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## Claiming Neutrality and Confessing Subjectivity in Supreme Court Confirmation Hearings (symposium)

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## CLAIMING NEUTRALITY AND CONFESSING SUBJECTIVITY IN SUPREME COURT CONFIRMATION HEARINGS

CAROLYN SHAPIRO\*

Supreme Court justices speak directly to the American people in a variety of ways—through their opinions, of course, and through books and public appearances. But for many Americans, the first (and possibly the only) time they hear from a Supreme Court justice (or would-be justice) is when he or she testifies during his or her confirmation hearing. Indeed, thanks to the ban on cameras in the courtroom, confirmation hearings provide Americans with one of their *only* opportunities to see official Court-related work being done.<sup>1</sup> Nonetheless, there has been very little systematic discussion of *what* Americans (or at least those who pay reasonably close attention to the hearings)<sup>2</sup> hear at that time, and even less of how they respond to what they hear. This paper undertakes a small part of that investigation, focusing narrowly on an empirical investigation of when and how the nominees talk about the role of the judge and the courts, especially the Supreme Court, and on whether and how those discussions have changed over time. More

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1. One other televised opportunity to see Court-related business is the justices' annual visit to congressional appropriations committees to discuss the Court's budget. As Jason Mazzone pointed out at the live Symposium at which this paper was presented, see <http://www.youtube.com/watch?v=tFLNllcaank&feature=youtu.be>, the testimony and colloquies in these hearings are an under-studied source of information. Nonetheless, relative to confirmation hearings, they are very low-profile events. Most Americans are probably completely unaware that they even occur.

2. While most Americans certainly do not listen to or watch confirmation hearings gavel-to-gavel, the public follows Supreme Court nominations and confirmation hearings with surprising attentiveness. James Gibson and Gregory Caldeira found, for example, that 51.9% of their survey respondents followed the Alito confirmation process "either very or somewhat closely" and only 22.2% said that "they paid relatively little attention to the process." JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 71 (2009); see also Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 449 (2011) (describing intense media coverage in contemporary confirmation hearings).

specifically, I examine when and under what circumstances nominees claim or suggest that judging is primarily an objective or neutral exercise and when they acknowledge the inevitable role of subjective judgment.<sup>3</sup>

This question is particularly timely. In the four most recent confirmation hearings, those for Chief Justice Roberts and Justices Alito, Sotomayor, and Kagan, nominees and senators alike frequently described the work of the Court as objective and neutral. Perhaps the most famous such statement in recent hearings is then-Judge Roberts' claim that the judge—or justice—is no more than an “umpire,” whose job is to “call balls and strikes.”<sup>4</sup> But Roberts is not alone. Then-Judge Sotomayor rejected President Obama's call for “empathy” in judging, explaining that judges “apply law to facts. We don't apply feelings to facts.”<sup>5</sup> Certain phrases crop up repeatedly in these discussions: it is the justice's role to “follow the law” or “apply the law” but not to “make

3. There is no question that some forms of neutrality are essential to the judicial role. We certainly expect judges not to allow any personal feelings about the parties to affect their rulings, for example. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 202 (2010) (response of Elena Kagan to Sen. Amy Klobuchar, S. Comm. on the Judiciary) (making this point); see also Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings* (work in progress) (on file with the author) (discussing different types of neutrality). Moreover, by saying that there is an inevitable role for subjective judgment, I do not mean to imply that judges operate solely on the basis of subjective judgment or that law has no role in their deliberations. See Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MISSOURI L. REV. 79, 126-28 (2010) (hereinafter, Shapiro, *Context*). In fact, law often explicitly requires subjective judgment. RICHARD A. POSNER, *HOW JUDGES THINK* 9 (2008).

4. *Confirmation Hearing on the Nomination of Hon. John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of J. John G. Roberts).

5. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 121 (2009) (response of J. Sonia Sotomayor to Sen. Jon Kyl, S. Comm. on the Judiciary).

the law.”<sup>6</sup> “Activist” judging is disavowed as illegitimate.<sup>7</sup> Ideology is emphatically rejected as having any legitimate role in what judges do.<sup>8</sup>

This version of the work of a Supreme Court justice is inaccurate at best.<sup>9</sup> Many of the questions that judges decide do not have simple, logically deducible resolutions. This feature of judicial decision-making is particularly salient in the Supreme Court, both because cases with easy answers are less likely to be appealed than harder cases and are much, much less likely to be reviewed by the Supreme Court, and because district and circuit court judges are bound by precedent in a way that the Supreme Court is not.<sup>10</sup> As a result, the justices can and must exercise subjective judgment, which inevitably involves political or ideological judgment, in deciding many cases.<sup>11</sup>

This feature of Supreme Court judging is well-known to the participants in the nomination and confirmation process. Both conventional wisdom and empirical studies illustrate that ideology “affect[s] who the President will nominate and whether the Senate will confirm his choice,”<sup>12</sup> and ideology appears to have become increasingly important

6. See, e.g., Confirmation Hearing, Roberts, *supra* note 4, at 8 (statement of Sen. Orrin Hatch, S. Comm. on the Judiciary); *id.* at 162, (response of J. John G. Roberts to Sen. Orrin Hatch, S. Comm. on the Judiciary) (promising to “interpret,” and not “make” law); *Confirmation Hearing on the Nomination of Hon. Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 378 (2006) (statement of Sen. Herbert Kohl, S. Comm. on the Judiciary); *supra* note 5, at 6 (statement of Sen. Jeff Sessions, S. Comm. on the Judiciary); *id.* at 70 (statement of J. Sonia Sotomayor) (“[J]udges must apply the law and not make the law.”); Confirmation Hearing, Kagan, *supra* note 3, at 220 (response of Elena Kagan to Sen. Al Franken, S. Comm. on the Judiciary) (noting that Congress makes the law and the Court must apply the law).

7. See, e.g., Confirmation Hearing, Sotomayor, *supra* note 5, at 6 (statement of Sen. Jeff Sessions, S. Comm. on the Judiciary); *id.* at 24 (statement of Sen. Jon Kyl, S. Comm. on the Judiciary).

8. See, e.g., Confirmation Hearing, Roberts, *supra* note 4, at 256 (response of J. John G. Roberts to Sen. Lindsey Graham, S. Comm. on the Judiciary).

9. The judge-as-umpire metaphor and disavowal of a role for empathy in judging have been extensively criticized. See, e.g., Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENTARY 701 (2007); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1946 (2012); Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1 (2011); Michael J. Gerhardt, *Constitutional Branding*, 40 HOFSTRA L. REV. 655 (2012).

10. See POSNER, *supra* note 3, at 144, 151, 275. District court judges have tremendous discretion over many rulings, but those rulings tend to be case- and fact-specific.

11. Take, for example, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). The issue in that case was whether a public school district could rely on race when assigning students to schools in an effort to maintain racial integration. “Although there were legal arguments to be made, the key textual sources – both *Brown v. Board of Education* and the Constitution itself – failed to explicitly [or objectively] dictate a result. Ultimately, therefore, the outcome was determined by the Justices’ political judgments, informed by their value-laden understanding of the meaning of *Brown*.” Shapiro, *Context*, *supra* note 3, at 127 (citing Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008)).

12. Lee Epstein, Jeffrey A. Segal & Chad Westerland, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 610 (2008); see

over time.<sup>13</sup> Nor is it a secret from the American public. When the current Supreme Court actually decides cases, many of those cases are decided by narrow votes, with four “conservative” justices on one side, four “liberal” justices on the other, and with Justice Kennedy as the swing vote.<sup>14</sup> Such cases tend to be among the most high profile on the Court’s docket,<sup>15</sup> and media reports often describe the voting blocs on the Court and individual justices as liberal or conservative.<sup>16</sup> There is thus a significant disconnect between many of the claims of neutrality made about judging during confirmation hearings and much of what the public sees once the new justice takes his or her seat on the Court.

In this paper, I examine part of that disconnect. Specifically, I explore what nominees say about judging during their confirmation

also Stone, *supra* note 2, at 392 (noting that “[H]istorically, then, a nominee’s views have often played an important role in the confirmation process” and that “senators tend to vote with at least one eye on ideology”); *id.* at 393 (demonstrating that senators are much more likely to vote for a nominee with whom they are ideologically aligned).

13. Epstein, Segal & Westerland, *supra* note 12, at 610; see also Stone, *supra* note 2, at 446-47 (noting that ideology has become most important in the four most recent confirmation hearings).

14. In October Term 2011, which ended in June 2012, there were fifteen cases decided by a 5-4 vote. Ten of those cases have this liberal/conservative split. SCOTUSBLOG STAT PACK – Final – October Term 2011, (June 30, 2012), [http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB\\_five-to-four\\_OT11\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_five-to-four_OT11_final.pdf). Of course, Justice Kennedy is not *always* the swing vote. A notable and surprising recent instance in which he was not is *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the remarkably high-profile challenge to the Patient Protection and Affordable Care Act. In that case, Chief Justice Roberts provided the fifth vote, along with the four liberals, to uphold the law. Justice Kennedy joined Justices Alito, Scalia, and Thomas in dissent. See also Benjamin E. Lauderdale & Tom. S. Clark, *The Supreme Court’s Many Median Justices*, 106 AM. POL. SCI. REV. 847, 847-48 (2012) (explaining that Justice Kennedy is not reliably the median justice). The votes in *National Federation of Independent Business*, however, were widely seen as highly ideological.

15. Pamela S. Karlan, *The Supreme Court—2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 6 (2012) (explaining that on the current Court, the divide on “the issues of greatest public concern” is not only ideological, but also partisan).

16. See, e.g., Robert Barnes & N.C. Aizenman, *Supreme Court Expresses Doubt About Key Issue in Health-Care Law*, WASH. POST. (March 27, 2012), [http://www.washingtonpost.com/politics/supreme-court-considers-main-constitutional-question-in-health-care-law/2012/03/26/gIQAkyKWdS\\_story.html](http://www.washingtonpost.com/politics/supreme-court-considers-main-constitutional-question-in-health-care-law/2012/03/26/gIQAkyKWdS_story.html) (describing reactions and questioning of “conservative” and “liberal” justices during the oral arguments in *National Federation of Independent Business*, 132 S. Ct. 2566 (2012)); Sheryl Gay Stolberg, *Future of an Aging Court Raises Stakes in Presidential Vote*, N.Y. TIMES (June 27, 2012), <http://www.nytimes.com/2012/06/28/us/presidential-election-could-reshape-an-aging-supreme-court.html> (discussing current and historical justices and the timing of their retirements in ideological terms); David G. Savage, *Supreme Court Voting Blocs Set in Stone*, L.A. TIMES (June 29, 2008), <http://articles.latimes.com/2008/jun/29/nation/na-scotus29> (assessing October Term 2007 by discussing in which cases the conservative bloc prevailed and in which the liberals won). There are, of course, a substantial number of cases that evidence non-ideological voting, whether because they are unanimous or because the voting patterns are less predictable. See Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Measuring Deviations from Expected Voting Patterns on Collegial Courts*, 5 J. OF EMPIRICAL LEG. STUD. 819 (2008); Paul H. Edelman, David E. Klein & Stefanie A. Lindquist, *Consensus, Disorder, and Ideology on the Supreme Court*, 9 J. OF EMPIRICAL LEG. STUD. 129 (2012).

hearings and consider how those statements might affect Americans' view of the Court as an institution. Ultimately, I consider whether and how those statements—in particular the disparity between ubiquitous claims of neutrality and objectivity on the one hand and the rarer acknowledgements of the role for subjective judgment on the other – might affect the legitimacy of the Court.

The paper proceeds in three parts. In Part I, I provide some background on Supreme Court confirmation hearings and nominations,<sup>17</sup> on some of the empirical research that has already been done, and on the reasons that the particular question I pursue here is important. In Part II, I describe my empirical investigation into nominee claims of neutrality and admissions of subjectivity, and I present my findings. Finally, in Part III, I discuss some of the implications of these findings. Most specifically, I rely on a burgeoning literature on cultural cognition and law to explore possible consequences and implications of the disconnect between the confirmation hearing rhetoric of objectivity or neutrality and the reality of Supreme Court judging. The paper concludes by suggesting directions for future research.

## I. SUPREME COURT CONFIRMATION HEARINGS: HISTORY AND RHETORIC

### A. Background

Supreme Court confirmation hearings and nominees' appearances at them are newer than many assume.<sup>18</sup> Until 1916, the Senate voted on Supreme Court nominations without any public hearings at all.<sup>19</sup> Even after hearings began to be held, no nominee testified before the Judiciary Committee until Harlan Fiske Stone in 1925.<sup>20</sup> And after

17. Throughout this Article, I rely on background data collected and made publicly available by Lee Epstein, et al., *U.S. Supreme Court Justices Database*, available at <http://epstein.law.northwestern.edu/research/justicesdata.html>. This database contains an enormous amount of information about every individual nominated to the Supreme Court (through Justice Sotomayor), whether or not that individual was ultimately confirmed.

18. That there were no hearings does not mean that the Senate automatically confirmed whoever the President nominated. To the contrary, "from 1790 to 1900, the Senate confirmed 69 percent of all nominees . . . ." Stone, *supra* note 2, at 382. From 1900 through 1955, the Senate confirmed 92 percent of nominees, and since 1955, it has confirmed 77 percent. *Id.* at 383. Note, however, that a number of the nominees who were not confirmed—in both time periods—also were not voted down. Either the Congress ended without a vote or the nomination was withdrawn. *Id.* at 382. An examination of only those nominations that the Senate actually voted on, however, reveals the same pattern. *Id.* at 384.

19. Stone, *supra* note 2, at 426.

20. Harlan Stone appeared "at the request of President Calvin Coolidge" in order to "defend[] himself against charges" related to the Teapot Dome scandal. Lori A. Ringhand & Paul M. Collins, Jr., *May It Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of*

Stone's testimony, such appearances remained extremely rare for the next thirty years.

Since 1955, however, an appearance before the Senate Judiciary Committee has been expected of every nominee,<sup>21</sup> and since 1955 a total of thirty Supreme Court confirmation hearings, for thirty nominees, have been held. Ten of these nominees were nominated by Democratic presidents and twenty by Republican presidents.<sup>22</sup> Out of the thirty nominees who testified, only five were not confirmed.<sup>23</sup> Although Republican presidents have made twice as many nominations as Democratic presidents, almost all of the nominations, by either party, were considered by a Senate under Democratic control. All ten of the Democratic nominees were made to Democratic-controlled Senates, and only five Republican nominees were made to a Republican Senate.<sup>24</sup>

Not all confirmation hearings are the same. Historically, some nominees were asked virtually no questions. Justice Whittaker's public testimony at his 1957 confirmation hearing takes up precisely three pages of transcript.<sup>25</sup> Even some of the more controversial nominations, such as President Johnson's nomination of Thurgood Marshall, featured only a relatively small number of senators asking questions. Marshall was interrogated at length, but primarily by only four senators—three of them Southern Democrats and all of them ardent segregationists.<sup>26</sup> Beginning in 1981, however, with Justice O'Connor's

*Supreme Court Nominees, 1939-2009*, 60 AM. U. L. REV. 589, 594 (2011) (citing *History of the Senate Committee on the Judiciary*, U.S. SENATE COMM. ON THE JUDICIARY, <http://judiciary.senate.gov/about/history/index.cfm>). "In 1939, Felix Frankfurter became the first nominee to take unrestricted questions in an open, transcribed public hearing." *Id.*

21. Stone, *supra* note 2, at 427.

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

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

24. These nominees were O'Connor, Scalia, Rehnquist, when nominated for Chief Justice, Roberts, and Alito. Note, then, that we have no examples of Democratic nominees being nominated to a Republican Senate. See Stone, *supra* note 2, at 386.

25. *Nomination of Charles E. Whittaker, of Missouri, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 85th Cong. 32-34 (1957). At the end of the public testimony, the committee went into executive session. *Id.* at 34.

26. *Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 90th Cong. 1-27, 48-74, 86-100, 155-80, 187-98 (1967) (questioning by Senators James O. Eastland, John J. McClellan, and Sam J. Ervin, all Democrats, as well as by Strom Thurmond, who was, by then, a Republican).



hearing, almost every committee member has asked questions of the nominee.<sup>27</sup> (Probably not coincidentally, Justice O'Connor's hearing was the first to be televised.<sup>28</sup>) And since Justice Souter's nomination in 1990, *every* senator on the committee has taken a turn—or several—asking questions of every nominee.<sup>29</sup>

It is conventional wisdom that the failed nomination of Robert Bork in 1987 marked a turning point in confirmation hearings, although the conventional wisdom is not always consistent on the nature of the change. After Bork, some argue, confirmation hearings became highly partisan “vicious fights,” rife with inappropriate demands that nominees declare their position on issues.<sup>30</sup> On the other hand, some complain that post-Bork, senators do not insist on serious discussions of “a nominee’s legal views” on important issues,<sup>31</sup> and some likewise argue that because Bork was particularly candid in discussing his (relatively extreme) views about the law, and because that candor led to his defeat, subsequent nominees have become increasingly less candid.<sup>32</sup>

Recent empirical research complicates these claims. In one study, Lori Ringhand and Paul Collins found that nominees have long been asked substantive questions about legal matters, especially civil rights, and judicial philosophy.<sup>33</sup> At the same time, they found that there has been an increase in the proportion of substantive questions asked at confirmation hearings, but they date the beginning of that trend to the

27. Beginning with Justice O'Connor's hearing, every Republican on the committee asked questions. Senator Byrd, a Democrat, declined to ask questions of O'Connor, Scalia, and of Rehnquist at his Chief Justice hearing. Senator Simon, also a Democrat, did not ask Kennedy any questions. All senators had questions for Robert Bork.

28. Ringhand & Collins, *supra* note 20, at 601 (citing Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J.L. & POL. 1, 29 (1999)).

29. This information was generated through the coding project described in Part II. Televising the hearings of course provides senators a chance to perform for their constituents and for various interest groups. Comiskey, *supra* note 28 at 28 (citing TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 9-10 (1988) (discussing increased senatorial attention to the hearings after they began being broadcast on television)); Stone, *supra*, note 2, at 450-52 (discussing the increasing importance of interest groups in the confirmation process and noting that a “senator who ignores these groups does so at his peril.”).

30. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* x-xi, 10-11 (1994).

31. Elena Kagan, *Confirmation Messes Old and New*, 62 U. CHI. L. REV. 919, 920 (1995).

32. Stone, *supra* note 2, at 434-36, 436 fig. 34.

33. Ringhand & Collins, *supra* note 20, at 598-99. This finding is consistent with my own review of hearing transcripts. Some nominees, however, were asked virtually no such questions, while today such a situation would be unthinkable.

early 1970s<sup>34</sup>—years before Bork’s 1987 nomination. Moreover, they date the significant increase in the total number of questions in each hearing asked to Rehnquist’s 1986 hearings to become Chief Justice.<sup>35</sup>

In another set of studies, Dion Farganis and Justin Wedeking found that post-Bork, there was only a modest change in the willingness of nominees to respond forthrightly to questions about civil rights and civil liberties—what they call “candor.”<sup>36</sup> Interestingly, Kennedy (along with Bork) “took the level of forthrightness to a new high,” followed by a gradual decline.<sup>37</sup> More recently, however, nominees have become significantly less candid: “the post-2000 level of candor dipped appreciably below the pre-Bork level.”<sup>38</sup>

Wedeking and Farganis also note that because there are now more questions and “tougher” questions asked in each confirmation hearing than there used to be, the public also sees nominees refuse to answer more questions.<sup>39</sup> Thus, even if nominees are not significantly less candid than they used to be when measured by the proportion of questions they answer, because the absolute number of refusals has increased, observers may experience the nominees as being less candid. Overall, however, as Geoffrey Stone puts it in his study of the confirmation process, “Bork’s candor . . . marked, not a critical turning point in the nature of the confirmation process, but an aberration . . . .”<sup>40</sup>

Both the Ringhand/Collins work and the Farganis/Wedeking studies add valuable information about the content of Supreme Court confirmation hearings. But while their investigations help to clarify both

34. *Id.* at 603, 604 fig. 2.

35. *Id.* at 598.

36. Stone, *supra* note 2, at 434 (citing Dion Farganis & Justin Wedeking, No Hints, No Forecasts, No Previews: Analyzing Supreme Court Nominee Evasiveness, 1955-2009 at 2 (June 22, 2010) (unpublished manuscript), available at

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1628813](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628813) (hereinafter, *No Hints I*); Dion Farganis & Justin Wedeking, Kagan’s Candor: Updated Findings from the Recent Supreme Court Confirmation Hearings (July 6, 2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1635240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635240) (hereinafter *Kagan’s Candor*)). Farganis and Wedeking have since combined these two articles into a single publication: Dion Farganis & Justin Wedeking, “No Hints, No Forecasts, No Previews”: An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan, 45 L. & SOCIETY REV. 525 (2011) (hereinafter *No Hints II*).

37. Stone, *supra* note 2, at 434 (citing Farganis & Wedeking, *No Hints I*, *supra* note 36, at 2; *Kagan’s Candor*, *supra* note 36).

38. Stone, *supra* note 2, at 434 (citing Farganis & Wedeking, *No Hints I*, *supra* note 36, at 2; *Kagan’s Candor*, *supra* note 36).

39. Farganis & Wedeking, *No Hints II*, *supra* note 36, at 551-52.

40. Stone, *supra* note 2, at 435.

that confirmation hearings have long included discussions of important subjects and that nominees have always declined to answer some of the senators' questions, the studies do not attempt to tease out the substance of what the nominees actually say in those discussions, particularly about the nature of judging. This article turns the focus to that question.

### *B. The Recent Hearings*

The question of how nominees describe the role of the judge is particularly salient in light of claims made by the four most recent nominees to the Supreme Court: Chief Justice Roberts, and Justices Alito, Sotomayor, and Kagan. Many cases decided by the Supreme Court involve difficult questions to which there are not objective answers.<sup>41</sup> Despite this reality, in these most recent confirmation hearings, the nominees have, at least sometimes, described their approach to judging as if by looking closely at case facts and legal materials, a logically deducible-objective, neutral-resolution would emerge. Justice Sotomayor, for example, explained repeatedly that judging involves looking closely at the facts, looking closely at the relevant legal materials and drawing a logical conclusion from those sources:

I don't judge on the basis of ideology. I judge on the basis of law and my reasoning . . . . When my colleagues and I [on the Circuit Court], in many cases, have initially come to disagreeing positions, we've discussed them and either persuaded each other, changed each other's minds, and worked from the starting point of arguing, discussing, exchanging perspectives on what the law commands.<sup>42</sup>

Justice Alito, like most nominees, repeatedly described the importance of judicial restraint and the need for judges to guard against injecting their personal views into their work. In describing how judges might do this, he emphasized the importance of "objective" sources of information:

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

41. It is in part for this reason, Judge Posner calls the Supreme Court a "political court." Posner, *supra* note 3, at 272. See also Shapiro, *Context*, *supra* note 3, at 126-27 (listing examples of Supreme Court cases involving questions without "objectively correct answer[s]"); *supra* note 11 (discussing *Parents Involved*); *supra* notes 10-11 and accompanying text.

42. See Confirmation Hearing, Sotomayor, *supra* note 5, at 437 (response of J. Sonia Sotomayor to Sen. Arlen Specter, S. Comm. on the Judiciary).

You certainly would look to precedent, which is an objective factor, and most of the issues that come up in constitutional law now fall within an area in which there is a rich and often very complex body of doctrine that has worked out. Search and seizure is an example. Most of the issues that arise concerning freedom of speech is another example. There is a whole body of doctrine dealing with that, and that's objective and you would look to that and you would reason by analogy from the precedents that are in existence.<sup>43</sup>

Most famously, when Chief Justice Roberts made claims of constraint and objectivity at his confirmation hearing, he returned repeatedly to his umpire metaphor, and like the other three post-2000 nominees, he also invoked the legal sources he claimed he would rely on exclusively:

We don't turn a matter over to a judge because we want his view about what the best idea is, what the best solution is. It's because we want him or her to apply the law. They are constrained when they do that. They are constrained by the words that you choose to enact into law in interpreting the law. They are constrained by the words of the Constitution. They are constrained by the precedents of other judges that become part of the rule of law that they must apply.<sup>44</sup>

Justice Kagan's description of the judicial process was the most complex of the four. On the one hand, she repeatedly returned to the expression "it's law all the way down"<sup>45</sup> to describe the proper approach to judicial decision-making, implying that the law alone can provide the answers to the questions put to the Supreme Court. On the other hand, she did acknowledge that there are sometimes clashes of constitutional provisions that may require "judgment" and "wisdom" to resolve:

[J]udges do in many of these cases have to exercise judgment. They are not easy calls. That does not mean that they are doing anything other than applying the law. I said yesterday on a couple of different occasions it is law all the way down. You know, you are looking at the text, you are looking at structure, you are looking at history, you are looking at precedent. You are looking at law and only at law, not your political preferences, not your personal preferences. But we do know that not every case is decided 9-0, and that is not because anybody is acting in bad faith. It is because . . . law does require a kind of judgment, a kind of wisdom and there are frequently clashes of constitutional values . . . . And judges have to, you know, listen to both

43. Confirmation Hearing, Alito, *supra* note 6, at 357 (response of J. Samuel A. Alito to Sen. Charles Grassley, S. Comm. on the Judiciary).

44. See Confirmation Hearing, Roberts, *supra* note 4, at 177 (response of J. John G. Roberts to Sen. Charles Grassley, S. Comm. on the Judiciary).

45. See, e.g., Confirmation Hearing, Kagan, *supra* note 3, at 103 (response of Elena Kagan to Sen. Jon Kyl, S. Comm. on the Judiciary); *id.* at 160 (response of Elena Kagan to Sen. John Cornyn, S. Comm. on the Judiciary).

sides and cast each argument in the best possible light, but sometimes they are not going to agree.<sup>46</sup>

The post-2000 nominees' insistence on neutrality is, in one sense, neither surprising nor novel. Supreme Court nominees have long insisted that their "personal predilections" have no place in the judicial enterprise,<sup>47</sup> that their job is solely to enforce and apply the law,<sup>48</sup> and that they would not approach the judicial enterprise with any particular agenda or set of biases.<sup>49</sup> Indeed, such assurances are not only commonplace, but also appropriate. We legitimately expect our justices to approach cases dispassionately, with open minds, and without bias towards or against any parties. Nonetheless, the ubiquity of these claims in the post-2000 hearings, the emphasis on the possibility of reaching objectively correct conclusions in difficult cases, and the lack of much countervailing discussion of the role of judgment or subjectivity are striking.

## II. MINING THE TESTIMONY OF THE NOMINEES

### *A. Methodology*

Is this emphasis on neutrality or objectivity new, or at least heightened, relative to historical experience?<sup>50</sup> Under what circum-

46. *Id.* at 203 (response of Elena Kagan to Sen. Amy Klobuchar, S. Comm. on the Judiciary).

47. See, e.g., *Nomination of John Marshall Harlan, of New York, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 84th Cong. 141 (1955) (response of J. John Marshall Harlan to Sen. James O. Eastland, S. Comm. on the Judiciary).

48. See, e.g., *Nomination of Arthur J. Goldberg, of Illinois, to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 87th Cong. 8 (1962) (response of J. Arthur J. Goldberg to Sen. John J. McClellan, S. Comm. on the Judiciary).

49. See, e.g., *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 100th Cong. 139 (1987) (response of J. Anthony M. Kennedy to Sen. Charles Grassley, S. Comm. on the Judiciary).

50. There are reasons to think that recent hearings might be different from older ones. As Geoffrey Stone has pointed out, between 1994 and 2005—the "longest period in American history without a Supreme Court nomination"—the dynamics of the nomination process changed. Stone, *supra* note 2, at 447. Stone demonstrates that in the four most recent nominations, the number of negative votes per nominee has increased significantly over prior comparable nominations, even as the relative perceived ideological intensity of the recent nominees is relatively low. *Id.* at 446-47, 453-54. Stone proposes several possible and mutually reinforcing explanations: (1) Between 1968 and 1993, there were 12 successive Republican nominations and the Court became significantly more conservative. "So dramatic a change in the Court's ideology . . . would naturally heighten the attentiveness of senators to the potential changes in the membership of the Court." *Id.* at 447-48. (2) *Bush v. Gore*, decided in 2000, "undoubtedly highlighted the ideological inclinations of the Justices in both the public and political consciousness." *Id.* at 448. (3) Television, internet, and other saturated media coverage brings all of the details of confirmation hearings and nomination politics to the American people. *Id.* at 449. (4) Interest group involvement in the confirmation process has become "increasingly aggressive." *Id.* at 450. (5) American politics have

stances do nominees make such claims and under what circumstances do they acknowledge a legitimate role for what Justice Kagan called “judgment?” To investigate these questions, I recruited a team of law students to code the colloquies between senators and nominees at confirmation hearings.<sup>51</sup> The law students were instructed to code by senator and by “round” of questioning.<sup>52</sup>

Within each round, law students were instructed to identify, *inter alia*, whether the nominee made claims that judging is a neutral or objective enterprise and whether he or she acknowledged the inevitable role of subjectivity.<sup>53</sup> I did not attempt to distinguish between different types of claims of neutrality. In other words, a claim that a judge should not allow his or her “personal predilections” to dictate the results in cases counted as a claim of neutrality as much as Chief Justice Roberts’ umpire claims. Thus, not all claims of neutrality should be assumed to be claims of objectivity, and the results here should be understood in that light.

Once consolidated, I had a database of 613 rounds of questioning covering all 30 hearings from 1955 through 2010.<sup>54</sup> For purposes of this Article, I collapsed the data still further, looking at each unique senator-nominee pair, of which there were 332. As between the pairs, I wanted to determine under what circumstances it was likely that a nominee would claim neutrality or objectivity in judging and under

become increasingly polarized. *Id.* at 452 (citing Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarization in American Democracy*, 98 CAL. L. REV. 273, 277 (2010)).

51. I did not ask the students to code Senators’ or nominees’ opening statements, written testimony submitted by the nominees in answer to written questions, or testimony, whether live or written, by third parties. Nor did I have them code the portion of Clarence Thomas’s hearing in which he addressed Anita Hill’s allegations. In this last regard, I follow Ringhand & Collins, *supra* note 20, at 594-95, and Frank Guliuzza III, et. al., *The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria*, 56 J. OF POL. 773, 776 (1994).

52. In contemporary Supreme Court nomination hearings, each Senator gets a turn at asking questions for a set period of time (generally 30 minutes). After each Senator has asked his or her questions, they start over again.

53. I did not share my hypotheses with the law students. I gave one student a (nearly) random sample of rounds from other students’ assignments for purposes of trying to establish a reliability baseline. (The sample was not quite random because it was drawn from a dataset that had one omission, as well as some mis-numbering, which resulted in an overrepresentation of Roberts’ rounds. The sample was drawn using Stata12.) For identifying when nominees claimed neutrality, agreement between coders was 60.10%, with a Kappa of .25. For identifying when nominees admitted to judgment or subjectivity, agreement between coders was 73.91%, with a Kappa of .44. Although the reliability scores are lower than ideal, I have no reason to think that there is any systematic disparity in the coding that would affect the results.

54. Two justices had two hearings—Abe Fortas and William Rehnquist—both of whom were associate justices when they were nominated to the position of Chief Justice. Chief Justice Roberts was originally nominated to replace the retiring Associate Justice Sandra Day O’Connor. After his hearings were held, Chief Justice Rehnquist died and President Bush re-nominated Roberts to be Chief Justice. No new hearings were held.

what circumstances it was likely that the nominee would acknowledge that subjectivity inevitably—and perhaps even desirably—has a role in judging.

I began by considering whether there were differences between Democratic and Republican nominees. Simple t-tests<sup>55</sup> established that Democratic nominees are nearly twice as likely (.41) to mention the role of judgment or subjectivity in colloquy with any particular Senator than are Republican nominees (.23).<sup>56</sup> On the other hand, I did not find statistically significant differences between Democratic and Republican nominees' likelihood of describing the judicial role as neutral. In fact those rates were virtually identical.<sup>57</sup>

To investigate the data further, I ran probit regressions<sup>58</sup> to try to identify the circumstances under which we are more likely to see claims of neutrality or admissions of subjectivity.<sup>59</sup> In addition to considering the party of the nominating president, I considered the perceived ideology of the nominee at the time.<sup>60</sup> I also thought that the party of the senator asking the questions might matter, as well as whether that senator was of the opposing party to the president.<sup>61</sup> Likewise, it seemed to me that with respect to any given senator/nominee pair, a nominee was more likely to make claims of neutrality/objectivity if he or she also admitted to a role for subjectivity

55. All statistical analysis in this paper was performed using Stata12.

56. The 95% confidence interval for the Democratic nominees was .31-.50 and for Republican nominees, it was .18-.29. (For these numbers, as well as those in the text, I have rounded to two decimal points.)

57. Republican nominees claimed neutrality in colloquy with any particular senator at a rate of .59, with a 95% confidence interval of .53-.66. The rate for Democratic nominees was .62, with a 95% confidence interval of .53-.72.

58. I clustered the results on nominee.

59. I make no claims of causation based on these regressions. I use the results to describe when we might find certain types of claims made during the hearings, not to establish why.

60. To account for perceived ideology of the nominees, I used the Segal-Cover scores. The Segal-Cover score codes the perceived liberalism of each nominee at the time of nomination by evaluating statements made about them in major newspaper editorials. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989); *Segal-Cover and Martin-Quinn Measures Codebook*, THE SUPREME COURT DATABASE (Dec. 12, 2012), available at [http://scdb.wustl.edu/\\_dataSupplements/SegalCoverMartinQuinn\\_Codebook\\_120512.pdf](http://scdb.wustl.edu/_dataSupplements/SegalCoverMartinQuinn_Codebook_120512.pdf).

61. I also considered two interrelated measures of the ideology of the Senator (both the first and second dimensions of the DW-NOMINATE scores). See Royce Carroll, et al., *DW-NOMINATE Scores with Bootstrapped Standard Errors*, (February 3, 2011), <http://voteview.com/dwnomin.htm>. Because the early hearings were dominated by Southern Democrat segregationists and because the second dimension of the DW-NOMINATE scores focuses on matters of civil rights and equality as opposed to "government intervention in the economy. . .," *id.*, I thought they might give different results than party of the senator. I did not find any statistically significant effect in using these scores, however.



(and vice versa). In other words, those two types of claims might go hand-in-hand as nominees attempt to explain the delicate balance of discretion and constraint that makes up the judicial task. Finally, because the number of rounds of questioning and the numbers of senators asking questions vary significantly from nominee to nominee but have overall increased steadily over time, I ran the regressions separately using two different variables: (1) the number of rounds of questioning per senator/nominee pair, reasoning that as hearings get longer, there are more opportunities for nominees to say all kinds of things, and (2) time.<sup>62</sup> And another time-related measure, I calculated how close each hearing was to the next presidential election, as it seemed plausible that hearings become more ideologically charged—probably leading to more claims of neutrality—the closer they occur to an election.<sup>63</sup>

### B. Results

The results of the probit regressions showed that a nominee is more likely to assert claims of neutrality or objectivity:

- (a) the more recent the hearing (or the more rounds of questioning in the hearing);
- (b) when the Senator is a Republican;
- (c) when the Senator is a member of the party in opposition to the President; and
- (d) when the nominee also acknowledges a role for judgment/subjectivity in colloquy with the same Senator.

I found that a nominee is more likely to acknowledge a role for judgment and subjectivity when:

- (a) the more liberal the nominee appeared to be at the time<sup>64</sup>;
- (b) the more recent the hearing (or the more rounds of questioning in the hearing) but if the hearing took place after 2000, the likelihood of such acknowledgement was reduced; and

62. Each proved statistically significant when alone in the regression; when both were present, neither was.

63. See Stone, *supra* note 2, at 386-87 (discussing conservative Republican and southern Democratic opposition to Fortas' nomination to Chief Justice) ("[T]he coalition... had an incentive to block Johnson's... nomination... less than five months before the 1968 presidential election, which the Republicans fully expected to win."); *id.* at 414 n.56 (noting that "in all of American history, presidents have made only eight Supreme Court nominations within six months of a presidential election").

64. This finding should be interpreted with some caution due to possible endogeneity. Because the Segal-Cover scores rely on newspaper editorial descriptions of the nominee, those editorials could themselves be responding to things the nominee said during the confirmation hearings. Interestingly, the party of the nominating president was not statistically significant.



(c) the nominee makes claims of neutrality or objectivity in colloquy with the same Senator.<sup>65</sup>

All of these results are significant at  $p > .05$ . Proximity to the next presidential election was not statistically significant.

### III. IMPLICATIONS AND FUTURE RESEARCH

These results are suggestive in many ways and raise numerous questions. Perhaps of most interest, however, is the fact that claims of objectivity or neutrality do in fact appear to be increasingly likely aspects of confirmation hearings over time. Moreover, such claims are particularly likely when the nominee is speaking to a member of the opposing party. In our currently highly polarized political environment,<sup>66</sup> it is hardly surprising that nominees are more likely to claim neutrality or objectivity in their confirmation hearings in order to not become targets of the opposing party; nor is it surprising that such claims are more likely the more recent the hearing. Indeed, at least for a nominee facing an opposition-led Senate or an opposition-led filibuster,<sup>67</sup> a real possibility in our current political environment, it might well be impossible to get confirmed *without* making such claims.

Ironically, however, while these unsurprising efforts by nominees to claim neutrality may help them get confirmed, in the long run they might have deleterious effects on the Supreme Court's standing and legitimacy. Recent research, including some in this very volume, demonstrates that legitimacy is often enhanced when decisionmakers acknowledge that they are deciding difficult questions and make clear that they have taken account of different perspectives. Supreme Court nominees, however, sometimes imply that judges do the opposite: instead of weighing different perspectives, they rely on legal materials and deductive logic to reach the objectively correct answer. These claims, rather than enhance legitimacy, may exacerbate alienation and disappointment among those unhappy with decisions of the Court or with the votes of individual justices.

To explain why requires some discussion of what several theorists and empirical scholars call "cultural cognition."<sup>68</sup> Cultural cognition

65. The other results were the same regardless of whether this factor was included.

66. See, e.g., Pildes, *supra* note 50, at 273.

67. See Stone, *supra* note 2, at 385-86 (discussing circumstances under which the Senate has failed to confirm a nominee, including the Republican-led filibuster of Abe Fortas's nomination for Chief Justice).

68. See, e.g., Dan Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (here-

influences the way people evaluate empirical evidence in legally salient situations. More specifically, it is a form of motivated reasoning through which individuals' group affiliations and social commitments color the conclusions they draw from empirical evidence.<sup>69</sup> For example, when asked to determine whether a videotaped protest involved constitutionally protected speech or crossed the line into unprotected conduct, individuals' responses varied predictably and systematically based on those values and affiliations on the one hand, and on the other hand, whether they were told that the protest involved abortion protesters outside a clinic or gay rights protesters objecting to "don't ask don't tell" outside a college placement facility where the military was interviewing students.<sup>70</sup> People's perceptions of the protests were often tied to their sympathies for or against the protesters.

Not only do people's perceptions and evaluations of events vary with their worldviews and group affiliations, but people are very good at recognizing this trait in those with different worldviews while generally being oblivious to it in themselves and those they tend to agree with. This phenomenon is called "naïve realism" because people are realistic when it comes to the way others' thoughts and conclusions are influenced by their values and commitments, but naïve about themselves.<sup>71</sup> As a result, people believe that they themselves are fair and neutral, but they often fail to credit the good faith of those with whom they disagree.<sup>72</sup> This feature of cultural cognition can cause or exacerbate social division as people on either side of an issue believe that their opponents (and only their opponents) are acting out of illegitimate partisanship.<sup>73</sup>

In his recent Harvard Law Review *Foreword*, Dan Kahan explores the way that cultural cognition might shape public responses to Supreme Court decisions.<sup>74</sup> As in other arenas, he says, people are likely

inafter, Kahan, et al., *Whose Eyes*); Dan Kahan, et al., "*They Saw a Protest*": *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) (hereinafter, Kahan, et al., *Protest*).

69. Kahan, et al., *Protest*, *supra* note 68, at 853, 859.

70. *Id.* at 863-64, 869-73 (explaining the experimental conditions); *id.* at 877-80 (explaining the results). The video actually depicted a protest by the Westboro Baptist Church and a counter-protest, but in the video they looked like a single protest. *Id.* at 18-19. The words on all of the signs were blurred so that the study participants could not read them, and a generic sound track was added. *Id.* at 872.

71. *Id.* at 860.

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

73. *Id.* at 61.

74. *Id.*

to believe that the justices with whom they agree are reaching carefully considered results, while those with whom they disagree are allowing their ideological views to inappropriately dictate their conclusions. Particularly because the Supreme Court often decides cases on controversial and high-profile issues—abortion or affirmative action, for example—these reactions carry with them the threat of de-legitimizing the Court in the public's eyes because it (or at least those justices with whom the citizen disagrees) is acting ideologically, not based on law. And such views of the Court are not uncommon. In a poll taken before the Court announced its ruling upholding the Affordable Care Act,<sup>75</sup> for example, “a majority of respondents expressed concern that ‘the Supreme Court makes decisions based on a political agenda instead of the law,’ with only eleven percent of respondents expressing ‘a great deal of confidence that the Supreme Court puts politics aside and makes decisions based on the law.’”<sup>76</sup> This view is not conducive to public support and respect for life-tenured, unelected justices or for the Court on which they sit.

Intriguingly and counter-intuitively, Kahan argues that the neutral, authoritative voice of the classic judicial opinion itself may contribute to public perception that the Court is deciding cases “based on a political agenda instead of law”<sup>77</sup> or that the justices are “fitting their rulings to their partisan views.”<sup>78</sup> When people disagree with an outcome, that neutral voice, rather than assuring them that the result is objectively correct, instead can contribute to a perception that the Court considered only one side and that other perspectives were not even considered.<sup>79</sup>

As a result, Kahan argues, the justices would do better to write opinions that explicitly acknowledge the complexity and value-laden nature of many of the decisions they must make and that acknowledge that law and legal reasoning alone may not provide a path to a single “right” answer.<sup>80</sup> Explicit judicial recognition of the inherently indeterminate nature of many of the issues confronted by the Court—a

75. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

76. Karlan, *supra* note 15, at 7 n.34 (quoting Memorandum from Geoff Garin et al., Hart Research Assocs., to Alliance for Justice, Views of the Supreme Court on Eve of the Health Care Ruling (June 11, 2012), available at <http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/hart-afj-scotus-attitudes.pdf>).

77. *Id.*

78. Kahan, *Foreword*, *supra* note 72, at 28.

79. *Id.* at 28-29.

80. *Id.* at 62.

kind of complexity that Kahan calls *aporia*<sup>81</sup>—would not of course erase social divisions and disagreements. But such recognition might, he argues, allow those on the losing side to feel that their position was considered—and it might therefore actually *increase* the Court’s legitimacy with the citizenry.<sup>82</sup>

As other members of the Symposium have illustrated, experiments on people’s reactions to hypothetical judicial decisions they disagree with provide empirical support for Kahan’s theory. Tom Tyler and Margaret Krochik find that individuals are more likely to accept policy outcomes they disagree with when they believe, *inter alia*, that their concerns or values have been given due consideration.<sup>83</sup> Dan Simon and Nicholas Scurich likewise find that among people who disagree with the outcome in hypothetical judicial decisions, “decisions accompanied by monolithic reasoning received lower evaluations than decisions that provided good reasons for both sides of the dispute. In other words, lay participants seem to prefer decisions that admit to complexity and open-endedness of the legal issue over ones that only acknowledge the strength of the winning side.”<sup>84</sup> In other words, people seem to respond better to unfavorable decisions that acknowledge *aporia* than to unfavorable decisions that seem to insist that the result was the only one possible.

All of this may have implications for Supreme Court confirmation hearings and the way they are conducted. Just as the “neutral” judicial voice may trigger naïve realism and its consequent social division, so too might confirmation hearings’ repeated invocations of neutrality and disavowals of ideology or subjectivity in judging. The disconnect between these claims and the reality of what people observe once decisions are made might worsen what Kahan calls the Court’s “neutrality crisis.”<sup>85</sup> And recent hearings may increase this danger. Although claims of neutrality have become *more* likely to occur in colloquy between particular senators and judicial nominees, admissions of subjectivity may not have, since 2000, followed the same path.

81. *Id.* at 62-63.

82. *Id.* at 63.

83. Tom Tyler and Margaret Krochik, *Deference to Authority as a Basis for Managing Ideological Conflict*, 88 CHI.-KENT L. REV. 433, 449 (2013).

84. Dan Simon and Nicholas Scurich, *Judicial Overstating*, 88 CHI.-KENT L. REV. 411, 429 (2013).

85. Kahan uses the term throughout his Harvard Law Review Foreword. Kahan, *Foreword*, *supra* note 72. (Whether the Court currently faces a “crisis” is of course debatable, but the conditions that Kahan argues may cause such a crisis are indeed present.)

To be clear, I do not mean to suggest that any particular statement in a confirmation hearing or even any particular hearing have led or will lead to a “neutrality crisis.” Any effect that confirmation hearing rhetoric might have on public views of the Court is greatly attenuated. Nonetheless, confirmation hearings are virtually the only time that ordinary people are likely to pay much attention to the way judges and justices describe their work and the work of the court, whether by watching or listening to the hearings themselves or by following media accounts. In fact, surprising numbers of people apparently do so.<sup>86</sup> The hearings thus can have a significant educative function.<sup>87</sup> Moreover, the rhetoric and themes of the hearings likely work their way into mainstream discussions of the Court and its work. Future research might well investigate this aspect of media coverage of confirmation hearings.

Subject to this caveat, my finding that Democratic nominees are about twice as likely to make admissions of subjectivity than are Republican nominees gives rise to an additional, related concern. How might these differences in the way nominees of different parties have described the role of judges affect the way that people of different political orientations themselves think about the role of the Court and, ultimately, to the Court’s own legitimacy? As Tyler and Simon/Scurich suggest, admissions of *aporia* might increase people’s acceptance of decisions they disagree with. But for those who tend to agree with Republican nominees, does the same dynamic operate when the authorities on “their side” do not reinforce those admissions? Likewise, for those sympathetic to Democratic nominees, if the authorities they agree with admit to subjectivity but the other side does not, is that likely to heighten a belief that those on the other side acting in bad faith? That nominees are more likely to make their claims of neutrality when talking to senators of the opposing party heighten any effect? More research is needed to tease out some of these dynamics.

The wealth of data provided by coding the confirmation hearings also provides the opportunity to investigate the role of a variety of additional variables. For example, how often do the senators themselves describe the judicial role as one of total objectivity and how often do they acknowledge *aporia* or the need for subjective judgment? Do discussions of the judicial role come up more frequently in the con-

86. See Gibson and Caldeira, *supra* note 2, at 71.

87. See Stone, *supra* note 2, at 466 (arguing that the educative function of the hearings should be “paramount”).

text of particular areas of law or controversial legal issues, such as the right to privacy or the rights of criminal defendants, or do these discussions tend to occur in the abstract? Does the increasing polarization of our political culture have consequences for the ways that senators and nominees alike discuss the judicial role? These and other questions provide rich terrain for future work.

#### CONCLUSION

In this paper, I present some preliminary analysis of nominees' claims during confirmation hearings about how judicial decision-making operates. Virtually all—appropriately—profess neutrality, but for some that profession not only implies appropriate neutrality but also suggests that judging is primarily an objective process. For other nominees, in particular more liberal nominees, while they certainly make claims of neutrality, they also acknowledge that judging in fact also involves making judgments, judgments that are necessarily subjective. These disparities, as well as other features of the confirmation process, coupled with the insights of cultural cognition researchers, raise concerns about the longterm effect on public attitudes towards the Court, particularly on people's willingness to accept Supreme Court decisions with which they strongly disagree.