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# Party Polarization and Congressional Committee Consideration of Constitutional Questions

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## PARTY POLARIZATION AND CONGRESSIONAL COMMITTEE CONSIDERATION OF CONSTITUTIONAL QUESTIONS

*Neal Devins\**

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### INTRODUCTION

Starting around 1990 and especially following the 1995 Republican takeover of Congress, congressional committees have paid less attention to constitutional issues than before. During the same period, the House and Senate Judiciary Committees have become Congress's dominant voice on constitutional questions. In the pages that follow, I link these two phenomena to party polarization in Congress. Specifically, I argue that party polarization has played an important role in defining the policy agendas of

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\* Goodrich Professor of Law and Professor of Government, College of William and Mary. In thinking through the points made in this Article, I have greatly benefited from conversations with Steve Calabresi, Larry Evans, Mike Gerhardt, Mark Miller, Bruce Peabody, Mitch Pickerill, David Rohde, Jeff Rosen, Steve Smith, and Sean Theriault. This Article was improved by questions and comments at the American Political Science Association annual meeting and at a faculty workshop at the University of Texas School of Law. My general thinking on this topic has been shaped by past collaborations with Louis Fisher and Keith Whittington. I also owe thanks to my hardworking research assistants Perry Cooper and Nick Cumings.

congressional committees, committee resources and power, congressional attitudes toward the Supreme Court, and the willingness of committee chairs to allow members of the minority party to call witnesses and otherwise air objections to committee proposals. Each of these factors contributes both to diminishing committee interest in the Constitution and to the increasing share of constitutional hearings<sup>1</sup> held by the Judiciary Committees. Yet polarization is not the only variable that figures into the number and location of constitutional hearings. Court decisionmaking and presidential action, for example, may prompt lawmakers (often at the urging of interest groups) to hold constitutional hearings. Moreover, even though party polarization affects many of the factors lowering interest in congressional hearings, it does not always depress congressional committee interest in constitutional questions. For example, when Republicans gained control of Congress in 1995, federalism figured prominently into the party's agenda, and as such, there was a spike in constitutional hearings.

In calling attention to factors that influence the number and location of constitutional hearings, this Article extends the analysis of a 2004 chapter that I coauthored with Keith Whittington and Hutch Hicken.<sup>2</sup> That chapter mapped patterns of constitutional hearing activity in Congress from 1970 to 2000. At that time, patterns of declining committee interest in the Constitution were harder to discern, as was the pivotal role that party polarization played in transforming congressional practices in congressional hearing activity.<sup>3</sup> By analyzing the period from 2000 to 2009, this Article will provide a somewhat different and hopefully fuller account of congressional committee consideration of constitutional questions.<sup>4</sup> In particular, by explaining why party polarization is likely to depress committee interest in constitutional hearings, this Article explicitly links the overall decline in constitutional hearings with increasing party polarization. But this Article also accounts for the fact that congressional practices are both extremely dynam-

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<sup>1</sup> See *infra* note 22 and accompanying text (discussing the methodology employed in this Article in identifying constitutional hearings).

<sup>2</sup> Keith E. Whittington, Neal Devins & Hutch Hicken, *The Constitution and Congressional Committees: 1971–2000*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 396 (Richard W. Bauman & Tsvi Kahana eds., 2006).

<sup>3</sup> The growing dominion of the Judiciary Committees was discernable at that time, see *id.* at 405–08, but in 2000 and from 2002 to 2009, the Judiciary Committees heard an even larger percentage of constitutional hearings than at any other time in that study. See *infra* Figure 7; *cf. infra* Figures 9–12 (showing the increased percentage of constitutional hearings heard by the Judiciary Committees from 1994 to 2009).

<sup>4</sup> Most notably, the data from 1970 through 2000 do not suggest declining congressional interest in the Constitution. Because of the 1995 Republican takeover and the subsequent spike in congressional interest in the Constitution, the data from 1995 to 2000 do not suggest a meaningful diminution in committee consideration of constitutional questions. See Whittington, Devins & Hicken, *supra* note 2, at 397 (noting a “surprising consistency in congressional hearing activity”). Eight years later, the data do suggest a diminution in interest. See *infra* Figures 1, 3 & 4. Correspondingly, the impact of party polarization on the number and location of constitutional hearings seems stronger today than ever.

ic and extremely situational.<sup>5</sup> For example, on the one hand, the Gingrich Revolution of 1995 immediately transformed congressional practices and priorities; on the other hand, neither the 2007 Democratic takeover of Congress nor the 2008 election of Barack Obama led to dramatic change in the patterns of constitutional hearings.<sup>6</sup>

This Article will proceed in three parts. In Part I, I detail the data on House and Senate practices from 1970 to 2009, charting the frequency of congressional hearings as well as changing practices among congressional committees. In Parts II and III, I attempt to make sense of the changing patterns in constitutional hearings. Part II discusses the decline in constitutional hearings outside the Judiciary Committees. Part II explains in part how party polarization contributes to Congress's increasing focus on policy issues though not to the constitutional underpinnings of those policies. Part II also explains why it is that committee interest in constitutional questions varies over time and spurs occasional spikes in committee interest in constitutional questions. In Part III, I turn my attention to the Judiciary Committees and discuss why those committees continue to regularly hold constitutional hearings.<sup>7</sup> In the Conclusion, I summarize the Article's claims and offer a brief commentary about the future of constitutional hearings.

Before turning to the data, let me provide a quick explanation of why I think it useful to study constitutional hearings this way. First, committees, along with political parties, are one of the two "principal organizing structures of Congress."<sup>8</sup> And although the relative influence of committees and

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<sup>5</sup> For this reason, it is difficult to say with certainty why a particular issue is or is not pursued by a committee. The explanations I offer should therefore be seen as informed guesses. That said, I think this Article amasses sufficient information to support its conclusions: anyone who disagrees with my claims should have the facts needed to advance a competing hypothesis.

<sup>6</sup> Practices from 2007 roughly track the pattern of the period of unified Republican government from 2001 to 2006, when there was a gradual dip in constitutional hearings. *See infra* Figures 1 and 3 and note 33 and accompanying text. Data from 2009 largely follow data from the previous two years and Administrations. *See infra* Figures 1 & 2. In sharp contrast, the 1995 Republican takeover of Congress was immediately transformative. *See infra* Figures 1 & 2 (documenting spike in 1995 hearings); *see also infra* notes 68–74 and accompanying text.

<sup>7</sup> At the same time, the Judiciary Committees are hardly immune to Part II factors that contribute to the ebb and flow of constitutional hearings in Congress. For example, when constitutional issues are more salient to the national policy agenda, the number of constitutional hearings increases throughout Congress—so that the Judiciary Committees hold more constitutional hearings at the very time that other committees in Congress are holding more constitutional hearings. *See infra* Figures 5–7. Likewise, party polarization helps shape the constitutional agendas of the Judiciary Committees. The choices of which issues to pursue and of which witnesses to invite to testify are very much tied to party polarization. *See* Neal Devins, *The Academic Expert Before Congress*, 54 DUKE L.J. 1525, 1539–45 (2005); *see also infra* note 167 and accompanying text (discussing the Judiciary Committees' tendency since 1985 to call witnesses who back up policy preferences).

<sup>8</sup> John H. Aldrich & David W. Rohde, *Congressional Committees in a Continuing Partisan Era*, in CONGRESS RECONSIDERED 217, 217 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 9th ed. 2009). Political parties are the other principal organizing structure of Congress. *Id.*

political parties has varied over time, it has always been the case that “[m]uch of the important work of Congress is done in committees.”<sup>9</sup> “[T]he connections between public attention and hearings, and between hearings and statutes, strongly suggest the general sensitivity of the lawmaking process to public priorities.”<sup>10</sup> Hearings, moreover, are a relatively accessible source of information about Congress. Unlike informal contacts among staffers, members, lobbyists, and agency officials, hearings are public events. Recognizing their prominence and accessibility, political scientists regularly use congressional hearings as a source from which to draw insight into legislative priorities and practices.<sup>11</sup>

None of this is to say that hearings are a perfect measure of congressional interest in a subject. For example, it is increasingly true that much congressional business, including congressional consideration of constitutional questions, is done “without the benefit of hearings . . . [or even] deliberation in committee.”<sup>12</sup> This is particularly true today; reductions in committee staff and the shift from party leader control to centralized control have diminished the overall importance of committee work.<sup>13</sup> Furthermore, rather than engage in public deliberations through hearings, committee staff and members often deliberate and negotiate behind closed doors.<sup>14</sup> Like-

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<sup>9</sup> Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in CONGRESS AND THE CONSTITUTION 87, 87 (Neal Devins & Keith E. Whittington eds., 2005).

<sup>10</sup> BRYAN D. JONES & FRANK R. BAUMGARTNER, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS 263 (2005); *accord id.* at 258–63 (examining congruence between congressional agenda and policy, and policy priorities of the American people); David C. King, *The Nature of Congressional Committee Jurisdictions*, 88 AM. POL. SCI. REV. 48, 51 (1994) (discussing committee jurisdiction and jurisdictional wrangling among committees); Roger Larocca, *Committee Parallelism and Bicameral Agenda Coordination*, 38 AM. POL. RES. 3, 17 (2010) (noting that issues that are high on the public agenda are more likely to be considered in hearings); Adam D. Sheingate, *Structure and Opportunity: Committee Jurisdiction and Issue Attention in Congress*, 50 AM. J. POL. SCI. 844, 847 (2006) (discussing the relationship between congressional politics and policy agendas, particularly institutional effects on individual issues); Jeffery C. Talbert et al., *Nonlegislative Hearings and Policy Change in Congress*, 39 AM. J. POL. SCI. 383, 385–90 (1995) (discussing committee use of hearings to control the content of legislation).

<sup>11</sup> See Whittington, *supra* note 9, at 87–91 (detailing why political scientists study congressional hearings and including citations to the literature).

<sup>12</sup> THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 217 (2006) (discussing congressional efforts to compel federal court review of Terry Schiavo’s termination-of-life-support case).

<sup>13</sup> See *infra* notes 62–84 and accompanying text (linking the declining status of committees to political polarization); *infra* note 105 and accompanying text (linking committee interest in the Constitution to, among other things, the size of committee staff).

<sup>14</sup> This has always been the case, but the prevalence of back-door negotiations may well be tied to party polarization: polarization encourages behind-the-scenes negotiations among party members, who typically present themselves as a unified front at hearings, on the floor of Congress, and so on. See *infra* notes 71–73, 81, 133–34 (discussing efforts by party leaders to communicate a coordinated message); *infra* notes 170–72 (discussing rise of party-line voting on judicial nominations). For additional discussion of party-line voting, see David M. Herszenhorn, *In Health Vote, A New Vitriol*, N.Y. TIMES, Dec. 24, 2009, at A1, which discusses party-line voting on health care legislation, and Richard Rubin, *Party*

wise, today's hearings are increasingly "stage-managed"<sup>15</sup> and "orchestrated as a form of political theater."<sup>16</sup>

But even if hearings play a less prominent role in congressional deliberations, it is nevertheless true that hearings remain one of the most visible mechanisms for lawmakers to take "action in the public sphere."<sup>17</sup> "In hearings," as Keith Whittington put it, "legislators put political relationships and concerns on display and establish the warrants of authority for legislative action."<sup>18</sup> Furthermore, for the purposes of this Article, differences in congressional practices over the past forty years will serve as a useful point of reference in sorting out how party polarization has shaped congressional consideration of constitutional issues. From 1970 to the 1980 election of Ronald Reagan, Republicans and Democrats were not especially polarized; from 1980 to the 1995 Republican takeover of Congress, the ideological divide between the parties grew considerably. More recently, from 1995 to 2009, Democrats and Republicans have become more polarized than at any other time in our nation's history.<sup>19</sup>

### I. DATA AND PRELIMINARY OBSERVATIONS

With the help of my research assistant Nick Cumings, I collected data on committee hearings in the U.S. House of Representatives and U.S. Senate from January 1, 1970, to December 31, 2009. The Congressional Information Service (CIS) publishes abstracts and witness lists for the public hearings held by congressional committees and subcommittees. CIS also assigns subject terms to each hearing. Using an electronic version of the CIS index, we searched for every entry in the database with any variation of the word "Constitution"<sup>20</sup> registered as a subject term. We then examined the results for relevance: for example, we excluded entries referring to foreign constitutions or the testimony of constitutional law professors on is-

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*Unity: An Ever Thicker Dividing Line*, 68 CQ WKLY. 122, 123 (2010), which notes that Democrats have a 91% party-unity score and Republicans an 87% unity score. Furthermore, even when Congress holds public hearings, much of the lawmaker and staff deliberation occurs outside of public view. For example, Senate Judiciary Committee members and their staff actively engage in conversations about federal court of appeals nominees, including their likely rulings on highly charged constitutional issues. Telephone Interview with Michael Gerhardt, Special Counsel to Senate Judiciary Committee (June 23, 2010).

<sup>15</sup> Richard E. Cohen, *Crackup of the Committees*, 31 NAT'L J. 2210, 2215 (1999).

<sup>16</sup> ROGER H. DAVIDSON & WALTER J. OLESZEK, CONGRESS AND ITS MEMBERS 214 (11th ed. 2008); see also Devins, *supra* note 7, at 1544.

<sup>17</sup> Whittington, *supra* note 9, at 88 (quoting DAVID R. MAYHEW, AMERICA'S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH (2000)).

<sup>18</sup> *Id.*; accord JOHN MARK HANSEN, GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919–1981, at 23 (1991) ("[H]earings often are less a forum for gathering information than a ritual for legitimizing decisions.")

<sup>19</sup> See *infra* Figure 8; see also *infra* notes 52–59 and accompanying text.

<sup>20</sup> We used the expander operator. Our search string was "constitution!"

sues unrelated to the U.S. Constitution.<sup>21</sup> We organized the data by calendar year and by committee in both the House and Senate. We recorded data on total House and Senate hearings held in each year and total House and Senate hearings held on the Constitution in each year to capture larger trends in the number and overall percentage of constitutional hearings. We also broke down the data for each year in both chambers by committee, revealing trends in each committee's interest in constitutional issues.<sup>22</sup>

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<sup>21</sup> This methodology largely mirrors the methodology previously employed in the *Constitution and Congressional Committees* book chapter. See Whittington, Devins & Hicken, *supra* note 2, at 398.

<sup>22</sup> Although we think our data set is fairly complete, CIS did not use the “constitution” subject term for some hearings that, in fact, did pay substantial attention to constitutional issues. For example, some constitutionally related confirmation hearings were not included in our data set, as I will soon explain. Also, we needed to make several judgment calls about whether a hearing actually featured the Constitution in some meaningful way. That said, the data set that I used “is likely to capture a large proportion of the relevant universe and [is otherwise] broadly representative.” *Id.*

I have two other comments about the data set: First, rather than simply supplement the data set used in Whittington, Devins & Hicken, *supra* note 2, this data set is entirely new. We did this because we could not exactly replicate the numbers from the *Constitution and Congressional Committees* project. This could be a result of possible additions of new hearings by the LexisNexis database over the past several years or, alternatively, the use of the subject term “constitution” in this piece is potentially broader than “constitutional law,” the subject term used in the earlier piece. Some differences might also have occurred due to differences in judgment by individuals collecting data as to which hearings related substantively to the Constitution.

Second, Judicial and Executive Branch confirmation hearings often use the subject terms “nominations” as well as the name of the position that an individual is nominated for. A federal district court judge, for example, would also have “judges” and “federal district court” as subject terms. Many hearings in which the words “constitution” or “constitutional” are mentioned ten or more times in testimony or prepared statements are excluded from a search that makes use of the “constitutional” subject term. That is not to say that there is substantial attention to constitutional issues in all of these hearings because just two or three questions or answers over the course of a hearing may result in ten references to the Constitution—references to the Constitution may be made in submitted testimony without being pursued at the hearing itself, and several nominees may be under consideration at a single hearing so that no individual nominee is meaningfully questioned about constitutional issues. And our data set should not be seen as including every single hearing in which constitutional issues were aired in a meaningful way. Nonetheless, the omission of some hearings does not undermine this Article's central findings about the frequency and location of constitutional hearings over time. The fact that some relevant hearings are not included will be true of all years covered in the study; the larger patterns identified in this Article still hold true.

Furthermore, as I discuss *infra* note 195, my examination of confirmation hearings in which the words “constitution” or “constitutional” were mentioned ten or more times reinforces the central claims in this Article about the impact of party polarization on congressional consideration of constitutional issues. In particular, there were more confirmation hearings that considered constitutional questions in the less polarized period from 1970 to 1989 than in the more polarized period from 1990 to 2009, notwithstanding the fact that increases in the size of the government created more opportunities for the Senate to pursue constitutional questions in the post-1990 period. During the period from 1970 to 1989, there were 72 constitutional confirmation hearings outside of the Judiciary Committee, and from 1990 to 2009, there were 39 constitutional confirmation hearings outside of the Judiciary Committee. This fact speaks to an inverse relationship between party polarization and lawmaker interest in constitutional questions. For a detailed statement of the methodology employed in calculating these numbers, see *infra* note 195. On the other hand, as I also discuss *infra* note 195, the Senate Judiciary Committee held significantly more constitutional confirmation hearings from 1990 to 2009 than from 1970 to 1989. This

The data set includes 2214 hearings—944 were held in the Senate and 1270 in the House. Figure 1 details the number of constitutional hearings per year in Congress as well as the number in each chamber. Figure 2 details the percentage of constitutional hearings in each chamber of Congress. Figure 3 details the overall percentage of constitutional hearings in Congress. Figure 3 sets out the puzzle that I try to sort through in Part II of this Article.

FIGURE 1: HEARINGS ON CONSTITUTION OVER TIME

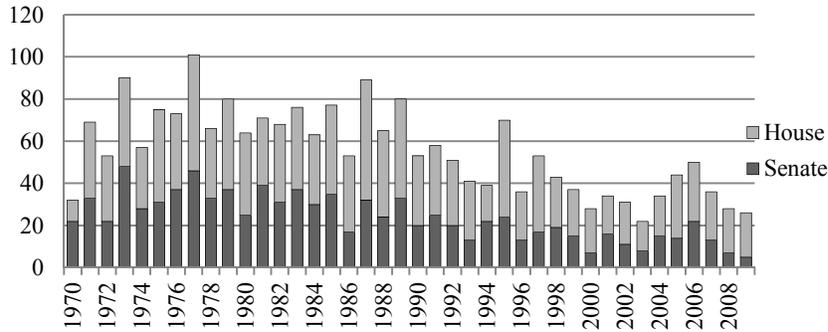
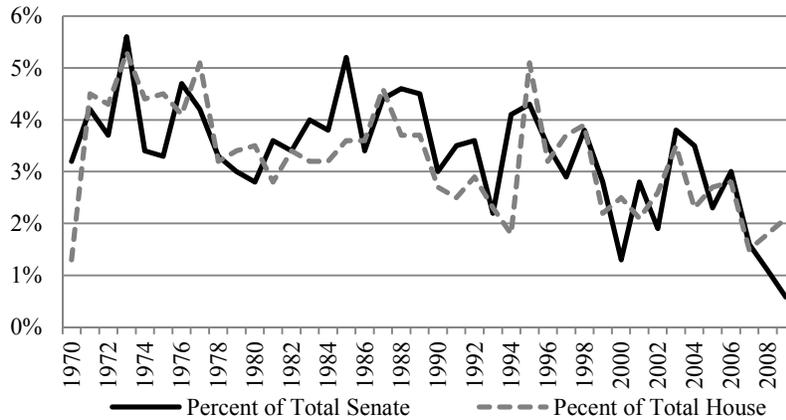
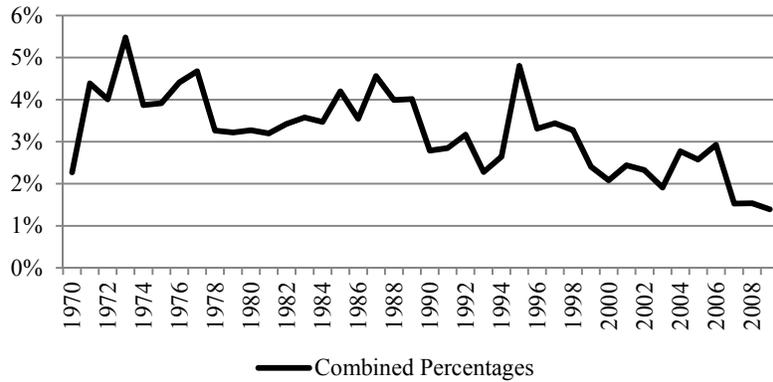


FIGURE 2: PERCENT OF CONSTITUTIONAL HEARINGS BY CHAMBER



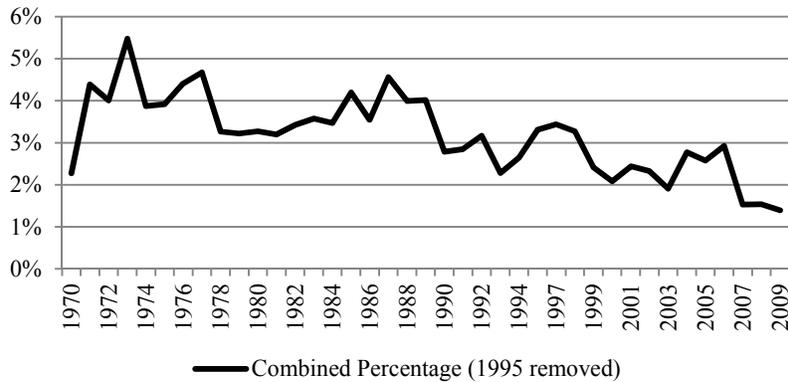
speaks to the Judiciary Committee’s continuing interest in the Constitution and, with it, the Judiciary Committee’s growing dominion over constitutional hearings throughout the past 25 years.

FIGURE 3: COMBINED PERCENTAGE OF CONSTITUTIONAL HEARINGS



To start, the frequency of constitutional hearings and the comparative percentage of such hearings varies from year to year. There are numerous peaks and valleys. Yet there is little question that the pace of constitutional hearings has slowed somewhat since 1990, especially if, as Figure 4 reveals, the spike years associated with the 1995 Republican takeover of Congress are not considered.

FIGURE 4: COMBINED PERCENTAGE OF CONSTITUTIONAL HEARINGS, OMITTING 1995



In Part II of this Article, I explain how party polarization contributes to declining congressional interest in constitutional questions (or, more precisely, how party polarization has changed congressional practices in ways that have depressed lawmaker interest in constitutional hearings). More generally, Part II identifies a range of factors that contribute to the holding of constitutional hearings and, in so doing, suggests that it is inevitable that congressional interest in constitutional questions ebbs and flows over the

years.<sup>23</sup> In identifying the sources of both general trends and year-to-year variances, Part II demonstrates that constitutional hearings are part and parcel of the normal tugs and pulls of congressional politics. That said, Congress's interest in holding constitutional hearings does not seem tied to which party controls Congress, whether there is unified or divided government, or whether there is a change in party control of Congress.<sup>24</sup> None of these partisan factors reliably signals greater or lesser lawmaker interest in holding constitutional hearings.<sup>25</sup>

Consider, for example, the impact of whether there is unified or divided government: from 1970 to 2009, the president and House of Representatives were unified for 13 years and divided for 27 years. During this time, the average number of constitutional hearings in the House during periods of unified government was 30, and the average number during periods of divided government was 32.<sup>26</sup> In the Senate, the government was unified for 17 years and divided for 23 years. The average number of constitutional hearings during periods of unified government was 25, and the average number during periods of divided government was 22.<sup>27</sup> Moreover, there are significant variances during each presidential administration, and the presence of unified or divided government does not appear to push the number or percentages of constitutional hearings up or down during a particular administration.<sup>28</sup> During the Administrations of Ronald Reagan, Bill

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<sup>23</sup> In the House, the 1995 Republican takeover of Congress prompted lawmakers to rethink the boundaries of federal–state authority. For additional discussion, see *infra* note 33 and accompanying text. In the Senate, judicial confirmations were especially politically heated in 1987, and as a result, the Senate held several constitutionally related judicial confirmation hearings. There were therefore more Senate constitutional hearings in 1987 than 1986. Robert Bork's nomination to the Supreme Court, for example, generated five volumes of published Senate hearings. See *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. (1987). See generally ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989) (exploring the Bork nomination and the political struggle it engendered in the Senate).

<sup>24</sup> For additional discussion, see Whittington, Devins & Hicken, *supra* note 2, at 401–02.

<sup>25</sup> On occasion, these partisan factors are highly salient, and in Part II, I discuss one such occasion: the 1995 Republican takeover of Congress. Overall, however, none of these factors seems significant in identifying patterns in the number of constitutional hearings.

<sup>26</sup> See *supra* Figure 1 (identifying the number of constitutional hearings in the House and Senate from 1970 to 2009). Calculations were made by totaling all House hearings during periods of unified and divided government and dividing the unified-government total by 13 and the divided-government total by 27.

<sup>27</sup> See *supra* Figure 1 (identifying the number of constitutional hearings in the House and Senate from 1970 to 2009). Calculations were made by totaling all Senate hearings during periods of unified and divided government and dividing the unified-government total by 17 and the divided-government total by 23.

<sup>28</sup> I mention this because averages are arguably misleading. For example, 6 of the 13 years that the House was unified occurred during the George W. Bush Administration, a time when there were fewer constitutional hearings than in any time from 1970 to 2000.

Clinton, and George W. Bush, variations in the number of constitutional hearings did not track shifts from unified to divided government.<sup>29</sup>

Likewise, there is no obvious correlation between changes in party control and the number of constitutional hearings. When a unified Democratic government gave way to divided government in 1995, there was a dramatic short-term spike in constitutional hearings.<sup>30</sup> However, when a unified Republican government gave way to divided government after the 2006 elections, the number of constitutional hearings dropped in both the House and Senate.<sup>31</sup> Moreover, when a divided government gave way to a unified Democratic government after the 2008 elections, the number of constitutional hearings remained constant.<sup>32</sup> This variable impact does not mean that shifts from unified to divided government are irrelevant.<sup>33</sup> It does indicate, though, that other factors must be at play.<sup>34</sup>

Similarly, the frequency of constitutional hearings does not seem tied to which party controls Congress. Because Democrats controlled both houses of Congress during the 1970s, when there was lower polarization and more constitutional hearings, and Republicans largely controlled in the post-1995 period, when there was higher polarization and fewer constitutional hearings,<sup>35</sup> the average number of constitutional hearings was higher for years in which the Democrats were in control.<sup>36</sup> But by averaging hearings held in four-year clusters of the last two years in which one party controlled the House or Senate and the first two years in which the other party controlled the House or Senate, the gap between Republicans and Demo-

<sup>29</sup> See *supra* Figures 1, 3 & 4 (documenting shifts from unified to divided government in 1981, 1983, 1995, and 2007). For additional discussion, see *infra* notes 163–67 and accompanying text.

<sup>30</sup> See *supra* Figure 1.

<sup>31</sup> See *supra* Figure 1.

<sup>32</sup> See *supra* Figure 1.

<sup>33</sup> For example, the 1995 Republican takeover of Congress triggered a spike in constitutional hearings because the Republican Party agenda focused on constitutional issues such as federal–state relations. See *supra* Figures 1 & 2; see also Whittington, *supra* note 9, at 93–94 (discussing the spike in constitutionally oriented committee hearings following Newt Gingrich’s assumption of the speakership).

<sup>34</sup> See Whittington, Devins & Hicken, *supra* note 2, at 402 (contending that changes in party control in the Senate in 1981, 1987, and 1995 did not significantly impact the number of constitutional hearings held). Consider, for example, the 1987 fight over the Bork confirmation. The Democrats regained control of the Senate in 1987, but the power shift did not cause the confirmation battle. Instead, it took place because Justice Lewis Powell retired from the Court and Ronald Reagan nominated Robert Bork to fill the vacant seat. Yet if Republicans had maintained control of the Senate, Bork and other related battles would have played out differently—thus impacting the number of constitutional hearings held that year.

<sup>35</sup> Figure 8, *infra*, illustrates dramatic differences in party polarization between the 1970s and the post-1995 period.

<sup>36</sup> In the House, for example, the average number for Democrat control is 35 and Republican control is 25. This number reflects the fact that Republicans controlled the House for 12 of the 14 high polarization years and Democrats controlled the House throughout the period from 1970 to 1994. In the Senate, the average number is 21 in Republican years and 26 in Democratic years. The Senate range is closer because Republicans controlled the Senate from 1981 to 1986. See *supra* Figure 1.

crats disappeared.<sup>37</sup> In fact, Republicans in both the House and Senate held somewhat more hearings than did their Democratic counterparts in the two years immediately before or after party turnovers in Congress.<sup>38</sup> It therefore seems likely that differences between Democratic and Republican numbers are tied to the overall decline in constitutional hearings—a downward trend for most of the past two decades, during periods of both Democratic and Republican control and during periods of unified and divided government. Correspondingly, the number of constitutional hearings in the House and Senate varied under both Democratic and Republican control so that each party presided over constitutional hearings during spike years and during lull years.

Needless to say, the questions of which party is in control of Congress and whether the government is unified or divided are critically important to the types of issues that Congress considers in constitutional hearings. Democrats are more apt to hold hearings on separation of powers and civil rights and liberties; Republicans put more emphasis on federalism and constitutional amendments.<sup>39</sup> When Congress is unified, moreover, majority party lawmakers do not seek to cast doubt on the constitutionality of presidential initiatives; when Congress is divided, majority party lawmakers are far more likely to question the constitutionality of presidential initiatives.<sup>40</sup>

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<sup>37</sup> In looking at four-year blocks in which each party controlled Congress for two of those years, I was able to answer the following question: were differences between the average number of hearings held by Democrats and Republicans tied to party differences or, instead, tied to historical periods? If Democrats consistently held more hearings, the Democratic Party would be more interested in constitutional hearings than Republicans. On the other hand, if Republicans held as many hearings as Democrats during these four-year blocks, differences in party averages would seem tied to historical periods. That latter explanation, of course, is what the data show—suggesting that the frequency of constitutional hearings is tied more to historical periods than to which party controls Congress. See *supra* Figure 1.

<sup>38</sup> In the Senate, the average was 21 when Republicans controlled the Senate and 26 when Democrats controlled the Senate. In the House, the average was 25 when Republicans controlled the House and 35 when Democrats controlled the House. See *supra* Figure 1 and note 36.

<sup>39</sup> See Whittington, Devins & Hicken, *supra* note 2, at 402. On the related issue of how Democrats and Republicans send out competing constitutional messages, see *infra* notes 133–34134 and accompanying text.

<sup>40</sup> For example, when Democrats regained control of Congress in 2007, lawmakers held hearings to question the constitutionality of the Bush Administration's War on Terror initiatives. Examples include *Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007); *Turning Spy Satellites on the Homeland: The Privacy and Civil Liberties Implications of the National Applications Office: Hearing Before the H. Comm. on Homeland Sec.*, 110th Cong. (2007); *Upholding the Principle of Habeas Corpus for Detainees: Hearing Before the H. Comm. on Armed Servs.*, 110th Cong. (2007); *Habeas Corpus and Detentions at Guantanamo Bay: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Constitutional Limitations on Domestic Surveillance: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007); and *Restoring Habeas Corpus: Protecting American Values and the Great Writ: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007). For a related argument, see Ilya Somin & Neal Devins, *Can We Make the Constitution More Democratic?*, 55 *DRAKE L. REV.* 971, 986–87

These factors do not, however, illuminate the broader question about the decline of constitutional hearings.

Unlike party identity, changes in party control, and the unification of the government, party polarization seems especially salient in understanding the downward trend of constitutional hearings. Before turning to my explanation of why that is so,<sup>41</sup> let me highlight the transformative effect of party polarization on the location of constitutional hearings.<sup>42</sup>

Figures 5 and 6 map the number of House and Senate Judiciary Committee hearings on constitutional issues relative to the number of constitutional hearings in the House and Senate. Figure 7 charts the ever-increasing percentage of constitutional hearings held in the Judiciary Committees. And while the Judiciary Committees have always held more constitutional hearings than any other committee, there is no question that there is a positive correlation between declining committee interest in constitutional questions and Judiciary Committee dominion over constitutional hearings. In the 1970s, for example, constitutional hearings were held throughout Congress—thus, a downturn did not result in the Judiciary Committees holding the vast majority of constitutional hearings. Instead, a spike or a downturn simply spoke to the number of constitutional hearings held in a given year, and the Judiciary Committees simply mirrored the larger congressional trends. Starting around 1995, however, the Judiciary Committees were the only committees to regularly consider constitutional questions. Although Judiciary Committee numbers have increased in spike years and decreased in downturn years, the pattern of numerous committees holding constitutional hearings has given way to a pattern in which the Judiciary Committees are the only committees to regularly consider constitutional issues. Unless there was a spike in constitutional hearings like the spikes in 1995, 1997, and 2005, very few constitutional hearings were held outside of the Judiciary Committees. Figures 5 and 6 demonstrate this shift and highlight both the significant difference between Judiciary Committee totals and congressional totals in the 1970s, as well as the post-1995 pattern in which meaningful difference between the Judiciary Committees and other committees only exists in years when there was a spike in congressional interest in the Constitution. Figures 5 and 6 suggest that party polarization is instrumental in understanding this shift.

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(2007), which highlights the relationship between unified and divided government and congressional oversight of the executive.

<sup>41</sup> See *infra* Part II.

<sup>42</sup> See *infra* Part III.

FIGURE 5: COMPARISON OF TOTAL CONSTITUTIONAL HEARINGS IN SENATE COMMITTEES WITH CONSTITUTIONAL HEARINGS IN SENATE JUDICIARY COMMITTEE

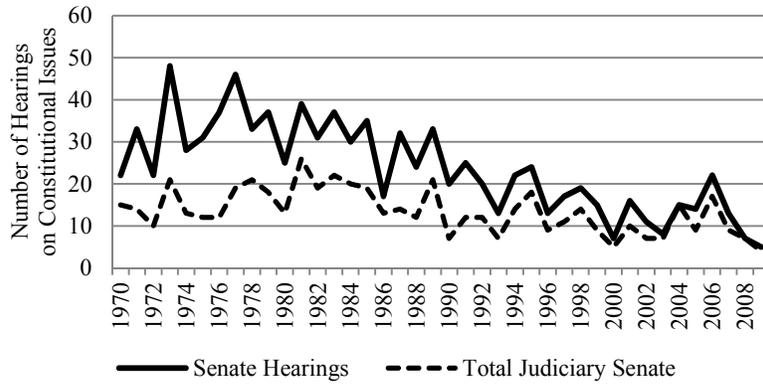


FIGURE 6: COMPARISON OF TOTAL CONSTITUTIONAL HEARINGS IN HOUSE COMMITTEES WITH CONSTITUTIONAL HEARINGS IN HOUSE JUDICIARY COMMITTEE

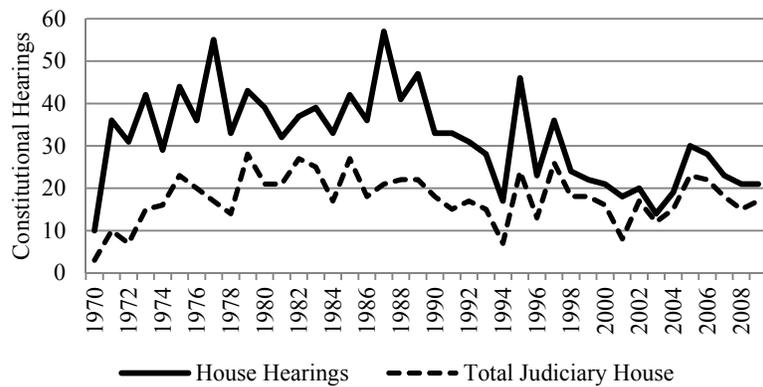


FIGURE 7: PERCENTAGE OF CONSTITUTIONAL HEARINGS HELD BY THE JUDICIARY COMMITTEES

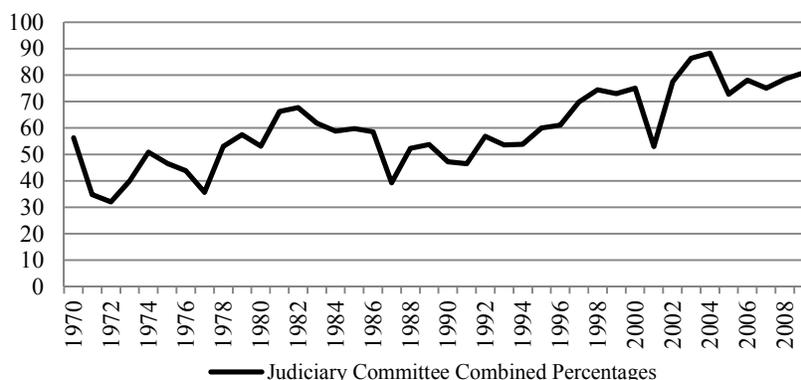


Figure 8 highlights the dramatic upswing in party polarization the past forty years. From 1970 to 1980, Congress was not especially polarized along party lines, but from 1980 to 1994, party polarization increased. Following the 1995 Republican takeover of Congress, party polarization was deeply entrenched and growing—so much so that scholars began talking about the “separation of parties, not powers.”<sup>43</sup> Figures 9 through 12 compare changes in party polarization to the distribution of constitutional hearings—looking at House and Senate combined totals. Figures 9 through 12 reveal dramatic shifts in this distribution during the periods from 1970 to 1980, from 1981 to 1994, and from 1995 to 2009.<sup>44</sup> During the 1970s, Judiciary Committees held 46% of all constitutional hearings, during the period from 1980 to 1994, that number had risen to 56%, from 1995 to 2009, the Judiciary Committees heard 72% of constitutional hearings (75% if the spike year of 1995 is not considered).<sup>45</sup>

<sup>43</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>44</sup> My decision to divide hearing data into the periods from 1970 to 1980, from 1981 to 1994, and from 1995 to 2009 roughly tracks the periods identified by John Aldrich and David Rohde. Aldrich and Rohde divided the current partisan era into three periods: 1970 to 1982, 1983 to 1994, and post-1995. See Aldrich & Rohde, *supra* note 8, at 220–22.

<sup>45</sup> See *supra* Figures 9–12. Although I highlight the role of party polarization in the changing patterns of constitutional hearings, I am not suggesting that other factors are not also at play. Consider, for example, that the Judiciary Committee percentage leveled off in the House after Democrats regained control in the late 2000s. See *supra* Figure 7. On the one hand, unlike House Republicans in 1995, the House Democrats in 2007 did not deploy numerous committees to advance a constitutional agenda throughout Congress, which speaks to partisan differences between Democrats and Republicans. On the other hand, the 1995 Republican takeover of the Senate did not meaningfully impact the number of constitutional hearings. For additional discussion of the 2007 Democratic takeover, see *infra* notes 166, 206 and accompanying text.

FIGURE 8: PARTY POLARIZATION 1879–2010<sup>46</sup>

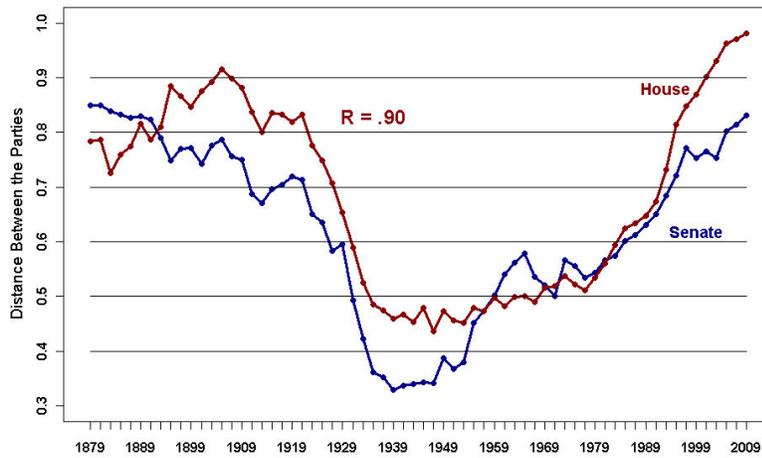
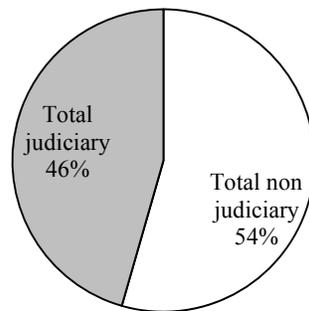


FIGURE 9: CONSTITUTIONAL HEARINGS BY COMMITTEE, 1970–1980



<sup>46</sup> This chart is used with permission. For more information, see POLARIZED AMERICA, <http://polarizedamerica.com> (last visited July 7, 2011). See also NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA (2006).

FIGURE 10: CONSTITUTIONAL HEARINGS BY COMMITTEE, 1981–1994

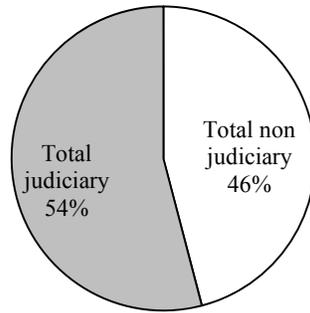


FIGURE 11: CONSTITUTIONAL HEARINGS BY COMMITTEE, 1995–2009

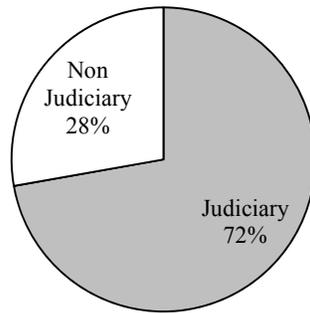
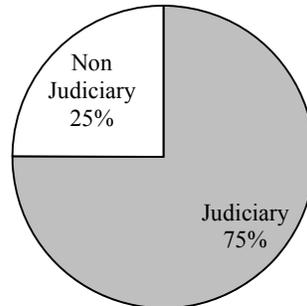


FIGURE 12: CONSTITUTIONAL HEARINGS BY COMMITTEE, 1995–2009,  
EXCLUDING THE SPIKE OF 1995



Part III addresses the question of why the Judiciary Committees regularly interpret the Constitution while other committees that had once regularly considered constitutional questions, such as the Foreign Relations, Education, and Labor Committees, have now ceded constitutional expertise to the Judiciary Committees. In so doing, I explain why the Judiciary Committees now dominate constitutional hearings, and I detail the consequences of party polarization on the constitutional hearings that Congress holds, such as topics pursued and witnesses invited.<sup>47</sup> I now turn to Part II and the related question of why most congressional committees are holding fewer and fewer constitutional hearings. In answering this question, I link party polarization to the decline in constitutional hearings.

## II. HOW PARTY POLARIZATION CONTRIBUTES TO THE DECLINE IN CONSTITUTIONAL HEARINGS

Today's Congress is much different than the Congress of 1970.<sup>48</sup> In 1968, for example, Democrats occupied every ideological niche and there were several liberal Republicans.<sup>49</sup> Throughout the 1970s, there was no meaningful gap in the median liberal–conservative scores of the two par-

<sup>47</sup> Part III builds upon a very brief discussion of this issue in Whittington, Devins & Hicken, *supra* note 2, at 405–08.

<sup>48</sup> Portions of the following two paragraphs are drawn from Devins, *supra* note 7, at 1534–37.

<sup>49</sup> See *supra* Figure 8 (documenting comparatively low party polarization throughout the 1960s and 1970s); see also Sean M. Theriault, *Party Polarization in the U.S. Congress: Member Replacement and Member Adaptation*, 12 PARTY POL. 483, 484 (2006); Sean M. Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress* 6 figs. 1 & 2 (Sept. 23, 2003) (unpublished manuscript), <https://www.msu.edu/~rohde/Theriault.pdf> [hereinafter Theriault, *Vanishing Moderates*]. For a general discussion of party polarization since the early 1970s, see SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008) [hereinafter THERIAULT, PARTY POLARIZATION].

ties.<sup>50</sup> For this reason, George Wallace justified his third-party bid for the presidency in 1968 by claiming that there was not a “dime’s worth of difference” between Democrats and Republicans.<sup>51</sup> Today, however, the forces that pushed the Democratic and Republican parties toward the center have disappeared. The liberal “Rockefeller Republicans” and conservative “Southern Democrats” have given way to an era of ideological polarization in Congress.<sup>52</sup>

After Ronald Reagan’s 1980 victory, the moderate-to-liberal wing of the Republican Party began to dissipate. Not only did “Ronald Reagan’s GOP” pursue a conservative agenda, but congressional redistricting also marginalized centrist voters in both the Democratic and Republican Parties. In particular, computer-driven redistricting resulted in the drawing of district lines that essentially guaranteed that each party would win particular seats in the House of Representatives.<sup>53</sup> In so doing, Democratic and Republican candidates sought to mobilize the more partisan bases that vote in party primaries, pushing moderates out and rewarding candidates who were both more ideological and more loyal to their parties.<sup>54</sup> By 1990, Congress was transformed; the sharp gap between Northern and Southern members of each party had largely disappeared, replaced by a sharp and ever-growing divide between the parties.<sup>55</sup> Throughout the 1990s, this divide grew, especially in the Senate, where both conservative “Gingrich Senators” and liberal “Gephardt allies” had come to the Senate from the House.<sup>56</sup> In 2004,

<sup>50</sup> See Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED, *supra* note 8, at 141, 147 fig.7-2, 151 fig.7-4.

<sup>51</sup> Richard Pearson, *Ex-Gov. George C. Wallace Dies at 79*, WASH. POST, Sept. 14, 1998, at A1.

<sup>52</sup> See Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 306 (2003) (tracking in particular the rapid growth of Southern Republicans).

<sup>53</sup> See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 428–31 (2004); Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 477–78 (2004).

<sup>54</sup> For example, Karl Rove, an advisor to President George W. Bush, attributed the electoral success of Republicans to the Party’s efforts to bring religious conservatives to the polls. See Jeffrey Toobin, *Ashcroft’s Ascent*, NEW YORKER, Apr. 15, 2002, at 50, 63; cf. Morris P. Fiorina, *Whatever Happened to the Median Voter?* 16–18 (Oct. 2, 1999) (unpublished manuscript prepared for the MIT Conference on Parties and Congress), <http://www.stanford.edu/~mfiorina/Fiorina%20Web%20Files/MedianVoterPaper.pdf> (noting that the greatest increase in polarization is in caucus and party primary elections). On the linkage between ideology and party loyalty, see Roberts & Smith, *supra* note 52, at 313. See also *infra* notes 140, 198–200 and accompanying text (discussing the impact of Republican ties to social conservatives on the types of constitutional hearings held in the House of Representatives).

<sup>55</sup> See Roberts & Smith, *supra* note 52, at 306.

<sup>56</sup> See THERIAULT, PARTY POLARIZATION, *supra* note 49, at 205, 211 (discussing Gingrich Senators); C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 220 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001) (discussing Gephardt Senators); see also THERIAULT, PARTY POLARIZATION, *supra* note 49, at 202 (noting that the 1990s saw “an influx of ideologically committed conservatives into the Senate, with many of them being veterans of the highly partisan house” (quoting BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 75 (3d ed. 2007))); Alan I. Abramowitz, *Party Realignment, Ideolog-*

measures of ideology revealed that the “two parties are perfectly separated in the liberal-conservative ordering.”<sup>57</sup> At that time, there was only one Democrat in either the House or Senate who was more conservative than the most liberal Republican in the respective chamber.<sup>58</sup> By 2009, the distance between the two parties was greater than any time since Reconstruction.<sup>59</sup>

Against this backdrop, it is not surprising that “[t]he polarization between the legislative parties is, perhaps, one of the most obvious and recognizable trends in Congress during the last [twenty-five] years.”<sup>60</sup> In this Part, I call attention to factors which help explain why very few congressional committees are interested in holding constitutional hearings and how it is that party polarization contributed to declining congressional interest in constitutional hearings. My analysis proceeds in three steps. *First*, I pro-

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*ical Polarization, and Voting Behavior in U.S. Senate Elections*, in U.S. SENATE EXCEPTIONALISM 31, 32 (Bruce I. Oppenheimer ed., 2002) (noting that party cohesion and party-line voting increased substantially during the 1990s).

<sup>57</sup> See *108th House Rank Ordering*, VOTEVIEW.COM, <http://voteview.com/hou108.htm> (last updated Aug. 25, 2005). For an article explaining the methodology employed in these rankings, see Keith T. Poole & Howard Rosenthal, *D-NOMINATE After 10 Years: A Comparative Update to Congress: A Political–Economic History of Roll-Call Voting*, 26 LEGIS. STUD. Q. 5 (2001).

<sup>58</sup> *108th Senate Rank Ordering*, VOTEVIEW.COM, <http://voteview.com/sen108.htm> (last updated Oct. 26, 2004). The Democrat was Georgia Senator Zell Miller. *Id.*

<sup>59</sup> See *Party Polarization: 1879–2010*, POLARIZED AMERICA, <http://polarizedamerica.com> (last updated Jan. 11, 2011). Polarization was also fueled by changes in federal regulatory policy, most notably the repeal of the Fairness Doctrine in 1987, and the proliferation of media outlets that allowed conservative and liberal audiences to get their news and opinion programming from stations that reinforced their political beliefs. The repeal of the Fairness Doctrine, as Cass Sunstein observed, “produced a flowering of controversial substantive programming, frequently with an extreme view of one kind or another” and, in so doing, “create[d] group polarization, and all too many people . . . exposed to louder echoes of their own voices, resulting in social fragmentation, enmity, and misunderstanding.” Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 101–02 (2000); see also Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 295 (1997) (noting dramatic increase in informational programming on AM radio).

In particular, Pew Research Center polls revealed that, in 2004, George W. Bush outpolled John Kerry 70% to 21% among Fox viewers but that Kerry outpolled Bush 67% to 26% among CNN viewers. Dan Bernhardt et al., *Political Polarization and the Electoral Effects of Media Bias*, 92 J. PUB. ECON. 1092, 1092–93 (2008). Likewise, Republicans account for only 24% of NPR listeners whereas Democrats account for only 28% of listeners to talk radio, and self-identified liberals account for just 18% of radio listeners. News Release, The Pew Research Center for the People and the Press, *Online News Audiences Larger, More Diverse: News Audiences Increasingly Politicized* 8 (June 8, 2004) (on file with author). These data back up the claim that the proliferation of media outlets—cable television, radio, and the Internet—feeds polarization by creating markets for niche audiences; by way of contrast, “[i]f this change in the parties had occurred half a century ago, the dominant news media might have moderated polarizing tendencies because of their interest in appealing to a mass audience that crossed ideological lines. But the incentives have changed: on cable, talk radio, and the Internet, partisanship pays.” Paul Starr, *Governing in the Age of Fox News*, ATLANTIC, Jan./Feb. 2010, at 95, 98.

<sup>60</sup> Theriault, *Vanishing Moderates*, *supra* note 49, at 5. Theriault’s data covered the twenty-year period from 1986 to 2006. The trend has continued since. See *Party Polarization: 1879–2010*, *supra* note 59.

vide an overview of the ways that party polarization has fundamentally transformed the balance of power within Congress by shifting power away from committees and toward party leaders interested in advancing a coordinated party message. I also discuss congressional interest in the Constitution, that is, how lawmakers are more interested in advancing favored policies than in thinking about the Constitution. *Second*, I explain how these phenomena have contributed to a decline in the number of constitutional hearings—so that, with the important exception of the Judiciary Committees, all committees now hold fewer constitutional hearings. I focus on various factors that contribute to the supply of constitutional hearings in Congress. I also suggest that party polarization has changed Congress in ways that cut against the holding of constitutional hearings by committees other than the Judiciary Committees. *Third*, I talk about why the number of constitutional hearings is nevertheless variable—that is, why the general downward trend is punctuated by spikes in certain years. In particular, I discuss how exogenous factors, such as court decisions, presidential action, and changes in the national policy agenda, impact the demand for constitutional hearings.<sup>61</sup>

*A. Parties, Committees, and Congressional Leadership: How Party Polarization Transformed Congress*

Starting in the 1970s and especially in the wake of the 1995 Republican takeover of Congress, party leaders have pursued institutional reforms intended to shift the balance of legislative power from committee chairs to party leaders. These reforms track growing homogeneity within the parties. “As the views of members within the majority party become more alike, the costs of [members] delegating positive agenda power [to the majority party leadership] diminishes relative to the potential benefits.”<sup>62</sup> In this way, “party influence varies with party polarization” because the willingness of party members to prefer centralized leadership to a more decentralized system is tied both to the cohesiveness within a party and the ideological distance between parties.<sup>63</sup>

In the 1970s, younger party loyalists pursued reforms that sought to limit the prerogatives of committee chairs. They did so due in part to the waning influence of Southern Democrats, several of whom were prominent

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<sup>61</sup> Thanks to Steve Smith for suggesting that I think about changing patterns in constitutional hearings as a question of supply and demand.

<sup>62</sup> David W. Rohde et al., *Parties, Committees, and Pivots: A Reassessment of the Literature on Congressional Organization* 12 (Aug. 22, 2008) (unpublished manuscript prepared for the 2008 American Political Science Association Meeting), <http://research.allacademic.com> (select “Titles” from the drop down box and search for “Parties, Committees, and Pivots” from the “Quick Search” box on the main page; then find the APSA presentation and follow the link entitled “Application/PDF”).

<sup>63</sup> STEVEN S. SMITH, *PARTY INFLUENCE IN CONGRESS* 120 (2007).

committee chairs.<sup>64</sup> For example, the so-called Subcommittee Bill of Rights prevented committee chairs from naming subcommittee chairs and empowered subcommittees to operate in a somewhat autonomous manner.<sup>65</sup> During the 1980s, reform strategies were pursued to bolster Democratic Party leadership in the House. In particular, with party polarization narrowing the ideological gap among party members, committee and party leaders increasingly saw themselves as part of a team<sup>66</sup>—a team at odds with Republicans in general and President Reagan in particular.<sup>67</sup>

The most dramatic reforms took place in 1995, part of the “Gingrich Revolution” that further transformed a sharply polarized Congress. Immediately after assuming power, the Republican Congress adopted “landmark rule[] changes” that centralized power in party leadership.<sup>68</sup> In the House of Representatives, Speaker Newt Gingrich took control of the committee system. He bypassed seniority and appointed ideologically simpatico committee chairs. He then gutted subcommittee autonomy, empowering handpicked committee chairs to name subcommittee chairs and control committee staff.<sup>69</sup> To further ensure committee loyalty to majority leadership, House Republicans adopted a six-year term limit for committee chairs.<sup>70</sup> In so doing, committee chairs could not establish an independent power base that might vary from leadership preferences.<sup>71</sup> House Republicans also approved measures that would limit committee autonomy such as reducing staff size by one-third.<sup>72</sup> Leadership also seized control of committee jurisdiction through changes in the referral system. Under new House rules, the Speaker would designate a primary committee of his choosing and would also have significant flexibility in determining wheth-

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<sup>64</sup> Aldrich & Rohde, *supra* note 8, at 219–20.

<sup>65</sup> *Id.* at 220.

<sup>66</sup> See BARBARA SINCLAIR, LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA 164 (1995); Aldrich & Rohde, *supra* note 8, at 221; Barbara Sinclair, *The Emergence of Strong Leadership in the 1980s House of Representatives*, 54 J. POL. 657, 668 (1992) [hereinafter Sinclair, *Strong Leadership*].

<sup>67</sup> Sinclair, *Strong Leadership*, *supra* note 66, at 671–72.

<sup>68</sup> CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 48 (3d ed. 1997). Most of these changes affected the House of Representatives. See *id.* at 49 (identifying major House and Senate reforms in 1995).

<sup>69</sup> See Aldrich & Rohde, *supra* note 8, at 223. Republicans also centralized control in party leadership by eliminating thirty-one subcommittees—so that it would be easier for the committee chair and party leadership to control committee business. See DEERING & SMITH, *supra* note 68, at 48–50.

<sup>70</sup> Aldrich & Rohde, *supra* note 8, at 223.

<sup>71</sup> At the same time, committee chairs did not always do the bidding of party leadership, and as such, party leaders sometimes bypassed the committee process to advance their agenda. See SINCLAIR, *supra* note 56, at 132 (discussing House Speaker Dennis Hastert’s convening of a party task force to sidestep committee control over the 1999 Patient Bill of Rights).

<sup>72</sup> Between 1993 and 1995, House committee staff was reduced from 2147 to 1266. See NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS 2008, at 110 tbl.5-1 (2008). For additional discussion, see *infra* text accompanying note 105.

er, when, and how long additional panels would receive legislation.<sup>73</sup> In so doing, rival committee chairs would not lay claim to the same issue—expanding their own power at the expense of leadership preferences.<sup>74</sup>

In the Senate, committees and parties “have been institutionally weaker than their House counterparts, and individual senators have been more consequential.”<sup>75</sup> Nevertheless, “Polarization has made participation through their parties more attractive to senators than it was when the parties were more heterogeneous and the ideological distance between them less.”<sup>76</sup> Correspondingly, the “mobilization of Senate parties over the past 25 years has coincided with systematic changes in the Senate roll call agenda.”<sup>77</sup> In particular, party leaders fueled polarization by seeking roll call votes on the very issues that are likely to divide the parties.<sup>78</sup>

The Senate has also adopted institutional reforms that shift power to party leaders, including term limits on committee chairs.<sup>79</sup> Party leaders in both the House and Senate also sought to centralize leadership by using party caucuses, task forces, and other techniques to shape the party’s agenda.<sup>80</sup> These efforts are often tied to “message politics”—party efforts to use the legislative process to make symbolic statements to voters and other constituents.<sup>81</sup> Rather than allow decentralized committees to define Congress’s agenda, Democrats and Republicans alike see the lawmaking process as a way to distinguish each party from the other.

Over fifteen years have now passed since the 1995 Republican takeover of Congress. During that time, Republicans and Democrats, especially in the House, have both largely adhered to rule changes that limited committee prerogatives to take positions and pursue initiatives that do not match leadership preferences. None of the significant authority granted to the Republican House leadership was rescinded during the post-Gingrich era,

<sup>73</sup> See Lawrence C. Evans & Walter J. Oleszek, *Congressional Tsunami? Institutional Change in the 104th Congress*, in CONGRESS RECONSIDERED 193 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 6th ed. 1997).

<sup>74</sup> See DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 113–16 (1997) (discussing referrals to multiple committees).

<sup>75</sup> Aldrich & Rohde, *supra* note 8, at 228.

<sup>76</sup> Barbara Sinclair, *Question: What’s Wrong with Congress? Answer: It’s a Democratic Legislature*, 89 B.U. L. REV. 387, 393 (2009).

<sup>77</sup> FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 174 (2009).

<sup>78</sup> See *id.* at 174, 178–80 (noting that the roll call agenda now focuses on the sorts of economic issues that will likely produce cleavage between the two parties). For discussion of why Senate leaders pursue roll call votes that divide the parties, see *supra* note 59, which suggests that changes in federal regulation and technology fuel polarization, and *infra* text accompanying notes 79–82, which explains how polarization expands the power base of party leaders.

<sup>79</sup> DEERING & SMITH, *supra* note 68, at 51–52.

<sup>80</sup> See SUSAN WEBB HAMMOND, CONGRESSIONAL CAUCUSES IN NATIONAL POLICY MAKING 87–92 (1998).

<sup>81</sup> See Evans, *supra* note 56, at 219.

from 1999 to 2006.<sup>82</sup> Following the 2007 Democratic takeover of Congress, House Democrats also embraced a rules package that protected leadership prerogatives. In the Senate, party polarization manifests itself less through rule changes and more through party-line voting. Examples abound, but the most notable is the power of the minority party to stand together and use its filibuster power to block the majority's legislative initiatives. Since sometime between 1993 and 1998, "about half of all major legislation was subject to filibusters or threatened filibusters,"<sup>83</sup> and that pattern continued even after the Democratic takeover of Congress in 2007.<sup>84</sup>

The ability of lawmakers to enact major legislation, leadership prerogatives, congressional committee staffing, and message politics all affect the balance of power between parties and committees. Before I explore the ways in which party polarization has contributed to a decline in the number of congressional committees that regularly hold constitutional hearings, I think it useful to say a few words about lawmaker interest in constitutional questions.

### B. Gauging Congressional Interest in the Constitution

Members of Congress have numerous goals, including winning reelection, making good public policy, and gaining the respect of their col-

<sup>82</sup> See Aldrich & Rohde, *supra* note 8, at 232–37.

<sup>83</sup> Smith & Gamm, *supra* note 50, at 161. For additional examples of party-line voting, see *supra* note 14 and *infra* note 171 and accompanying text, which discuss minority party efforts to block judicial nominations.

<sup>84</sup> This pattern continued through 2009 as the Republican Party vigorously opposed Democratic legislation advanced by the Obama Administration. The 110th Congress saw a record 52 filibusters, a marked increase from the 36 filibusters in the previous Congress. Barbara Sinclair, *The New World of U.S. Senators, in CONGRESS RECONSIDERED*, *supra* note 8, at 1, 8. During this same period, from 2007 to 2008, there were 139 cloture votes to end filibusters. Senator Thomas R. Harkin, 2010 Living Constitution Lecture at Brennan Center for Justice, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in the Senate* (June 21, 2010), [http://www.brennancenter.org/content/resource/filibuster\\_reform\\_curbing\\_abuse\\_to\\_prevent\\_minority\\_tyranny\\_in\\_the\\_sen](http://www.brennancenter.org/content/resource/filibuster_reform_curbing_abuse_to_prevent_minority_tyranny_in_the_sen). In the 111th Congress, from January 2009 to June 14, 2010, there were 98 cloture votes. *Id.* "The sense of institutional stalemate," according to a February 2010 Congressional Quarterly report, "has been underscored by the rapid increase in the use of delaying tactics by the minority party not only to stall major legislation and top-tier nominees but also on matters once considered routine—essentially establishing a 60-vote threshold to advance almost any piece of business that annoys someone willing to mount a filibuster." Joseph J. Shatz, *No Winners in a "Broken" Congress*, 68 CQ WKLY. 434, 434 (2010); see also Rubin, *supra* note 14, at 122–23 (discussing Republican efforts to make the threat of filibuster routine for most Democratic legislation). After the 2010 elections, there is good reason to think that this pattern of party-line voting and congressional stalemate will continue. Republicans now hold 47 Senate seats and have gained control of the House, increasing the power of each party to block the legislative initiatives of the other. It is likely that Democrats and Republicans will exercise this power. More than any election before it, the 2010 elections made clear that "the single most significant fact about American politics over the last generation is the emergence of hyperpolarized political parties." Rick Pildes, *Political Polarization and the Nationalization for Congressional Elections*, BALKINIZATION (Nov. 4, 2010, 7:51 AM), <http://balkin.blogspot.com/2010/11/political-polarization-and.html>; see also Charles M. Blow, Op-Ed., *The Great American Cleaving*, N.Y. TIMES, Nov. 5, 2010, at A23.

leagues.<sup>85</sup> In pursuing these goals, lawmakers have little interest in constitutional interpretation for its own sake. As Beth Garrett and Adrian Vermeule have argued, constitutional interpretation is the type of “public good” that is likely to be shortchanged by the legislative process.<sup>86</sup> Lawmakers, for example, prioritize “fundraising, casework, media appearances, and obtaining particularized spending projects in [their] district[s]” over “analyzing constitutional questions[] and working with specialized personal staff on constitutional issues.”<sup>87</sup> Lawmakers, moreover, look to party leaders in sorting out whether to support a measure.<sup>88</sup>

Lawmakers’ comments about Congress’s role in interpreting the Constitution bear this out. Here are two examples taken from Mitch Pickerill’s exhaustive study of constitutional deliberation in Congress: One Senator told Pickerill, “Policy issue first, how do you get a consensus to pass the bill, six other things, then constitutionality.”<sup>89</sup> A member of the House was even blunter, saying, “When I go home and talk to my constituents, they ask me to help solve problems in Congress. They don’t ask if it’s constitutional.”<sup>90</sup> Based on these comments and others, Pickerill concluded that lawmakers “first take their position on legislation based on their policy preferences, and then use all arguments possible to support that position.”<sup>91</sup> When advancing a positive legislative agenda, they rarely have a reason to discuss potential constitutional limitations. “[T]he constitutional principles involved in a bill, unlike its merits, are generally abstract, unpopular, and fail to capture the imagination of either the media or the public. The Constitution is often portrayed as an obstacle to a better society by Congressmen forced to confront its limitations.”<sup>92</sup> For this very reason, constitutional arguments are typically made by lawmakers who oppose a measure.<sup>93</sup> But Congress will not necessarily hold constitutional hearings to air constitutional objections. A bill may never get to committee because the

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<sup>85</sup> See RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1 (1973); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 16 (1974).

<sup>86</sup> Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 *DUKE L.J.* 1277, 1300–01 (2001).

<sup>87</sup> *Id.* at 1301.

<sup>88</sup> See Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 *N.C. L. REV.* 587, 609 (1983).

<sup>89</sup> J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* 134 (2004).

<sup>90</sup> *Id.*; see also Keith E. Whittington, *James Madison Has Left the Building*, 72 *U. CHI. L. REV.* 1137, 1154 (2005) (reviewing PICKERILL, *supra* note 89) (noting Pickerill’s conclusions on the demise of constitutional deliberation). For reasons I detail *infra* notes 104–30130 and accompanying text, party polarization fuels these attitudes by making it more likely that legislators will care more about party policy than about the Constitution.

<sup>91</sup> PICKERILL, *supra* note 89, at 143–44.

<sup>92</sup> Mikva, *supra* note 88, at 609–10.

<sup>93</sup> See PICKERILL, *supra* note 89, at 142–43.

majority disapproves of it, or if the majority approves of the bill, the minority may not have control of what issues the committee will discuss.<sup>94</sup>

Congress's interest in independently interpreting the Constitution is also constricted by "judicial overhang," the tendency of lawmakers to punt constitutional questions to the courts.<sup>95</sup> "Knowing the courts are available to correct (some of) their constitutional errors, legislators have little incentive to expend great effort in enacting only constitutionally permissible statutes."<sup>96</sup> For example, when casting his vote in support of the habeas stripping provisions of the Military Commission Act, Senator Arlen Specter "told reporters that he was sure that 'the courts would 'clean it up.'"<sup>97</sup> More to the point, unless the Supreme Court is regularly frustrating the first-order policy preferences of lawmakers or the preferences of voters, interest groups, and other constituents that lawmakers care about, lawmakers have little reason to assert Congress's institutional authority to independently interpret the Constitution.<sup>98</sup>

Congress, as former congressman and former D.C. Circuit Judge Abner Mikva put it, is "designed to pass over the constitutional questions, leaving the hard decisions to the courts."<sup>99</sup> Outside of the Judiciary Committees, where jurisdiction, constituent desires, and member preferences all contribute to the holding of constitutional hearings, lawmakers typically prefer to avoid constitutional questions.<sup>100</sup> Because the "likelihood that a particular statute will actually be reviewed and struck down by the Court is relatively small," the perceived threat of judicial invalidation "is likely to be low."<sup>101</sup> Moreover, even when the Court invalidates a federal statute, Congress can typically find some way to enact follow-up legislation that generally advances lawmaker and constituent preferences—so that there is little pressure to anticipate possible judicial invalidations of federal legislation.<sup>102</sup>

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<sup>94</sup> See *infra* notes 122–24124 and accompanying text (discussing these phenomena and attributing them to party polarization).

<sup>95</sup> See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–60 (1999).

<sup>96</sup> Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 504 (2009). See generally TUSHNET, *supra* note 95 (discussing the intersection of constitutional theory and modern society).

<sup>97</sup> Tushnet, *supra* note 96, at 499.

<sup>98</sup> See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 14–18 (2007).

<sup>99</sup> Mikva, *supra* note 88, at 609. On the related question of whether Congress has the tools necessary to responsibly interpret the Constitution, see Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985), which argues in favor of congressional capacity

<sup>100</sup> See *infra* Part III.

<sup>101</sup> PICKERILL, *supra* note 89, at 65.

<sup>102</sup> For a general treatment of this issue, see *id.* at 31–61, which highlights the ability of lawmakers to respond to Supreme Court invalidations of federal legislation without actually challenging Supreme Court decisionmaking. I also have written on this topic, contrasting differences in lawmaker power to respond to Supreme Court federalism and individual rights decisions. See Neal Devins, *The Federalism-*

Finally, to the extent that lawmakers are interested in staking out positions when holding hearings or voting on legislation, lawmakers may not care if the Supreme Court invalidates their handiwork.<sup>103</sup>

None of this is at all surprising. Although each of the 535 members of Congress has a stake in Congress's institutional authority to independently interpret the Constitution, parochial interests overwhelm this collective good. Though speaking in a slightly different context, Terry Moe and William Howell put it this way: Lawmakers are "trapped in a prisoners' dilemma: all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency."<sup>104</sup> The question remains: Why is today's Congress less interested in holding constitutional hearings than earlier Congresses? After all, much of the above discussion references longstanding congressional structures and incentives. But for reasons I now detail, party polarization and accompanying changes in the balance of power within Congress have contributed to diminishing interest in holding constitutional hearings by nearly all congressional committees.

### *C. Party Polarization and Diminishing Congressional Interest in Holding Constitutional Hearings*

No single factor explains either the general decline in constitutional hearings outside the Judiciary Committees or the noticeable year-to-year variations in the number and percentage of constitutional hearings. Nevertheless, there is good reason to attribute the decline in constitutional hearings to party polarization. Party polarization has contributed to message politics, the rise in leadership powers, the decline in committee authority (including reductions in committee staff size), and a drop in legislative productivity. All of these factors have contributed to the decline in constitutional hearings. In particular, the decline in constitutional hearings is largely explained by the interface of these factors with lawmaker incentives to discount constitutional interpretation in favor of other pursuits: reelection, constituent service, and the advancement of favored policies.

First, congressional committees, with the notable exception of the Judiciary Committees, invest scarce staffing resources in developing policy expertise, not constitutional expertise. After all, policy issues are a first-order priority, and the Constitution and policy issues closely linked to the Constitution are, at best, second-order priorities. Consequently, the 1995

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*Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making but Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307 (2002).

<sup>103</sup> See *infra* notes 115–18118 and accompanying text.

<sup>104</sup> Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144 (1999).

slashing of House committee staff by 40%<sup>105</sup> may well have resulted in a further discounting of constitutional issues in favor of core policy concerns.

Changes in how lawmakers run for office and interact with local constituents may also impact committee consideration of constitutional issues with little salience. In particular, against the backdrop of declining committee influence in an ever more polarized Congress, lawmakers take time that they might have spent on committee service and instead spend it on fundraising, constituent service, and other reelection efforts.<sup>106</sup> Today's lawmakers seek to strengthen their position with their constituents by "visit[ing] their districts and states extremely frequently (often three or four times a month). They and their staffs devote much of their time to constituency casework (with roughly one third of members' staffs based in their home district or state)."<sup>107</sup> Fundraising demands have also increased, further drawing lawmakers away from committee business.<sup>108</sup> For all these reasons, lawmakers are more likely to view the pursuit of constitutional issues as a "form[] of political 'indulgence.'"<sup>109</sup>

To make the above point more concrete, I think it useful to track changes in lawmakers' attitudes toward constitutional interpretation, especially the relationship between Congress and the Supreme Court. Survey data assembled by Bruce Peabody that compare lawmakers' attitudes in 1959 and 1999 reveals a profound shift. In 1959, 40% of lawmakers thought that courts should treat congressional interpretations of the Constitution as "controlling," but in 1999, only 14% of lawmakers thought congressional judgments should be seen as controlling.<sup>110</sup> Perhaps more significantly, lawmakers in 1999 emphasized "local and electorally salient matters" like gun control, Native American relations, and interactions between church and state as constitutional matters of "special legislative interest."<sup>111</sup> Peabody observed that the focus on local and constituent concerns

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<sup>105</sup> See ORNSTEIN ET AL., *supra* note 72, at 110.

<sup>106</sup> On the linkage between party polarization and the shift of lawmaker time away from committee service and toward fundraising and other reelection efforts, see Eric Heberlig et al., *The Price of Leadership: Campaign Money and the Polarization of Congressional Parties*, 68 J. POL. 992 (2006), which explains how political parties organize congressional institutions in order to facilitate fundraising. Committee staff reductions also speak to declining committee influence and, with it, diminishing lawmaker interest in committee service. See *supra* notes 69–73. Correspondingly, lawmakers and their staffs increasingly focus their energies on fundraising and constituent service. See *supra* notes 90–92.

<sup>107</sup> ANTHONY KING, *RUNNING SCARED: WHY AMERICA'S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE* 49 (1997).

<sup>108</sup> See *id.* at 70–72; see also Wendy K. Tam Cho & James G. Gimpel, *Prospecting for (Campaign) Gold*, 51 AM. J. POL. SCI. 255, 255–56 (2007) (illustrating how fundraising demands detract from the time available for normal policy business).

<sup>109</sup> See Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127, 163 (2004).

<sup>110</sup> *Id.* at 147 tbl.3. For Peabody's discussion of 1959–1999 differences, see *id.* at 156–58.

<sup>111</sup> *Id.* at 151. In sharp contrast, in 1999 lawmakers did not rank foreign affairs or the separation of powers as being of "special interest." *Id.*

“reflect[s] the more hectic pace of contemporary political life, filled with the proliferating, immediate, and often reelection-oriented demands that can crowd out other responsibilities, including constitutional interpretation.”<sup>112</sup> More to the point, absent constituent or national party interest in constitutional questions,<sup>113</sup> committee chairs are somewhat less likely to pursue constitutional issues today than before. Along these lines, it is to be expected that the Judiciary Committees will occupy a larger and larger share of constitutional hearings—lawmakers on the Judiciary Committees are more likely to get signals from interest groups and others interested in constitutional issues than are lawmakers on other congressional committees.<sup>114</sup>

Peabody’s survey data are relevant for another reason. They highlight lawmakers’ growing acquiescence to the Supreme Court’s authority to invalidate legislation: more than 70% of respondents said the Court should give little or no weight to congressional judgments.<sup>115</sup> Peabody’s data also signal that today’s lawmakers are especially likely to engage in “position taking” strategies.<sup>116</sup> Position taking is taking actions without policy consequences to make “judgmental statements” that match constituent sentiments.<sup>117</sup> When reaching out to constituents this way, lawmakers are not particularly interested in whether a court upholds or invalidates their handiwork; their goal, instead, is to strengthen ties with constituents by saying “pleasing things.”<sup>118</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> In 1959, Supreme Court rulings on communists and school desegregation were central both to the national policy agenda and to voters, especially Southern voters. For additional discussion, see Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1342–46 (2006). For general treatments on Court–Congress relations in 1959, see DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* (1966), and WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* (1962).

<sup>114</sup> See *infra* Part III.

<sup>115</sup> Peabody, *supra* note 109, at 147.

<sup>116</sup> See *id.* at 157.

<sup>117</sup> Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 DUKE L.J. 477, 512–13 (2007) (quoting MAYHEW, *supra* note 85, at 74).

<sup>118</sup> *Id.* For this very reason, I do not think that lawmakers are increasingly deferential to the courts because of changed attitudes about judicial supremacy. In part, party polarization has fueled lawmaker efforts to pursue jurisdiction-stripping proposals. See *infra* notes 193–94194 (detailing recent jurisdiction-stripping efforts and linking those efforts to polarization). Moreover, there is no reason to think that there has been a pendulum shift toward judicial supremacy among the American people. Although there is evidence of a slight upward tick of public support for the Court, the degree of difference is slight, and consequently, fundamental changes in congressional committee practices cannot be attributed to changing attitudes toward judicial supremacy. See James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 543 (2003) (noting survey results). Finally, the trajectory of popular press coverage of the Supreme Court has not shifted—journalists today are no more likely to embrace judicial supremacy than, say, journalists in 1987, when Attorney General Meese ignited a firestorm of criticism by suggesting that Supreme Court decisions were subject to political challenge. See NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 3, 26–28 (2004) (detailing the academic and journalistic response to Meese).

Position taking is especially common in today's politically polarized Congress. Democrats and Republicans agree more within the party and less with the other party so that lawmakers are more willing to back party-defined messages.<sup>119</sup> Correspondingly, voters that identify themselves as Democratic or Republican are more ideological today than ever before<sup>120</sup> so that increasingly partisan lawmakers can seek out electoral advantage by taking those same partisan positions that they and their respective political parties support.<sup>121</sup>

Position taking is also fueled by the fact that there is typically a negative correlation between party polarization and legislative productivity.<sup>122</sup> In the Senate, ideological cohesion among minority party members has resulted in a noticeable decline in major legislation.<sup>123</sup> The prevalence of divided government in the politically polarized 1990–2009 period also contributed to a decline in legislative productivity. In particular, when each party disagrees with and seeks to distance itself from the other party, the President and Congress cannot come together to advance a mutually agree-

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<sup>119</sup> See Evans, *supra* note 56, at 219–27. For more on why party leaders are especially interested in differentiating themselves this way, see *supra* note 59, which explains how changes in federal regulation and technology create incentives for political parties to embrace one or another ideological message that will resonate with polarized subsets of the population and not the more moderate median voter.

<sup>120</sup> See Paul DiMaggio et al., *Have Americans' Social Attitudes Become More Polarized?*, 102 AM. J. SOC. 690, 734–38 (1996) (arguing that attitudes of Americans who identify with one or the other political party have become more polarized); Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA, 9, 17–18 (Jon R. Bond & Richard Fleisher eds., 2000) (showing that voter views on “hot button” issues increasingly correlate with party identity).

<sup>121</sup> See WHITTINGTON, *supra* note 98, at 135–36; Whittington, *supra* note 117, at 512–15.

<sup>122</sup> See Lawrence C. Dodd & Scott Schraufnagel, *Reconsidering Party Polarization and Policy Productivity: A Curvilinear Perspective*, in CONGRESS RECONSIDERED, *supra* note 8, at 393, 401–04. Because of supermajority rules in the Senate, Congress–White House deadlock often persists during periods of unified government. During the 108th and 109th Congresses, when Republicans controlled both the White House and Congress (i.e. from 2003 to 2007), 130 motions for cloture were filed, 62 in the 108th and 68 in the 109th. See *Senate Action on Cloture Motions*, U.S. SENATE, [http://www.senate.gov/pagelayout/reference/cloture\\_motions/clotureCounts.htm](http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm) (last visited June 3, 2011). During the 110th Congress, under Democratic control, 139 motions for cloture were filed. See *id.* Likewise, in the 111th Congress 136 motions were filed. See *id.* The fact that Democrats had 60 seats during much of this time did not matter. See *infra* note 215 and accompanying text. Following the 2010 elections, after which Republicans held 47 Senate seats and gained control of the House, there is good reason to think that this pattern of polarized legislative statement will continue. See *supra* note 84.

<sup>123</sup> See *supra* notes 83–84, 122 and accompanying text; see also Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395 (2009) (contrasting Watergate era to modern era to show that a less polarized Congress can enact major legislation that limits presidential prerogatives); Smith & Gamm, *supra* note 50, at 161 (discussing the links between partisanship and obstructionism); Barbara Sinclair, *Partisan Polarization, Rules and Legislative Productivity 20–22* (Sept. 2009) (paper prepared for delivery at the Annual Meeting of the American Political Science Association), <http://ssrn.com/abstract=1450627> (discussing the links between partisanship and decreased legislative productivity).

able legislative agenda.<sup>124</sup> With fewer opportunities to take credit for legislative accomplishments, lawmakers have stronger incentives to find ways to stake out policy preferences. More than that, with voters and other constituents interested in policy positions and not constitutional reasoning, position-taking lawmakers are much more interested in using legislative hearings as vehicles to articulate policy preferences than in considering potential constitutional objections to proposed legislation.<sup>125</sup>

There is one other reason why today's hearings outside of the Judiciary Committees are more likely to emphasize policy positions and less likely to consider constitutional questions: the increasing unwillingness of the majority party to allow opposition lawmakers to challenge the constitutionality of legislative proposals. Although it has always been the case that legislative majorities have controlled the policy and hearing agendas of committee hearings, party polarization has nevertheless resulted in further limits on minority access to hearings.<sup>126</sup> In part, the majority party's increasing homogeneity has resulted in an absence of competing views that has made hearings more one-sided. Committee chairs can count on party loyalists to stick together, and consequently, there is less reason to reach out to majority or minority party members that do not necessarily agree with the chair's agenda. When Republicans controlled Congress from 1995 until 2007, for example, Democratic lawmakers held "shadow" or "mock" hearings to pro-

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<sup>124</sup> For thirteen of the twenty years between 1990 and 2009, one or the other house of Congress had a majority from a different party than the president. See Dennis Florig, *Party Control of Congress and the Presidency*, DFLORIG.COM, <http://www.dflorig.com/partycontrol.htm> (last visited June 3, 2011); see also Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63 (2007) (attributing prevalence of divided government to rise in unilateral presidential policymaking).

<sup>125</sup> See Mikva, *supra* note 88, at 609. In making these points, I do not mean to suggest that lawmakers and their constituents always care more about position taking than about potential constitutional roadblocks to the enactment of favored policies. When Congress enacts "son of" legislation that responds to a Supreme Court invalidation of a federal statute, lawmakers often hold hearings to find ways to work within constitutional boundaries set by the Court. See PICKERILL, *supra* note 89, at 57–61; Devins, *supra* note 102, at 1313–14. Furthermore, congressional action sometimes takes place in the shadow of some Supreme Court decision, forcing lawmakers and interest groups to think of the constitutional implications of their decisions. Here are two examples: When Congress enacted the Federal Partial Birth Abortion Ban Act, lawmakers and their constituents could not ignore the Supreme Court's invalidation of a state partial birth ban, but they could ignore the Court's Commerce Clause rulings that arguably cast doubt on the constitutionality of the partial birth measure. See Neal Devins, *How Congress Paved the Way for the Rehnquist Court's Federalism Revival: Lessons from the Federal Partial Birth Abortion Ban*, 21 ST. JOHN'S J. LEGAL COMMENT. 461 (2007). The Rehnquist Court's limits on group-conscious remedial legislation also figured into congressional hearings on the 2006 Voting Rights Act reauthorization. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007).

<sup>126</sup> See generally Oliver A. Houck, *Things Fall Apart: A Constitutional Analysis of Legislative Exclusion*, 55 EMORY L.J. 1 (2006) (assessing constitutionality of Congress's recent practice of excluding minority party members from the legislative process). Before party polarization set in, committee chairs would sometimes reach out to the minority in both agenda control and witness selection. See Christine DeGregorio, *Leadership Approaches in Congressional Committee Hearings*, 45 W. POL. Q. 971, 976–80 (1992).

test their inability to call witnesses or otherwise define the hearing agenda.<sup>127</sup> Furthermore, with party leaders exercising greater control over the agenda and membership of committees,<sup>128</sup> committee chairs have less interest in and less freedom to pursue issues that do not match the interest of party leaders. Against this backdrop, policy and constitutional objections to committee initiatives will likely only come from the minority party, and the majority party will not allow committee hearings to serve as a vehicle for the airing of minority party objections.<sup>129</sup>

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<sup>127</sup> See, e.g., *Democrats, White House Step Up Rhetoric on Spying Program*, ST. PETERSBURG TIMES, Jan. 21, 2006, at 3A; Steven T. Dennis & Liriel Higa, *GOP Leaders Drop Drilling Provisions*, CQ TODAY, Nov. 10, 2005, at 1; Brian Hansen, *Democrats Denounce EPA Mercury Rule, Call On Bush Administration to Revise It*, INSIDE ENERGY, Apr. 25, 2005, at 5; James Pinkerton, *Moving from 'Me' to 'We' on Health*, CINCINNATI POST, June 23, 2007, at 14A; Dick Polman, *Most Democrats Keep Quiet—Lawmakers Who Backed War Unable to Use British Memos to Attack Bush*, AKRON BEACON J., June 19, 2005, at A13.

<sup>128</sup> See *supra* notes 62–84 and accompanying text.

<sup>129</sup> The recent political struggle over national health care reform serves as an illustration. Between President Obama's inauguration and the enactment of H.R. 3590, the Patient Protection and Affordable Care Act, approximately forty-four congressional committee hearings were held primarily to review various aspects of national health care reform. However, none of these hearings focused on the constitutionality of national health care reform as a major topic of discussion. Moreover, only a single witness during these hearings discussed the constitutionality of health care reform legislation at length. See *Between You and Your Doctor: The Bureaucracy of Private Health Insurance: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2009), video available at [http://www.youtube.com/watch?v=HkIv9nt\\_F2g](http://www.youtube.com/watch?v=HkIv9nt_F2g) (testimony of Michael F. Cannon, Director of Health Policy Studies, Cato Institute) (positing that the U.S. Constitution's General Welfare Clause should not be expansively interpreted to incorporate national health care reform). Therefore, the Democratic-controlled 111th Congress chose not to perform in-depth hearings on the possible constitutional problems involved with national health care reform.

With congressional committee hearings essentially closed off to debate regarding the constitutionality of national health care reform, Republicans turned to the floors of the U.S. House and Senate to voice their objections. During the same time frame, eighty-eight pages of congressional floor debates discussed the constitutional questions surrounding national health care reform. All objections to the constitutionality of national health care reform were raised by Republicans during these debates. See, e.g., 156 CONG. REC. H177–83 (daily ed. Jan. 19, 2010) (statements of Reps. Garrett, Foxx, Broun, Gohmert, and Bishop); 155 CONG. REC. S13,821–29 (daily ed. Dec. 23, 2009) (statements of Sens. Hutchinson, Ensign, Hatch, and Kyl); 155 CONG. REC. H12,429 (daily ed. Nov. 5, 2009) (statement of Rep. Poe).

After Republicans took over the House of Representatives in 2011, it seemed likely that Republican leadership would convene hearings to challenge the underlying constitutionality of health care reform. During the 2010 election campaign, Republican leadership questioned the constitutionality of health care reform and embraced a proposal to require every bill to include language citing its constitutional authority. See Jake Sherman & Richard E. Cohen, *Republicans to Release 'Contract with America'-Style Election Agenda*, POLITICO (Sept. 17, 2010, 9:37 AM), <http://www.politico.com/news/stories/0910/42302.html>. At that time, House Minority Leader John Boehner blogged that “[t]he centerpiece of ObamaCare is a constitutionally suspect ‘individual mandate’” and that a requirement that all bills cite specific constitutional authority could create a valuable “obstacle to expanded government.” See *House Republicans Want All Bills to Cite Constitutional Authority*, FOX NEWS (Sept. 17, 2010), <http://www.foxnews.com/politics/2010/09/17/house-republicans-want-bills-cite-constitutional-authority>. House Minority Whip Eric Cantor embraced the requirement for similar reasons. See *id.* Following the 2010 elections, Republican leadership made clear that it intended to pursue its campaign to dismantle health

Outside of the Judiciary Committees, today's polarized Congress holds fewer constitutional hearings than earlier, less polarized Congresses. I have suggested a range of factors that directly or indirectly contribute to the supply of constitutional hearings. Party polarization impacts all of these factors and leads to declining committee interest in constitutional questions. And although there is room to question the salience of any of these factors, there is nevertheless good reason to attribute the overall decline in constitutional hearings to what may be the most consequential and pervasive change in Congress over the past forty years.<sup>130</sup>

*D. Interest Groups, Party Leaders, and the Variable Demand for Constitutional Hearings*

Congressional committee interest in constitutional questions ebbs and flows.<sup>131</sup> Numerous committees hold constitutional hearings in spike years like 1977, 1987, and 1995 in the House or 1973, 1977, and 1981 in the Senate. At other times, especially since 1990, very few constitutional hearings are held, and those that are held are overwhelmingly held in the Judiciary Committees. Two causes help explain the often dramatic year-to-year differences in constitutional hearings. *First*, outside of the Judiciary Committees, there is no constituency in Congress that pushes to hold constitutional hearings. Congress and its constituents are interested in policy goals and therefore view the Constitution in purely instrumental terms.<sup>132</sup> Congressional committees, in other words, do not interpret the Constitution as a matter of course—their interest in the Constitution is contingent on the specific policy goals they seek to achieve. *Second*, the exogenous triggers that affect the number and percentage of constitutional hearings also vary from year to year. These factors include Supreme Court decisions, presidential actions, changes in party leadership, and the national policy agenda.

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care reform. See Noam Levy, *Republicans Are Spoiling for a Health Care Fight*, L.A. TIMES, Nov. 15, 2010, at A1. For additional discussion, see *infra* notes 208–14 and accompanying text.

<sup>130</sup> One other factor, suggested to me by Mitch Pickerill, is that congressional committee hearings are impacted by the increasing volume of legislation that needs to be reauthorized and, more generally, by the growth of the administrative state. Specifically, if committee business is increasingly defined by the need to reauthorize and oversee federal programs, committees will simply have less time to pursue the types of issues that are likely to implicate the Constitution. Pickerill's suggestion is indirectly supported by studies on committee jurisdiction. One prominent study, for example, shows that Congress must deal with more and more issues so that the jurisdiction of individual committees becomes denser. See Frank R. Baumgartner et al., *The Evolution of Legislative Jurisdictions*, 62 J. POL. 321 (2000). With more issues on their respective plates, it is understandable that committees would push aside second-order concerns.

<sup>131</sup> See *supra* Figures 1 & 2.

<sup>132</sup> For the Judiciary Committees, of course, relevant interest group constituents care intensely about policy issues that are inextricably constitutional issues, such as abortion and gun rights. For additional discussion, see *infra* Part III.

*I. National Policy Agenda.*—The message priorities of congressional leaders and, more generally, the national policy agenda define the subjects of congressional hearings. For the most part, constitutional issues play a subordinate role in the overall national policy agenda, and even in that subordinate role, each party emphasizes different issues. Democrats emphasize that they are the party of civil rights and civil liberties.<sup>133</sup> Republicans, especially House Republicans, send a message that resonates with social conservatives. Recent Republican-led efforts to countermand court decisions on same-sex marriage, abortion, the Pledge of Allegiance, and the Ten Commandments exemplify this practice.<sup>134</sup>

With the exception of the period from 1963 to 1972, when social issues dominated the public agenda, the national policy agenda has been largely defined by economic issues.<sup>135</sup> Topics such as separation of powers, federalism, and civil rights are not listed among the fourteen top policy issues on the congressional agenda.<sup>136</sup> For this reason, the overall percentage of hearings on constitutional issues ranges from about 1% to 5% in each chamber.<sup>137</sup> Correspondingly, the number and percentage of constitutional hearings appears especially variable because fairly small changes in the message priorities of the majority parties can cause fairly significant

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<sup>133</sup> During the Alito confirmation hearing, for example, Democratic senators spoke at length about abortion, voting rights, the use of torture in fighting the War on Terror, and federalism-based limits on Congress's power to enact antidiscrimination legislation. Adam Nagourney, *Partisan Tenor of Alito Hearing Reflects a Quick Change in Washington*, N.Y. TIMES, Jan. 10, 2006, at A17. Likewise, Democratic senators emphasized abortion and civil rights in the Roberts confirmation hearing. Robin Toner & David D. Kirkpatrick, *Liberals and Conservatives Remain Worlds Apart on Roberts's Suitability*, N.Y. TIMES, Sept. 16, 2005, at A22.

<sup>134</sup> See Devins, *supra* note 113, at 1354–58; Sam Rosenfeld, *Disorder in the Court*, AM. PROSPECT (June 19, 2005), [http://prospect.org/cs/articles?article=disorder\\_in\\_the\\_court](http://prospect.org/cs/articles?article=disorder_in_the_court). Republicans have also championed numerous structural reforms—most notably, the 1994 Contract with America included provisions on term limits, the line-item veto, and unfunded mandates. See Whittington, Devins & Hicken, *supra* note 2, at 402.

<sup>135</sup> See FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 144–48 (1993).

<sup>136</sup> See *id.* at 254; see also *Policy Agendas Project*, COLL. OF LIBERAL ARTS, UNIV. OF TEX. AT AUSTIN, <http://www.policyagendas.org/page/trend-analysis> (last visited June 3, 2011). Furthermore, when pursuing first-order economic or social reform, majority party lawmakers may ignore the constitutional implications of their handiwork. For example, as discussed *supra* note 129, Democratic lawmakers largely ignored potential constitutional objections, like federalism concerns, to the recently enacted health care legislation, preferring, instead, to focus on the policy aspects of the bill. Moreover, party polarization reinforces the dominion of economic, not social, issues on the national policy agenda. For reasons identified *supra* notes 77–78 and accompanying text, party leaders seek roll call votes on economic issues that are likely to expose divisions between the two parties. In this way, party polarization is a vicious cycle. Party leaders have more power in a polarized Congress and have incentive to pursue roll call votes on issues that strengthen party polarization. See *supra* Part II.A and accompanying text (explaining how party leaders have greater power when there is an ideological divide between the parties). Consequently, it is hardly surprising that the national agenda gravitates toward economic matters that divide the parties.

<sup>137</sup> See *supra* Figure 2.

changes in the relative number and percentage of constitutional hearings.<sup>138</sup> More significant, because few constituencies outside of the Judiciary Committees push Congress to regularly consider constitutional questions, congressional interest in constitutional hearings is likely to be triggered by court decisions, presidential initiatives, and changes in party leadership.<sup>139</sup>

2. *Court Decisions.*—Court decisions, especially Supreme Court decisions, seem an obvious trigger for constitutional hearings. Following Supreme Court invalidations of federal statutes, lawmakers and interest groups that back the statute often pursue one or another statutory alternative that will advance their agenda while taking into account the legal infirmities identified by the Supreme Court. From 1954 to 1997, Congress sought to save its underlying statutory policy in 36 of the 74 cases in which the Supreme Court struck down federal legislation.<sup>140</sup> At the same time, lawmaker responses to Court rulings slowed markedly after 1986. From 1986 to 1998, lawmakers only responded to 4 of 18 Rehnquist Court invalidations of federal statutes.<sup>141</sup> More striking, even though the Rehnquist Court invalidated all or parts of 31 laws between 1995 and 2002, “[t]hese rulings had

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<sup>138</sup> Because Congress holds a fairly small number of constitutional hearings, a spike may also be the byproduct of the convergence of several unrelated constitutional issues being considered at the same time. In other words, there may be a spike in constitutional hearings that is not tied to an obvious trigger (change in policy agenda or leadership, a controversial court ruling, etc.). In 1977, for example, the House and Senate each held an above-average number of constitutional hearings. See *supra* Figure 1. This spike had nothing to do with the shift from divided government under President Ford, a Republican, to unified government under President Carter, a Democrat. Instead, the spike reflected the confluence of several general agenda items being considered at the same time. Constitutional issues discussed in 1977 included D.C. statehood, the decriminalization of marijuana, and civil rights for institutionalized persons. See, e.g., *Representation for the District of Columbia: Hearing on H.J. Res. 139, 142, 392, 554, and 565 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 95th Cong. (1977)*; *Decriminalization of Marihuana: Hearing on H.R. 432 Before the H. Select Comm. on Narcotics Abuse and Control, 95th Cong. (1977)*; *Civil Rights of Institutionalized Persons: Hearing on S. 1393 and H.R. 2439 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 95th Cong. (1977)*. For a complete listing of 1977 hearings, visit PROQUEST CONGRESSIONAL, <https://web.lexis-nexis.com/congcomp>, search “constitution!” in subject term for the date range January 1, 1977, through December 31, 1977, and examine archive entries.

<sup>139</sup> In discussing these triggers, I call attention to various instances where today’s polarized Congress was presented with opportunities to tackle one constitutional issue or another. This discussion makes clear that there were numerous opportunities for Congress to play an active role in interpreting the Constitution—ranging from responses to the Rehnquist Court’s invalidation of federal statutes to unilateral presidential warmaking. See *infra* notes 144–70170 and accompanying text; see also Michael J. Gerhardt, *Judging Congress*, 89 B.U. L. REV. 525, 530–31 (2009) (providing past examples of Court decisions, changes in the composition of the Supreme Court, and presidential initiatives that triggered constitutional activity in Congress).

<sup>140</sup> PICKERILL, *supra* note 89, at 42–43. And although Congress may not have held constitutional hearings each time it responded to a judicial invalidation, I would think that several, if not most, of these statutory invalidations triggered a hearing—both to provide interest groups with an opportunity to testify and to inform committee members and staff of the best way to navigate around an unfavorable Court ruling.

<sup>141</sup> *Id.*

little aggregate effect on congressional hearings at which constitutional issues were discussed.”<sup>142</sup>

Two factors help explain increasing lawmaker acquiescence to Supreme Court rulings invalidating federal statutes. First, today’s Congress is more accepting of Supreme Court decisions invalidating federal statutes and thus more likely to engage in position-taking behavior, in which lawmakers care about registering party positions rather than whether the federal courts will uphold legislation after the statute is enacted.<sup>143</sup> Second, during the Rehnquist Court’s tenure, lawmakers were not especially upset by (and may have supported some) Supreme Court invalidations of federal statutes. The Court’s federalism revival, for example, did not begin until Republicans had gained control of Congress while running on an anti-Congress agenda, so there was no meaningful ideological distance between the Court and the sitting Congress on those issues.<sup>144</sup> Equally important, unlike earlier abortion, school desegregation, and other civil rights decisions, Rehnquist Court decisionmaking rarely foreclosed democratic outlets.<sup>145</sup> In other words, Rehnquist Court decisionmaking did not stop lawmakers from pursuing first-order priorities.<sup>146</sup>

Absent something as stark as the *Lochner* era, when Court hostility to the New Deal undermined first-order priorities, the constitutional agenda in today’s polarized Congress appears to be set by Congress rather than by judicial decisionmaking.<sup>147</sup> It did not matter that the Rehnquist Court invalidated more federal statutes than any Court before it and in so doing revived federalism as a limit on congressional power. No interest group tied to the Republican Party demanded constitutional hearings on these decisions. Moreover, majority lawmakers are not interested in abstract threats

<sup>142</sup> Whittington, *supra* note 9, at 95. For slightly updated data, see Whittington, Devins & Hicken, *supra* note 2, at 408.

<sup>143</sup> See *supra* notes 115–18 and accompanying text.

<sup>144</sup> See Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003). In sharp contrast, Democratic lawmakers claimed that the Court engaged in “conservative judicial activism”; if Democrats had controlled Congress, it seems likely that they would have held constitutional hearings to make their case against the Court. See Devins, *supra* note 102, at 1325–35 (describing and analyzing Democratic claims).

<sup>145</sup> See PICKERILL, *supra* note 89, at 148–49; Devins, *supra* note 102, at 1318–23.

<sup>146</sup> See Whittington, *supra* note 117, at 511–16. In sharp contrast, Warren Court decisionmaking threatened lawmaker preferences in a more fundamental way. Perhaps for this reason, 40% of lawmakers in 1959 thought that the Supreme Court should treat congressional constitutional interpretations as controlling, a stark contrast to the mere 14% of congressmen in 1999 who thought this. See Peabody, *supra* note 109, at 147 (contrasting 1959 and 1999 survey data).

<sup>147</sup> To make this point more concrete, let me highlight a counterexample of today’s Congress holding constitutional hearings in order to comply with Supreme Court dictates. When reauthorizing the Voting Rights Act in 2006, lawmakers took into account Rehnquist Court decisions governing Congress’s authority to enact remedial race-conscious legislation. See Persily, *supra* note 125, at 252–53. Were the Supreme Court to place comparable constraints on other exercises of congressional power, Congress might be compelled to hold constitutional hearings on a broad range of issues or, alternatively, to hold constitutional hearings as part of a broader effort to force the Court to change its doctrine.

to congressional power as long as the majority party can pursue its legislative agenda.<sup>148</sup> With increased emphasis on message politics and position taking, lawmakers are thus less invested in the constitutional fate of their handiwork.

Yet judicial decisions that trigger constitutional hearings are very much tied to the message agenda of the majority party. Consider, for example, recent Republican-led efforts to strip the federal courts of jurisdiction on a range of hot-button social issues, including same-sex marriage, the Pledge of Allegiance, and the public display of the Ten Commandments.<sup>149</sup> None of these decisions questioned federal power, and none was issued by the U.S. Supreme Court. Instead, Republican lawmakers sought to strengthen ties with social conservatives by expressing disapproval of these decisions and providing an outlet for party constituents to testify at hearings.<sup>150</sup> For this very reason, the Supreme Court ruling that most vexed the Republican Congress was *Kelo v. City of New London*, a property rights case that spoke much more to the exercise of state than federal power.<sup>151</sup>

Court decisions may trigger constitutional hearings, but only if those decisions undermine the policy priorities of the majority party or, alternatively, provide majority lawmakers with opportunities to make judgmental statements that resonate with their party and their constituents.<sup>152</sup> Conse-

<sup>148</sup> See Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131 (2004).

<sup>149</sup> See generally Devins, *supra* note 113 (explaining why Republican attacks on the judiciary in 2006 and 2007 did not threaten judicial independence).

<sup>150</sup> For an instructive though one-sided treatment of the politics of Republican attacks on the courts, see Rosenfeld, *supra* note 134.

<sup>151</sup> 545 U.S. 469 (2005). *Kelo*-related hearings include *H.R. 3405, Strengthening the Ownership of Private Property Act of 2005 (STOPP): Hearing on H.R. 3405 Before the H. Comm. on Res.*, 109th Cong. (2005); *Protecting Property Rights After Kelo: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005); *Supreme Court's Kelo Decision and Potential Congressional Responses: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005); *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005); *Kelo v. City of New London U.S. Supreme Court Decision and Strengthening the Ownership of Private Property Act of 2005: Hearing on H.R. 3405 Before the H. Comm. on Agric.*, 109th Cong. (2005); and *Eminent Domain: Are Ohio Homeowners at Risk?: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 109th Cong. (2005).

<sup>152</sup> After the Supreme Court's decision to strike down a major section of 2002 campaign finance reform law in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), Democratic Party politicians immediately expressed their disapproval with the case's outcome. See Russ Feingold, *High Court Opens the Floodgates*, USA TODAY, Jan. 22, 2010, at 9A; Daniel Malloy & Bill Toland, *Court Lets Corporations Dip into Politics*, PITTSBURGH POST-GAZETTE, Jan. 22, 2010, at A1; Jared Polis, *Politics and Corporate Personhood*, DENVER POST, Feb. 19, 2010, at B11; David G. Savage, *Campaign Cash Limits Lifted*, CHI. TRIB., Jan. 22, 2010, at C12. And through congressional hearings, Democratic Party committee chairs were able to bring forth multiple witnesses whose testimony critiqued the Court's decision and advocated new campaign finance reform legislation. With the exception of Ted Olson, the lawyer who argued *Citizens United*, no witness defended the decision, and no witness claimed that the decision could only be overturned through a constitutional amendment. See *H.R. 5175, The Disclose Act, Democracy Is Strengthened by Casting Light on Spending in Elections: Hearing Before the H. Comm. on*

quently, there is no necessary correlation between Congress's holding constitutional hearings and Supreme Court constitutional decisionmaking.<sup>153</sup> With Democrats now in charge of Congress, the ideological distance between the Court and the Congress has grown, raising the prospect of Court decisions frustrating the policy preferences of today's lawmakers and their constituents. I discuss this issue in the conclusion of this Article.

3. *Presidential Action.*—The national policy agenda that drives constitutional hearings is often shaped by presidential actions. Congress, for example, held an unusual number of constitutional hearings in connection with the Nixon Administration both because of the President's strong push for unilateral authority and because of Watergate.<sup>154</sup> Also, when President Reagan nominated Robert Bork to the Supreme Court, the Senate held several constitutional hearings.<sup>155</sup> At the same time, the changing balance of power between Congress and the President may have contributed to the overall decline of constitutional hearings. Unlike the Watergate era, when Democrats and Republicans were willing to come together to stand up for congressional power, today's Congress has ceded significant policymaking authority to the President.<sup>156</sup> Consider, for example, the drop in constitutional hearings by the Senate Foreign Relations and House Foreign Affairs Committees. This drop corresponds with increasing presidential control

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*H. Admin.*, 111th Cong. (2010) (statement of Theodore B. Olson); *see also We the People? Corporate Spending in American Elections After Citizens United: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010); *First Amendment and Campaign Finance Reform After Citizens United: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2010); *Corporate America vs. the Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections: Hearing Before the S. Comm. on Rules and Admin.*, 111th Cong. (2010).

<sup>153</sup> This applies both to Court invalidations of federal statutes and consequential Supreme Court decisions (measured by front-page *New York Times* coverage).

<sup>154</sup> Whittington, Devins & Hicken, *supra* note 2, at 397.

<sup>155</sup> *See supra* note 23.

<sup>156</sup> *See* Devins, *supra* note 123, at 406–15 (linking party polarization to the growth of presidential power); *see also* Moe & Howell, *supra* note 104, at 143–48 (explaining why lawmakers have little interest in preserving, let alone expanding, Congress's institutional prerogatives). On questions of constitutional interpretation, especially on the separation of powers, the gap between presidential incentives to advance a coherent pro-president agenda and congressional incentives to advance a pro-Congress agenda are striking. *See* Moe & Howell, *supra* note 104, at 136–38. Presidents, for example, typically back the efforts of the Department of Justice to coordinate legal policymaking, a department whose Offices of Legal Counsel and Solicitor General have strong incentives to ensure uniformity in the legal positions of the Executive Branch. *See* Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 *LAW & CONTEMP. PROBS.* 205, 219–20 (1998). For its part, Congress has no incentive to break up this Department of Justice monopoly on legal policymaking. *See id.* at 206–07. Instead, in an era of declining congressional interest in abstract questions of constitutional law, lawmakers play a limited, largely reactive role to presidential constitutional interpretations. In particular, in periods of divided government, majority party lawmakers sometimes use hearings to question the constitutionality of presidential initiatives. *See supra* note 40. In other words, although lawmakers have not ceded the power of constitutional interpretation to the Justice Department, lawmakers lack the incentive to systematically advance their own theory of constitutional interpretation.

over warmaking.<sup>157</sup> More generally, since presidential unilateralism has become more prevalent,<sup>158</sup> it is now unlikely that today's lawmakers will be interested in holding constitutional hearings and otherwise pursuing structural reforms that shift the balance of power back to Congress.<sup>159</sup> Lawmakers are interested in serving local constituencies, not standing up for abstract notions of congressional power.<sup>160</sup> In other words, presidential initiatives may trigger constitutional hearings, but only if they implicate the party priorities of the majority party or its constituents.

4. *Changes in Party Leadership.*—Changes in party leadership, especially after the new majority party had been the minority party for a number of years, are defining moments in Congress. “Members of the new majority party are likely to seek to revise a large number of [old majority party] policies . . . [and] are more likely to delegate agenda powers to party lead-

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<sup>157</sup> See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 261 (rev. 2d ed. 2004). Perhaps for this reason, today's lawmakers are far less interested in serving on the Senate Foreign Relations and Armed Services Committees. See Linda L. Fowler & R. Brian Law, *Seen but Not Heard: Committee Visibility and Institutional Change in the Senate National Security Committees, 1947–2006*, 33 *LEGIS. STUD. Q.* 357, 381 (2008).

<sup>158</sup> See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 112–20 (2003) (discussing the rise of unilateral presidential policymaking); see also Devins, *supra* note 123, at 406–15 (explaining why today's lawmakers lack the will or way to check presidential unilateralism).

<sup>159</sup> See Devins, *supra* note 123, at 413–15; Moe & Howell, *supra* note 104, at 144–45. Even when a change in party leadership results in divided government, lawmakers use hearings to strengthen their party's message, not the broader powers of Congress. In particular, party leaders are unwilling to trade off the immediate needs of their party in favor of institutional reforms that are unlikely to be enacted because of delaying techniques and that may cut against their party's interests if the opposition party were to regain control of Congress. Consider, for example, the 1995 Republican takeover and the 2007 Democratic takeover. In 1995, Republicans sought to diminish legislative power by pursuing Contract with America reforms that shifted power to the states. In 2007, Democrats sought to embarrass the Bush Administration through oversight hearings that did not seek to shift power away from the President to the Congress. See *supra* note 40; *infra* note 160.

<sup>160</sup> See *supra* note 104 and accompanying text. In today's polarized Congress, one would think that constitutional hearings might increase when the government was divided—so that the majority in Congress could use hearings to challenge the constitutionality of presidential actions. Yet overall patterns of constitutional hearings suggest no meaningful differences between unified and divided government. See *supra* notes 26–29 and accompanying text. For example, the 1995 spike in House constitutional hearings seems tied to the Republican pursuit of Contract with America reforms, not the shift to divided government. See *supra* notes 30–34 and accompanying text. Also, the 2007 Democratic takeover of Congress did not spur on an increase in constitutional hearings. See *supra* Figure 1. Thus, even though Congress does hold noticeably more oversight hearings when the government is divided, it appears that constitutional questions are not regularly pursued in these hearings. See Somin & Devins, *supra* note 40, at 986–87 (noting patterns in lawmaker oversight during periods of unified and divided government). Of course, that is not to say that majority party lawmakers never use oversight hearings to cast doubt on the constitutionality of presidential initiatives during periods of divided government. After the Democratic takeover of Congress in 2007, for example, lawmakers planned to step up their oversight of President Bush's enemy combatant initiatives. See Seth Stern, *The House Committees: Judiciary*, 64 *CQ WKLY.* 3001, 3001 (2006).

ers . . . .<sup>161</sup> In 1995, when Republicans took over the House after forty years of Democratic control, power was centralized in House leadership, and lawmakers pursued a range of significant legislative reforms.<sup>162</sup> Federalism and other constitutional issues figured prominently in the Republican policy agenda, and consequently, there was a huge spike in the number of House constitutional hearings held in the immediate wake of the 1995 takeover.<sup>163</sup> Likewise, in 1981, when Republicans took over the Senate after twenty-six years of Democratic control, the Reagan Revolution figured prominently in the spike in constitutional hearings: the Senate held hearings on firearms, tort claims, tuition tax credits, busing, affirmative action, and abortion.<sup>164</sup>

Changes in party leadership, however, do not necessarily mean that there will be a spike in constitutional hearings. In 2007, when Democrats regained control of Congress after twelve years of Republican control in the House and six years in the Senate, both the number and percentage of constitutional hearings declined.<sup>165</sup> Unlike its 1981 and 1995 Republican counterparts, the 2007 Democratic policy agenda did not prominently feature constitutional issues.<sup>166</sup> In the conclusion of this Article, I discuss whether this downturn signals either growing disinterest in constitutional hearings, differences between the Democratic Party and Republican Party agendas, or some combination of both.

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<sup>161</sup> David W. Rohde et al., *Dynamic Congressional Organization: A Theory of Institutional Stability and Reform* 13 (Mar. 30, 2009) (unpublished manuscript prepared for the Sixty-Seventh Annual National Conference of the Midwest Political Science Association) (on file with the Northwestern University Law Review).

<sup>162</sup> See *supra* notes 68–74 and accompanying text.

<sup>163</sup> See Whittington, *supra* note 9, at 93–95.

<sup>164</sup> See *Constitutional Amendments Relating to Abortion: Hearing on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. (1981); *Firearms Owner Protection Act: Hearings on S. 1030 Before the S. Comm. on the Judiciary*, 97th Cong. (1981); *Federal Tort Claims Act: Hearing on S. 1775 Before the Subcomm. on Agency Admin. of the S. Comm. on the Judiciary*, 97th Cong. (1981); *Court-Ordered School Busing: Hearings on S. 528, S. 1005, S. 1147, S. 1647, S. 1743, and S. 1760 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. (1981); *Affirmative Action and Equal Protection: Hearings on S.J. Res. 41 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. (1981); *Tuition Tax Credits: Hearings on S. 550 Before the Subcomm. on Taxation and Debt Mgmt. of the S. Comm. on Fin.*, 97th Cong. (1981).

<sup>165</sup> See *supra* Figures 1 & 3. In the 2010 campaign, which resulted in a Republican majority in the House, Republicans ran on an agenda that sought to limit the scope of federal governmental programs, most notably health care. See *supra* note 129; see *infra* notes 208–14214. And although House Republicans might hold hearings on the constitutional foundations of health care reform and other governmental programs, there is reason to think that constitutional issues will not play a prominent role in the House Republican agenda. See *infra* notes 208–14214 and accompanying text.

<sup>166</sup> Democrats did centralize power in newly elected House Speaker Nancy Pelosi. See Aldrich & Rohde, *supra* note 8, at 234–37; Rohde et al., *supra* note 161, at 28–31. Pelosi, moreover, sidestepped the committee system when she exercised power, bypassing committees altogether to force votes on six bills that party leadership had identified as priority items. See Rohde et al., *supra* note 161, at 29.

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Outside of the Judiciary Committees, there has been a decline in congressional committee consideration of constitutional issues. This Part has attributed that decline to party polarization. Also, by discussing reasons why the demand for congressional hearings is variable over time, this Part has suggested that there will be occasional spikes in constitutional hearings and identified a range of factors that contribute to these spikes. I do not doubt that some of the factors I identified are not very predictive or that I may have omitted some relevant factors. Nonetheless, there has been a decline in overall committee interest in constitutional questions revealed by the general decline in constitutional hearings, and more noticeably, there are dramatic differences in the relative percentage of constitutional hearings held by the Judiciary Committee and other constitutional committees. For reasons detailed in this Part, party polarization can explain the general decline in committee interest in constitutional questions. In Part III of this Article, I discuss why the Judiciary Committees have bucked this trend and, in so doing, reinforce this Part's conclusions about party polarization's likely impact on the number and location of constitutional hearings.

### III. PARTY POLARIZATION AND THE JUDICIARY COMMITTEES

Like all congressional committees, the Judiciary Committees are very much influenced by party polarization. Before 1985, for example, the Judiciary Committees invited nonpartisan academic witnesses to testify at constitutional hearings, but over the past two decades, the Judiciary Committees almost always call on witnesses who can be relied on to support the policy preferences of one or the other party.<sup>167</sup> Party polarization also affects the issues that the Judiciary Committees pursue, especially the House Judiciary Committee because so much Senate Judiciary Committee hearing time is dedicated to judicial confirmations.<sup>168</sup> From 2003 to 2005, the House Judiciary Committee reinforced ties with social conservatives by holding hearings and casting votes on proposals to strip the federal courts of

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<sup>167</sup> For a general treatment of how party polarization impacted witness lists and other aspects of constitutional hearings, see Devins, *supra* note 7, at 1543–45, which compares pre- and post-1985 practices. By highlighting the increasing partisan nature of committee hearings, I do not mean to suggest that academic witnesses either lack expertise or craft their testimony to match the stated preferences of the political party that asks them to testify. My point, instead, is that committee staff members ensure that the witnesses the committee calls will testify in ways that support the majority's preferences.

<sup>168</sup> Party polarization has also impacted the number of constitutional confirmation hearings held by the Senate Judiciary Committee. In particular, polarization has resulted in the Senate Judiciary Committee spending more and more time on the confirmation hearings of federal appeals court judges. *See infra* note 201 (detailing and examining the increase in the number of constitutional confirmation hearings in the Senate Judiciary Committee). For additional discussion, see *infra* note 171.

jurisdiction over school prayer, the Pledge of Allegiance, and other controversial issues.<sup>169</sup>

Another measure of increasing party polarization is the rise in party-line voting. Unlike the 1970s, when committee members would often cross party lines, the post-1995 period is full of examples of party-line voting.<sup>170</sup> In the Senate, the practice of bipartisan support for Supreme Court nominees, typical from 1970 to 1987, has largely given way to party-line voting in the past decade.<sup>171</sup> In the House, in 1999, committee members reinforced “public perception[s] of the intense partisanship” by casting party-line votes on articles of impeachment against President Bill Clinton; in 1974, committee members “rose above partisanship” when voting on articles of impeachment against President Richard Nixon, reflecting the then-narrow ideological gap between the parties.<sup>172</sup>

Judiciary Committee polarization is more extreme than party polarization elsewhere because the Judiciary Committees tend to attract especially ideological lawmakers.<sup>173</sup> Correspondingly, interest groups that have strong ties to the Judiciary Committees are often identified with the far left or far right.<sup>174</sup> For these very reasons, party polarization has done anything but diminish Judiciary Committee interest in the Constitution. Moreover, the Judiciary Committees have jurisdiction over civil liberties, constitutional amendments, and federal courts, not to mention the Senate’s power to confirm federal judges and Justice Department officials.<sup>175</sup> This confluence of

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<sup>169</sup> See Devins, *supra* note 113; Rosenfeld, *supra* note 134. For additional discussion, see *infra* note 200 and accompanying text.

<sup>170</sup> See *infra* notes 171–172; see also *Judiciary Committee Votes on Recent Supreme Court Nominees*, U.S. SENATE COMM. ON THE JUDICIARY, <http://judiciary.senate.gov/nominations/SupremeCourt/CommitteeVotes.cfm> (last visited June 3, 2011) (recording committee votes on Supreme Court nominations dating back to 1971).

<sup>171</sup> From 1970 until the 1987 confirmation hearing for Robert Bork, the Senate unanimously approved the nominations of Justices Stevens, O’Connor, and Scalia; following the 1995 Republican takeover of Congress, the committee has sharply divided along party lines. See *Supreme Court Nominations, Present–1798*, U.S. SENATE, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited June 3, 2011). Votes on Chief Justice Roberts and Justices Alito and Sotomayor were largely along party lines. See *id.*; see also Abramowitz, *supra* note 56, at 32–33 (noting rise of party-line voting in the Senate); Sarah A. Binder & Forrest Maltzman, *The Politics of Advice and Consent: Putting Judges on the Federal Bench*, in CONGRESS RECONSIDERED, *supra* note 8, at 241 (attributing changes in Senate judicial confirmation practices to, among other things, party polarization).

<sup>172</sup> MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 193 (2d ed. 2000). In the Clinton case, the House Judiciary Committee cast party-line votes. In the Nixon case, six Judiciary Committee Republicans joined Democrats in voting for articles of impeachment. Richard K. Neumann, Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 255 (2007). After the release of the Watergate tapes, all but one Judiciary Committee Republican supported articles of impeachment. *Id.* at 256.

<sup>173</sup> See *infra* notes 186–89189 and accompanying text.

<sup>174</sup> See *infra* notes 198–200 and accompanying text.

<sup>175</sup> See CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED ELEVENTH CONGRESS, H.R. DOC. NO. 110-162, at 451–52 (2009)

jurisdiction, member preferences, and interest group pressures has caused the Judiciary Committees to hold more than 70% of all constitutional hearings since 1995—in the less polarized 1970s, the Judiciary Committees held less than 50% of constitutional hearings.<sup>176</sup>

#### A. Committee Members

Members of Congress choose committees based on their reelection ambitions, policy concerns, and desires to achieve status within their chambers.<sup>177</sup> The Judiciary Committees are quintessential policy committees, and members who are on those committees predominantly have “issue-based motivations.”<sup>178</sup> Because the Judiciary Committees offer little reelection value, members choose to serve on the Judiciary Committees because of their personal interest in engaging with the legalistic issues considered by the Committee.<sup>179</sup> Those issues are plentiful (more bills and resolutions are referred to the Judiciary committees than to any other committee in either the House or Senate);<sup>180</sup> they are highly salient (the bills feature more in national news coverage);<sup>181</sup> and they are contested (concerned outsiders see their interests as competing with one another).<sup>182</sup>

Judiciary Committee members are most often policy-oriented lawyers.<sup>183</sup> They are comfortable with, even relish, legalistic arguments, often employing a “lawyer-like culture and deliberative style.”<sup>184</sup> Judiciary Committee members are usually also strong partisans. Unlike the period

(House Rule X(1)(k)); U.S. SENATE COMM. ON RULES & ADMIN., SENATE MANUAL, S. DOC. NO. 110-1, at 34 (2008) (Senate Rule XXV(1)(m)).

<sup>176</sup> See *supra* Figures 9–12. Although my analysis focuses on the reasons that the Judiciary Committees are especially likely to hold constitutional hearings, I also recognize that committee leaders sometimes purposefully keep an issue off the committee’s docket. For example, throughout the 1970s and 1980s, the House Judiciary Committee “became known as the graveyard for social conservative initiatives.” MARK C. MILLER, *THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY* 136 (2009). At that time, Democratic leadership made sure that committee members “would kill constitutional amendments and other measures desired by conservatives on such subjects as school prayer, abortion, budget procedures, and term limits.” Roger H. Davidson, *The Lawmaking Congress*, 56 *LAW & CONTEMP. PROBS.* 99, 107 (1993).

<sup>177</sup> See DEERING & SMITH, *supra* note 68, at 60–62; FENNO, *supra* note 85, at 1.

<sup>178</sup> DEERING & SMITH, *supra* note 68, at 72.

<sup>179</sup> Lynette P. Perkins, *Member Recruitment to a Mixed Goal Committee: The House Judiciary Committee*, 43 *J. POL.* 348, 353–56 (1981).

<sup>180</sup> Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 90, 104 (Robert A. Katzmann ed., 1988); see also DEERING & SMITH, *supra* note 68, at 88–91 (noting that the jurisdiction of the Judiciary Committees is highly fragmented).

<sup>181</sup> DEERING & SMITH, *supra* note 68, at 91–93.

<sup>182</sup> *Id.* at 93–96.

<sup>183</sup> See MILLER, *supra* note 176, at 135 (“The House Judiciary Committee used to be known as the ‘Committee of Lawyers.’”).

<sup>184</sup> Mark C. Miller, *Congressional Committees and the Federal Courts: A Neo-institutional Perspective*, 45 *W. POL. Q.* 949, 961 (1992).

from 1963 until 1972, when civil rights and social issues figured prominently in the national policy agenda and policy entrepreneurs were attracted to the Judiciary Committees,<sup>185</sup> the post-1980 Judiciary Committees have increasingly attracted “conservative Republicans and liberal Democratic firebrands.”<sup>186</sup> In part, party leaders may see to it that “‘reliable’ partisans are given seats on Judiciary.”<sup>187</sup> More tellingly, because most lawmakers are uninterested in staking out positions on divisive social issues,<sup>188</sup> the Judiciary Committees often draw lawmakers from the extremes of their parties.<sup>189</sup>

Party polarization has shaped the membership as well as the agendas of the House and Senate Judiciary Committees. In the House, Democratic interest in serving on the Judiciary Committee began to wane in the 1980s, when members found themselves in a defensive posture, seeking to beat back Reagan era initiatives,<sup>190</sup> and the Judiciary Committee remained unpopular throughout the George W. Bush Administration.<sup>191</sup> But ideological Republicans, many of whom were not lawyers, sought out the House Judiciary Committee because of their interest in divisive social issues like abortion, separation of church and state, affirmative action, and gun control.<sup>192</sup> The corresponding willingness of the House Judiciary Committee to hold

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<sup>185</sup> See DEERING & SMITH, *supra* note 68, at 73; Lynette P. Perkins, *Influences of Members' Goals on Their Committee Behavior: The U.S. House Judiciary Committee*, 5 LEGIS. STUD. Q. 373, 377–83 (1980).

<sup>186</sup> DAVIDSON & OLESZEK, *supra* note 16, at 219.

<sup>187</sup> Davidson, *supra* note 180, at 105.

<sup>188</sup> Perkins, *supra* note 179, at 349. For this very reason, many senators do not want to serve on the Judiciary Committee. See DEERING & SMITH, *supra* note 68, at 82.

<sup>189</sup> Correspondingly, the Judiciary Committees, unlike other committees, are more likely to put social issues at the front of their agendas even though the national policy agenda typically focuses on economic issues. See *supra* notes 135–36136 and accompanying text (discussing predominance of economic issues in national policy agenda).

<sup>190</sup> MILLER, *supra* note 176, at 136; see DEERING & SMITH, *supra* note 68, at 73.

<sup>191</sup> In an effort to recruit House Democrats to serve on the Judiciary Committee, for example, Democratic leadership granted waivers to committee members so that service on the Judiciary Committees would not count against a committee member's ability to serve on other committees. For an example of this practice, see Press Release, Congressman Artur Davis, Congressman Artur Davis Newly Appointed to House Administration Committee (May 3, 2007), available at [http://web.archive.org/web/20090503110207/http://www.house.gov/apps/list/press/al07\\_davis/houseadmin050307.html](http://web.archive.org/web/20090503110207/http://www.house.gov/apps/list/press/al07_davis/houseadmin050307.html) (accessed by searching the Internet Archive index). Perhaps for this reason, Democrats serving on the House Judiciary Committee during the George W. Bush era are somewhat closer to the party median—especially compared to far-right Republicans who served on the Committee with them. See Memorandum from Nick Cumings to author (Nov. 15, 2009) (on file with the Northwestern University Law Review) (detailing distance between party medians and Judiciary Committee members).

<sup>192</sup> See SCOTT A. FRISCH & SEAN Q. KELLY, COMMITTEE ASSIGNMENT POLITICS IN THE U.S. HOUSE OF REPRESENTATIVES 107 (2006); MILLER, *supra* note 176, at 136–37. Not surprisingly, House Republicans on the Judiciary Committee during George W. Bush's Administration were at the far right of their party. See Memorandum from Nick Cumings to author, *supra* note 191, at 2. For additional discussion on the ties between Republicans on the House Judiciary Committee and social conservative interest groups, see Devins, *supra* note 113, and Rosenfeld, *supra* note 134.

hearings on and report out jurisdiction-stripping bills reflects increasing party polarization because Republican Judiciary Committee members are increasingly partisan and increasingly committed to the social conservative agenda.<sup>193</sup> It also reflects declining reverence for the federal courts because committee members are now willing to use “the courts as pawns in a broader partisan and ideological culture war.”<sup>194</sup>

Party polarization has also affected the Senate Judiciary Committee. Most significantly, polarization has transformed the process of confirming lower federal court judges, resulting in a dramatic upswing in the amount of time it takes for the Senate to confirm judges and an equally dramatic downswing in the percentage of lower court nominees whom the Committee approves.<sup>195</sup> Because most lawmakers now see constitutional interpreta-

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<sup>193</sup> See MILLER, *supra* note 176, at 95; Devins, *supra* note 113, at 1355 (tying jurisdiction-stripping measures to social conservative goals); Rosenfeld, *supra* note 134 (connecting opposition to judicial activism and support for jurisdictional limits to the Christian Right and the Republican Party).

<sup>194</sup> MILLER, *supra* note 176, at 147; see also *id.* at 142–52 (discussing how changes in the institutional culture of the House Judiciary Committee affect the Judicial Branch). Against this backdrop, there is reason to question the Judiciary Committees’ reputation for caring about whether the Supreme Court will uphold the Committees’ handiwork. Instead, it may be that party polarization has transformed committee attitudes toward the courts. For a discussion of earlier committee practices, see Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees*, 3 SETON HALL CONST. L.J. 317 (1993). In this article, Miller details differences between the House Judiciary and the House Energy and Commerce Committees in their respective handling of legislation that was likely to be challenged on constitutional grounds—finding that the Energy and Commerce Committees were uninterested in potential constitutional challenges and that the Judiciary Committee was very much concerned about such challenges. See *id.* at 327–36.

<sup>195</sup> See DAVIDSON & OLESZEK, *supra* note 16, at 379–87; Binder & Maltzmann, *supra* note 171, at 242. Another measure of the increasing importance of federal court of appeals nominations to the work of the Senate Judiciary Committee is the fact that, from 1970 to 1989, the first half of this study, the Committee held 31 constitutionally related confirmation hearings on court of appeals nominees. From 1990 to 2009, though, the Committee held 61 such hearings. This number was calculated by using the electronic version of the CIS index available through LexisNexis. For additional discussion of the search methodology, see *supra* notes 21–22 and accompanying text. William and Mary reference librarian Paul Hellyer and I searched the CIS index for “judiciary and senate” in the “congressional source” field, “(court of appeals or circuit) and (nominat! or confirm!)” in the “all fields except full text” field, and “ATLEAST10(constitution or constitutional)” in the “all fields including full text” field. False hits were then excluded. With respect to other confirmation hearings held by Senate Judiciary, we conducted a similar search. We searched for “judiciary and senate” in the “congressional source” field, “nominat! or confirm!” in the “all fields except full text” field, and “ATLEAST10(constitution or constitutional)” in the “all fields including full text” field. From this larger subset, we excluded false hits and federal court of appeals nominations. The numbers were stable between the two periods—44 for the 1970–1989 period and 38 for the 1990–2009 period, further highlighting the dramatic changes in federal court of appeals confirmation hearings, changes which can be attributed to increasing polarization between the parties. We also conducted another search, referenced *supra* note 16, looking at constitutional confirmation hearings throughout the Senate and comparing the number of hearings in and outside the Judiciary Committees. We did this by searching for “nominat! or confirm!” in the “all fields except full text” field and “ATLEAST10(constitution or constitutional)” in the “all fields including full text” field. After reviewing the results and excluding false hits and Senate Judiciary Committee confirmation hearings, we identified the number of constitutional confirmation hearings outside of the Judiciary Committee. These numbers support the claim that today’s congressional committees, other than the Judiciary

tion as the business of the federal courts, the increasing ideological gap between the parties has resulted in hard-fought conflicts over nominations to the federal courts of appeal.<sup>196</sup> Because of this, the Senate Judiciary Committee attracts members interested in engaging in high-stakes, high-visibility battles over divisive issues of constitutional interpretation.<sup>197</sup>

### B. Interest Groups

The Judiciary Committees' continuing interest in holding constitutional hearings is also tied to the policy agendas of the Committees' interest group constituents. Unlike constituent committees, which are often beholden to a narrow, unified set of interests,<sup>198</sup> members of the Judiciary Committees split sharply along ideological lines, taking positions on deeply contested issues. Committee members, in other words, are identified with the positions taken by members of conflicting interest groups. Not surprisingly, committee members work closely with these policy-oriented interest group constituents. During the confirmation hearings for Robert Bork's nomination to the Supreme Court, for example, Democratic constituents pushed

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Committee, are less engaged in constitutional questions. There were 72 constitutional confirmation hearings outside of Judiciary in the period from 1970 to 1989 and 39 in the period from 1990 to 2009. The number of confirmation hearings held by the Senate Judiciary Committee also increased from 75 in the period from 1970 through 1989 to 99 in the period from 1990 through 2009.

Changes in Senate practices in confirming lower federal court judges, however, do not explain Senate Judiciary Committee preeminence in holding constitutional hearings. This preeminence is largely attributable to the dramatic downswing in constitutional hearings by other congressional committees. *See supra* Figures 1 & 2 (highlighting overall decline in number and percentage of constitutional hearings). Moreover, for reasons identified *supra* note 22, several appellate court confirmation hearings did not show up in our data set, which suggests that the Senate Judiciary Committee's dominance is not linked to these confirmation hearings. Moreover, even though the number of appeals court constitutional hearings doubled in the second half of this study, the average number of those hearings per year is fairly low: the number doubled from 1.5 per year to 3 per year.

<sup>196</sup> *See* Binder & Maltzman, *supra* note 171, at 256–57 (noting that Democrats made scrutiny of judicial nominees a caucus priority in 2003). During the George W. Bush Administration, Democrats on the Senate Judiciary Committee saw judicial nominations as an ideological battle, and perhaps for this reason, the median Democrat on the Committee moved further and further to the left during the George W. Bush Administration. *See* Memorandum from Nick Cumings to author, *supra* note 191, at 1 (demonstrating this trend).

<sup>197</sup> Ever since the hearings on Robert Bork's nomination to the Supreme Court in 1987, media coverage of Supreme Court confirmations has increased roughly 38%, making the Senate Judiciary Committee an especially attractive committee for members interested in reaching out to their constituents through media coverage. *See* RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 98 (2005). Yet given the divisive issues faced by the Senate Judiciary Committee, the Committee typically attracts members who can safely stake out positions on these highly charged issues.

<sup>198</sup> *See* DEERING & SMITH, *supra* note 68, at 74–77, 84–86 (noting that the work of constituent committees is inextricably linked to the interests of the districts and states that elect constituent committee members to Congress).

for the Committee to hold constitutional hearings.<sup>199</sup> Likewise, recent House Republican efforts to consider jurisdiction-stripping legislation are part of the Committee's effort to reinforce its ties with social conservative interests.<sup>200</sup>

It is little wonder, then, that the Judiciary Committees continue to hold constitutional hearings. Not only do these committees have jurisdiction over constitutional issues and judicial confirmations, Judiciary Committee members are personally interested in these issues, as are the Committees' interest group constituents. Moreover, because other congressional committees are letting the courts sort out the constitutionality of their handiwork, judicial confirmation politics has become increasingly important for both parties. Needless to say, after Democrats took over the White House and Congress in 2009, the Judiciary Committees shifted their focus away from the social conservative agenda and toward the agenda of the Democratic Party.<sup>201</sup> This shift may change which lawmakers serve on the Judiciary Committees, but it should not significantly impact the Committees' continued interest in holding constitutional hearings.<sup>202</sup>

#### CONCLUSION: THE PAST AND FUTURE OF CONSTITUTIONAL HEARINGS IN CONGRESS

Congressional committee interest in the Constitution has been on the decline for more than two decades. Throughout this period and especially since the 1995 Republican takeover of Congress, the vast majority of constitutional hearings have taken place in the House and Senate Judiciary Committees. To explain these two phenomena, this Article has pointed out a range of factors that impact congressional interest in constitutional hearings. For reasons detailed in Part II, I argued that party polarization has played a significant role in the decline in constitutional hearings in every congressional committee except the Judiciary Committees. One factor in

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<sup>199</sup> These groups included the National Women's Law Center, the NAACP Legal Defense and Educational Fund, and the National Abortion Rights Action League. See Gregory A. Caldeira & John R. Wright, *Lobbying for Justice: Organized Interests, Supreme Court Nominations, and the United States Senate*, 42 AM. J. POL. SCI. 499, 504 (1998). For additional discussion of the Bork confirmation, see generally BRONNER, *supra* note 23, and MARK GITENSTEIN, *MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT* (1992). The 2006 Voting Rights Act Reauthorization is another example of left-leaning interest groups pushing for Senate Judiciary Committee hearings. See Persily, *supra* note 125, at 195 n.79.

<sup>200</sup> See Devins, *supra* note 113, at 1355–58; Rosenfeld, *supra* note 134.

<sup>201</sup> For discussions of this kind of shift, see Stern, *supra* note 160, and Keith Perine, *The Senate Committees: Judiciary*, 64 CQ WKLY. 3034, 3034 (2006). Since Republicans gained control of the House in 2011, there is good reason to think that abortion, immigration, and other issues salient to social conservatives will again dominate House Judiciary constitutional hearings. See Robert Pear, *Push for Stricter Abortion Limits Is Expected in House*, N.Y. TIMES, Dec. 12, 2010, at A34; Jennifer Steinhauer, *Republicans Name Leaders of House Committees*, N.Y. TIMES, Dec. 9, 2010, at A38.

<sup>202</sup> See *supra* notes 190–91191 and accompanying text (noting reluctance of House Democrats to serve on the Judiciary Committee during Republican presidencies).

particular, party polarization, has contributed to numerous shifts in congressional practices, shifts that have discouraged committees from holding constitutional hearings. These shifts include the rise of message politics and thus the increasing emphasis on position taking; the declining influence of congressional committees, including cutbacks in committee staff and increasing lawmaker emphasis on constituent services and reelection instead of committee service; and the increasing refusal of committee leaders to allow the minority party to use hearings as a vehicle to raise constitutional objections to committee proposals. Thus, to explain the shift toward Judiciary Committee control of constitutional hearings, Part III discussed the competing incentives of the Judiciary Committees and other congressional committees and explained why party polarization and declining lawmaker interest in constitutional questions have not meaningfully impacted the number of constitutional hearings held by the Judiciary Committees. There, polarization has impacted hearing topics and witness lists instead.

Notwithstanding the importance of party polarization, constitutional hearings can also be triggered by judicial decisions, changes in party leadership, executive branch initiatives, and the national policy agenda.<sup>203</sup> These variables are constantly in flux, and consequently, the number of constitutional hearings varies significantly from year to year. For example, although today's lawmakers seem increasingly content to stake out policy positions and let the courts sort out the constitutionality of their policy preferences,<sup>204</sup> there may be a spike in constitutional hearings if the Roberts Court undermines the first-order policy preferences of lawmakers.<sup>205</sup>

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<sup>203</sup> Some of these triggers are linked to party polarization. For example, the national policy agenda may well be tied to the incentives of party leaders to take roll call votes on the very issues that divide the parties. *See supra* notes 77–78 and accompanying text.

<sup>204</sup> *See supra* note 90 and accompanying text; *see also* Neal Devins, *Congress as Culprit: How Lawmakers Spurred On the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 441–47 (2001) (identifying ways in which Congress signaled to the Rehnquist Court that it would acquiesce to Court invalidations of federal statutes).

<sup>205</sup> Before the 2010 elections, there was reason to suspect that the ideological distance between the Roberts Court and the Democratic Congress might have frustrated lawmaker preferences in ways that would trigger constitutional hearings. The Roberts Court, after all, is especially conservative; the Democratic Congress was far more liberal than the Republican Congresses that witnessed the Rehnquist Court's revival of federalism and, with it, the invalidation of progressive legislation. *See* Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1; *see supra* note 144 and accompanying text (noting that Rehnquist Court's invalidation of federal statutes may have matched preferences of sitting Congress). Indeed, President Obama invited a Court–Congress confrontation by calling for legislation overturning the *Citizens United* ruling. *See* Michael D. Shear, *Obama Calls Citizens United Ruling 'A Huge Blow'*, WASH. POST (May 1, 2010, 6:00 AM), <http://voices.washingtonpost.com/44/2010/05/obama-calls-citizens-united-ru.html>. Notwithstanding *Citizens United*, the Roberts Court has largely operated within bounds acceptable to Congress and the American people. *See* Dahlia Lithwick, *Spoonfuls of Sugar*, SLATE (Sept. 26, 2009, 7:36 AM), <http://www.slate.com/id/2229517/> (bemoaning public support of Roberts Court). At the end of the 2009–2010 Supreme Court Term, the conflict over the Court's invalidation of campaign finance legislation in *Citizens United* stands alone as a point of friction between the Court and Congress. *See supra*

The question remains: Is the past prologue? That is, will the trends identified in this Article persist? I think the answer is a qualified yes. The 2007 Democratic takeover of Congress did not meaningfully impact Judiciary Committee control of constitutional hearings: in particular, unlike the 1995 Republican takeover, the 2007 Democratic takeover did not result in an upswing in the number or percentage of constitutional hearings.<sup>206</sup> Similarly, the election of President Obama did not meaningfully impact the number of constitutional hearings: hearing numbers stayed constant in the House and only decreased slightly in the Senate.<sup>207</sup>

What, then, will come of the 2011 Republican takeover of the House?<sup>208</sup> On the one hand, Republican leaders sought to make common ground with the Tea Party movement during the 2010 campaign by questioning the constitutionality of health care legislation, embracing limited government, and demanding that all legislation include language citing its constitutional authority.<sup>209</sup> On the other hand, there is little reason to think that this embrace of first principles will result in more constitutional hearings. Most telling, although Republicans list their constitutional obligation

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note 150 and accompanying text. Otherwise, the Roberts Court has sidestepped direct confrontations with Congress. In 2008, for example, the Court employed the doctrine of constitutional avoidance to steer clear of a constitutional challenge to the Voting Rights Act reauthorization. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504 (2009). In so doing, the Court signaled its desire to avoid triggering a political maelstrom by invalidating the reauthorization. *See* Barry Friedman, *Benched: Why the Supreme Court Is Irrelevant*, *NEW REPUBLIC*, Sept. 23, 2009, at 8–9; Jack Balkin, *Why Has the Roberts Court Suddenly Gone Minimalist?*, *BALKINIZATION* (June 29, 2009, 3:50 PM), <http://balkin.blogspot.com/2009/06/why-has-roberts-court-gone-minimalist.html>. For a competing perspective, see Jeffrey Rosen, *Roberts Versus Roberts*, *NEW REPUBLIC*, Mar. 11, 2010, at 17–18, which suggests that Chief Justice Roberts is prepared to strike down the Voting Rights Act, and also see Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. PA. J. CONST. L. 491 (2009), which details how the Roberts Court's invalidation of the Military Commission Act tracked lawmaker preferences.

<sup>206</sup> *See supra* Figures 3, 5, 6 & 7. One possible explanation for this phenomenon is that political polarization has impacted the relationship between interest groups and congressional committees. The Constitution arguably plays a stronger role in the social conservative agenda than it does in the civil rights agenda—so that Republicans will hold hearings on jurisdiction-stripping proposals whereas Democrats will seek to amend federal statutes governing employment discrimination, housing discrimination, and the like. Along these lines, it is quite relevant that, since the 2007 Democratic takeover of Congress, the Roberts Court has yet to meaningfully frustrate the first-order policy preferences of Democratic interest group constituents. *See supra* note 205.

<sup>207</sup> *See supra* Figure 1.

<sup>208</sup> Republicans also gained seats in the Senate, strengthening their power to filibuster and otherwise block legislation. But Democrats are still the majority and therefore retain the agenda-setting power in the Senate including the power to decide whether to hold hearings and whether and which constitutional witnesses should testify at hearings.

<sup>209</sup> *See supra* note 129 (discussing statements of House Minority Leader John Boehner and House Minority Whip Eric Cantor). For its part, the Tea Party promulgated a *Contract from America*, embracing an agenda grounded in “individual liberty, limited government, and economic freedom” and calling for Congress to “restore fiscal responsibility & constitutionally limited government.” *The Contract from America*, *CONTRACT FROM AM.*, <http://www.thecontract.org/the-contract-from-america> (last visited June 3, 2011).

to oversee the Executive Branch as among their first priorities,<sup>210</sup> Republicans have no specific constitutional agenda to pursue and have made no mention of citing the constitutional foundations of laws as a Republican oversight priority.<sup>211</sup> And even though House Republicans recently embraced a rule calling for legislation to specify its constitutional source,<sup>212</sup> Republican leadership will not advance legislation it disapproves of and whose constitutionality it might well question.<sup>213</sup> And if it approves of a bill, there is no reason to think that it will hold hearings to examine the bill's constitutional foundations. Instead, it might well "find in the Constitution whatever authority it needs to do as it pleases."<sup>214</sup>

Yet even if there is eventually a meaningful upswing in constitutional hearings, the central points made in this Article remain accurate. More than anything, this Article has tried to unpack the factors that contribute to the decision to hold constitutional hearings, arguing that party polarization tends to reduce the number of constitutional hearings outside the Judiciary Committees but also that the number of constitutional hearings will ebb and flow depending on presidential initiatives, the national policy agenda, and court decisions. Any upswing in constitutional hearings will almost certainly be caused by the same factors that contribute to the ongoing ebb and flow of constitutional hearings. Party polarization does and will continue to depress the average number of constitutional hearings. Absent meaningful supermajority control by one party or the other,<sup>215</sup> polarization will continue

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<sup>210</sup> See STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 111TH CONG., A CONSTITUTIONAL OBLIGATION: CONGRESSIONAL OVERSIGHT OF THE EXECUTIVE BRANCH (2010), available at [http://republicans.oversight.house.gov/images/stories/Reports/9-22-10\\_OGR\\_Report\\_-\\_A\\_Constitutional\\_Obligation\\_-\\_Congressional\\_Oversight\\_of\\_the\\_Executive\\_Branch.pdf](http://republicans.oversight.house.gov/images/stories/Reports/9-22-10_OGR_Report_-_A_Constitutional_Obligation_-_Congressional_Oversight_of_the_Executive_Branch.pdf).

<sup>211</sup> See *id.*; see also Ben Weyl, *The House Committees: Oversight and Government Reform*, 68 CQ WKLY. 2542, 2542–43 (2010). It is also noteworthy that Republican leadership limited the role of the Tea Party in its transition team. See James Downie, *Are Boehner and Cantor Freezing Out the Tea Party?*, NEW REPUBLIC (Nov. 8, 2010, 2:34 PM), <http://www.tnr.com/blog/jonathan-chait/78997/moderate-gop-transition>.

<sup>212</sup> H.R. Res. 5, 112th Cong. § 2 (as passed by House, Jan. 5, 2011).

<sup>213</sup> See *supra* note 93 and accompanying text (noting that lawmakers typically question a bill's constitutionality when they disapprove of the bill).

<sup>214</sup> Perry Bacon Jr., *A Closer Look at GOP 'Pledge to America'*, WASH. POST, Sept. 24, 2010, at A17.

<sup>215</sup> From July 2009, following the seating of Minnesota Democrat Al Franken, to January 2010, when Republican Scott Brown won a special election in Massachusetts, Democrats had a sixty-vote supermajority control of the Senate. See Rubin, *supra* note 14, at 123; Alex Wayne & Drew Armstrong, *Election Upsets Overhaul Plans*, 68 CQ WKLY. 236 (2010). Even so, Republicans were able to derail or moderate much of the Democratic agenda during this time. See *supra* notes 122–23, 129 and accompanying text; see also Herszenhorn, *supra* note 14; Alan K. Ota, *Bad Climate for Crossovers*, 68 CQ WKLY. 1542, 1542–43 (2010); Rubin, *supra* note 14, at 122–23; Shatz, *supra* note 84, at 434–35. Needless to say, the election of Senator Brown made it more difficult for Democrats to pursue their legislative agenda.

to result in party-line voting and to make it very difficult for Congress to enact major legislation.<sup>216</sup>

In closing, I would like to discuss two questions raised but not answered by this Article. *First*, this Article does not attempt to answer whether congressional consideration of constitutional questions is a public good that we should value and develop ways to incentivize. Even if the Constitution becomes more vibrant and more enduring when all branches of government consider constitutional questions,<sup>217</sup> mechanisms that facilitate lawmaker interest in the Constitution may either prove counterproductive or otherwise require fundamental changes in our system of government.<sup>218</sup> *Second*, this Article is not intended to encourage courts to be opportunistic in advancing their preferred vision of law or policy. Although there may be little risk of legislative backlash because of declining lawmaker interest in constitutional questions and increasing belief that courts need not defer to congressional judgments,<sup>219</sup> Congress remains “our most democratic branch,” and it may be that judicial deference should be moored to that anchor rather than institutional engagement or competence.<sup>220</sup> For this very reason, I hope that this

<sup>216</sup> The fact that it is harder to enact major legislation, of course, does not mean that Congress is incapable of enacting such legislation. In 2010, Congress enacted both healthcare legislation and legislation regulating Wall Street. At the same time, for reasons noted *supra* notes 84, 122, and 215, today’s overwhelmingly Democratic Congress has had a difficult time pursuing its legislative agenda. Apparently, sixty Democratic Senators is not quite enough for effective supermajority control in today’s polarized Congress.

<sup>217</sup> See DEVINS & FISHER, *supra* note 118, at 217–39; Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 104–05 (1998).

<sup>218</sup> Proposals to improve congressional performance include the creation of a specialized “Committee on the Constitution” to provide a “constitutional impact statement” on proposed legislation and the evisceration of judicial review altogether to create needed incentives for Congress to pursue constitutional questions. See Garrett & Vermeule, *supra* note 86, at 1319–39; see also TUSHNET, *supra* note 95, at 163–72. For critiques of these proposals, see Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 367–71 (2000), which notes that the elimination of judicial review will result in the centralization of constitutional authority in the President, not Congress, and Tushnet, *supra* note 96, at 504–08, which describes difficulties of implementing the “Committee on the Constitution” proposal. Another proposal, suggested to me by Hans Linde, is to change the rules governing lawmaker standing. That would allow minority lawmakers to pressure the majority party to take constitutional issues seriously because minority party members would have an opportunity to raise those issues in court. The rub here, of course, is the need to overhaul Supreme Court doctrine on lawmaker standing and some fundamental tenets of our system of checks and balances. See *Raines v. Byrd*, 521 U.S. 811 (1996) (holding that members of Congress lack standing to allege a cause of action when official congressional power as a whole is affected).

<sup>219</sup> According to the strategic model of judicial behavior, judges should take backlash risks into account when crafting their decisions. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–18 (1998); see also Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (discussing why courts must consider Congress’s preferences and changes in the political environment).

<sup>220</sup> Sinclair, *supra* note 76, at 397. By raising this issue, I am not suggesting that Congress’s disinterest in constitutional questions is principally a byproduct of “judicial overhang,” the tendency of lawmakers to steer clear of the constitutional thicket by delegating that power to the judiciary. See TUSHNET, *supra* note 95, at 57–60 (suggesting that congressional disinterest is largely a result of “judi-

Article is not seen as a condemnation of Congress: my aim has been merely to note congressional practices over time and to identify the various factors that determine the number and location of constitutional hearings.

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cial overhang”). Instead, I mean to suggest, though not embrace, an alternative justification for judicial deference to Congress: the historic practice of the Supreme Court to defer to legislative judgments and “the democratic process.” *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

