

NEIL GORSUCH AND THE GINSBURG RULES

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I understand entirely the desire of everyone to want to know the views that I might subscribe to personally, and get me to make commitments about how I'd rule in future cases. . . . I'm not saying there's any improper questions. There are only improper answers. And as a judge, as a sitting judge, I'm bound by cano[n]s of ethics. . . . Those cano[n]s are important. They're important to me because if—if I did make a bunch of campaign promises here, what's that mean to the independent judiciary? What does that mean to the litigants in front of it? What does that mean for the future of this country? Those things are important to me, and there's a long line of judges who come before me and this is an unbroken chain and I don't want to be the weak link.

—Neil Gorsuch¹

When Justice Antonin Scalia died on February 13, 2016, Senate Majority Leader Mitch McConnell (R-KY) immediately announced that the U.S. Senate would refuse to consider any Supreme Court nomination sent to it by President Barack Obama.² The reason, McConnell said, was that “[t]he American people should have a voice in the selection of their next Supreme Court Justice.”³ Therefore, he continued, the Senate would not act on any nomination until a new President was sworn in almost a year after Scalia’s death.⁴

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1. *Senate Judiciary Committee—Hearing*, FED. NEWS SERV., Mar. 22, 2017, 2017 WLNR 8947139, at 108 [hereinafter *Gorsuch Transcript*, Mar. 22, 2017].

2. Susan Davis, *Senate Republicans Agree to Block Obama's Supreme Court Nominee*, NPR (Feb. 23, 2016, 6:28 PM), <https://www.npr.org/2016/02/23/467860960/senate-republicans-agree-to-block-obamas-supreme-court-nominee> [https://perma.cc/4Z2Q-U3HS].

3. Harper Neigid, *McConnell Don't Replace Scalia Until After Election*, THE HILL (Feb. 13, 2016, 6:27 PM), <http://thehill.com/homenews/senate/269389-mcconnell-dont-replace-scalia-until-after-election> [https://perma.cc/NQ5E-CTAY].

4. *Id.*

President Obama attempted to upend McConnell's strategy by nominating a well-respected centrist jurist, Merrick Garland, to fill Scalia's seat.⁵ McConnell didn't bite: Judge Garland made some token office visits to senators, but no hearings were held and no vote on his nomination was taken.⁶ When Donald Trump subsequently won an unexpected victory in November and was inaugurated as President in January 2017, one of his first acts was to nominate Neil Gorsuch to the Supreme Court.⁷

Majority Leader McConnell quickly convened hearings.⁸ During three days of testimony, Judge Gorsuch, like dozens of Supreme Court nominees before him, answered questions, in public and under oath, before the Senate Judiciary Committee. Like his predecessors, he was asked about his background and judicial philosophy, and whether he agreed or disagreed with particular Supreme Court cases. Also, like his predecessors, nominee Gorsuch answered some of those questions, but avoided direct responses to others. In doing so, Gorsuch repeatedly invoked what he called the "Ginsburg Rule." The "Ginsburg Rule" is a term used by not just Gorsuch but also by senators and numerous Supreme Court commentators. It attributes to Ruth Bader Ginsburg a "rule" prohibiting Supreme Court nominees from signaling their preferences about cases and issues.

This Article examines this so-called rule, and its attribution to Justice Ginsburg. We begin by exploring how past nominees have approached controversial questions at their hearings. In doing so, we demonstrate that the "Ginsburg Rule" is at best misnamed: the practice of claiming a professional privilege to not respond to certain types of questions predates the Ginsburg nomination by decades.⁹ We then examine Gorsuch's invocation of that privilege at his hearings, and contrast his use of the privilege with

5. Ariane de Vogue, *How McConnell Won, and Obama Lost, the Merrick Garland Fight*, CNN (Nov. 9, 2016, 5:07 PM), <http://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html> [https://perma.cc/9YUT-3Q2Y].

6. Karoun Demirjian & Mike DeBonis, *Senate Democrats Slam Republican Blockade as Garland Visits Capitol Hill*, WASH. POST (Mar. 17, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/03/17/merrick-garland-heads-to-capitol-hill-after-being-nominated-to-the-supreme-court/?utm_term=.3df2a1ae9047 [https://perma.cc/93SA-NC8V].

7. Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?_r=0 [https://perma.cc/PP8B-WXBV].

8. Nolan D. McCaskill, *McConnell Confident Senate Will Confirm Gorsuch by April 7*, POLITICO (Mar. 9, 2017, 10:04 AM), <https://www.politico.com/story/2017/03/mitch-mcconnell-neil-gorsuch-confirmation-senate-235867> [https://perma.cc/EA2M-9MB8].

9. See also PAUL M. COLLINS, JR. & LORI A. RINGHAND, *SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE* 235–66 (2013), and DION FARGANIS & JUSTIN WEDEKING, *SUPREME COURT CONFIRMATION HEARINGS IN THE U.S. SENATE: RECONSIDERING THE CHARADE* 42–71 (2014).

Justice Ginsburg's. In doing so, we show that if the "Ginsburg Rule" is supposed to reflect the actual practice of Justice Ginsburg at her hearings, it would be better conceived of as *two* rules: one governing when nominees should not provide direct responses to certain types of questions, and a second governing when they should.

These two rules, working together, constitute what we then call the "Ginsburg Rules": nominees can properly avoid giving direct responses about currently contested issues likely to return to the Court, but also should use their testimony to assure the senators and the public that they accept the resolution of *previously* contested cases that are now part of our constitutional canon.

Next, we use empirical data to examine the extent to which Justices Ginsburg and Gorsuch complied with *each* of these rules. In doing so, we develop a "responsiveness ratio" that incorporates both rules and creates an apples-to-apples comparison of the relative responsiveness of nominees across time. The responsiveness ratio demonstrates that Gorsuch, despite his insistence to the contrary, did not really follow the example set by Justice Ginsburg. Rather, Gorsuch's responsiveness ratio was the lowest of any nominee since 1968, while Ginsburg's in contrast was one of the five highest historically, and was on par with other contemporary nominees.

We close by addressing the question posed by Gorsuch himself in the quotation at the start of this Article: what *does* it mean for the future of the country if nominees follow Gorsuch's practice and refuse to answer questions about even our most canonical constitutional cases? We believe that the potential consequences of such a practice are grave. As we have demonstrated in our earlier work, the confirmation hearings function as a high-profile public forum in which we as a nation affirm our shared constitutional commitments. If future nominees follow Gorsuch in refusing to provide firm opinions on even our most iconic cases, we lose an important tool in ensuring that the individuals selected to serve on the Supreme Court accept the constitutional settlements reached by each generation of Americans.

I. THE PRIVILEGE EXPLAINED

Supreme Court nominees have not always testified before the Senate Judiciary Committee. The first nominee to take unrestricted questions in public and under oath was Felix Frankfurter in 1939.¹⁰ The practice became

10. COLLINS & RINGHAND, *supra* note 9, at 35.

standard with the nomination of John Marshall Harlan in 1955.¹¹ All nominees who have testified, however—including Frankfurter and Harlan—have consistently refused to provide firm answers to questions about contemporaneously contested constitutional cases and issues.¹² In doing so, nominees have invoked two concerns: the need to preserve the appearance of fairness and impartiality in the eyes of future litigants by not appearing to prejudge cases that may come before the Court; and the importance of protecting judicial independence by avoiding making inappropriate commitments to members of the Senate Judiciary Committee in exchange for confirmation to the Supreme Court.¹³

As noted by various scholars, these two concerns are related but distinct.¹⁴ The first is about the appearance of fairness in relation to future litigants, and stems from the Model Code of Judicial Conduct. Canon 5 of the Model Code prohibits judges from engaging in certain types of behaviors that could reasonably imply a bias in future cases.¹⁵ So, for example, section 5A(3)(d) states that judicial candidates should not:

with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial[] performance of the adjudicative duties of the office.¹⁶

The official commentary to this Canon states that, as a “corollary” to this provision, a “candidate should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views.”¹⁷ Supreme Court nominees testifying before the Senate Judiciary Committee frequently invoke this language when asserting that answering particular questions would interfere with the appearance of impartiality in future cases.

11. *Id.* at 37–38.

12. *Id.* at 234–35. In our earlier work, we defined a “privileged” response as one in which the nominee refuses to answer a question on privileged grounds, meaning that the nominee indicated that answering the question would create the reality or appearance of bias; would interfere with judicial independence, or would be in appropriate for some other, similar reason. *See* Lori A. Ringhand & Paul M. Collins, Jr., *May it Please the Senate An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939–2009*, 60 AM. U. L. REV. 589 (2011).

13. COLLINS & RINGHAND, *supra* note 9.

14. *Id.* *See generally* Robert Post & Reva Siegel, *Questioning Justice Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38 (2006), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1173&context=fss_papers [<https://perma.cc/E88X-3VT4>].

15. MODEL CODE OF JUDICIAL CONDUCT Canon 5 (AM. BAR ASS’N 1999).

16. *Id.* § 5(A)(3)(d)(i).

17. *Id.* § 5A(3)(d) cmt.

The second idea, in contrast, is based in the federal judiciary's status as a branch of government separate and institutionally independent from the U.S. Senate.¹⁸ While less fleshed out than the Model Code's prohibitions, the idea here is that a nominee should not have to pledge herself to certain outcomes as a condition of confirmation, and that doing so would give the Senate inappropriate influence over the Supreme Court.¹⁹ This rationale is invoked by nominees when they refuse to answer questions on the basis that senators should not solicit "promises" of future behavior as part of the confirmation process.²⁰

Both of these concerns are relevant and important in considering how the confirmation process of U.S. Supreme Court Justices should be structured. Neither, however, provides clear standards regarding how far nominees should go when responding to questions about previously decided constitutional cases or controversies. As Robert Post and Reva Siegel have pointed out, any judge or justice who has written or signed on to an opinion involving an issue that may come before the Court in the future has provided the same information—and thus presents the same risk regarding the appearance of future impartiality—as does a nominee who tells the Judiciary Committee whether she agrees or disagrees with the outcome or reasoning of an existing Supreme Court decision.²¹ Likewise, concerns about institutional independence provide little concrete guidance on how to balance the needs of an independent judiciary with the duty of the political branches in providing a check on judicial power through the constitutionally compelled nomination and confirmation of Supreme Court Justices.²² Consequently, nominees' invocation of the privilege to not respond to certain questions is rarely uncontroversial and frequently sparks vigorous debate among senators, commentators, and scholars.

II. THE GORSUCH HEARING

Given this uncertainty about the ground rules, and the contested political environment of the Gorsuch hearing, it is hardly a surprise that Neil Gorsuch claimed at his hearing a broad privilege to not answer questions about previously decided Supreme Court cases or controversies. More so than other recent nominees, however, Gorsuch also was quite vocal in attributing his understanding of the scope of that privilege to the so-called

18. Post & Siegel, *supra* note 14, at 45.

19. *Id.* at 45–48.

20. *Id.* at 48.

21. *Id.* at 46–47.

22. *See id.* at 45.

“Ginsburg Rule.” This nomenclature, used repeatedly by Gorsuch and senators, reflects the widespread belief that Justice Ruth Bader Ginsburg’s testimony at her 1993 confirmation hearing both shepherded in and exemplified a modern practice of nominees refusing to answer questions on the privileged grounds discussed above.²³

Republican members of the Senate Judiciary Committee introduced the privilege at the very start of the Gorsuch hearing, and defined it broadly. Senator Orrin Hatch (R-UT), for example, used his opening statement to instruct Gorsuch to avoid answering any questions Gorsuch found inappropriate. Hatch framed the issue as representing a choice between Gorsuch being perceived as an “impartial judge” or a “political judge.”²⁴ An impartial judge, Hatch said, “focuses on the process of interpreting and applying the law according to objective rules,” while a political judge “focuses on a desired result and fashions a means of achieving it.”²⁵ Senators needed to take care, Hatch warned his colleagues, to respect the difference, and ensure their questioning of Gorsuch did not lead the nominee into the inappropriate territory of politics:

A senator . . . who wants to know which side a nominee will be on in future cases or who demands the judge be [an] advocate for certain political interests clearly has a politicized judiciary in mind. . . . Something is seriously wrong when the confirmation process for a Supreme Court justice resembles an election campaign for political office.²⁶

Other Republican senators expanded on Hatch’s comments. Senator John Cornyn (R-TX) raised the concern of future accusations of bias should Gorsuch answer inappropriate questions. “Can you imagine,” Cornyn said, “what a litigant might think if the judge before whom he or she was to present their case said before they heard a word how they were going to decide the case? That’s why it’s improper for you, as you know, to prejudge cases in your testimony before the committee.”²⁷ Senator John Kennedy (R-LA) agreed, expressing his hope that the senators would avoid substantive questioning and instead “focus on temperament, on legal philosophy, on legal

23. DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., R41300, QUESTIONING SUPREME COURT NOMINEES ABOUT THEIR VIEWS ON LEGAL OR CONSTITUTIONAL ISSUES: A RECURRING ISSUE 6 (2010).

24. *Senate Committee on the Judiciary Hearing on the Nomination of Neil Gorsuch to Be Associate Justice of the U.S. Supreme Court*, FED. NEWS. SERV., Mar. 20, 2017, 2017 WLNR 8698078, at 8–9 [hereinafter *Gorsuch Transcript*, Mar. 20, 2017].

25. *Id.* at 8.

26. *Id.*

27. *Id.* at 14.

reasoning, on qualifications, on experience.”²⁸ Judiciary Committee Chair Chuck Grassley (R-IA), in turn, added the separation of powers point:

It’s odd that some of the same folks who will claim that you’re not independent from the [P]resident will turn around and . . . try to extract from you promises and commitments before they pass judgment on your nomination. . . .

. . . .

You’re going to be asked to make promises and commitments about how you’ll rule on particular issues. Now, they won’t necessarily ask you that directly . . . [.]

Instead they’ll probably ask you about old cases, whether they were correctly decided. Of course, that’s another way of asking the very same question. They know that you can’t answer, but they’re going to ask you anyway.²⁹

Grassley, like many of his colleagues, then explicitly attributed this rule to Justice Ginsburg. “[I]t’s what we call the Ginsburg standard,” he said.³⁰

Gorsuch readily took the hint. When Grassley asked Gorsuch his opinion about the personal right to bear arms established in *District of Columbia v. Heller*,³¹ Gorsuch said he would “respectfully respond that it is a precedent of the United States Supreme Court,” but would say nothing else on the topic.³² Grassley asked Gorsuch the same question about *Citizens United v. Federal Elections Commission*,³³ *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,³⁴ *Gideon v. Wainwright*,³⁵ *Bush v. Gore*,³⁶ *Roe v. Wade*,³⁷ and *Griswold v. Connecticut*.³⁸ To each of Grassley’s inquiries, Gorsuch essentially replied: “Respectfully, Senator, I give you the same answer.”³⁹

28. *Id.* at 47. Senator Kennedy went on, somewhat colorfully, to state that “I guess what I want is a cross between Socrates and Dirty Harry. And I believe you just might be that person.” *Id.* at 48.

29. *Senate Committee on the Judiciary Hearing on the Nomination of Neil Gorsuch to Be Associate Justice of the U.S. Supreme Court*, FED. NEWS SERV., Mar. 21, 2017, 2017 WLNR 8821289, at 4–6 [hereinafter *Gorsuch Transcript*, Mar. 21, 2017].

30. *Id.* at 6.

31. 554 U.S. 570 (2008).

32. *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29, at 6–7.

33. 558 U.S. 310 (2010).

34. 565 U.S. 171 (2012).

35. 372 U.S. 335 (1963).

36. 531 U.S. 98 (2000).

37. 410 U.S. 113 (1973).

38. 381 U.S. 479 (1965).

39. *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29, at 7; *see id.* at 7–8.

An exchange between Gorsuch and Senator Thom Tillis (R-NC) exemplifies the synergistic way the nominee and the senators talked about the nominee's privilege to not provide opinions on even the most well-settled cases:

Tillis: [W]ould you consider it an inappropriate question for me to get you to answer a question that would be in violation of the code of conduct for United States judges? Would you consider that an inappropriate question?

Gorsuch: Senator, I—questions aren't inappropriate. Answers would be inappropriate. I'm the one whose bound by my code of conduct. . . .

. . . .

Tillis: These folks don't get it. They realize that you were following a code of conduct and you answer the questions to the best of your ability within the guidelines that you as a judge have.

. . . You haven't side-stepped a single one. You've answered every one to the best of your ability within the guidelines that you have as a sitting judge. . . .

. . . There was never an instance over the course of these last three days where you wavered."⁴⁰

In explaining his refusal to answer questions about *Griswold*, Gorsuch neatly invoked both aspects of the privilege within a single statement:

If I were to start telling you which are my favorite precedents or which are my least favorite precedents or if I view a precedent in that fashion, I would be tipping my hand and suggesting to litigants that I've already made up my mind about their cases. That's not a fair judge. . . .

And then [there is] the independence problem. If it looks like I'm giving *hints or previews* or intimations about how I might rule . . . I think that's the beginning of the end of the independent judiciary if—if judges have to make effectively campaign promises for confirmation.⁴¹

Gorsuch's reluctance to affirm existing law extended even to perhaps the single most iconic case in the current constitutional canon: *Brown v. Board of Education*.⁴² His exchange with Senator Blumenthal about that case is worth reading in full:

Blumenthal: Let me ask you. Did you agree or do—I'm sorry, do you agree with the result in *Brown v. Board of Education*?

Gorsuch: Senator, *Brown v. Board of Education* corrected an erroneous decision—a badly erroneous decision—and vindicated a dissent by the

40. *Gorsuch Transcript*, Mar. 22, 2017, *supra* note 1, at 104.

41. *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29, at 8 (emphasis added).

42. 347 U.S. 483 (1954).

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first Justice Harlan in *Plessy v. Ferguson* where he correctly identified that separate to advantage [*sic*] one race can never be equal.

Blumenthal: And do you agree with—with the result?

Gorsuch: In *Plessy*? No. . . .

Blumenthal: . . . you agree with the result in *Board v. Board*?

Gorsuch: *Brown v. Board of Education*, Senator, was a correct application of the law of precedent and . . .

Blumenthal: You agree with it?

Gorsuch: Senator, it is a correct application of the law of precedent.

Blumenthal: By the way, when Chief Justice Roberts testified before this committee and he was asked by Senator Kennedy quote do you agree with the court[']s conclusion? Meaning in *Brown*, that the segregation of children in public schools solely on the basis of race is unconstitutional. Judge Robert[s] answered unequivocally quote, “I do.”

Gorsuch: Senator . . .

Blumenthal: Would you agree with Judge Roberts?

Gorsuch: Senator, there’s no—there’s—there’s no daylight, here.

Blumenthal: OK.⁴³

It is difficult to know what to make of this exchange. It is unlikely that Gorsuch was expressing disagreement with *Brown*, but nor was he willing to simply affirm it as had Roberts (and every other nominee testifying before the Judiciary Committee in recent decades). The most likely explanation for the exchange may be that Gorsuch simply was unwilling to express an opinion on virtually *any* case, no matter how canonical. This understanding certainly is supported by his responses throughout the hearing: at the end of the process, Gorsuch had provided firm responses on just a handful of issues. He agreed that *Plessy v. Ferguson*⁴⁴ and *Korematsu v. United States*⁴⁵ were wrongly decided, he affirmed two early privacy cases (*Meyer v. Nebraska*⁴⁶ and *Pierce v. Society of Sisters*⁴⁷), and he accepted as correct the Court’s opinions in *Gideon v. Wainwright*⁴⁸ and *Marbury v. Madison*.⁴⁹

Gorsuch’s reticence drew frustrated reactions from several Democratic senators. In addition to the above back-and-forth regarding *Brown*, Blu-

43. *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29, at 145.

44. 163 U.S. 537 (1896).

45. 323 U.S. 214 (1944); *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29, at 160; *see also Gorsuch Transcript*, Mar. 22, 2017, *supra* note 1, at 142.

46. 262 U.S. 390 (1923); *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29 at 127.

47. 268 U.S. 510 (1925); *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29, at 127.

48. 372 U.S. 335 (1963).

49. 5 U.S. (1 Cranch) 137 (1803); *Gorsuch Transcript*, Mar. 21., 2017, *supra* note 29, at 22.

menthal noted that as nominees both Justice Samuel Alito and Chief Justice John Roberts had accepted as correct the results reached by the Supreme Court in *Eisenstadt v. Baird*⁵⁰ and *Griswold*.⁵¹ Senator Al Franken (D-MN) likened the hearings to a “job interview” and complained that Gorsuch’s refusal to answer hindered the senators’ ability to fulfill their constitutional duty.⁵² Senator Mazie Hirono (D-HI) captured the Democratic senators’ frustration in her closing remarks: “I wish,” she said to Gorsuch, “that I could say that this hearing has been illuminating for what was said by you. Instead, I’m left to judge your nomination largely on the basis of what you refuse to say.”⁵³

III. THE GINSBURG RULES

As discussed above, Gorsuch, like the senators, repeatedly tied his reticence to answer questions to Justice Ginsburg. Asked about *Roe* and *Planned Parenthood v. Casey*,⁵⁴ then about *Bowers v. Hardwick*,⁵⁵ *Lawrence v. Texas*,⁵⁶ *Brown* and *Loving v. Virginia*,⁵⁷ Gorsuch quoted Ginsburg’s 1993 testimony:

I’ve also said, Senator . . . once a judge starts committing, promising, hinting, previewing, forecasting, agreeing or disagreeing with precedent at this confirmation table, we’re in the process then of campaign promises. And we’re in that process, Senator, I fear, of judges having to make commitments, tacit promises, hints, previews, as Justice Ginsburg called them, in order to become confirmed. Once we do that, I’m fearful for the independence of judiciary.⁵⁸

So was Gorsuch’s unwillingness to engage with senatorial questioning merely replicating the practice of prior nominees in general and Justice Ginsburg in particular? Answering this question requires a more nuanced understanding of nominees’ prior practice, and of the so-called “Ginsburg Rule” itself.

This Part explores those issues. In doing so, we show two things: 1) the practice of Supreme Court nominees refusing to answer certain ques-

50. 405 U.S. 438 (1972).

51. To which Gorsuch replied, “to say I agree or I disagree with a precedent of the United States Supreme Court, as a judge, that’s an act of hubris that to me just doesn’t feel like a judicial function.” *Gorsuch Transcript*, Mar. 22, 2017, *supra* note 1, at 91–92.

52. *Id.* at 129–30.

53. *Id.* at 143.

54. 505 U.S. 833 (1992).

55. 478 U.S. 186 (1986).

56. 539 U.S. 558 (2003).

57. 388 U.S. 1 (1967).

58. *Gorsuch Transcript*, Mar. 22, 2017, *supra* note 1, at 93.

tions posed by members of the Senate Judiciary Committee predates Justice Ginsburg nomination by decades; and 2) Justice Ginsburg's own practice was more nuanced than frequently claimed, and should be more accurately referred to as the "Ginsburg Rules"—one of which Gorsuch complied with and one of which he did not.

The very first nominee to take unrestricted questions from the Senate Judiciary Committee in public and under oath invoked the privilege to not answer questions. Nominated in 1939, Felix Frankfurter opened his testimony with this:

I should think it improper for a nominee no less than for a member of the Court to express his personal views on controversial political issues affecting the Court . . . I should think it not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplement my past record by present declarations.⁵⁹

John Marshall Harlan followed Frankfurter's example in his 1955 hearing. Harlan refused to opine on a then-hotly contested issue about whether a treaty can "be paramount" to domestic law.⁶⁰ In doing so, Harlan invoked the privilege in language that is, to contemporary ears, more familiar than Frankfurter's:

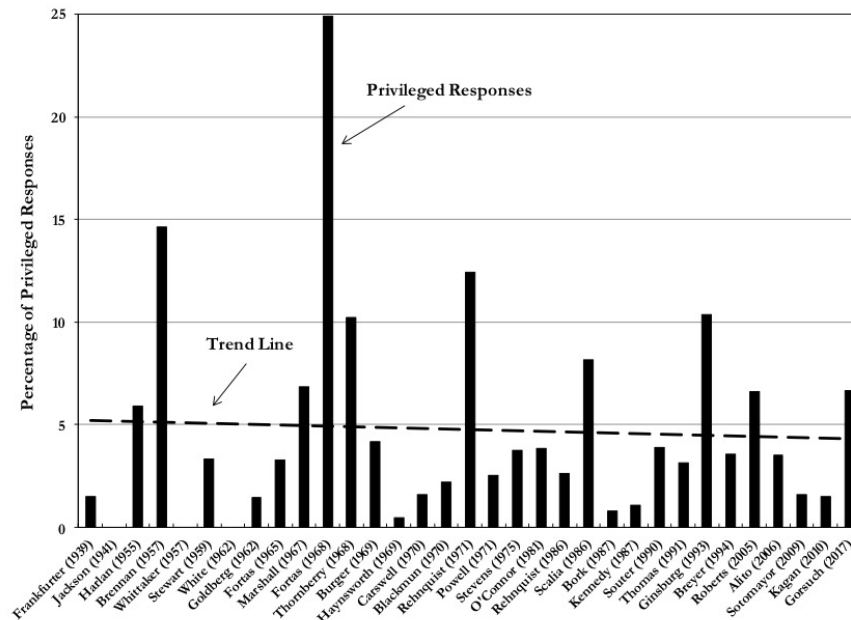
I am not one of those who believes that the Senate Judiciary Committee should be a rubber stamp in exercising its constitutional responsibility in participating in nominations. I am not of that school of thought. And that is why I am here. By the same token, I am sure that the members of the committee would recognize that under our scheme of things that a nominee to high judicial office would commit the gravest indiscretion, and I may add, impropriety, in expressing views as to how he would vote on issues that have not yet come before him and may come before him as a member of the Court.⁶¹

59. *Nomination of Felix Frankfurter to Be an Associate Justice of the Supreme Court Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 107–08 (1939) [hereinafter *Frankfurter Transcript*].

60. *Nomination of John Marshall Harlan, of New York, to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 84th Cong. 137–38 (1955) (statement of Sen. Eastland, Member, S. Comm. on the Judiciary). This issue was hotly contested because of Southern senators' concerns about the effect of international human rights treaties on their states' racially discriminatory practices on their states' racially discriminatory practices.

61. *Id.* at 139.

Figure 1. Percentage of Privileged Responses, 1939–2017



As shown in Figure 1, Frankfurter and Harlan exemplify a practice common to all nominees appearing before the Senate Judiciary Committee. Figure 1 contains information on the percentage of privileged responses each nominee gave at his or her hearing. The data from 1939–2010 come from *The U.S. Supreme Court Confirmation Hearing Database*,⁶² which contains information on every question asked and every answer given at each hearing at which the nominee appeared in open session and took unrestricted questions while under oath. The data for Gorsuch were collected for this Article using the coding rules developed in that database.⁶³ The unit of analysis in the dataset, which constitutes more than 31,000 observations, is the change of speaker, meaning a new observation begins whenever the speaker changes (e.g., from senator to nominee).

Privileged responses are those in which the nominee refuses to answer a question on the ground that answering would create the reality or appear-

62. Paul M. Collins, Jr. & Lori A. Ringhand, *The U.S. Supreme Court Confirmation Hearings Database*, BLOGS AT UMASS AMHERST: PAUL M. COLLINS, JR., <https://blogs.umass.edu/pmcollins/data/> [<https://perma.cc/H4X6-7A2B>].

63. Though we are confident in the conclusions drawn in this Article, we note that the Gorsuch hearing was coded from unofficial transcripts (*Federal News Service*) and has not yet been subjected to a full reliability analysis.

ance of bias, would interfere with judicial independence, or would be inappropriate for some other, similar reason.⁶⁴ A nominee indicates a privileged response when the nominee or the senator refers back to a previously asserted definition of the privilege to not respond, or answers a question by describing the scope of the privilege being asserted.⁶⁵ The privilege variable does not include instances in which the nominee evades a senator's question but does not provide a privileged reason for the evasion.⁶⁶

As shown in Figure 1, Ginsburg invoked the privilege in just over 10 percent (10.3 percent) of her hearing comments. Plainly, however, the practice did not begin with her, and nor did she invoke the privilege the most often. All but three nominees (Jackson, Whittaker and White) invoked the privilege at some point during their hearings. Abe Fortas, at his confirmation hearings for Chief Justice, did so the highest percentage of the time (24.9 percent). William Brennan in 1957 (14.6 percent) and William Rehnquist in his 1971 Associate Justice hearing (12.4 percent) also gave more privileged answers than did Ginsburg. Nominees Harlan (5.0 percent), Thurgood Marshall (6.8 percent), Antonin Scalia (8.1 percent), and Roberts (6.5 percent) also each gave privileged responses in at least 5 percent of their comments.

Gorsuch's privileged response rate was 6.6 percent. This puts him closer to this later group than to Ginsburg, with a response rate most similar to Roberts'. In terms of invocation of the privilege, then, Gorsuch is correct in asserting that he followed Ginsburg's lead, and in fact gave even fewer privileged responses than did she.

The issues and cases underlying these numbers further illustrate the ways in which nominees have used the privilege to not respond to avoid opining on the most hotly contested issues of their eras. For example, in his 1965 hearing for Associate Justice, Abe Fortas refused to answer certain questions, invoking the privilege when asked about the effect of *Reynolds v. Sims*⁶⁷ on the apportionment of the U.S. Senate (decided in 1964, and constitutionalizing the "one-person-one-vote" rule for legislative districting). Three years later, in his hearing for Chief Justice, Fortas also refused to answer questions about the freshly-decided *Katzenbach v. Morgan*⁶⁸

64. *Id.*

65. *Id.*

66. *Id.*

67. 377 U.S. 533 (1964); *Nomination of Abe Fortas To Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 89th Cong. 54 (1965).

68. 384 U.S. 641 (1966).

(upholding the Voting Rights Act of 1965).⁶⁹ In 1968, unsuccessful nominee Homer Thornberry invoked the privilege in regard to the constitutionality of poll taxes,⁷⁰ and both Thornberry and William Brennan (in 1957) refused to answer pointed questions about constitutional protections available to communists.⁷¹

Sex and gender questions also were among the issues earlier nominees frequently avoided answering questions about. The issue of gender discrimination first appeared at the 1970 hearing of another unsuccessful nominee, Harrold Carswell. Carswell invoked the privilege in declining to answer a question about whether an employer could refuse to hire mothers with young children.⁷² Most recent nominees have refused to answer questions about sexual orientation discrimination and the right to marriage equality.⁷³

To contemporary ears, the most striking invocation of the privilege may come from Potter Stewart, testifying in 1959, just four years after *Brown v. Board of Education* was decided. Like Gorsuch, Stewart avoided directly affirming the constitutional correctness of *Brown*. Unlike Gorsuch, he worked hard to not even indirectly signal his agreement or disagreement with the decision. When asked by Senator John McClellan (D-AR) whether he agreed with the “reasoning and logic applied, or the lack of application of either or both as the case may be,” Stewart said, “it is a question that I have never directly asked myself. I was a Circuit Judge, exactly the same time as that particular decision was announced.”⁷⁴ The exchange continued as follows:

McClellan: I am not asking you do you favor segregation, integration or anything else. I am asking you this – I am thinking in terms of what is now, what the many think is the law of the land, the decision that was reached. Now I am asking you, do you agree with the view, the reasoning and logic applied or the lack of application of either or both, as the case may be, and the philosophy expressed by the Supreme Court in arriving at its decision in the case of *Brown vs. Board of Education* on May 17, 1954?

69. *Nomination of Abe Fortas, of Tennessee, to Be Chief Justice of the United States and Nomination of Homer Thornberry, of Texas, to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 90th Cong. 181–82 (1968).

70. *See, e.g., id.* at 263–66.

71. *Id.* at 273–74; *Nomination of William Joseph Brennan, Junior, of New Jersey, to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 85th Cong. 19–20 (1957).

72. *Nomination of George Harrold Carswell, of Florida, to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 91st Cong. 40–41 (1970).

73. COLLINS & RINGHAND, *supra* note 9.

74. *Nomination of Potter Stewart to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 86th Cong. 34 (1959).

Stewart: That question I think I could not answer with an unqualified “yes” or “no.” And I am still in all honesty influenced by the fact then, as I say, having been a Circuit Judge, the law of the land is, at least it is to a lawyer you tell them, until that decision is changed that is the law.⁷⁵

Senators McClellan, John Carroll (D-CO), Thomas Hennings, Jr. (D-MO) and Sam Ervin, Jr. (D-NC) then embarked on a long exchange about whether Stewart should or should not answer the question. Senator McClellan said he needed a yes or no answer in order for him to perform his duty in regard to the confirmation.⁷⁶ Carroll raised a point of order, arguing that it was not “proper” for a nominee to make a commitment to the committee and thus “shackle and trammel his free exercise of his own intellect, of his own power to determine and to decide cases that come before him.”⁷⁷ Senator Ervin responded:

[I]s it that we are to try to find out what the knowledge of the nominee of the Supreme Court is with reference to what has been decided in the law, and ought not be permitted to find out what his attitude is toward the Constitution, or what his philosophy is? And if that is so, I don't see why . . . the Constitution was so foolish as to suggest that the nominee for the Supreme Court ought to be confirmed by the Senate.⁷⁸

The senators debated the point of order for an extraordinary nineteen pages of the printed transcript, including four separate calls for a roll call vote, before Senator Carroll withdrew his point of order after being reassured by the committee chair that Stewart would be allowed to decline to answer the question if he believed the question was improper.⁷⁹ In the end, the only answer Stewart gave was this:

Senator McClellan, the way that question is phrased I cannot conscientiously give you a simple “yes” or simple “no” answer. . . . I am here because I recognize the duty of the United States Senate under the Constitution with respect to appointments to the Federal Judiciary and the duty to find out all about me and to conscientiously get what you feel you need to know and therefore, I will try to first, tell you why I cannot. There are now pending in the court several, many, cases in which the reasoning of that particular thing is relied upon by at least one of the parties. Therefore, the decision inevitably will involve in that case consideration by the Court of that question.

If I give a simple “yes” or “no” answer to your conscientiously phrased question, therefore, it would not only disqualify my participation pending in cases and heaven only knows how many future cases, but it seems

75. *Id.*

76. *Id.* at 40.

77. *Id.* at 41.

78. *Id.* at 43–44.

79. *Id.* at 59.

to me it would involve a serious problem of simple judicial ethics. It would or might be construed in a case as prejudice on my part, one way or the other, about cases that are before the court and now pending. However, I recognize the United States Senate, as I said at the beginning, your duty to it. And therefore I can partially answer your question. . . . Let me say this so there will be no misunderstanding with this thought in mind. I would not like you to vote for me for the top position that I am dedicated to because I am for overturning that decision, because I am not. I have no pre-judgment against that decision.⁸⁰

As these excerpts demonstrate, the practice of Supreme Court nominees asserting a privilege to not answer certain questions plainly began well before Justice Ginsburg's 1993 hearing. All nominees testifying before the Senate Judiciary Committee have answered some questions while refusing to answer others.⁸¹ Ginsburg's articulation of the privilege differed from earlier nominees only perhaps in the colorful language she used in her opening statement, which included her now much-quoted insistence on offering "no forecasts, no hints":

Judges in our system are bound to decide concrete cases, not abstract issues; each case is based on particular facts and its decision should turn on those facts and the governing law, stated and explained in light of the particular arguments the parties or their representatives choose to present. A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.⁸²

Consistent with this articulation, and with the practice of previous nominees, Ginsburg refused to answer questions about the hot button issues which, in 1993, were certain to return in short order to the Court. She refused to opine on the then undecided understanding of the Second Amendment as including a personal right to bear arms,⁸³ the constitutionality of private school vouchers,⁸⁴ the constitutionality of same-sex education,⁸⁵ the "racial gerrymandering" claims recognized by the Court earlier that year in *Shaw v Reno*,⁸⁶ the consequences of a proposed balanced budget amendment,⁸⁷ the proper role of sexual orientation in child custody disputes,⁸⁸ the

80. *Id.* at 63.

81. For a more in-depth analysis of nominee responsiveness, see COLLINS & RINGHAND, *supra* note 9.

82. *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 55 (1993) [hereinafter *Ginsburg Transcript*].

83. *Id.* at 128, 242.

84. *Id.* at 140.

85. *Id.* at 141.

86. *Id.* at 144, 253.

87. *Id.* at 144–45.

constitutionality of the death penalty,⁸⁹ and the use of heightened review for sexual orientation discrimination.⁹⁰ Ginsburg also declined to comment on the appropriate parameters of the contested First Amendment doctrines set out in *Buckley v. Valeo*,⁹¹ *First National Bank of Boston v. Bellotti*,⁹² *Red Lion Broadcasting v. Federal Communications Commission*,⁹³ and *Wisconsin v. Mitchell*.⁹⁴ Each of these issues was, at the time of Ginsburg's confirmation hearing, actively contested and thus fell into her "no forecasts, no hints" prohibition regarding cases likely to come before the Court in the near future.

But despite her association with and liberal use of the privilege, Justice Ginsburg was careful in how she invoked it. In the same opening statement in which she stressed the importance of not appearing to pre-judge cases likely to come before the Court, she also made clear her understanding that the open-textured language of many contested constitutional provisions underscored the Senate's duty to consider Supreme Court nominees in terms of their likely opinions. The Constitution, she said, belongs not to the Court or the Justices, but to "We, the People."⁹⁵ Supreme Court Justices, she went on,

participate in shaping a lasting body of constitutional decisions. They continuously confront matters on which the Framers left things unsaid, unsettled, or uncertain. For that reason, when the Senate considers a Supreme Court nomination, the Senators are properly concerned about the nominee's capacity to serve the Nation, not just for the here and now, but over the long term. . . .

. . . .

. . . Judges, I am mindful, owe the elected branches—the Congress and the President—respectful consideration of how court opinions affect their responsibilities.⁹⁶

We could think of this part of Ginsburg's confirmation approach as setting out a *second* Ginsburg Rule: while nominees have a professional duty to refrain from previewing their opinion about cases and issues likely to come before the Court in the future, they *also* have a duty to be mindful

88. *Id.* at 146.

89. *Id.* at 192.

90. *Id.* at 322–23.

91. 424 U.S. 1 (1976).

92. 435 U.S. 765 (1978).

93. 395 U.S. 367 (1969).

94. 508 U.S. 476 (1993); *Ginsburg Transcript*, *supra* note 82, at 351–52, 357.

95. *See Ginsburg Transcript*, *supra* note 82, at 51.

96. *Id.* at 51–53.

of their obligations to Congress and the country over time when interpreting under-determinate constitutional text.

Figure 2. Percentage of Firm Responses, 1939–2017

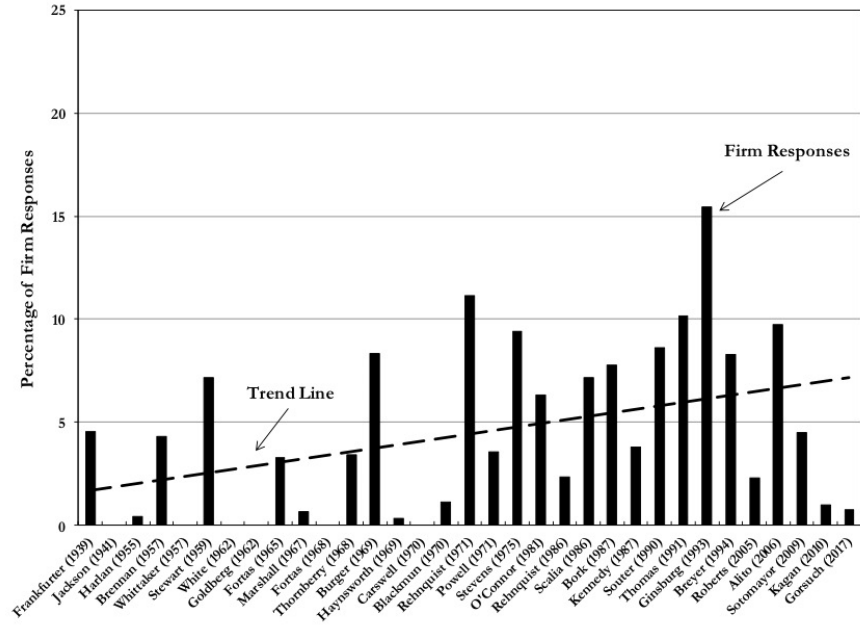


Figure 2 provides information on the percentage of statements nominees made in which the nominees did just that: took firm positions on specific legal issues. Nominee responses are coded as “firm” when a nominee provides a firm, current position on a clearly identified legal issue or case. Overall, nominees provide firm positions in about 4 percent of statements. By this measure, Ginsburg was the most responsive nominee in the data. She gave firm answers in 15.4 percent of her comments—more than any other nominee who has testified before the Committee. Rehnquist, testifying at his Associate Justice hearing in 1971, was her closest competitor, giving firm responses 11.5 percent of the time. Rehnquist was followed by Justices Thomas (10.1 percent), Alito (9.7 percent) and Stevens (9.3 percent). Gorsuch, in contrast, give firm responses less than 1 percent of the time.

In taking firm positions on previously contested constitutional issues, nominees use their testimony to assure the senators and the nation that they

concur with the existing constitutional consensus. Justice Ginsburg did this repeatedly and across an array of issue areas, notwithstanding her formulation of the judicial canon of ethics, or her self-described prohibition on providing “no forecasts; no previews, no hints.” Ginsburg affirmed *Griswold*, *Eisenstadt*, and—atypically—*Roe*.⁹⁷ She also affirmed that gender discrimination required heightened scrutiny,⁹⁸ that there is a constitutional right to privacy in regard to personal autonomy,⁹⁹ and that *Marbury v. Madison* was correctly decided.¹⁰⁰ She unequivocally stated that *Dred Scott v. Sandford*¹⁰¹ and *Korematsu* were wrongly decided,¹⁰² and that she had “no difficulty” with the test set out in *Lemon v. Kurtzman*.¹⁰³ She agreed that the *Lochner*-era cases were wrong,¹⁰⁴ and affirmed *Gibbons v. Ogden*,¹⁰⁵ *Brown*, and the now-celebrated dissenting opinions in *Abrams v. United States*¹⁰⁶ and *Gitlow v. New York*.¹⁰⁷ She also endorsed Justice Brandeis’s concurring opinions in *Whitney v. California*¹⁰⁸ and the Court’s opinion in *Brandenburg v. Ohio*.¹⁰⁹ She affirmed that the First Amendment properly protected more than just political speech,¹¹⁰ and celebrated *Taylor v. Louisiana*’s finding that women have a right to serve on juries.¹¹¹

Ginsburg’s willingness to opine on these canonical cases and doctrines was noted even by opposing-party senators. While complaining that Ginsburg was “not very specific” on the death penalty, Senator Hatch nonetheless noted her specificity on abortion, equal rights and “a number of other issues.”¹¹² It appears, then, that the “Ginsburg Rule” is really the “Ginsburg Rules”: nominees should not preview how they may decide cases or issues

97. *Id.* at 207.

98. *Id.* at 164.

99. *Id.* at 185.

100. *Id.* at 188.

101. 60 U.S. (19 How.) 393 (1857).

102. *Ginsburg Transcript*, *supra* note 82, at 210.

103. 403 U.S. 602 (1971); *Ginsburg Transcript*, *supra* note 82, at 212.

104. *Ginsburg Transcript*, *supra* note 82, at 288.

105. 22 U.S. (9 Wheat) 1 (1824).

106. 250 U.S. 616 (1919).

107. 268 U.S. 652 (1925).

108. 274 U.S. 357 (1927).

109. 395 U.S. 444 (1969); *Ginsburg Transcript*, *supra* note 82, at 312–13.

110. *Ginsburg Transcript*, *supra* note 82, at 314–15.

111. 419 U.S. 522 (1975); *see Ginsburg Transcript* at 317–18.

112. *Ginsburg Transcript*, *supra* note 82, at 263. Echoing the perpetual frustration of opposing-party senators, Senator Hatch said: “The thing I am worried about is that it appears that your willingness to discuss the established principles of constitutional law may depend somewhat on whether your answer might solicit a favorable response from the committee.” *Id.* at 264. He then noted that as nominees, Justices Thomas and Souter had at their confirmation hearings each provided more specific answers to the death penalty, which provoked Senator Howard Metzenbaum (D-OH) to add that Justice Kennedy, like Ginsburg, had avoided answering those same questions. *Id.* at 265–66.

likely to come before the Court, but they also *should* respect the role of the Senate in the confirmation process by affirming their acceptance, in public and under oath, of those previously controversial constitutional issues which by the time of their nomination are well-settled and firmly within the contemporary constitutional canon.

Ginsburg was not atypical in taking this two-tiered approach in her testimony. Earlier nominees have done so as well, as Figure 2 reveals. They have claimed a privilege to not answer questions about currently controversial cases and doctrines, while also affirming their acceptance of a core set of constitutional choices as both settled law *and* constitutionally correct. These nominees, named by Democratic and Republican Presidents, and testifying before Democratic and Republican Senate majorities, affirmed *Griswold*, agreed that gender discrimination warrants heightened scrutiny, that the Constitution protects at least a basic privacy right, that non-textual liberty interests are protected under the substantive Due Process Clause, and that the First Amendment protects more than political speech.¹¹³ In fact, as we have demonstrated in an exhaustive study of all confirmation testimony given in unrestricted and open session before the Senate Judiciary Committee, every nominee since 1987 had affirmed each of these core tenants of today's constitutional canon.

IV. THE RESPONSIVENESS RATIO

We now turn to evaluating the extent to which Ginsburg and Gorsuch avoided responding by invoking the privilege and also the extent to which they gave firm answers to questions about concrete doctrines and cases. Together, these two response types provide a comprehensive picture of nominee responsiveness at the Judiciary Committee hearings.

We begin by examining the issues and subissues in which Ginsburg and Gorsuch most frequently invoked privilege. These issue and subissue categories are primarily based on the *Policy Agendas Project* codebook,¹¹⁴ with several confirmation hearing-specific categories added. Overall, there are thirty-four issue categories and hundreds of subissue categories that each statement can conceivably fall into. Each statement falls into a single issue area and can be included in up to six subissue areas (although most fall into a single subissue area).

113. See generally COLLINS & RINGHAND, *supra* note 9.

114. COMPARATIVE AGENDAS PROJECT, <http://www.comparativeagendas.net> [https://perma.cc/TC25-BMK8].

There are limitations to this coding system. For example, the “Issue Area” code displayed on Tables 1 and 2 refers to the main issue raised in the comment being coded. In some cases, this may be different than the main issue raised in a case also mentioned in the comment.¹¹⁵ Also recall that the unit of analysis is the change of speaker so a single comment containing two privileged (or two firm) responses would appear in the data as a single privileged (or single firm) response.¹¹⁶ Nominees also at times will invoke the privilege on a case or issue only to provide a firm answer when the issue is reframed or pressed later in the hearing, or give more than one type of response to a question involving a named case (which is why some case names appear on both Table 1 and Table 2). Finally, not all firm or privileged responses include named cases. Nonetheless, the following Tables provide useful comparative insight into the different ways nominees are responding at their hearings.

Table 1. The Issues and Cases in Which Ginsburg and Gorsuch Exercised Privilege

Issue	Ginsburg	Gorsuch
Civil Rights	12.6% (26)	9.4% (43)
	Brown v. Board of Education (1954)	Brown v. Board of Education (1954)
	Buckley v. Valeo (1976)	Bush v. Gore (2000)
	Chevron v. Natural Resources Defense Council (1984)	Citizens United v. FEC (2010)
	Dred Scott v. Sandford (1856)	District of Columbia v. Heller (2008)
	First National Bank of Boston v. Bellotti (1978)	Eisenstadt v. Baird (1972)
	Lemon v. Kurtzman (1971)	Griswold v. Connecticut (1965)
	Mississippi University for Women v. Hogan (1982)	Planned Parenthood v. Casey (1992)
	Planned Parenthood v. Casey (1992)	
	Presley v. Etowah County Commission (1972)	
	Roe v. Wade (1973)	

115. *Id.*

116. *Id.*

	Rust v. Sullivan (1991) Sanchez-Espinoza v. Reagan (1985) Shaw v. Reno (1993) Thornburgh v. American College of Obstetricians and Gynecologists (1986) U.S. v. Miller (1939) Wards Cove Packing v. Attonio (1989)	
Labor and Employment		5.1% (2) Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton (2016)
Education	100% (3)	
Criminal Justice	9.5% (4) Herrera v. Collins (1993)	3.2% (1)
National Defense		3.1% (1)
Technology	100% (2) Action for Children's Television v. F.C.C. (1988) Miami Herald v. Tornillo (1974) Red Lion Broadcasting Co. v. F.C.C. (1969)	
International Affairs	50% (1) U.S. v. Alvarez-Machain (1992)	
Government Operations	11.8% (2) Davis v. Passman (1979) Walker v. Jones (1984)	13.8% (21) Marbury v. Madison (1803) Skidmore v. Swift & Co. (1944)
Federalism		11.8% (2)

Public Land and Water	32.3% (10) Lucas v. South Carolina Coastal Council (1992) Montana v. U. S. (1981) Nollan v. California Coastal Commission (1987) South Dakota v. Bourland (1993) State of Washington v. E.P.A. (1985) U.S. v. Sioux Nation of Indians (1980)	
Miscellaneous	5% (2)	2.9% (2)
Judicial Philosophy	7.4% (5) Ex parte McCardle (1868) U.S. v. Klein (1879)	4.9% (7)
Hearing Administration		2.6% (9)
Total Privileged Responses	55	89

Numerical entries represent the number of privileged responses each nominee gave in each category divided by the total number of statements they made in each category, expressed as a percentage. Numbers in parentheses indicate the number of privileged responses each nominee provided in each category. The case names represent the cases in each category in which nominees gave a privileged response.

As shown in Table 1, both Ginsburg and Gorsuch used the privilege to avoid offering opinions on the most contested issues of their respective eras. Both nominees invoked the privilege to avoid talking about a slew of controversial cases, particularly in regard to civil rights issues. Justice Ginsburg also used the privilege more expansively to avoid an array of issue areas outside that context, while Justice Gorsuch, perhaps in homage to his predecessor in the seat, Justice Scalia, invoked it at one point to refuse to provide an opinion about the iconic case of *Marbury v. Madison*.¹¹⁷

117. Gorsuch affirmed *Marbury* later in the hearing. Justice Scalia, however, frustrated senators by refusing to affirm this seminal case at his 1986 confirmation hearing. See Howard Kurtz, *Judicial Reticence Frustrates Senators*, WASH. POST (Sept. 9, 1986), https://www.washingtonpost.com/archive/politics/1986/09/09/judicial-reticence-frustrates-senators/75c46649-998a-409b-8006-ef5f21e0efbb/?utm_term=.5e8482fcae65 [https://perma.cc/563N-CJPS].

Table 2. The Issues and Cases in Which Ginsburg and Gorsuch Took Firm Positions

Issue	Ginsburg	Gorsuch
Civil Rights	26.6% (55)	1.5% (7)
	Coker v. Georgia (1977)	Meyer v. Nebraska (1923)
	DKT Memorial Fund Ltd. v. Agency for Intern. Development (1989)	Pierce v. Society of Sisters (1925)
	Dred Scott v. Sandford (1856)	Plessy v. Ferguson (1896)
	Federal Election Commission v. International Funding Institute (1992)	
	Frontiero v. Richardson (1973)	
	Goldman v. Secretary of Defense (1984)	
	Korematsu v. U.S. (1944)	
	Lemon v. Kurtzman (1971)	
	Lochner v. New York (1905)	
	Loving v. Virginia (1967)	
	Michael H. v. Gerald D. (1989)	
	Moore v. City of East Cleveland (1977)	
	Planned Parenthood v. Casey (1992)	
	Poe v. Ullman (1961)	
	Presley v. Etowah County Commission (1972)	
	Reed v. Reed (1971)	
	Roe v. Wade (1973)	
	Rust v. Sullivan (1991)	
	Sanchez-Espinoza v. Reagan (1985)	
	Skinner v. State of Oklahoma (1942)	
	Struck v. Secretary of Defense (1971)	

	Weinberger v. Wiesenfeld (1975)	
Labor and Employment	16.7% (1) Conair v. N.L.R.B. (1983) Fort Bragg Association of Educators v. Federal La- bor Relations Authority (1989) St. Francis Federation of Nurses and Health Pro- fessionals v. N.L.R.B. (1984)	
Criminal Justice	9.5% (4) Miranda v. Arizona (1966)	3.2% (1) Gideon v. Wainwright (1963)
Banking and Finance	25% (1) Michigan Citizens for an Independent Press v. Thornburgh (1989) Rothery Storage & Van v. Atlas Van Lines (1986)	
Government Operations	5.9% (1) Davis v. Passman (1979) Walker v. Jones (1986)	
Federalism	33.3% (1) Erie Railroad v. Tompkins (1938) Swift v. Tyson (1842)	
Miscellaneous	10% (4) Burnet v. Coronado Oil & Gas (1932) Dellums v. U.S. Nuclear Regulatory Commission (1988) Di Santo v. Pennsylvania (1927)	

	Erie Railroad v. Tompkins (1938) Swift v. Tyson (1842)	
Judicial Philosophy	22.1% (15) Burnet v. Coronado Oil & Gas (1932) Dred Scott v. Sandford (1856) Marbury v. Madison (1803) Worcester v. Georgia (1932)	1.4% (2) Marbury v. Madison (1803)
Total Firm Responses	82	10

Numerical entries represent the number of firm answers each nominee gave in each category divided by the total number of statements they made in each category, expressed as a percentage. Numbers in parentheses indicate the number of firm answers each nominee provided in each category. The case names represent the cases in each category in which nominees took a firm position.

The issues and cases on which Ginsburg and Gorsuch provided firm answers are more varied than those on which they invoked the privilege. As shown on Table 2, while both nominees initially deferred on questions in which *Brown* was mentioned, Ginsburg later firmly asserted her understanding that the case was correctly decided. Ginsburg also provided firm opinions in eight times as many civil rights comments as did Gorsuch, including not only her affirmations of canonical cases such as *Loving v. Virginia* and *Reed v. Reed*, but also of the more controversial *Roe v. Wade* and *Planned Parenthood v. Casey*.

Comparing the privileged and firm response type data allows us to generate what we call a “responsiveness ratio.” The responsiveness ratio is a simple comparison between the percentage of firm responses given by a nominee relative to the percentage of privileged responses given by the same nominee. This is calculated by subtracting the percentage of privileged responses from the percentage of firm responses for each nominee. A positive response ratio shows that a nominee provided more firm answers than privileged responses, while a negative responsiveness ratio shows the opposite. Since the ratio is calculated as a percentage of responses given by the nominee, it sensibly can be used to compare nominees across time even as the confirmation hearings themselves become longer and more in-depth.

Table 3. The Percentage of Firm and Privileged Responses Given by Supreme Court Nominees, 1939–2017

Nominee	Percentage Firm	Percentage Privilege	Difference
Frankfurter (1939)	4.55	1.52	3.03
Jackson (1941)	0.00	0.00	0.00
Harlan (1955)	0.42	5.91	-5.49
Brennan (1957)	4.31	14.66	-10.34
Whittaker (1957)	0.00	0.00	0.00
Stewart (1959)	7.18	3.35	3.83
White (1962)	0.00	0.00	0.00
Goldberg (1962)	0.00	1.45	-1.45
Fortas (1965)	3.26	3.26	0.00
Marshall (1967)	0.64	6.86	-6.22
Fortas (1968)	0.00	24.94	-24.94
Thornberry (1968)	3.41	10.23	-6.82
Burger (1969)	8.33	4.17	4.17
Haynsworth (1969)	0.32	0.48	-0.16
Carswell (1970)	0.00	1.59	-1.59
Blackmun (1970)	1.11	2.22	-1.11
Rehnquist (1971)	11.16	12.42	-1.26
Powell (1971)	3.54	2.53	1.01
Stevens (1975)	9.39	3.76	5.63
O'Connor (1981)	6.30	3.84	2.47
Rehnquist (1986)	2.34	2.61	-0.28
Scalia (1986)	7.17	8.14	-0.98
Bork (1987)	7.75	0.82	6.93
Kennedy (1987)	3.77	1.08	2.69
Souter (1990)	8.64	3.90	4.74
Thomas (1991)	10.18	3.15	7.03
Ginsburg (1993)	15.44	10.36	5.08
Breyer (1994)	8.29	3.55	4.74
Roberts (2005)	2.28	6.60	-4.32

Nominee	Percentage Firm	Percentage Privilege	Difference
Alito (2006)	9.74	3.51	6.23
Sotomayor (2009)	4.50	1.58	2.92
Kagan (2010)	0.99	1.48	-0.49
Gorsuch (2017)	0.75	6.66	-5.91

As shown in Table 3, Ginsburg has a responsiveness ratio of +5.05. Gorsuch in contrast has a -5.86 responsiveness ratio. This is a more than 10 percent responsiveness gap. This is consistent with the qualitative review of the hearing transcripts, showing how Gorsuch adopted Ginsburg's practice of not commenting on cases or issues (Ginsburg's First Rule) and but did not adopt her practice of affirmatively accepting cases and issues firmly enconced in the constitutional canon (Ginsburg's Second Rule).

As close followers of the Supreme Court confirmation process, we find this troubling. Nominees rarely opine on the most controversial issues of their day, but most nominees—and all recent nominees—have expressed their acceptance of previously contested cases and issues that have become settled over time. This practice allows the Supreme Court confirmation hearings to add real value to our constitutional discourse. It provides a forum at which nominees accept, in public and under oath, the current constitutional consensus, and thereby provides a key mechanism through which the Court's previously controversial constitutional choices are validated. It also allows senators and the American public to understand clearly what cases and issues a nominee in fact considers settled—in other words, what the nominee considers to be on- and off- the constitutional wall.¹¹⁸

Gorsuch himself appeared to recognize the value of a process that provides this information. When talking about the power of precedent, he acknowledged the important role that settling previous disputes has in constitutional law. Precedent, he said, over time means that “what was once a hotly contested issue is no longer a hotly contested issue. We move forward.”¹¹⁹ Nonetheless, he refused to contribute to that process by affirming his acceptance of the Court's previously controversial but now settled cases.

This is disappointing. Supreme Court nominees' adherence to the second Ginsburg Rule helps navigate the challenge of reconciling U.S. style

118. Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 247–50 (David Dysenhaus & Malcom Thorburn eds., 2016).

119. *Gorsuch Transcript*, Mar. 21, 2017, *supra* note 29, at 9.

judicial review with a more than 200-year-old constitutional text. Almost by definition, cases with clear legal answers do not make it to the Supreme Court. The Court only hears between seventy and eighty cases a year. These usually are cases in which very able judges across the country have disagreed about the correct answer to the legal question presented. In constitutional cases, they more often than not are disputes involving some of the most open-textured language found in our Constitution, language like “equal protection,” “freedom of speech,” and “liberty.”

Consequently, legal craftsmanship, while a critical part of a Supreme Court Justice’s job, is rarely sufficient to decide hard cases. In case after case, Justices also must exercise judgment. They must take the hodgepodge of possibilities rendered by legal tools and mold them into a coherent body of law consistent with our most fundamental Constitutional commitments.

Senator Patrick Leahy (D-VT), speaking at the 1981 confirmation hearing of Sandra Day O’Connor, captured this idea in stressing to O’Connor the importance of the Senate’s role in the confirmation process. No one, he said:

[C]an now safely forecast the issues that will dominate the coming years on the Court, but certain questions never will and never should go away—how to balance the powers among the branches of Government and how to maintain the Court’s coequal status while serving as the ultimate forum on the actions of other branches and States, will always be perplexing. The right answers have never been obvious, and they will not be during the time you serve on that Court. So far in our history there has been a remarkable acceptance of judicial interpretations, a willingness to make the necessary changes to conform to judicial mandate.¹²⁰

For at least the past fifty years, nominees have helped navigate this terrain by carefully balancing their privilege to avoid some questions with a recognition that they have a corresponding duty to answer others. Every member of the Supreme Court sitting at the time of Justice Scalia’s death had confirmed to this two-tiered model. But by relying heavily on the first Ginsburg Rule while disregarding the second, Judge Gorsuch did not.

CONCLUSION

This Article has examined the so-called “Ginsburg Rule” repeatedly invoked by both the nominee and Senate Judiciary Committee members at Neil Gorsuch’s Supreme Court Confirmation hearing. Using both qualita-

120. *The Nomination of Judge Sandra Day O’Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States Hearings Before the S. Comm. on the Judiciary, 97th Cong. 14 (1981).*

tive and quantitative analysis to compare the Ginsburg and Gorsuch testimony, we have revealed three things.

First, the “Ginsburg Rule” is badly named. Supreme Court nominees testifying before the Senate Judiciary Committee have invoked a privilege to not answer questions about hotly-contested constitutional cases since nominee testimony began in 1939. Justice Ginsburg invoked this privilege at her 1993 hearing, but she certainly did not create it.

Second, the “Ginsburg Rule” really should be referred to as the “Ginsburg Rules.” As our examination of the data reveals, nominee Ginsburg invoked the privilege to not answer certain questions in a higher percentage of her comments than did most other nominees, but she balanced those invocations with an unsurpassed willingness to use her testimony to affirm her agreement with the constitutional consensus of her era. In doing so, she respected the important role the confirmation hearings play in providing public validation of previously contested, but now well-settled constitutional cases and controversies.

Third, we demonstrated that Neil Gorsuch rigorously followed the first Ginsburg Rule by refusing to answer questions about hotly-contested cases, but disregarded the second by repeatedly failing to affirm his agreement with previously contested but now settled constitutional cases. As our analysis demonstrates, this combination of responses from Gorsuch generated an overall responsiveness ratio much lower than Justice Ginsburg’s, and lower than any other nominee since 1968.

We concluded by expressing our disappointment with this aspect of the Gorsuch testimony, and sharing our hope, as close observers of the confirmation process, that future nominees truly do take their lead from Justice Ginsburg and, unlike Justice Gorsuch, take care to follow both of the Ginsburg Rules.