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A Confirmation Process Worth Celebrating

Since 1939, almost every candidate nominated to serve on the Supreme Court has appeared to testify before the Senate Judiciary Committee. Each time one of these hearings occurs, Americans reengage in a debate about the meaning of the Constitution. Not only do the nominees respond to question after question from the senators, but these questions (and the nominees' answers) also frequently spark intense and colorful debate within the larger public. Nominees are grilled on everything from iconic and sublime cases such as *Brown v. Board of Education*[1] to deceptively mundane issues like spending Christmas Day at a Chinese restaurant – which sometimes turn out to have important cultural and political resonances.

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

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

[2] See, e.g., Richard Brust, "No More Kabuki Confirmations," 95 *American Bar Association Journal* 39 (2009); Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New York: Basic Books, 1994); Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York: Oxford University Press, 2005); Ronald Dworkin, "Justice Sotomayor: The Unjust Hearings," *The New York Review of Books*, September 24, 2009; Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton, NJ: Princeton University Press, 2007); Brian Fitzpatrick,

This book defends the celebratory view. Far from being empty rituals that degrade all involved, the confirmation hearings play an important but underappreciated role in our constitutional system: they provide a democratic forum for the discussion and ratification of constitutional change.[4] They do so by creating moments of democratic accountability during which senators debate what should be considered part of our constitutional consensus, and aspiring justices are expected – in public and under oath – to accept that consensus before being allowed to assume a seat on the high Court. Over time, the process of debating and repeatedly affirming (or, in some cases, rejecting) once deeply contested constitutional choices ratifies a new constitutional canon, one that reflects the broad and deep support of those who agree to live under it. In doing so, the confirmation process provides a key mechanism through which each generation of Americans defines and shapes our changing constitutional consensus.

Recognizing that public opinion shapes constitutional meaning is not novel. After all, the framers set up a Constitution that provides for indirect public input into the selection of federal judges through the public's representatives in the Senate and the White House, thereby ensuring that the Court's decisions would rarely stray too far from the public's preferences.[5] Moreover, numerous scholars have demonstrated that the Court is politically constrained and rarely deviates from deeply held majoritarian preferences.[6] Others have examined

"Confirmation 'Kabuki' Does No Justice," *Politico*, July 20, 2009. Retrieved from: http://www.politico.com/news/stories/0709/25131.html (Accessed July 24, 2012); Elena Kagan, "Confirmation Messes, Old and New," 62 *University of Chicago Law Review* 919 (1995); Scott Lemieux, "Can Kagan Win Over Liberals?" *American Prospect*, May 12, 2010. Retrieved from: http://prospect.org/article/can-kagan-win-over-liberals-0 (Accessed July 24, 2012,); John P. MacKenzie, "The Trouble with Hearings," *New York Times*, September 24, 1991; Stuart Taylor, Jr., "The Lessons of Bork," *National Journal*, July 22, 2009. Retrieved from: http://ninthjustice.nationaljournal.com/2009/07/the-lessons-of-bork.php (Accessed July 25, 2012); David A. Yalof, "Confirmation Obfuscation: Supreme Court Confirmation Politics in a Conservative Era," 44 *Studies in Law, Politics and Society* 143 (2008).

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

4 Our focus throughout this book is on constitutional, not statutory, law. As we demonstrate in Chapter 4, there is very little discussion of statutory law at the confirmation hearings: from 1939 to 2010, only 1% of all hearing dialogue involved matters of statutory interpretation.

5 Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," 6 *Journal of Public Law* 279 (1957).

6 See, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1961); Tom S. Clark, "The Separation of Powers, Court-curbing and Judicial Legitimacy," 53 *American Journal of Political Science* 971 (2009); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus & Giroux, 2010); Mark A.

various ways in which public opinion acts as a constraint on judicial decision making,[7] investigated how constitutional changes can obtain democratic validity,[8] and theorized why democratic input into constitutional meaning is normatively desirable.[9]

What our work adds to this rich literature is evidence that the confirmation hearings are one of the important ways in which the public contributes to constitutional change. When constitutional choices made by the Court gain acceptance by the public at large, nominees are expected to pledge their adherence to those choices at their confirmation hearings. Over time, subsequent nominees from across the political spectrum voice their support for those changes, allowing the hearings to function as a formal mechanism through which the Court's constitutional choices are ratified as a part of our constitutional consensus – the long-term constitutional commitments embraced by the public.[10] In doing so, the constitutional choices made by an otherwise largely insulated judiciary are affirmed through a formal, public, and law-focused process.

The hearings are uniquely positioned to play this role, in that they are conducted in the language of constitutional law and feature nominees testifying under oath and in the glare of substantial media attention, often for days on end. This separates the hearings from myriad other ways in which public

Graber, "The Nonmajoritarian Difficulty: Legislature Deference to the Judiciary," 7 *Studies in American Political Development* 35 (1993); Thomas R. Marshall, *Public Opinion and the Rehnquist Court* (Albany: State University of New York Press, 2008); Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," 66 *Journal of Politics* 1018 (2004).

7 See, e.g., Lee Epstein and Andrew D. Martin, "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)," 13 *University of Pennsylvania Journal of Constitutional Law* 263 (2010); Barry Friedman, "Dialogue and Judicial Review," 91 *Michigan Law Review* 577 (1993); Michael W. Giles, Bethany Blackstone, and Richard L. Vining, Jr., "The Supreme Court in American Democracy: Unraveling the Linkages between Public Opinion and Judicial Decision Making," 70 *Journal of Politics* 293 (2008); Terri Jennings Peretti, *In Defense of a Political Court* (Princeton, NJ: Princeton University Press, 2001).

8 See, e.g., Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," 87 *Virginia Law Review* 1045 (2001); David A. Strauss, "The Irrelevance of Constitutional Amendments," 114 *Harvard Law Review* 1457 (2001); Cass R. Sunstein, "If People Would Be Outraged By Their Rulings, Should Judges Care?" 60 *Stanford Law Review* 155 (2007).

9 See, e.g., Bruce Ackerman, *We the People*, Vol. 1: *Foundations* (Cambridge, MA: Harvard University Press, 1991); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Peretti, *In Defense of a Political Court*, supra, n. 7.

10 "Ratification" means to approve and give formal sanction to, which is the sense in which we are using the term here. See Joseph P. Pickett, ed., *The American Heritage Dictionary of the English Language* (Boston: Houghton Mifflin, 2000).

opinion influences constitutional change.[11] These differences are important, in that their very formality provides a measure of democratic accountability that looser mechanisms lack. Simply put, the Senate's ability to refuse to confirm a nominee who fails to accept or reject a particular constitutional doctrine provides a tangible moment at which elected officials, acting on our behalf, can choose one legally viable constitutional meaning and reject another.

Focusing on the role the confirmation hearings play in ratifying the current constitutional consensus, rather than on the ways in which they fail to impose a democratic check over the Court's handling of currently contested issues, has implications for the way we think about constitutional meaning and the role of the Court in our governing system. Although academic discourse has largely moved past this, much of the public mythology about constitutional lawmaking rests on the idea that smart justices acting in good faith can use the tools of constitutional interpretation to ascertain a single, "correct" meaning of the Constitution and apply that meaning in a determinative way to specific cases.[12] Though this view might be appealing, it is not the system we have. Legal and political science scholars have shown beyond reasonable dispute that our most careful methods of constitutional interpretation simply cannot eliminate judicial discretion in hard cases.[13] That is, to put it simply, what makes them hard. In such cases, the tools of legal reasoning may constrain judicial discretion, but they cannot eliminate it. Supreme Court justices therefore necessarily make choices among the constitutionally acceptable answers the tools of legal reasoning leave open to them. These choices are within those the Constitution allows, but they are not exclusively mandated by the Constitution. They are judicial *choices* – constructions built to operationalize

[11] Contrast, for example, the formal nature of the confirmation hearings with Ackerman's effort to legitimate constitutional change by identifying somewhat nebulously defined moments of "higher law making." See Bruce Ackerman, "The Living Constitution," 120 *Harvard Law Review* 1737 (2007).

[12] See, e.g., Erwin Chemerinsky, "Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making," 86 *Boston Law Review* 1069 (2006) (discussing how the myth of discretion-free decision making in constitutional law hinders the ability of the confirmation process to function as a democratic check on an unelected judiciary).

[13] See, e.g., Mitchell Berman, "Originalism Is Bunk," 84 *New York University Law Review* 1 (2009); Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008); Daniel Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago: University of Chicago Press, 2002); Friedman, *The Will of the People*, supra, n. 6; Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2009); Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007).

the words of the Constitution in ways that make sense to the people living under it.

But our public rhetoric, dominated by debates about "umpires" and "activists,"[14] has little patience for a Constitution that offers multiple legally viable answers to hard constitutional questions. Acknowledging such a thing would, after all, require facing up to the fact that we live in a system in which we give unelected justices the power to choose among the legally acceptable outcomes the Constitution leaves open to them. Giving such power to judges seems intolerable.[15]

As other scholars have noted, this picture changes if we instead see those judicial choices as constrained over time by constitutional commitments made by the people and their elected officials, rather than just by the judiciary.[16] But Supreme Court confirmation hearings are rarely seen as contributing to this process, in part because they have proven unable to draw from nominees their opinions on our most hotly contested constitutional issues.[17] Focusing our lens instead on the role the hearings play in formally recognizing previously contested cases as part our constitutional consensus allows us to see how the confirmation hearings can in fact contribute to this process. Major constitutional changes, from this perspective, are not "mistakes" that must be grudgingly tolerated because people have come to rely on them,[18] but rather are constitutional choices, made by the people and ratified through the confirmation process. Constitutional meaning, in the process we describe here, is

[14] See, e.g., Kim McLane Wardlaw, "Umpires, Empathy, and Activism: Lessons from Judge Cardozo," 85 *Notre Dame Law Review* 1629 (2010); Aaron S.J. Zelinsky, "The Justice as Commissioner: Benching the Judge-Umpire Analogy," 119 *Yale Law Journal Online* 113 (2010).

[15] See, e.g., Raoul Burger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Indianapolis: Liberty Fund, 1997). See also Richard A. Posner, "The Rise and Fall of Judicial Self-Restraint," 100 *California Law Review* 519 (2012) at 536 (discussing how the rise of constitutional theory, and its focus on finding "correct" constitutional answers, generates a belief that judging unrestrained by the "correct" method of interpretation necessarily results in "lawless" decisions).

[16] See, e.g., Kramer, *The People Themselves*, supra, n. 9; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 2000).

[17] See, e.g., Eisgruber, *The Next Justice*, supra, n. 2 at 4 (arguing that the hearings have become little more than a forum for "platitudes, anecdotes, and scandals" and that the senators, unable to extract anything of constitutional substance from the nominees, have instead "fished for evidence of wrongdoing"). See also Vikram David Amar, "How Senate Confirmation Hearings Should Better Educate Senators and the American Public: The Instructional Necessity of Case Specific Questioning," 61 *Hastings Law Journal* 1407 (2010) (arguing that democratic discourse requires that nominees answer questions about specific issues and cases).

[18] For a discussion of the problem constitutional change poses for certain theories of constitutional interpretation, see Jack M. Balkin, "Nine Perspectives on Living Originalism," 2012 *University of Illinois Law Review* 815 (2012) at 821.

not pulled from the parchment by nine legal seers, but rather is created in fits and starts as the Court issues decisions that are accepted, rejected, ignored, and passionately argued about by us.

As our empirical analyses show, this understanding of the value of the confirmation hearings has the important advantage of resting on a descriptively accurate picture of how the Supreme Court and the Constitution actually work. In providing both the data and the theory to support our view, we hope this book will thus work to lessen the grip of the incomplete story so many of us feel compelled to tell about the Constitution and the Court. We have found, however, that people of all political persuasions bring strong preconceptions to discussions of the confirmation hearings, the Supreme Court, and the Constitution, and that those perceptions sometimes lead readers to leap ahead and reach conclusions we reject in this book. We therefore find it helpful at the onset to lay out with some specificity what we are *not* saying.

We do not believe that it is the job of the Supreme Court to track short-term public opinion (although it frequently will do so), nor do we believe Supreme Court justices have an obligation to vote the way their political allies or "constituencies" want them to. We do not think nominees should be required to answer every question put to them by senators (although we do think that senators could get better answers if they asked better questions) and we certainly do not think justices should be impeached for failing to always vote in accordance with the answers they gave at their hearings (although we think they should feel a special obligation to explain such deviations in their written opinions). Nor do we believe that every decision issued by the Supreme Court is equally valid. The tools of legal reasoning constrain judicial discretion even if they cannot eliminate it, and there will always be better and worse legal arguments. Likewise, although the Constitution in almost all hard cases allows for more than one legally correct answer, it is not infinitely flexible. To say there is unlikely to be a single correct answer is not to say there are no *wrong* answers. Finally, we do not assert that the hearings are the only important means by which Supreme Court decisions gain democratic acceptance.[19] There are many ways this occurs,

[19] It is important to note that we are concerned with the ratification of the Court's decisions, not the legitimacy of the Court as an institution. For excellent treatments of the factors shaping the legitimacy of the Supreme Court, see, e.g., Gregory A. Caldeira and James L. Gibson, "The Etiology of Public Support for the Supreme Court," 36 *American Journal of Political Science* 635 (1992); James L. Gibson and Gregory A. Caldeira, *Citizens, Courts, and Confirmations: Positively Theory and the Judgments of the American People* (Princeton, NJ: Princeton University Press, 2009); Timothy R. Johnson and Andrew D. Martin, "The Public's Conditional Response to Supreme Court Decisions," 92 *American Political Science Review* 299 (1998).

including through long-term constitutional conversations,[20] the construction and re-construction of constitutional meaning,[21] and the acceptance of new constitutional understandings advanced by various social movements.[22]

What we *are* saying is this. The Constitution rarely gives determinative legal answers to complex constitutional questions. Supreme Court justices therefore necessarily make choices among the constitutionally acceptable answers the tools of legal reasoning leave open to them. These choices are within those the Constitution allows, but are rarely uniquely mandated by the Constitution itself. They are judicial choices. Accordingly, they draw their legitimacy not from any constitutional decree, but rather by acceptance, over time, by broad and deep swaths of the public. The confirmation hearings contribute to this process by providing a forum in which those choices are ratified in a democratically legitimated way. *Brown v. Board of Education* is accepted, *Plessy v. Ferguson*[23] is rejected, and what was once controversial is recognized as part of our constitutional understanding.

This celebratory view of the confirmation hearings – as a forum through which constitutional choices are, over time, embraced through a formal, public, and legalized process – builds on existing literature about constitutional construction, public opinion, and social movements. Scholars working in this tradition have argued that constitutional lawmaking is a constructive process in which the Court legitimates and rationalizes constitutional meanings developed through social movements and ordinary politics.[24] In doing so, they have shown how constitutional understandings can be changed through sustained and broad-based public action.[25] We add to this work by demonstrating how the confirmation process acts as one of the mechanisms used to validate those changes. We show that nominees testifying at the hearings do in fact repeatedly affirm their allegiance to (or rejection of) what were once disputed constitutional meanings.[26] Over time, these repeated avowals help to turn those

[20] See, e.g., Bruce A. Ackerman, "The Storrs Lectures: Discovering the Constitution," 93 *Yale Law Journal* 1013 (1984); Friedman, "Dialogue and Judicial Review," supra, n. 7.

[21] See, e.g., Kramer, *The People Themselves*, supra, n. 9.

[22] See, e.g., Reva Siegel, "Dead or Alive: Originalism as Popular Constitutionalism in *Heller*," 122 *Harvard Law Review* 191 (2008).

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

[24] See, e.g., Jack M. Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011); Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1989).

[25] See, e.g., Ackerman, *We the People*, supra, n. 9; Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012).

[26] Balkin has referred to these "must" affirm or reject issues as the "constitutional catechism." Jack M. Balkin, "The Constitutional Catechism." January 11, 2006. Retrieved from: http://balkin.blogspot.com/2006/01/constitutional-catechism.html (Accessed September 5, 2012).

once-disputed meanings – the constitutional choices made by the judiciary – into part of our constitutional fabric. They become constitutional meanings that "We the People" accept, acting not as a metaphysical abstraction, but as we actually think, live, and vote today.

This view of the importance of the hearings stands in stark contrast to the claim that the hearings lack value because senators are unable to pull from nominees their opinions on currently contested constitutional issues.[27] Focusing on the nominees' refusal to answer questions about unsettled areas of law, although meaningful in some contexts, overlooks the valuable role of the hearings in solidifying our common understandings of what areas *are* settled.[28] Thus, although nominees are unlikely to tell us much about their opinions of currently contested issues, such as abortion, affirmative action, and gay rights, the repeated affirmation of seminal cases, such as *Brown*, plays an important role in both validating the Court's choices in previously contested areas and defining the constitutional issues that are and are not actively in play.

PLAN OF THE BOOK

Although there is no shortage of critiques of the confirmation process, there has been very little empirical research examining exactly what happens when nominees appear before the Senate Judiciary Committee.[29] As a result, many of the calls for changes to the process are based primarily on anecdotes or the analysis of a few nominees,[30] as opposed to a large-scale investigation of

[27] See, e.g., Amar, "How Senate Confirmation Hearings Should Better Educate Senators and the American Public," supra, n. 17; Eisgruber, *The Next Justice*, supra, n. 2.

[28] In this light, senatorial discussions of "super precedents," addressed in Chapter 8, are best understood as efforts to define what is and is not part of the consensus that makes up our constitutional canon. John Roberts' confirmation hearing, for example, involved a great deal of debate about the role of such precedents in judicial law making. See, e.g., Michael J. Gerhardt, "Super Precedent," 90 *Minnesota Law Review* 1204 (2006).

[29] For exceptions to this, see, e.g., Dion Farganis and Justin Wedeking, "'No Hints, No Forecasts, No Previews': An Empirical Analysis of Supreme Court Nominee Candor from Harlan to Kagan," 45 *Law & Society Review* 525 (2011); Frank Guliuzza III, Daniel J. Reagan, and David M. Barrett, "The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria," 56 *Journal of Politics* 773 (1994); Ayo Ogundele and Linda Camp Keith, "Reexamining the Impact of the Bork Nomination to the Supreme Court," 52 *Political Research Quarterly* 403 (1999); Margaret Williams and Lawrence Baum, "Questioning Judges about Their Decisions: Supreme Court Nominees before the Senate Judiciary Committee," 90 *Judicature* 73 (2006).

[30] See, e.g., Bruce A. Ackerman, "Transformative Appointments," 101 *Harvard Law Review* 1164 (1988); Amar, "How Senate Confirmation Hearings Should Better Educate Senators and the American Public," supra, n. 17; Carter, *The Confirmation Mess*, supra, n. 2; Davis, *Electing Justice*, supra, n. 2; Eisgruber, *The Next Justice*, supra, n. 2; Bruce Fein, "A Circumscribed

every nominee who has testified before the Judiciary Committee. Bucking this trend, we ground our normative picture of the confirmation hearings in an empirically rigorous examination of what actually happens at the hearings. Our conclusions, however, are far from the mundane cataloging of confirmation questions and answers. Rather, our close inspection of the hearings allows us to draw not just on dry data, but also on stories and illustrations, plucked from hearing transcripts going back to before World War II, to show the various ways in which the hearings do in fact play a role in democratically ratifying the Court's constitutional choices.

In so doing, we are attentive to the fact that the research question should drive one's choice of methods, rather than the reverse. Consequently, we employ both quantitative and qualitative methods throughout this book. For example, we use quantitative methods to determine the extent to which public opinion and Supreme Court precedent influence confirmation hearing dialogue, a question we believe is best answered through the tools of statistical analysis. Conversely, we rely on qualitative methods to assess the extent to which various nominees affirmed or rejected core constitutional principles at their hearings, as this question calls out for the in-depth analysis of hearing dialogue. Thus, some chapters feature primarily statistical methods, others primarily qualitative methods, and still others utilize both methodological orientations. We are confident that employing this mixed-methods approach will result in a deeper understanding of the nuanced relationship between confirmation hearings and constitutional change.

The data we use throughout this book are based on the transcripts of the Senate Judiciary Committee hearings of Supreme Court nominees. Our quantitative analyses make use of an original database we have created. The database codes every question asked and every answer given at every open public hearing of a Supreme Court nominee since Felix Frankfurter testified in 1939. This data set includes nominees who appeared to testify and were confirmed, as well as nominees who testified but were not confirmed, either because they withdrew from the process or because their confirmation failed in the Senate. This database, the first of its kind, provides a rich source of information on hearing dialogue.[31] Our qualitative analyses likewise make use of hearing transcripts. In particular, we rely primarily on hearing transcripts to develop a compelling narrative exploring how hearing discourse evolves over time, thus providing

Senate Confirmation Role," 102 *Harvard Law Review* 672 (1989); David A. Strauss and Cass R. Sunstein, "The Senate, the Constitution, and the Confirmation Process," 101 *Yale Law Journal* 1491 (1992).

[31] A full treatment of our database is provided in the Appendix.

a vivid illustration of just how the senators' questions and nominees' answers contribute to the ratification of our evolving constitutional understandings.

We begin our story in Chapter 2 by presenting an overview of the Supreme Court nomination and confirmation process. The chapter offers an in-depth treatment of all stages of the process of filling a vacancy on the nation's highest Court. We start by discussing how vacancies arise on the Court. We then cover the means by which the president selects a nominee and the various influences on the president's decision as to whom to nominate. Next, we provide an exposition of the significant role the Senate Judiciary Committee plays in the process, as well as that of the full Senate. Following this, we discuss what happens after a nominee is confirmed and prepares to take his or her seat on the Supreme Court. As a way of highlighting this process in action, the chapter closes with a case study of the nomination and confirmation of the Court's newest Justice (as of the time of this writing), Elena Kagan.

While Chapter 2 provides necessary background for understanding the confirmation process, the remainder of the book is dedicated to advancing our thesis: Supreme Court confirmation hearings are a democratic forum for the discussion and ratification of constitutional change. Supporting this claim requires we do three things. First, we need to show that the hearings are democratic, in the sense that they feature the discussion of issues that are important to the American public. In this way, the hearings gain a large part of their democratic legitimacy insofar as the senators fulfill their representational duties by relaying the concerns of the citizenry to nominees.[32] Second, we need to illustrate that the hearings feature the discussion of constitutional issues of contemporary relevance to the public. Rather than merely follow an idiosyncratic path determined by the traits or personal histories of the nominees,[33] our thesis necessitates that we show that hearing dialogue centers around

[32] One might argue that the hearings are implicitly democratic because, at least since the passage of the Seventeenth Amendment (which predates the hearings), senators are directly elected. We believe the dialogical nature of the thesis we are advancing requires more than just reliance on the direct election of senators: it involves demonstrating that senators relay the concerns of the citizenry to nominees. For more general discussions of the democratic nature of the Senate relating to the effects of the Seventeenth Amendment, see, e.g., Vikram David Amar, "Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment," 49 *Vanderbilt Law Review* 1347 (1996); Jay S. Bybee, "Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment," 91 *Northwestern University Law Review* 500 (1997).

[33] The discussion of Sonia Sotomayor's "wise Latina" comment at her confirmation hearing is the most high-profile, recent example of nominee-specific factors driving hearing discourse. In that statement, Sotomayor appeared to suggest that minority judges would reach "better" conclusions than white male judges because of their life experiences. That such idiosyncratic conversations do not dominate the hearings is demonstrated in Chapters 3 and 4. See Sonia