significant difference between the amount of commentary regarding hearing administration and chatter with regard to Democratic and Republican senators facing Republican nominees.

The results regarding partisanship and civil rights commentary are particularly interesting. On the one hand, Republican senators engaged Democratic nominees in far more questioning pertaining to civil rights (30.6%) than did Democratic senators (18.5%). On the other hand, Democratic senators partook in slightly more civil rights interrogation with regard to Republican nominees (29.3%) than did Republican senators (26.2%). This suggests that members of the opposing party of the nominee are especially likely to press that nominee on civil

Table 6. The Issues Addressed by Democratic and Republican Senators, by Nominee Partisanship, at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Issue	Democratic Nominees			Republican Nominees		
	Democratic Senators	Republican Senators	P-value for t-test	Democratic Senators	Republican Senators	P-value for t-test
Hearing Administration/Chatter	42.6% (1,114)	28.5% (442)	<0.001	43.5% (3,144)	43.1% (1,958)	0.637
Civil Rights	18.5% (483)	30.6% (475)	<0.001	29.3% (2,118)	26.2% (1,190)	<0.001
Judicial Philosophy	9.8% (256)	14.5% (225)	<0.001	9.2% (667)	13.9% (629)	<0.001
Criminal Justice	19.4% (508)	12.2% (190)	<0.001	5.1% (370)	3.6% (163)	<0.001
Government Operations	1.5% (40)	2.6% (40)	0.017	3.7% (264)	3.9% (177)	0.505
Court Administration	2.1% (55)	0.3% (4)	<0.001	3.5% (249)	3.5% (158)	0.932
Federalism	0.6% (15)	1.2% (18)	0.039	1.2% (83)	1.3% (61)	0.354
Statutory Interpretation	0.8% (21)	2.0% (31)	<0.001	0.3% (18)	1.3% (57)	<0.001
Banking and Finance	1.6% (43)	0.8% (12)	0.017	0.6% (46)	0.5% (22)	0.287
Labor and Employment	0.4% (10)	0.7% (11)	0.150	0.9% (64)	0.3% (13)	<0.001
Standing/Access to Courts	0.3% (8)	0.9% (14)	0.010	0.7% (48)	0.5% (21)	0.161
Best/Favorite Justices	0.3% (8)	0.1% (1)	0.105	0.4% (25)	0.5% (24)	0.136
National Defense	0.2% (4)	0.5% (7)	0.070	0.3% (20)	0.6% (28)	0.005
Other Issues	1.9% (50)	5.3% (82)	<0.001	1.4% (103)	0.9% (41)	0.012
Totals	100% (2,615)	100.2% (1,552)		100.1% (7,219)	100.1% (4,542)	

The unit of analysis is the change of speaker. The entries in columns one, two, four, and five represent the percentage of comments regarding each issue area. The percentages do not necessarily sum to 100% due to rounding. The numbers in parentheses indicate the total number of comments pertaining to each issue area. The entries in column three and six report the p-values corresponding to two-tailed, unpaired difference of means tests. P-value entries appearing in bold indicate that the difference of means is statistically significant at $p < .05$ (two-tailed tests). Issue areas representing less than 0.4% of the column totals in Table 1 are combined into the “Other Issues” category. The data contain information on Supreme Court nominees, both confirmed and unconfirmed, who appeared in front of an open session of the Senate Judiciary Committee since 1939.

rights issues, no doubt in an attempt to discern how closely the nominee meshes with his or her political party's stance on the pressing civil rights issues of the day.

Table 6 also illustrates that Republican senators dominated conversations regarding judicial philosophy, statutory interpretation, and national defense, regardless of the nominee partisanship. Indeed, 14.5% of the questions from Republican senators to Democratic nominees involved judicial philosophy, compared to 9.8% of questions from Democratic senators. Similarly, 13.9% of questions from Republican senators to Republican nominees implicated judicial philosophy, while only 9.2% of questions from Democratic senators to Republican nominees touched on this issue area. Republican senators also queried Democratic nominees about statutory interpretation more than twice as often as Democratic senators, and they interrogated Republican nominees on this issue almost four times as often as Democratic nominees. Further, Republicans addressed issues of national security about twice as often as their Democratic counterparts, regardless of nominee partisanship (although the p-value corresponding to Democratic nominees is only significant at 0.070).

These figures reveal that, in a real way, the Republican Party has taken ownership of inquisitions regarding judicial philosophy, statutory interpretation, and national defense at the confirmation hearings—irrespective of whether the nominee was appointed by a Democratic or Republican president.⁴⁹ Even among Republican senators, however, such queries constitute only 16% of all of the comments those senators made at the hearings.

While it is apparent that Republican senators focused substantial attention on questions involving judicial philosophy, statutory interpretation, and national security, Table 6 illustrates the fact that Democratic senators more often canvassed nominees of both political stripes

⁴⁹ See, e.g., Noah Kaplan, David K. Park & Travis N. Ridout, *Dialogue in American Political Campaigns? An Examination of Issue Convergence in Candidate Television Advertising*, 50 AM. J. POL. SCI. 724; John R. Petrocik, William L. Benoit & Glenn J. Hansen, *Issue Ownership and Presidential Campaigning, 1952-2000*, 118 POL. SCI. Q. 599 (2003).

regarding criminal justice issues than did Republicans. In particular, 19.4% of questions from Democratic senators to Democratic nominees involved criminal justice, compared to 12.2% of questions from Republican senators. With regard to Republican nominees, 5.1% of questions from Democrats involved criminal rights, while only 3.6% of queries from Republican senators touched on this issue. Thus, notwithstanding the fact that the appointment of “law and order” judges is most commonly associated with the Republican Party, and Richard Nixon in particular,⁵⁰ Democratic senators, perhaps in an effort to secure Warren Court precedents involving the rights of the criminally accused, focused on this issue much more often than did their Republican counterparts.

The remaining issue areas reported in Table 6 exhibit less consistent variation. For example, while Republican senators engaged Democratic nominees in more discussions of government operations, federalism, and access to courts than did Democratic senators, these differences do not hold for Republican nominees. In addition, Table 5 reveals that Democratic senators asked more questions of Democratic nominees regarding banking and finance, and more questions of Republican nominees involving labor and employment, than Republican senators, but these differences do not apply to Republican nominees for banking and finance and Democratic nominees with respect to labor and employment.

D. NOMINEE RACE AND GENDER

Issues of gender and race have garnered substantial attention with regard to the nomination and confirmation of federal judges.⁵¹ This is perhaps no more evident than in Justice

⁵⁰ See, e.g., C. K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. OF POLITICS 175 (1991); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002), at 181.

⁵¹ See, e.g., Paul M. Collins, Jr., Kenneth L. Manning & Robert A. Carp, *Gender, Critical Mass, and Judicial Decision Making*, 32 L. & POLICY 206 (2010); Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L. J. 1759 (2005); Lisa A. Solowiej, Wendy L. Martinek & Thomas L. Brunell, *Partisan Politics: The Impact of Party in the Confirmation of Minority and Female Federal Court Nominees*, 11 PARTY POLITICS 557 (2005);

O'Connor's comments regarding President George W. Bush's first choice to succeed her on the Court. In opining about the nomination of Judge John Roberts to fill her seat, O'Connor noted, "He's good in every way, except he's not a woman."⁵² Similar notions exist with regard to the importance of diversifying the Court in terms of its racial composition. For example, some have attributed President George H. W. Bush's choice of Judge Clarence Thomas to the fact Bush needed to fill the "black seat" vacated by Thurgood Marshall.⁵³

Despite the fact that issues of race and gender have become staples of nomination and confirmation rhetoric, we know surprisingly little about whether racial and gender minorities are treated differently in Senate confirmation hearings. We rectify this lacuna by investigating the types of questions senators ask minority nominees for the purpose of determining if the issues facing gender and racial minority nominees differ from those posed to white male nominees.

Table 7 reports the issues addressed by senators, separated by nominee race and gender. Columns one and two represent the percentage of comments in each issue for minority nominees (column one) and white nominees (column two).⁵⁴ Columns four and five indicate the percentage of comments in each issue area for female nominees (column four) and male nominees (column five). Column three reports the p-values corresponding to two-tailed, unpaired difference of

Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. OF POLITICS 596 (1985).

⁵² Dan Balz & Darryl Fears, *Some Disappointed Nominee Won't Add Diversity to Court*, WASH. POST, July 21, 2005, at A-15.

⁵³ See, e.g., HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS (1985), at 62-65; Thomas R. Marshall, *The Supreme Court and the Grass Roots: Whom Does the Court Represent Best?*, 76 JUDICATURE 22 (1992); Barbara A. Perry & Henry J. Abraham, *A Representative Supreme Court: The Thomas, Ginsburg, and Breyer Appointments*, 81 JUDICATURE 158 (1997).

⁵⁴ Marshall, Sotomayor, and Thomas represent the minority nominees, while Ginsburg, O'Connor, and Sotomayor represent the female nominees. Note that Ringhand has posited that Frankfurter was perceived to be a minority nominee during his confirmation hearing. Lori A. Ringhand, *Aliens on the Bench: Lessons in Identity, Race and Politics from the First "Modern" Supreme Court Confirmation Hearing to Today*, 2010 MICH. ST. L. REV. (forthcoming 2010). When we include Frankfurter among the minority nominees, the results do not substantively alter. Note also that we examined the distinctions between minority nominees and white nominees using hearings beginning with Marshall. None of our conclusions changed in any meaningful way. However, when we compare female nominees to male nominees using the 1981 to 2009 time period (beginning with O'Connor) three minor differences emerge. First, we find that male nominees are asked statistically significantly more questions regarding civil rights than female nominees. In other words, the p-value pertaining to civil rights becomes significant at $p < 0.001$. Second, we find that female nominees are presented with statistically significantly more questions regarding criminal justice than males. Finally, we discover that male nominees are asked statistically significantly more questions regarding statutory interpretation than females. That is, the p-value corresponding to statutory interpretation becomes significant at $p = 0.003$.

Table 7. The Issues Addressed by Senators, by Nominee Race and Gender, at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Issue	Nominee Race			Nominee Gender		
	Minority Nominees	White Nominees	P-value for t-test	Female Nominees	Male Nominees	P-value for t-test
Hearing Administration/Chatter	36.2% (970)	42.9% (5,688)	<0.001	39.3% (809)	42.2% (5,849)	0.014
Civil Rights	27.3% (733)	26.7% (3,533)	0.475	25.3% (520)	27.0 (3,746)	0.096
Judicial Philosophy	14.2% (380)	10.6% (1,397)	<0.001	13.9% (286)	10.8% (1,491)	<0.001
Criminal Justice	15.2% (407)	6.2% (824)	<0.001	5.5% (113)	8.1% (1,118)	<0.001
Government Operations	1.5% (40)	3.6% (481)	<0.001	2.3% (48)	3.4% (473)	0.010
Court Administration	1.3% (34)	3.3% (432)	<0.001	4.1% (84)	2.8% (382)	<0.001
Federalism	0.5% (14)	1.2% (163)	0.001	1.5% (31)	1.1% (146)	0.067
Statutory Interpretation	0.4% (11)	0.9% (116)	0.014	0.5% (10)	0.8% (117)	0.089
Banking and Finance	1.5% (39)	0.6% (84)	<0.001	1.8% (36)	0.6% (87)	<0.001
Labor and Employment	0.6% (16)	0.6% (82)	0.893	0.6% (12)	0.6% (86)	0.842
Standing/Access to Courts	0.2% (4)	0.7% (87)	0.002	1.0% (21)	0.5% (70)	0.004
Best/Favorite Justices	0.3% (7)	0.4% (51)	0.331	0.3% (7)	0.4% (51)	0.846
National Defense	0.4% (10)	0.4% (49)	0.981	0.3% (7)	0.4% (52)	0.809
Other Issues	0.6% (16)	2.0% (260)	<0.001	3.6% (74)	1.5% (202)	<0.001
Totals	100.2% (2,681)	100.1% (13,247)		100% (2,058)	100.2% (13,870)	

The unit of analysis is the change of speaker. The entries in columns one, two, four, and five represent the percentage of comments regarding each issue area. The percentages do not necessarily sum to 100% due to rounding. The numbers in parentheses indicate the total number of comments pertaining to each issue area. The entries in columns three and six report the p-values corresponding to two-tailed, unpaired difference of means tests. P-value entries appearing in bold indicate that the difference of means is statistically significant at $p < .05$ (two-tailed tests). Issue areas representing less than 0.4% of the column totals in Table 1 are combined into the “Other Issues” category. The data contain information on Supreme Court nominees, both confirmed and unconfirmed, who appeared in front of an open session of the Senate Judiciary Committee since 1939. Nominees Marshall, Sotomayor, and Thomas represent the minority nominees, while nominees Ginsburg, O’Connor, and Sotomayor represent the female nominees

means tests that compare minority nominees to white nominees. Column six provides this same information with respect to female and male nominees. To assist in interpretation of these statistics, we have bolded p-values denoting that the difference of means between minority and white nominees, and female and male nominees, is statistically significant at $p < 0.05$ using two-tailed tests.

Several notable differences emerge from Table 7. First, it is evident that Senators engaged in less chatter for both minority and female nominees. Hearing administration and chatter represents 36.2% of the comments made by senators to minority nominees, compared to 42.9% for white nominees. Similarly, chatter represents 39.3% of senatorial commentary for female nominees, compared to 42.2% for male nominees. This distinction is particularly striking given that a nominee's personal background – frequently discussed in celebratory terms in the hearings of minority and female nominees – are included within the chatter issue area. This indicates that senators have engaged minority and female nominees in more substantive questioning than white male nominees.

Second, senators pressed minority and female nominees much more heavily with regard to their judicial philosophies. Indeed, 14.2% of the questions from senators to minority nominees involved their preferred means of judicial interpretation, compared to 10.6% of questions for white nominees, while 13.9% of interrogatories addressed to female nominees involved judicial philosophy, compared to 10.8% for male nominees. As such, it is evident that senators are particularly interested in grilling female and minority nominees regarding their approaches to constitutional interpretation.

Third, female and minority nominees received fewer questions involving government operations and more questions implicating banking and finance. Senators pressed minority

nominees on issues related to governmental operations, such as the separation of powers system, in only 1.5% of comments, while they queried white nominees about this topic 3.3% of the time. Female nominees received slightly more questions on government operations than minority nominees (2.3%), but not as many questions as male nominees (3.4%). In addition, white nominees and male nominees were asked about banking and finance more than twice as often as minority and female nominees.

While minority and female nominees share the differences discussed above, Table 7 reveals several points of departure. For example, minority nominees were interrogated with respect to criminal justice issues substantially more often than white nominees. Some 15.2% of questions from senators involved criminal justice for minority nominees, compared to only 6.2% for white nominees. Conversely, senators investigated male nominees on this issue more often than female nominees: 8.1% for male nominees compared to 5.5% for female nominees. In addition, while minority nominees received fewer questions involving court administration and access to courts than did white nominees, female nominees were at the receiving end of more court administration and standing questions than male nominees. Finally, note that minority nominees received about twice as many queries implicating federalism and statutory interpretation than did white nominees, although there is no discernable difference between male and female nominees with regard to these issue areas.

III. CONCLUSIONS: “THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME”⁵⁵

Senate Judiciary Committee hearings of Supreme Court nominees represent the only institutionalized opportunity for nominees to engage in a face-to-face dialogue with members of the legislative branch. As part of the Senate’s advice and consent role, these hearings provide

⁵⁵ Rob Derhak, *The Ghost of Ralph’s Mom*, on DITHER (Fatboy Records 2001).

information to Senators and the American public regarding a host of issues implicating nominees' backgrounds, preferred means of judicial interpretation, and views on the most pressing issues of the day. Moreover, Senate Judiciary Committee hearings represent a vital step as an individual makes the transformation from nominee to justice.

Despite the paramount significance of Senate Judiciary Committee hearings, there has been surprisingly little rigorous empirical scholarship on the topic. The purpose of this project is to fill this gap by contributing to our knowledge of confirmation politics and constitutional development by addressing the issues discussed by nominees and senators at the hearings. To do this, we created a novel dataset – the largest and most thorough of its kind – that tracks the issues discussed by all senators and nominees who testified at an open hearing of the Senate Judiciary Committee from 1939-2009.

In a very real way, the evidence we bring to bear makes it clear that the past 70 years of Senate Judiciary Committee hearings have been marked by both continuity and change. With regard to the number of comments made by nominees and senators, it is evident there was a steady increase in the amount of dialogue that transpires at the hearings, though it was Rehnquist's hearing for the Chief Justice position in 1986 that marked the most dramatic transformation, not Robert Bork's appearance before the committee in 1987. Following Rehnquist's hearing, the number of comments made by senators and nominees effectively plateaued to the very high levels that continue today.

As to the issues discussed at the hearings, our findings indicate that comments regarding hearing administration and chatter superabound and, with a few notable exceptions, this has always been the case. Indeed, from 1939-2009, more than 35% of comments involved hearing administration and chatter. Commentary pertaining to civil rights has exhibited more radical

temporal change. While there was considerable variation with respect to civil rights dialogue until 1970, beginning with Powell's hearing in 1971, civil rights has been the dominant substantive issue area of discussion. Within the realm of civil rights, several issue areas also have undergone notable alteration. For example, issues of gender and sexual orientation discrimination did not appear until Carswell's hearing in 1970, but these issues have subsequently represented 15% of civil rights discussions. Similarly, although *Roe v. Wade* was decided in 1973, discussions of abortion did not manifest themselves at the hearings until O'Connors' hearing in 1981. Even since then, however, dialogue touching on abortion rights has constituted only 14.5% of civil rights commentary and 4.7% of hearing comments overall.

We have also uncovered some important differences with respect to the types of questions asked by Democratic and Republican senators. Republican senators seem to have developed a type of issue ownership with regard to questions pertaining to judicial philosophy, statutory interpretation, and national defense, pressing nominees on these issues substantially more than their Democratic counterparts. Conversely, Democrats interrogated nominees on criminal justice and labor relations issues almost twice as often as Republicans. What is more, Democratic senators grilled Republican nominees on civil rights more often than Republican senators, while Republican senators queried Democratic nominees on this issue more often than did Democratic senators. As such, it is apparent that senators from both political parties more often pressed nominees of the opposing party on civil rights issues, no doubt in an attempt to discern the extent to which the nominees' positions on salient civil rights subjects differs from their own.

In addition to illuminating the partisan differences in terms of the issues addressed at confirmation hearings, our results also provide evidence that female and minority nominees are

differently treated than more traditional white male nominees. For example, senators pressed female and minority nominees substantially more often on issues of judicial philosophy and banking and finance. Moreover, senators engaged in far less comments involving hearing administration and chatter for female and minority nominees, indicating that senators interrogated female and minority on more substantive issues than white male nominees.

These findings provide a solid empirical foundation for additional research in several emerging areas of political science and constitutional scholarship. For scholars interested in exploring causal mechanisms explaining the connection between public opinion and the evolution of constitutional law, the data presented here provide useful information regarding how senators and nominees use the confirmation process to validate, refute, or debate constitutional change over time. For those interested in studying the balance between judicial independence and judicial accountability, our data provide a useful starting point from which to judge the effectiveness of the confirmation hearings as a check on judicial power. Finally, scholars interested in reforming or changing the confirmation process will find much to interest them in our data involving how the process has, and has not, changed over time.

Our findings also should change the way confirmation hearings are discussed more generally. For example, an awareness that substantive issues such as civil rights, rather than abstracted theories of constitutional interpretation, have long dominated the hearings may change the dialogue about whether there is something wrong or inappropriate about the hearings as they are conducted today. The evidence regarding female and minority nominees should give pause to those concerned with the unique challenges the process presented to non-traditional nominees. Regardless of how participants in the ongoing dialogue about Supreme Court confirmations

interpret and use these findings, however, our hope is that this project will create a foundation for more vigorous empirical work in this area in the future.

APPENDIX A

THE NOMINEES APPEARING IN THE SUPREME COURT CONFIRMATION HEARINGS DATABASE

Appendix Table 1. The Nominees who Testified at the Senate Judiciary Committee Confirmation Hearings of Supreme Court Nominees, 1939-2009

Nominee	Appointing President (President's Party)	Year of Hearing	Outcome
Frankfurter	Roosevelt (D)	1939	Confirmed
Jackson	Roosevelt (D)	1941	Confirmed
Harlan	Eisenhower (R)	1955	Confirmed
Brennan	Eisenhower (R)	1957	Confirmed
Whittaker	Eisenhower (R)	1957	Confirmed
Stewart	Eisenhower (R)	1959	Confirmed
White	Kennedy (D)	1962	Confirmed
Goldberg	Kennedy (D)	1962	Confirmed
Fortas	Johnson (D)	1965	Confirmed
Marshall	Johnson (D)	1967	Confirmed
Fortas (Chief Justice)	Johnson (D)	1968	Withdrawn
Thornberry	Johnson (D)	1968	Withdrawn
Burger (Chief Justice)	Nixon (R)	1969	Confirmed
Haynsworth	Nixon (R)	1969	Rejected
Carswell	Nixon (R)	1970	Rejected
Blackmun	Nixon (R)	1970	Confirmed
Powell	Nixon (R)	1971	Confirmed
Rehnquist	Nixon (R)	1971	Confirmed
Stevens	Ford (R)	1975	Confirmed
O'Connor	Reagan (R)	1981	Confirmed
Rehnquist (Chief Justice)	Reagan (R)	1986	Confirmed
Scalia	Reagan (R)	1986	Confirmed
Bork	Reagan (R)	1987	Rejected
Kennedy	Reagan (R)	1987	Confirmed
Souter	Bush (G. H. W.) (R)	1990	Confirmed
Thomas	Bush (G. H. W.) (R)	1991	Confirmed
Ginsburg	Clinton (D)	1993	Confirmed
Breyer	Clinton (D)	1994	Confirmed
Roberts (Chief Justice)	Bush (G. W.) (R)	2005	Confirmed
Alito	Bush (G. W.) (R)	2006	Confirmed
Sotomayor	Obama (D)	2009	Confirmed

(D) denotes Democratic president; (R) denotes Republican president.

APPENDIX B

THE ISSUES AND SUBISSUES APPEARING IN THE SUPREME COURT CONFIRMATION HEARINGS DATABASE

Appendix Table 2. Issues, Subissues, and Itemized Subissues Appearing in the Data

Issue	Subissues and Itemized Subissues
Macroeconomics	Taxation, Tax Policy, and Tax Reform; Price Control and Stabilization; Other and General Macroeconomic Issues
Civil Rights	Ethnic Minority and Racial Group Discrimination; Gender and Sexual Orientation Discrimination; Age Discrimination; Handicap or Disease Discrimination; Voting Rights and Issues; Freedom of Speech and Religion; Right to Privacy and Access to Government Information; Abortion; Anti-Government Activities; Second Amendment; Speech: Political Speech and Campaign Finance; Speech: Commercial; Speech: Obscenity and Pornography; Speech: Other; Religion: Free Exercise; Religion: Establishment; Other Civil Rights Issues
Health	Comprehensive Health Care Reform; Regulation of Drug Industry; Medical Devices, and Clinical Labs; Provider and Insurer Payment and Regulation; Prevention, Communicable Diseases and Health Promotion; Long-term Care, Home Health, Terminally Ill, and Rehabilitation Services; Research and Development; Other Health Issues
Labor and Employment	Worker Safety and Protection, Occupational and Safety Health Administration (OSHA); Employment Benefits; Employee Relations and Labor Unions; Fair Labor Standards; Parental Leave and Child Care; Immigration and Refugee Issues; Other Labor and Employment Issues
Education	Higher Education; Elementary and Secondary Education; Education of Underprivileged Students; Special Education; Other Education Issues
Environment	Drinking Water Safety; Hazardous Waste and Toxic Chemical Regulation, Treatment, and Disposal; Species and Forest Protection; Other Environment Issues
Energy	Nuclear Energy and Nuclear Regulatory Commission Issues; Natural Gas and Oil; Coal

Appendix Table 2. (continued)

Issue	Subissues and Itemized Subissues
Criminal Justice	Executive Branch Agencies Dealing With Law and Crime; White Collar Crime and Organized Crime; Illegal Drug Production, Trafficking, and Control; Prisons; Juvenile Crime and the Juvenile Justice System; Child Abuse and Child Pornography; Family Issues; Police, Fire, and Weapons Control; Riots and Crime Prevention; Death Penalty/Capital Punishment; Miranda Rights; Double Jeopardy; Search and Seizure; Right to Counsel; Self-Incrimination, Involuntary Confession, Refusal to Testify; Confrontation Clause, Right to Confront Witnesses Against You; Habeas Corpus Reform; Other Criminal Justice Issues
Social Welfare	Poverty and Assistance for Low-Income Families; Assistance to the Disabled and Handicapped; Other Social Welfare Issues
Community Development and Housing	Low and Middle Income Housing Programs and Needs
Banking, Finance and Domestic Commerce	U.S. Banking System and Financial Institution Regulation; Securities and Commodities Regulation; Corporate Mergers, Antitrust Regulation, and Corporate Management Issues; Small Business Issues and Small Business Administration; Copyrights and Patents; Consumer Safety and Consumer Fraud; Sports and Gambling Regulation; Other Banking, Finance, and Domestic Commerce Issues
Defense	Military Intelligence, CIA, Espionage; Manpower, Military Personnel and Dependents (Army, Navy, Air Force, Marines), Military Courts; Civil Defense and Homeland Security; Direct War Related Issues; Relief of Claims Against U.S. Military
Space, Technology and Communications	Broadcast Industry Regulation (TV, Cable, Radio); Computer Industry, Computer Security, and General Issues Related to the Internet
International Affairs and Aid	Human Rights; International Organizations Other Than Finance: United Nations (UN), UNESCO, International Red Cross; Terrorism, Hijacking; Other International Affairs and Aid Issues

Appendix Table 2. (continued)

Issue	Subissues and Itemized Subissues
Government Operations	Intergovernmental Relations; Government Efficiency and Bureaucratic Oversight; Nominations and Appointments; Presidential Impeachment and Scandal; Federal Government Branch Relations and Administrative Issues, Congressional Operations; Regulation of Political Campaigns, Political Advertising, PAC Regulation, Voter Registration, Government Ethics; Relief of Claims Against the U.S. Government; Constitutional Roles of the President and Congress in Declaring and Waging War, Limits on Presidential War Powers; Other Government Operations Issues
Public Land and Public Water	Native American Affairs; Natural Resources, Public Lands, and Forest Management; Water Resource Development and Research; U.S. Dependencies and Territorial Issues
State and Local Government	State and Local Government Administration
Federalism	Scope of Federal Preemption of State Law; Scope of Congressional Power Under Section Five of the Thirteenth, Fourteenth, or Fifteenth Amendments; Commerce Clause; Tenth Amendment; Eleventh Amendment, State Sovereign Immunity; Other Federalism Issues
Miscellaneous Substantive Topics	Judicial Administration; Statutory Interpretation; Best/Favorite Justices; Best/Favorite Cases or Opinions; Worst Cases or Opinions; Standing/Access to Courts; Non-Standing Justiciability Issues, Political Questions Doctrine, Mootness and Ripeness, Advisory Opinions
Judicial Philosophy/Interpretive Methods	Judicial Restraint, Activism, Humility, Deference, Hubris; Original Intent, Original Meaning, Founders, Framers' Purposes; Living Constitutionalism, Constitution as Evolving or Incorporating Current Norms; Text as Interpretive Tool; Precedent, Stare Decisis; Separation of Powers; Other Judicial Philosophy Issues

Appendix Table 2. (continued)

Issue	Subissues and Itemized Subissues
Hearing Administration and Chatter	Hearing Administration and Chatter; Character and Background, Ethics of Nominee; Discussion of Media Coverage or Spin About the Hearings of the Nominee; Discussions of Pre-Hearing Conversations or Coaching or Contact Between the Nominee and Executive Officials or Others

APPENDIX C

RELIABILITY ANALYSIS

To conduct a reliability analysis of the data, we extracted a random sample of 92 pages of transcript (out of 3,672 pages). Since the average number of observations per page is 7.57, we sought to obtain a sample of ~2.5% of the data. Indeed, our sample constituted 715 observations, making up 2.57% of the data. This sample size gives us precision of $\pm 3.6\%$ with 95% confidence. An independent coder collected the data for the reliability sample.

The number of observations in the main data file for the 92 pages of transcript is 718. The number of observations in the random sample for the 92 pages of transcript is 717. Thus, five observations do not match in the random sample and the main data file. As such, the agreement rate with regard to the number of observations is 99.3%. Because we are unable to compare observations that are present in one dataset and absent from the other, we excluded the five non-matching observations from the reliability analysis.

Because the SUBISSUE and ITEMIZED SUBISSUE variables are not ordered, it was necessary to order them to conduct the reliability analysis. For example, a discussion of protests at abortion clinics would fall under the general issue of civil rights, and the subissues of freedom of speech/religion and abortion. Coder 1 may have ordered these such that ITEMIZED SUBISSUE 1 = abortion and ITEMIZED SUBISSUE 2 = freedom of speech/religion, while Coder 2 may have ordered these such that ITEMIZED SUBISSUE 1 = freedom of speech/religion and ITEMIZED SUBISSUE 2 = abortion. In such an instance, both coders agreed that the observation contained discussions of abortion and freedom of speech/religion, although they ordered these issues differently. To ensure the reliability analysis reflected the fact that the coders were in perfect agreement with respect to the subissues discussed in this example,

the SUBISSUE and ITEMIZED SUBISSUE variables were ordered to match for the purpose of the reliability analysis.

We report information pertaining to the reliability of each variable below. This table reports the agreement rate for both samples, the expected agreement (that which would be expected by chance), along with a kappa statistic for each variable. The average agreement rate for all of the variables is 91.23%, indicating that the data are quite reliable. Considered individually, it is evident that the agreement rate between coders is very high, ranging from a low of 59.16% to a high of 100.0% for several variables. Note the lowest agreement rates pertain to the SUBISSUE and ITEMIZED SUBISSUE 1 variables. We would expect these variables to have the lowest rate of agreement in that, if the coders differed as to the ISSUE variable, they necessarily differ with respect to the SUBISSUE and ITEMIZED SUBISSUE 1 variables, as those variables represent the subissues and itemized subissues within the ISSUE variable.

Although there are no firm guidelines with regard to exactly how strong kappa should be to determine a variable's reliability, Landis and Koch⁵⁶ suggest that kappa values between 0.00 and 0.20 are poor; values between 0.21 and 0.40 are fair; values between 0.41 and 0.60 are moderate; values between 0.61 and 0.80 are substantial; and values above 0.81 are almost perfect. Using this as a guide, it is evident that the data are quite reliable. The average kappa score over all variables is 0.893, which is almost perfect. Considered individually, none of the variables performs worse than moderate and almost all of the variables achieve substantial to almost perfect reliability.

⁵⁶ J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 *Biometrics* 159 (1977).

Appendix Table 3. Reliability Analysis

Variable	Agreement Rate (%)	Expected Agreement	Kappa	Standard Error	Probability
NOMINEE ID	100.0	6.98	1.000	0.010	<0.001
YEAR	100.0	10.72	1.000	0.012	<0.001
CITE	96.36	1.62	0.963	0.005	<0.001
PRESIDENT'S PARTY	100.0	57.50	1.000	0.037	<0.001
SENATE CONTROL	99.16	55.40	0.981	0.037	<0.001
SENATOR ID	99.30	5.75	0.993	0.009	<0.001
SENATOR'S PARTY	91.60	50.83	0.829	0.037	<0.001
COMMITTEE CHAIR	100.0	26.16	1.000	0.021	<0.001
SPEAKER	99.72	50.77	0.994	0.037	<0.001
ISSUE	76.92	21.54	0.706	0.018	<0.001
SUBISSUE	59.16	7.15	0.560	0.001	<0.001
ITEMIZED SUBISSUE 1	63.79	12.93	0.584	0.042	<0.001
ITEMIZED SUBISSUE 2	100.0	72.22	1.000	0.408	0.007
ITEMIZED SUBISSUE 3		insufficient observations for calculation			
ITEMIZED SUBISSUE 4		insufficient observations for calculation			
ITEMIZED SUBISSUE 5		insufficient observations for calculation			

NOMINEE ID is a unique identification number given to each nominee. YEAR represents the year of the confirmation hearing. CITE indicates the page number of the transcript on which the observation is coded. PRESIDENT'S PARTY represents the political party of the president who appointed the nominee. SENATE CONTROL indicates which political party controlled the Senate at the time of the confirmation hearing. SENATOR ID is a unique identification number given to the questioning senator. SENATOR'S PARTY represents the political party of the questioning senator. COMMITTEE CHAIR indicates the identification number of the Chair of the Senate Judiciary Committee during each nominee's hearing. SPEAKER indicates whether the statement being coded was made by the nominee or senator. ISSUE represents the main issue being discussed. SUBISSUE denotes the subissue being discussed. The ITEMIZED SUBISSUE variables code the itemized subissues being discussed.