Laughing All the Way To the Bench: The Role of Humor in Supreme Court Confirmation Hearings

*Joanna T. Brown**

Senator SCHUMER. Yesterday, as I told you, I was sort of confounded by the refusal to answer certain questions. I do not think any of us expected you to answer every question or answer the—give us the answer the way we want it. But we did hope that you would answer enough questions with enough specificity so that we and the American people would get a clear picture of the kind of Chief Justice you will be, not just rely on your assurances. So I want to try this another way because I really want to find out. You are one of the best litigators in America. You know how to convince people. That is what you have been paid to do for a long time. So let me ask you, if you were sitting here, what question would you ask John Roberts so that you or us could be sure that we were not nominating what I call an ideologue, someone who you might define as somebody who wants to make law, not interpret law? And then how would you answer the question you asked yourself?

[Laughter.]

Judge ROBERTS. I'd begin by saying, "Well, that's a good question, Senator."

[Laughter.][1]

* J.D. Candidate, Columbia Law School, Class of 2024; B.A., Tufts University, Class of 2019. Thank you to my Note Advisor, Caroline DeCell, for guiding me through the writing process. Additional thanks to David Pozen for inspiring this unconventional topic, to the *Columbia Journal of Law & the Arts* Note Editors for their support in executing it, and finally to the many hilarious Supreme Court Justice nominees, for serving as this Note's comedic muses.

This humorous exchange between Senator Chuck Schumer and then-Judge John Roberts, captured by the "[Laughter.]" notation in the hearing transcript, is anything but trivial. In the midst of Roberts's confirmation hearing to become Chief Justice, Senator Schumer pushed him to divulge more information about his jurisprudence and how he would decide important legal questions if confirmed to the Supreme Court. Roberts could have explained his dodginess by reasoning that judges must decide impartially when presented with new cases, and thus cannot divulge certain stances without rendering potential future decisions partial,[2] or that answering too honestly about a contentious legal issue may jeopardize gaining the requisite number of Senate votes to be confirmed. Instead, Roberts's cheeky reply—"Well, that's a good question, Senator"—further evades answering Schumer's questions. This kind of response, though exceedingly common, complicates the role of a hearing; after all, a confirmation hearing's purpose is to "gather information useful to deciding whether to approve or reject a candidate nominated for a high office."[3] The absurdity of trying to gather information from an individual who is ethically, if not also politically, obligated to obfuscate, may in fact account for the first instance of "[Laughter.]" during the exchange between Schumer and Roberts. Roberts's witty reply played off this shared understanding as well, and similarly provoked laughter, perhaps in part because his question-dodging was so on the nose.

Clearly, Senator Schumer did not find the joke endearing, ultimately voting "nay" both in the Judiciary Committee[4] and in the Senate roll-call confirmation vote.[5] Roberts was eventually confirmed 78-22,[6] but his clash with Senator Schumer continued well past a single line of questioning.[7] In a 2007 address to the American Constitution Society, Senator Schumer exclaimed:

1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 438 (2005).

2. Expressing this sentiment, Chief Justice Roberts famously related judges to umpires in his confirmation hearing opening statement, saying, "Judges are like umpires. Umpires don't make the rules, they apply them." *Id.* at 55.

3. *Confirmation Hearing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. *Judiciary Committee Votes on Recent Supreme Court Nominees*, U.S. S. COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes [https://perma.cc/C4QF-MWHG] [https://web.archive.org/web/20231013173851/https://www.judiciary.senate.gov/nominations/supreme-court/committee-votes] (last visited Nov. 16, 2023).

5. *Roll Call Vote 109th Congress – 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1091/vote_109_1_00245.htm [https://perma.cc/DHK3-W6W2] [https://web.archive.org/web/20231013173928/https://www.senate.gov/legislative/LIS/roll_call_votes/vote1091/vote_109_1_00245.htm] (last visited Nov. 16, 2023).

6. *Id.*

7. Senator Charles E. Schumer, Keynote Address To the American Constitution Society (July 27, 2007) (transcript available at https://www.schumer.senate.gov/newsroom/press-releases/schumer-declares-democrats-hoodwinked-into-confirming-chief-justice-roberts-urges-higher-burden-of-proof-for-any-future-bush-nominees [https://perma.cc/NY6K-PAVF] [https://web.archive.org/web/20231117024724/https://www.schumer.senate.gov/newsroom/press-

> So the question comes: Were we too easily impressed with the charm of nominee Roberts and the erudition of nominee Alito? . . . Were we sold a bill of goods by two hypersmart and wellcoached [sic] nominees who artfully exploited a confirmation process illsuited [sic] to lay bare their genuine judicial philosophy? . . . Based on the record of the last Supreme Court term, sadly, the answer to each of these questions is yes.[8]

In his speech, Schumer thus implied that Roberts' "charm" clouded senators' judgment and led to an easy confirmation that may have been avoided had his "genuine judicial philosophy" been laid bare.

Supreme Court confirmation hearings serve a unique role in our government: They are the only instances where future Justices and their judicial philosophies are televised and subject to the scrutiny of not only the Senate, but also the public. In some cases, such scrutiny has resulted in nominees withdrawing their candidacy[9] or failing to garner the requisite number of votes in the Senate.[10] But more often than not, nominees across the spectrum of political affiliation garner a spot on the Court following intense media frenzy and congressional grilling. Against this backdrop, Senator Schumer's remark thus raises the question: In the push and pull between candor and ambiguity in confirmation hearings, how does charm—or in other words, humor—serve as a tool for nominees? Furthermore, what can we learn about a nominee's future jurisprudence through studying their use of humor during their confirmation hearings?

In this Note, I will investigate these and related questions about the use of humor and the denotation of "[Laughter.]" in Supreme Court confirmation hearing transcripts. How is humor used as a defense mechanism versus a means to bond with and appeal to the Judiciary Committee? Who uses humor the most, and who the least, and what factors could account for those differences? And lastly, what can humorous comments from Supreme Court nominees forecast to both the Committee and the public about their behavior once they are on the Court?

releases/schumer-declares-democrats-hoodwinked-into-confirming-chief-justice-roberts-urges-higher-burden-of-proof-for-any-future-bush-nominees]).

8. *Id.* Schumer also responded directly to Roberts's umpire analogy, stating, "Unfortunately, if there is one thing this term has showed us, notwithstanding protests to the contrary, it is that Chief Justice Roberts seems intent on changing the strike zone. When the team he favors is at bat—those who seek to restrict access to the courts, those who seek to roll back civil rights and liberties—he calls all balls. When the team he doesn't like is at bat, he calls all strikes. If the past Supreme Court term were a movie, it might be called: 'The Umpire Strikes Back.'" *Id.*

9. In 2005, President George W. Bush nominated Harriet Miers to the Court. Miers was attacked by conservatives and liberals alike, criticized for a lack of legal experience and accused of "cronyism" because of her close relationship to Bush. Miers withdrew her candidacy in response to the criticisms. *See Miers Withdraws Supreme Court Nomination*, NBC NEWS (Oct. 27, 2005, 8:52 AM), https://www.nbcnews.com/id/wbna9837151 [https://perma.cc/643V-RSV7] [https://web.archive.org/web/20231013173501/https://www.nbcnews.com/id/wbna9837151].

10. In 1987, Robert Bork infamously did not hold back on extreme right-wing views, and the Senate rejected his nomination. *See* Jane Coaston, *"Borking," Explained: Why a Failed Supreme Court Nomination in 1987 Matters*, VOX (Sept. 27, 2018, 4:02 PM), https://www.vox.com/2018/9/26/17896126/bork-kavanaugh-supreme-court-conservatives-republicans [https://perma.cc/U8W7-WLHJ] [https://web.archive.org/web/20231013173313/https://www.vox.com/2018/9/26/17896126/bork-kavanaugh-supreme-court-conservatives-republicans].

I do not wish to imply that all instances of humor are the result of calculated, conniving preparation intended to manipulate senators during the confirmation process. In fact, many instances of humor are prompted by senators themselves, or drawn from the inherent awkwardness of days-long formal hearings. But, by that same token, even benign moments of lightheartedness in this specific context may provide valuable insights that are easily overlooked. Especially as judicial nominations become increasingly politicized and polarized,[11] appearing trustworthy, likeable, and sensible becomes essential to a nominee's candidacy. Humor thus arms nominees with the ability to volunteer positive information, appear humble, showcase values, lighten difficult topics, and otherwise bond with senators. Perhaps more saliently, it enables them to dodge, correct, or mock contentious or unflattering lines of questioning. Based on an analysis of each nominee's hearing transcript since Justice Sandra Day O'Connor in 1981, every nominee harnesses the power of humor to their advantage, and perhaps to the detriment of the gullible, "too easily impressed" senators about whom Senator Schumer spoke in his remarks. By studying when, why, and how nominees use humor, we can get a glimpse into their future jurisprudence and decisions on the bench. Avoiding a topic or making light of a question may seem harmless in the hearing, but it can actually reveal a nominee's position on an issue and serve an important truth-telling role.

In Part I, I will explore the history of Supreme Court hearings and literature on the role that hearings play in the confirmation process. Further, I will discuss several studies conducted on the role of humor at the Supreme Court, which will also provide us with a philosophical and psychological angle through which to analyze confirmation humor. Part II will build upon this foundation with my own research. First, I will explain which future Justices elicited the most laughter, the least laughter, and how these numbers may reflect or be informed by an increasingly polarized political landscape. Then I will illustrate how the nominees use humor as a "shield" to defend against probing questions or negative perceptions and as a "sword" to bond with senators and appeal to the public. Finally, in Part III, I will explore the connection between humor during confirmation hearings and Justices' later behavior on the Court through case studies on different lines of questioning about weighty topics like abortion rights, constitutional interpretation, and the scope of congressional power. While the language in the transcript says one thing, the "[Laughter.]" notation communicates much more: how nominees are perceived and, derivatively, how they

11. Confirmations increasingly toe party lines with each vote, made clear by comparing Justice Breyer's vote (87–9) in 1994 to Justice Jackson's (53-47) in 2022. *Compare Roll Call Vote 103rd Congress – 2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1032/vote_103_2_00242.htm [https://perma.cc/V89K-VAP4] [https://web.archive.org/web/20231013173154/https://www.senate.gov/legislative/LIS/roll_call_votes/vote1032/vote_103_2_00242.htm] (last visited Apr. 15, 2024), *with Roll Call Vote 117th Congress – 2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00134.htm [https://perma.cc/FQ7W-RVUL] [https://web.archive.org/web/20231129004826/https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00134.htm] (last visited Apr. 15, 2024).

will win over votes because and in spite of their judicial philosophies. Given this, the American public and the Judiciary Committee would be well served to pay attention to confirmation humor to better understand the nominees and, in turn, check them during the Advice and Consent period.

I. A BARREL OF LAUGHS: A BRIEF HISTORY OF CONFIRMATION HEARINGS AND HUMOR AT THE SUPREME COURT

A. HISTORY OF "ADVICE AND CONSENT" OF THE SENATE

Article II Section 2 of the Constitution, the Appointments Clause, mandates that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . ."[12] Before 1916, however, the "Advice and Consent of the Senate" simply consisted of a "yea" or "nay" vote.[13] Compared to the present, nominees scarcely faced close scrutiny of their character and jurisprudence: The Senate did not hold hearings to interview potential candidates, much less weigh public opinion into the decision.[14] Confirmation was relatively quick, routine business in the Senate. For instance, in 1894 Edward Douglass White, a former Confederate, was nominated and sworn in on the same day.[15] Not until 1916, when President Woodrow Wilson appointed Louis Brandeis, the first Jewish nominee to the Court, did Advice and Consent include a hearing, presumably in reaction to a liberal-leaning Jewish person being nominated.[16] Brandeis did not show up to the hearing. Rather, several witnesses testified before the Judiciary Committee about Brandeis, with some opponents employing antisemitic tropes to try to discredit the judge.[17] Notwithstanding the attacks on Brandeis's character and politics during the confirmation hearing, he was confirmed 47-22, four months after his nomination.[18]

12. U.S. CONST. art. II, § 2.

13. Jay Willis, *A Brief Guide To Supreme Court Confirmation Hearings, the Silliest Ritual in Washington*, BALLS AND STRIKES (Mar. 15, 2022), https://ballsandstrikes.org/nominations/supreme-court-confirmation-hearings-brief-guide [https://perma.cc/8VML-MX5R] [https://web.archive.org/web/20231013172702/https://ballsandstrikes.org/nominations/supreme-court-confirmation-hearings-brief-guide/].

14. *Id.*

15. *Id.*

16. Drew DeSilver, *Up Until the Postwar Era, U.S. Supreme Court Confirmations Usually Were Routine Business*, PEW RSCH. CTR. (Feb. 7, 2022), https://www.pewresearch.org/fact-tank/2022/02/07/up-until-the-postwar-era-u-s-supreme-court-confirmations-usually-were-routine-business/ [https://perma.cc/G7RM-RU4A] [https://web.archive.org/web/20231013172055/https://www.pewresearch.org/short-reads/2022/02/07/up-until-the-postwar-era-u-s-supreme-court-confirmations-usually-were-routine-business/]; *see also* Matthew Wills, *The Confirmation of Louis D. Brandeis*, JSTOR DAILY (June 1, 2016), https://daily.jstor.org/confirmation-louis-brandeis [https://perma.cc/6TUM-9BRQ] [https://web.archive.org/web/20231013173153/https://daily.jstor.org/confirmation-louis-brandeis/].

17. Willis, *supra* note 13.

18. *Id.*

Brandeis's contentious confirmation process, though pivotal, did not immediately usher in a new era of months-long debates about nominees. From the birth of the United States to the early 1950s, the average time between nomination and confirmation remained a quick and easy 13.2 days.[19] From the 1950s to 2020, however, the time between nomination and confirmation averaged 54.4 days, nearly quadrupling the average period of Advice and Consent.[20]

The more modern organization of confirmation hearings—which almost resemble a trial, where the nominee justifies past actions and overall worthiness—came four decades after Louis Brandeis, with Potter Stewart's nomination. Stewart was nominated in 1959 against the backdrop of the civil rights movement as well as the Cold War.[21] As the spotlight on the Supreme Court grew brighter in the wake of monumental decisions like *Brown v. Board of Education*, confirming a Justice in line with senators' views felt more important than ever: "[S]outhern Democrats were fully hostile to the Supreme Court because of its desegregation decisions, and conservative Republicans were worried about the Supreme Court over national security issues, and Stewart got a fair grilling."[22]

More probing lines of questioning also emerged with more contentious, publicized hearings, especially for minority nominees. When Thurgood Marshall was nominated as the first Black Justice, he was asked if he would be prejudiced against white southerners and interrogated about crime rates.[23] Sandra Day O'Connor's nomination also marked a shift in confirmation hearing protocol. Not only was she the first female nominee, but her hearing was also the first to be broadcast live in its entirety; this opened her up to heightened scrutiny from the press, the public, and the Judiciary Committee, especially on hot button women's rights issues like abortion.[24]

As the confirmation process became increasingly polarized, publicized, and otherwise arduous, a nominee's odds of actually being confirmed became increasingly

19. DeSilver, *supra* note 16.

20. *Id.*

21. *A History of Supreme Court Confirmation Hearings*, NPR (July 12, 2009, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=106528133 [https://perma.cc/H3T6-RQG8] [https://web.archive.org/web/20231013172625/https://www.npr.org/templates/story/story.php?storyId=106528133].

22. *Id.*

23. Kayla Epstein, *The Discriminatory History of the Senate Confirmation Process that Started when a Jewish Person Was First Nominated for the Supreme Court in 1916*, INSIDER (Mar. 24, 2022, 6:01 PM), https://www.businessinsider.com/racist-history-of-senate-scotus-confirmation-hearings-ketanji-brown-jackson-2022-3 [https://perma.cc/5AA2-89KL] [https://web.archive.org/web/20231013172547/https://www.businessinsider.com/racist-history-of-senate-scotus-confirmation-hearings-ketanji-brown-jackson-2022-3].

24. Ronald J. Hansen, *Spectacle of Sandra Day O'Connor's 1981 Confirmation Hearing Foreshadowed Today's Politics*, AZCENTRAL. (Sept. 11, 2022, 11:26 AM), https://www.azcentral.com/story/news/local/phoenix/2019/03/15/sandra-day-oconnor-senate-confirmation-hearings-1981-were-spectacle-barry-goldwater-ted-kennedy/2722312002/ [https://perma.cc/V7VK-HSAY] [https://web.archive.org/web/20231013172538/https://www.azcentral.com/story/news/local/phoenix/2019/03/15/sandra-day-oconnor-senate-confirmation-hearings-1981-were-spectacle-barry-goldwater-ted-kennedy/2722312002/#tbl-em-lnovqosnh3xsx89fh7].

slim. Prior to 1965, only three of 130 nominees had been confirmed by a margin of under ten votes, and twenty-four nominations failed due to rejection, Senate inaction, or withdrawal.[25] Post-1965, of the twenty-eight nominations, seven have failed (including, most recently, Merrick Garland, whose nomination the Senate refused to act on in 2016[26]) and five have been confirmed by a margin of fewer than ten votes.[27]

Among those nominees who never reached the bench, Robert Bork's high-profile hearing and rejection by the Senate may be the most infamous. In his 1987 hearing, Bork did not hold back on his extreme right-wing views, leading a majority of the Senate to vote against his confirmation.[28] The campaign against Bork's confirmation was so vigorous that a new term emerged in the political lexicon—to "Bork" someone—or to publicly vilify someone to prevent their appointment to political office.[29] Since Bork's significant embarrassment, nominees have trended towards caginess in hearings, refusing to offer their opinion on matters that may come before the Court. "A judge sworn to decide impartially can offer no forecasts, no hints," explained Ruth Bader Ginsburg during her hearings in 1993, adding that doing so would "display disdain for the entire judicial process."[30] Indeed, avoiding getting "Borked" may well be a real fear for contemporary nominees, even those with spotless records. Take, for example, the current Supreme Court. Of the nine Justices, five—Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson—were sworn in by a margin of less than ten votes, with the more recent appointees nearly split along party lines.[31]

Political polarization has also leaked into the lines of questioning in contemporary hearings. To be expected, the Judiciary Committee grilled recent nominees about contemporaneous legal issues like abortion, terrorism, and the Affordable Care Act, generally receiving vague, indefinite responses.[32] Most recently, however, conservatives used the confirmation hearing of Ketanji Brown Jackson to press on politicized topics like critical race theory and transgender women in sports, asking the judge unorthodox, non-legal questions like how religious she is on a scale of one to ten, or if she thinks babies are racist.[33] Thus, Jackson's hearing may have signaled yet

25. DeSilver, *supra* note 16.

26. *Id.*

27. *Id.*; *see also Supreme Court Nominations (1789-Present)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/Q32U-XM9T] [https://web.archive.org/web/20231117035043/https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm] (last visited Nov. 16, 2023).

28. *See* Coaston, *supra* note 10.

29. *Bork*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

30. Willis, *supra* note 13.

31. *Supreme Court Nominations (1789-Present)*, *supra* note 27.

32. Adam Liptak, *Confirmation Hearings, Once Focused on Law, Are Now Mired in Politics*, N.Y. TIMES (Mar. 23, 2022), https://www.nytimes.com/2022/03/23/us/politics/ketanji-brown-jackson-confirmation-hearing.html [https://perma.cc/EGK8-VLTS] [http://web.archive.org/web/20231104135751/https://www.nytimes.com/2022/03/23/us/politics/ketanji-brown-jackson-confirmation-hearing.html].

33. *Id.*

another shift for confirmation hearings, where Senators fail to even ask about concrete legal issues, treating the confirmation process instead as an "ideological food-fight."[34]

B. PRIOR LITERATURE ON SUPREME COURT CONFIRMATION HEARINGS

Several studies have attempted to identify the various factors driving increased polarization around confirmation hearings and explore the consequences of such polarization. In 2011, Geoffrey Stone conducted extensive research on Supreme Court confirmations, concluding that the evolution towards a more polarized, heated nomination and confirmation period was influenced by several factors including: (1) an increasingly conservative court makeup at least since the early nineties; (2) highly publicized, controversial, and polarized decisions such as *Bush v. Gore* where the Court stood divided on clear political grounds; (3) the high-stakes, highly publicized news coverage of nominees; (4) interest groups' involvement in the process;[35] and (5) the more general polarization of the political process such as "stealth" nominations and the decline of "moderate" nominees.[36] Looking at more recent nominations, the effects of these factors are clear: Elena Kagan and Sonia Sotomayor, the most recent nominees at the time of the article, were both seemingly straightforward candidates—highly qualified, ideologically moderate, and with clean personal records. Yet, they received a much higher percentage of "nay" votes than similarly situated historical candidates.[37]

In addition to the broader political factors driving confirmation dynamics, Patrick Barry's 2018 article posited that additional factors, such as media attention, which senators are present or leading the Judiciary Committee, and aspects of a nominee's identity, culminate to create different biographical depictions of a nominee that can either help or hinder their confirmation process.[38] These "micro" factors could have potentially large effects on the perception of a given nominee and, in turn, whether or not they get confirmed. Barry illustrated, for example, that the attitude of the Chairman of the Judiciary, then-Senator Joe Biden, was very jovial during Clarence Thomas's hearing, which arguably helped Thomas fight off accusations of unfitness and appear more likeable.[39]

Given that confirmation has become more difficult and that manipulating different aspects of the process can create a more favorable depiction of a nominee, it figures that nominees would increasingly use a tool like humor to avoid controversial stances and help curb political opposition. But the lack of candor in hearings also comes with a price. More recent confirmation proceedings have been described as "a vapid and

34. *Id.* The "ideological food fight" metaphor is borrowed from Neil Gorsuch himself, who described modern confirmation trends as such while still a lawyer. *Id.*

35. Examples include the National Organization for Women and the Christian Coalition.

36. Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 447–54 (2011).

37. *Id.* at 453–54.

38. Patrick Barry, *Sites of Storytelling: Supreme Court Confirmation Hearings*, 94 IND. L.J. SUPPLEMENT 1 (2018).

39. *Id.* at 3–4.

hollow charade, an exercise in obfuscation, and even a carefully choreographed kabuki dance" where nominees divulge little information of value.[40] In response to dwindling confidence in the truth-telling function of confirmation hearings, recent scholarship proposes various solutions to re-legitimize the confirmation process. For instance, Robert Post and Reva Siegel proposed that senators ask nominees about how they would have voted in cases the Supreme Court already decided.[41] According to Post and Siegel, this framework would allow senators to "obtain information necessary to discharge their democratic responsibilities in confirming nominees" without offending the autonomy of courts, since the questions are retrospective rather than prospective.[42] Until such change occurs, however, the confirmation process finds itself trapped in a feedback cycle. Increased politicization leads to less forthright nominees, which leads to distrust in the confirmation process, consequently feeding further political polarization around nomination and confirmation.

C. PRIOR LITERATURE ON HUMOR AT THE SUPREME COURT

Against this backdrop, humor can play a key rhetorical and interpersonal role to help nominees evade hard questions and appeal to more senators. While prior literature on the role of humor in confirmation hearings remains scarce, research and analysis of humor at Supreme Court oral arguments can provide a helpful framework for analyzing how, why, and to what ends humor is employed by the Justices. This research also illustrates the insights humor can provide; notably, that instances of humor in oral arguments help predict Justices' ultimate decisions and opinions.

In order to understand prior findings about the role of humor on the bench, we should first explore the basic theories of humor. There are three main theories of humor: Superiority, Relief, and Incongruity. Espoused by Plato, Aristotle, and Thomas Hobbes, the Superiority theory of humor posits that a person laughs at the misfortunes of others because it makes that person feel superior.[43] Though this theory probably fails to account for *every* instance of humor, the Superiority theory of humor explains why we find home videos of people bellyflopping funny. By contrast, the Relief theory of humor maintains that laughter is the release of nervous energy.[44] Freud believed that laughter served to alleviate repressed emotions like sexual desire or hostility—when a

40. Dion Farganis & Justin Wedeking, *"No Hints, No Forecasts, No Previews": An Empirical Analysis of Supreme Court Nominee Candor from Harlan To Kagan*, 45 LAW & SOC'Y REV. 525, 525 (2011) (internal quotation marks omitted).

41. Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. F. (Sept. 1, 2006), https://www.yalelawjournal.org/forum/questioning-justice-law-and-politics-in-judicial-confirmation-hearings [https://perma.cc/PT28-LBZU] [https://web.archive.org/web/20231117182111/https://www.yalelawjournal.org/forum/questioning-justice-law-and-politics-in-judicial-confirmation-hearings].

42. *Id.*

43. *Philosophy of Humor*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 20, 2020), https://plato.stanford.edu/entries/humor/ [https://perma.cc/43F9-9EJ4] [http://web.archive.org/web/20231104140404/https://plato.stanford.edu/entries/humor/].

44. *Id.*

person cracks wise about sex or gossips about a mutually disliked person, they overcome their internal censor and offer relief to their true emotions.[45] The third main theory, the Incongruity theory favored by Kant and Kierkegaard, says that humor is the perception of something that violates our expectations and thus is funny as an incongruous deviation.[46] Think of modern stand-up comedian jokes that consist of a set-up and the punch line; the punch line is funny because it violates the expectations teed up by the set-up.

In addition to these theories of humor, others have cropped up to help explain humor's mysterious workings. For example, evolutionary psychologist Geoffrey Miller contends that humor evolved as a result of sexual selection, since it serves as an indicator of a prospective mate's mental fitness.[47] As a complement to the Superiority theory, the Inferiority theory views humor as a tool to display self-deprecating behavior or modesty.[48] Moreover, the Punctuation theory posits that humor is used as a rhetorical device to strategically emphasize certain phrases or ideas.[49]

Several studies have analyzed humor in Supreme Court oral arguments. In 2005, Jay Wexler counted how often each Justice provoked laughter by counting "(laughter)" notations in the Court's 2004–2005 oral argument transcripts to reveal which Justices were the funniest.[50] Following this lighthearted exercise, Ryan Malphurs conducted a more extensive study of humor. Malphurs considered four factors contributing to each instance of "(laughter)" during oral arguments: context (Malphurs views theoretical contexts, such as the Superiority theory, as a framework to view each joke), frequency of laughter, tone (negative or positive), and direction (at themselves, at advocates, or at other Justices).[51] Through this analysis, he found that Justices poked fun at themselves—for example, Justice Stephen Breyer admitted that "people did sometimes stick things in my underwear [during gym class]" during the oral argument for *Safford Unified School District v. Redding* just as often as they directed jokes at advocates and other Justices.[52] Thus, Malphurs concluded that through self-deprecating comments by the Justices or moments of lightheartedness shared with litigants, "[humor] enables advocates and [J]ustices to negotiate the complex institutional, social, and intellectual barriers to obtain brief moments of equality within the Courtroom."[53]

Responding to Malphurs's optimistic conclusion, Tonja Jacobi and Matthew Sag conducted a study in 2019 that found that Justices did not use humor to equalize; rather, making jokes at the advocates' expense served as a rhetorical weapon, often

45. *Id.*

46. *Id.*

47. GEOFFREY MILLER, THE MATING MIND: HOW SEXUAL CHOICE SHAPED THE EVOLUTION OF HUMAN NATURE 111–12, 132–33 (2001).

48. Tonja Jacobi & Matthew Sag, *Taking Laughter Seriously at the Supreme Court*, 72 VAND. L. REV. 1423, 1433–34 (2019).

49. *Id.* at 1434

50. Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 2D 59 (2005).

51. Ryan A. Malphurs, *"People Did Sometimes Stick Things in My Underwear": The Function of Laughter at the U.S. Supreme Court*, 10 COMMC'N L. REV. 48, 51 (2011).

52. *Id.* at 48.

53. *Id.*

foreshadowing how the Justice would eventually come out on an issue.[54] Jacobi and Sag identified every episode of laughter in oral argument transcripts since 1955, considering not only the main three theories of humor, but also some of the lesser known theories like Punctuation or Inferiority.[55] By comparing frequency of laughter and Justices' decisions, the study hypothesized that humor targeted at advocates could predict how a given Justice would decide a case.[56] Moreover, by analyzing meta-trends in instances of humor since 1955, the study concluded that "in an increasingly polarized Court, the Justices are significantly more likely to make laugh-inducing comments . . . just as they have a greater tendency to engage in other forms of aggressive advocacy" such as strategic interruptions, greater dominance over the conversation, and theatricality.[57]

Though their ultimate conclusions differ, both studies can be instructive for analyzing humor not only on the bench but also, for our purposes, during the uphill battle to gain a seat on that bench. True, there are clear differences between these studies and this Note. During oral arguments, Justices hold a position of relative power, whereas in confirmation hearings, they are largely beholden to the Judiciary Committee. Moreover, in an oral argument, it is unlikely that a Justice would use humor to dodge a question since they hold the position of asking, not answering, questions. That said, larger trends like political polarization, heightened media attention, and a growing distrust of government inform trends in humor both during and after confirmation. Against this backdrop, I will thus explore how nominees use humor to facilitate interpersonal benefits, per Malphurs, and as a tool of rhetorical aggression that may serve as a predictive device for later decisions, per Jacobi and Sag.

II. TAKING [LAUGHING] STOCK: STATS, TRENDS, AND USES OF HUMOR IN CONFIRMATION HEARINGS

A. DISCUSSION OF METHOD

In order to assess humor's role in confirmation hearings, I first noted all "[Laughter.]" notations in hearing transcripts, starting with the first televised hearing of Justice O'Connor in 1981. Of course, there may have been instances of humor before O'Connor, but for our purposes, we will only analyze instances of humor in fully televised, modern hearings from the past four decades. I attributed instances of "[Laughter.]" to the nominee if that text came directly after their speech, though this

54. Jacobi & Sag, *supra* note 48, at 1482–83. However, the authors noted that their study also "leaves room for the alternative theory that the Justices make more jests at advocates they disagree with, but only because they spend more time speaking to them in the first place. Put another way, while we can predict who a given Justice would favor based on who is the butt of his or her jokes, we could have ascertained that same information from examining who the Justice spoke more to, and laughter tells us little new in addition to that." *Id.*

55. *Id.* at 1429, 1432–34.

56. *Id.* at 1455–56.

57. *Id.* at 1429–30.

may not include a delayed reaction. Moreover, this notation may be underinclusive, since there may be quieter tittering at a comment. However, for our purposes, the comments that elicit audible laughter reflect the Judiciary Committee's reception of certain comments more than a silent giggle would, thus telling us not only that a joke was made, but that it was well-received by those tasked with confirmation. As of the writing of this Note, the official transcripts for Barrett and Jackson have yet to be released, so the data for those Justices is limited to C-SPAN broadcast transcripts. Because these transcripts are not as detailed as official copies, they do not include as many instances of "[Laughter.]" as would probably be noted by the official stenographers. My discussion comparing the number of "[Laughter.]" notations in different hearings will thus be limited to hearings between O'Connor in 1981 and Kavanaugh in 2018, but I will also include examples of humor from Jackson and Barrett anecdotally in later analysis.

B. HUMOR BY NUMBERS

Every nominee since O'Connor has provoked at least one instance of "[Laughter.]" during their confirmation hearing. Common topics covered by humor included abortion rights, character and fitness of a nominee, constitutional interpretation, separation of powers, logistics such as federal judge salaries, the judicial process and access, and general filler conversation regarding the hearings themselves. As for individuals, Gorsuch, Thomas, and Kavanaugh had the most total instances of "[Laughter.]" at their hearings, with 169, 162, and 124 notations of "[Laughter.]," respectively. Interestingly, and perhaps relatedly, Gorsuch and Kavanaugh are two of the most recent nominees, while Thomas and Kavanaugh both faced serious sexual harassment allegations during their hearings. Conversely, the least number of "[Laughter.]" notations are found in Antonin Scalia's hearing transcript, with a mere twenty-five total instances of laughter—ironic given the late Justice's famed sense of humor on the bench.[58] As for individuals, the numbers indicate that the "funniest" nominees were Neil Gorsuch, with forty provocations of laughter, and John Roberts, with twenty-four, while the "least funny" award goes to Anthony Kennedy with only one joke to his name throughout the whole hearing. By percentage of total laughs, however, the funniest nominee is Elena Kagan, who provoked twenty-nine percent of all titters in her hearing.[59] All told, factors like race, gender, and political affiliation were not dispositive on which nominees provoked more or less laughter. Rather, how

58. *See* Malphurs, *supra* note 51, at 63–64. Malphurs's study found that Scalia provoked "laughter" sixty times during the 2006–2007 term oral arguments, accounting for almost half of all "laughter" tags that term (135 total). Wexler's study also crowned Scalia the "funniest" Justice, as he provoked seventy-seven laughing episodes in the 2004–2005 term, far ahead of the second-place Justice, Stephen Breyer, with forty-five laughing episodes. *See* Wexler *supra* note 50, at 60.

59. Compare to Clarence Thomas, who, despite having one of the highest total number of laughs in his hearings, only accounted for about seven percent of them!

recently the hearing was held (and relatedly, how controversial that hearing may have been) seemed to be the most predictive measure of humor during hearings.[60]

60. *See* Figure 1.

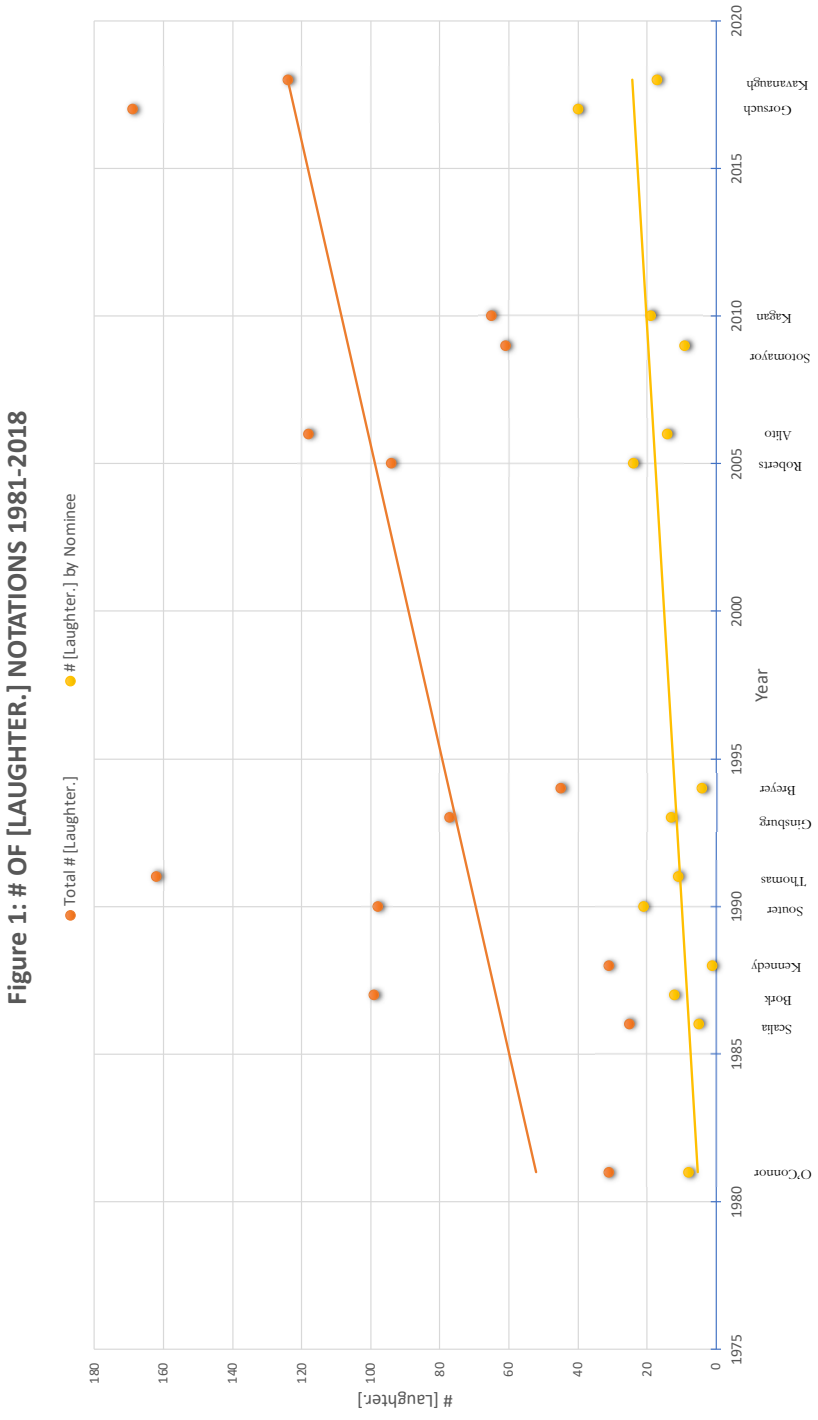
Figure 1: # OF [LAUGHTER.] NOTATIONS 1981-2018
Total # [Laughter.]
[Laughter.] by Nominee
[laughter.]
Year
0
20
40
60
80
100
120
140
160
180
1975
1980
1985
1990
1995
2000
2005
2010
2015
2020
O'Connor
Scalia
Bork
Kennedy
Souter
Thomas
Ginsburg
Breyer
Roberts
Alito
Sotomayor
Kagan
Gorsuch
Kavanaugh

According to "[Laughter.]" notations in official hearing transcripts, humor at Supreme Court confirmation hearings has increased considerably from O'Connor in 1981 to Kavanaugh in 2018, both from the nominees and the Senate Judiciary Committee members.[61] Several factors, of course, may account for the increase in "[Laughter.]" notations. First, hearings themselves may be particularly long, which could in turn increase the amount of laughter recorded during them; for example, Justice Kennedy's hearing in 1988 lasted three days, while Justice Kavanaugh's hearing two decades later lasted five days.[62] Additionally, more recent hearings could be more conversational than in the past, inspiring more laughter overall. In addition to these possible factors, though, there is also a strong correlation between the increase in "[Laughter.]" and heightened political polarization around the Supreme Court and nominations to it.

The connection between humor and polarization is perhaps best evidenced by the total number of "nay" votes to confirm nominees over time as compared to the number of "[Laughter.]" notations.[63] Apart from significant outliers Robert Bork and Clarence Thomas, nearly every nominee from 1981 to 2000 was easily confirmed with little to no "nay" votes and bipartisan support.[64] Correspondingly, most hearings in the 80s and 90s contained relatively low total instances of "[Laughter.]."[65] By comparison, Bork and Thomas's hearings had high "[Laughter.]" totals, making those hearings the most contentious *and* some of the funniest of those decades.[66] Nominees during the Bush and Obama administrations faced slightly more opposition, but were still confirmed with margins above ten votes.[67] These nominees' hearings also saw an uptick in the average number of "[Laughter.]" notations during their confirmation hearings. Then, following the Senate's pseudo-rejection of Merrick Garland and the 2016 election of Donald Trump, confirmation of Supreme Court nominees became highly polarized, with margins under ten votes falling neatly across party lines.[68] As evidenced by Gorsuch and Kavanaugh's datapoints, their highly contentious hearings also produced a higher average number of "[Laughter.]" notations than earlier hearings.

61. *Id.*

62. *Nomination Hearings for Supreme Court Justices*, U.S. SENATE, https://www.senate.gov/committees/SupremeCourtNominationHearings.htm [https://perma.cc/GAE7-HTSZ] [https://web.archive.org/web/20231123032657/https://www.senate.gov/committees/SupremeCourtNominationHearings.htm] (last visited Apr. 15, 2024).

63. *See* Figure 2; *see also Supreme Court Nominations (1789-Present)*, *supra* note 27.

64. *Supreme Court Nominations (1789-Present)*, *supra* note 27.

65. *Id.*

66. *Id.* While not a particularly contentious hearing, Justice Souter's hearing also contained a high total number of "[Laughter.]" notations.

67. *Id.*

68. *Id.*

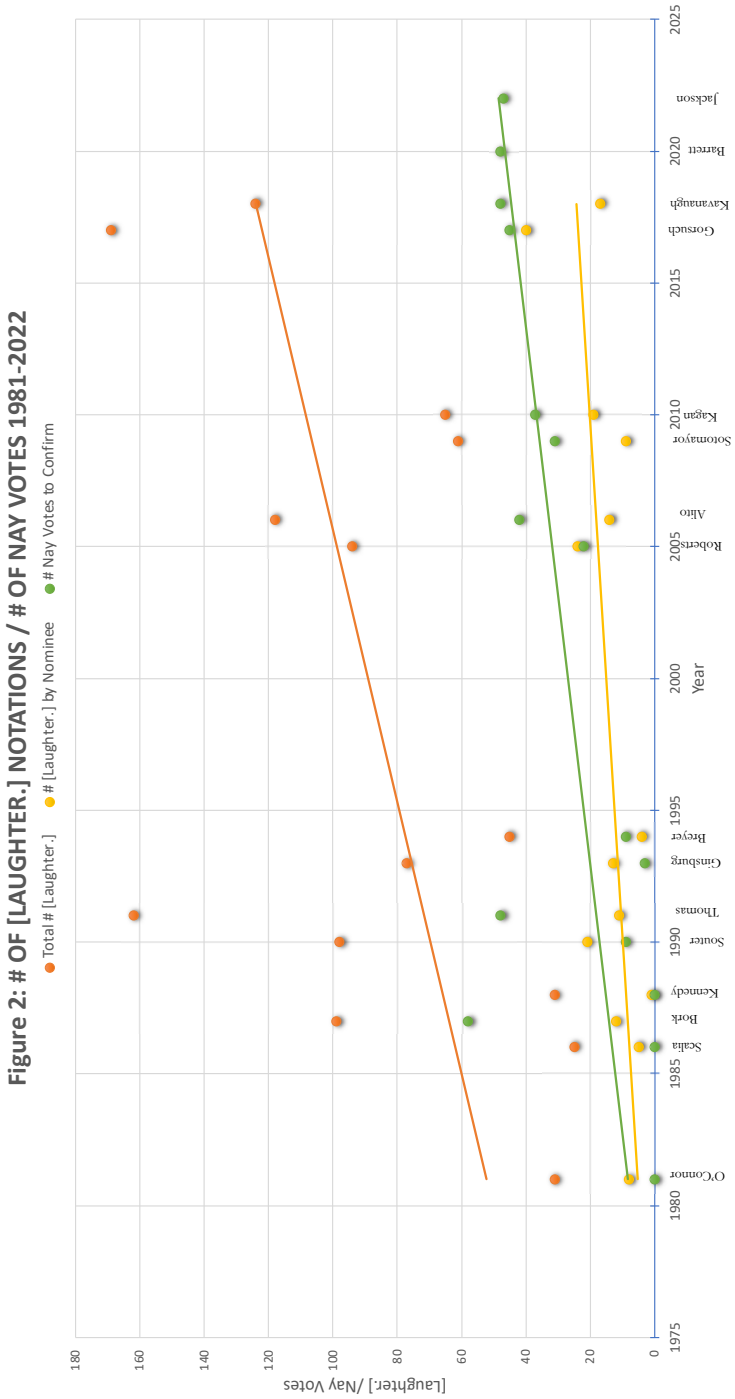
Figure 2: # OF [LAUGHTER.] NOTATIONS / # OF NAY VOTES 1981-2022
Total # [Laughter.]
[Laughter.] by Nominee
Nay Votes to Confirm
[Laughter.] /Nay Votes
Year
O'Connor
Scalia
Bork
Kennedy
Souter
Thomas
Ginsburg
Breyer
Roberts
Alito
Sotomayor
Kagan
Gorsuch
Kavanaugh
Barrett
Jackson

This correlation tracks. Against the backdrop of an increasingly politicized process, humor serves as both a defensive shield and an offensive sword for nominees. On the defensive side, humor enables nominees to dodge questions or correct negative assumptions. Defensive humor may be a particularly pertinent rhetorical device in polarized hearings, as it can help nominees gain strategic dominance over the conversation and steer it in a more favorable direction.[69] On the flipside, humor also serves an important social role in polarized hearings by allowing nominees to bond with senators, showcase values, appear more "likable," and lighten difficult topics.

C. HUMOR AS A SHIELD

Humor helps nominees avoid answering controversial questions in their hearings. For example, compare these two exchanges where the respective nominees, Ruth Bader Ginsburg and Brett Kavanaugh, use humor to dodge questions:

Senator COHEN:	Let me come back to the issue of conduct and speech. We have a somewhat ironic situation where conduct can in fact be interpreted as speech protected by the first amendment. For example, we know the Court's ruling on burning of the American flag. A number of people believe that to be an act which is not protected by the first amendment, but the Court ruled otherwise. So this is a case in which what I consider to be a violent act is construed to be speech. We also have a situation in which speech can be construed to be conduct. You would agree with that?
Judge GINSBURG.	That conduct—
Senator COHEN.	That speech itself can constitute conduct.
Judge GINSBURG.	Can you give me an example?
Senator COHEN.	I could, but if I did, you couldn't answer the question.
Judge GINSBURG.	Then you are tipping me off that I shouldn't—
	[Laughter.]
	You are starting me down the slope and I shouldn't put on the skis.[70]

---

69. *See infra* Parts II.C, II.D; *see also* Jacobi & Sag, *supra* note 48, at 1495 ("[L]aughter is used strategically by the Justices to shape the process [of oral arguments] and, potentially, the outcome. Laughter incidents are exercises of control by Justices over their subordinates that are used strategically to favor preferred positions.").

70. *Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103d Cong. 225 (1993) [hereinafter *Ginsburg Hearing Transcript*].

Senator WHITEHOUSE.	And, did the word "ralph" you used in your yearbook relate to alcohol?
Judge KAVANAUGH.	I already said—I already answered the question. If you're—
Senator WHITEHOUSE.	Did it relate to alcohol?
Judge KAVANAUGH.	I like beer.
Senator WHITEHOUSE.	You have not answered that.
Judge KAVANAUGH.	I like beer. I don't know if you do. Do you like beer, Senator, or not?
Senator WHITEHOUSE.	Okay.
Judge KAVANAUGH.	What do you like to drink?
Senator WHITEHOUSE.	The next one is——
Judge KAVANAUGH.	Senator, what do you like to drink?
Senator WHITEHOUSE	[continuing]. Judge, have you—I do not know if it is "boofed" or "bufed"—how do you pronounce that?
Judge KAVANAUGH.	That refers to flatulence. We were 16.
	[Laughter.][71]

In her exchange with Senator William Cohen, Ginsburg explicitly dodges the question about First Amendment protections. To Ginsburg's credit, Senator Cohen's question—"you would agree . . . that speech itself can constitute conduct"—without context or an example seems to set a trap that simply answering in the affirmative could set off.[72] The collective laughter that ensued seems to reflect a common understanding about the aggressive nature of this kind of question, confirmation hearing questions in general, and the consequences of mis-stepping. This mirrors the Relief theory of humor, because acknowledging the high-stress nature of the hearing releases nervous energy brewing for all parties. By comparison, Kavanaugh dodged questions about his high school yearbook quotes that senators used as part of a line of questioning about his character and fitness in light of, among other things, sexual assault allegations from high school.[73] Kavanaugh's remark—"That refers to flatulence. We were 16."—

71. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 703–04 (2018) [hereinafter *Kavanaugh Hearing Transcript*].

72. *See Ginsburg Hearing Transcript*, *supra* note 70, at 225.

73. Kate Kelly & David Enrich, *Kavanaugh's Yearbook Page Is 'Horrible, Hurtful' To a Woman It Named*, N.Y. TIMES (Sept. 24, 2018), https://www.nytimes.com/2018/09/24/business/brett-kavanaugh-yearbook-renate.html [https://perma.cc/9FBT-TWWD] [https://web.archive.org/web/20231010210852/https://www.nytimes.com/2018/09/24/business/brett-kavanaugh-yearbook-renate.html] ("Judge Kavanaugh's years at Georgetown Prep, in a Maryland suburb of

exemplifies the Superiority theory of humor.[74] Though not explicitly calling attention to his question-dodging like Ginsburg, he dodges feeding into a heated interrogation into his past by essentially making a fart joke. With this and similar remarks, Kavanaugh minimizes the line of questioning about his character as a youth, conveying that such questions are beneath him, uncouth, and irrelevant to the hearings.

Humor also allows nominees to correct negative assumptions or depictions of their character, which proves imperative with heightened media coverage and scrutiny of nominees. For example, during Elena Kagan's nomination and confirmation hearing, she faced a persistent narrative that she was too politically motivated to be a neutral arbiter, in part because she had previously worked for two Democratic administrations.[75] To help quash one such question relating to this negative depiction of her jurisprudence, Kagan employed humor to succinctly discredit Senator Tom Coburn's question:

> Ms. KAGAN. Senator Coburn, my—the advocate's hat that I was referring to was not a political hat, it was the hat that I wear as Solicitor General of the United States, representing the interests of the United States. That has nothing to do with my own political views. It has to do with a long and historic tradition that the Solicitor General's Office has of representing the long-term interests of the U.S. Government.
>
> Senator COBURN. Then let's move back to your political hat. How are you going to take that off?
>
> Ms. KAGAN. Senator Coburn, that hat has not been on for many years.
>
> [Laughter.]
>
> Ms. KAGAN. Senator Coburn, I know that, you know, some people have said, oh, she's a political person. I've had a 25-year career in the law. Of that 25-year career, 4 were spent in the Clinton White House.[76]

With her quip, Kagan authoritatively rejects the premise of the question; rather than answering how she would remain neutral despite having worked in politics, she manipulates the hat metaphor to gut Senator Coburn's assumption that she would need to remove a "political hat" in the first place. While her subsequent explanation that out of a twenty-five-year career in law, only four were spent in politics, supports this

Washington, are under intense scrutiny because of allegations by Christine Blasey Ford that he sexually assaulted her during high school.").

74. *Kavanaugh Hearing Transcript*, *supra* note 71, at 704.

75. Reuters, *Elena Kagan Under Fire from Republicans*, THE GUARDIAN (June 29, 2010), https://www.theguardian.com/law/2010/jun/29/elena-kagan-barack-obama-supreme-court [https://perma.cc/UL5E-CHBR] [https://web.archive.org/web/20231010211153/https://www.theguardian.com/law/2010/jun/29/elena-kagan-barack-obama-supreme-court].

76. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 178 (2010) [hereinafter *Kagan Hearing Transcript*].

conviction, her initial statement, "Senator Coburn, that hat has not been on for many years," wields important rhetorical power. This is a prime example of the Punctuation theory of humor; Kagan's curt remark serves more as an exclamation emphasizing her sentiment than an explanation of it.

In a broader sense, humor aids nominees from diverse backgrounds to dismiss persistent lines of questioning that their diverse perspectives and identities are somehow at odds with neutral judging. During his campaign, Ronald Reagan promised to nominate the "most qualified woman I can possibly find" to the Supreme Court.[77] During O'Connor's confirmation hearing, she was peppered with questions about women's rights and abortion, seemingly addressing concerns that, despite her conservatism, her identity would seep into decisions.[78] In one such line of questioning, Senator Arlen Specter cut right to the chase:

> Senator SPECTER. Let me skip quite a number of questions since my time is almost up and ask you one final question, Judge O'Connor. Do you think there is any basis at all for appointing a Supreme Court Justice with a view to diversity on account of sex, race, religion, or geography; or would you think it preferable to appoint the nine most qualified people that could be found for the job, even if they all came from Stanford in the same year and lived in Arizona?
>
> Judge O'CONNOR. Senator Specter, that would undoubtedly guarantee quality if that were to be the case.
>
> [Laughter.][79]

Senator Specter's question—should diversity matter, or should the "most qualified" candidate be nominated—exemplifies the concern about identity politics and neutral judging. O'Connor thus uses humor to simultaneously dodge the question and advocate for herself, stressing that the "most diverse" and the "most qualified" are not mutually exclusive terms. Under the Superiority theory of humor, her response effectively dismisses the absurdity of the question itself without having to explicitly rebut Senator Specter's insulting assumption that as a woman she would not be able to competently serve on the bench.

Justice Thomas also marked a historic nomination as the second Black Justice on the Court and Justice Thurgood Marshall's successor. However, in light of Thomas's outspoken views on affirmative action, senators had to grapple with whether he would

77. Mark Z. Barabak, *Column: The Architect of Reagan's Pledge To Put a Woman on the Supreme Court Says It Was All Political*, L.A. TIMES (Feb. 1, 2022), https://www.latimes.com/politics/story/2022-02-01/biden-reagan-supreme-court-politics [https://perma.cc/K2VB-SSVL] [https://web.archive.org/web/20231010211443/https://www.latimes.com/politics/story/2022-02-01/biden-reagan-supreme-court-politics].

78. *See The Nomination of Judge Sandra Day O'Connor of Arizona To Serve as an Associate Justice of the Supreme Court of the United States*, 97th Cong. 198–200 (1981).

79. *Id.* at 214.

safeguard constitutional protections for minorities, despite having benefitted from those same systems.[80]

> Senator HEFLIN. In this article, it goes on and says,
>
> In a November 1987 interview with Reason Magazine, he lamented, the thing that bothered me when I was in college was that I saw myself rejecting the way of life that got me to where I was. We rejected a very stable and disciplined environment, an environment with very strict rules, an environment that did not preach any kind of reliance on government.
>
> Do you want to comment on that?
>
> Judge THOMAS. Well, as I have indicated in these hearings, the environment in which I grew up was a disciplined environment, it was one in which you were expected to be up early. I can still remember my grandfather on Saturday mornings, when he thought we were going to sleep until 7 or 7:30, he would come to the open windows of our bedrooms and just simply say, "Y'all think y'all rich," and that had a way of inspiring me to get up.
>
> [Laughter.][81]

Through introducing a personal story, Thomas illustrates the origins of his "anti-reliance" philosophy. Thomas's grandfather's exclamation emphasizes Thomas's humble origins, perhaps conveying a more authentic picture of his upbringing than a non-humorous discussion of his anti-reliance philosophy may have done. While not directly responding to criticisms and concerns about his attitudes towards governmental protections for minorities, Thomas's story serves to "show not tell" about his own experience growing up as a Black man in America that informs his current beliefs, reaffirming his anti-reliance position rather than evading or justifying it. Especially in the midst of criticisms about Thomas's legal views and Anita Hill's sexual harassment allegations, Thomas's "ingratiatingly self-deprecating" sense of humor, as evidenced here, "may [have been] one of the strongest things going for him," helping him win senators' confidence and garner a position on the Court.[82]

More recently, Justice Sotomayor, the first Latina to be nominated to the bench, faced several questions about a speech she made at UC Berkeley School of Law where she said she hoped that a "wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived

80. Barry, *supra* note 38, at 4–5.

81. *Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States*, 102d Cong. 368 (1991) [hereinafter *Thomas Hearing Transcript*].

82. Richard L. Berke, *Sense of Humor Helps Thomas in His Trial by Committee*, N.Y. TIMES, Sept. 14, 1991, at 6, https://www.nytimes.com/1991/09/14/us/the-thomas-hearings-sense-of-humor-helps-thomas-in-his-trial-by-committee.html [https://perma.cc/B4KZ-NHMA] [https://web.archive.org/web/20231010212117/https://www.nytimes.com/1991/09/14/us/the-thomas-hearings-sense-of-humor-helps-thomas-in-his-trial-by-committee.html].

that life and those life experiences."[83] Her speech, given to an audience at Berkeley's "Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation" symposium in 2001, became the focus of a smear campaign against Sotomayor, with opponents using the "wise Latina" quote as evidence that she was a biased, activist idealogue, not an impartial judge.[84] In light of these allegations, Chairman Patrick Leahy asked Sotomayor to explain the "wise Latina" remarks during her confirmation hearing:

> Chairman LEAHY. So tell us. You have heard all of these charges and counter-charges, the wise Latina and on and on. Here is your chance. You tell us what is going on here, Judge.
>
> Judge SOTOMAYOR. Thank you for giving me an opportunity to explain my remarks. No words I have ever spoken or written have received so much attention.
>
> [Laughter.][85]

The Inferiority style of humor explains why Sotomayor's comment here provoked laughter, humbly downplaying her status as a prominent federal judge and Supreme Court nominee. Her remark, "[n]o words I have ever spoken or written have received so much attention," also plays off the influx of criticism she faced leading up to and during confirmation. Though Sotomayor goes on to sincerely justify her "wise Latina" comment, her initial quip emphasizes the overblown spotlight on her speech which was repeatedly taken out of context to attack her character, helping to defend against further interrogation about that same quote.

D. HUMOR AS A SWORD

Proactive instances of humor, while perhaps less obviously strategic than defensive dodges, also serve an interpersonal role in confirmation hearings. Over the course of their hearings, nearly every nominee at some point showcases their family values and humility:

> Judge GORSUCH: Mr. Chairman, I could not even attempt to do this without Louise, my wife of more than 20 years. The sacrifices she has made, and her open and giving heart, leave me in awe.
>
> I love you so much.

83. Virginia Sanchez Korrol, *Sotomayor's "Wise Latinas,"* HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/sotomayors-wise-latinas_b_229875 [https://perma.cc/WL5K-A99M] [https://web.archive.org/web/20231010212311/https://www.huffpost.com/entry/sotomayors-wise-latinas_b_229875].

84. *Id.*

85. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 66 (2009).

> We started off in a place very different than this one, a tiny apartment and little to show for it. When Louise's mother first came to visit, she was concerned by the conditions—understandably. As I headed out the door to work, I will never forget her whispering to her daughter, in a voice I think intended to be just loud enough for me to hear, "Are you sure he is really a lawyer?"
>
> [Laughter.][86]

Chairman SPECTER. Welcome back, Judge Alito. A thought just crossed my mind that this is the only time when you walk into a room that everybody does not stand up.

Judge ALITO. That happens to me all the time at home, Senator.

[Laughter.][87]

These are just a couple examples of nominees appealing to senators and the general public alike by showcasing their roots and emphasizing that, despite being considered for one of the most important offices in the nation, their personal lives are humble and relatable. Like Sotomayor's remarks above, these comments draw on the Incongruity and Inferiority theories of humor—Gorsuch relating a story about his humble origins or Samuel Alito talking about his subservience at home may be particularly funny precisely because of the positions of power they hold in the public sphere. By volunteering intimate information about their home lives, the nominees help paint flattering, accessible portraits of their characters, not unlike when a celebrity discusses going to the grocery store or getting a flat tire.

This type of proactive humor also extends to bonding with Senators:

Senator HATCH. I have got to go vote, so you will have to forgive me, but I wish you well.

Judge GINSBURG. May I say, if my mother-in-law is watching, she just loves you, Senator Hatch?

[Laughter.][88]

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86. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 64 (2017) [hereinafter *Gorsuch Hearing Transcript*].

87. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 607 (2006) [hereinafter *Alito Hearing Transcript*].

88. *Ginsburg Hearing Transcript*, *supra* note 70, at 366.

Chairman BIDEN. Judge, because of your youth and, God bless you for it—I never thought I would be sitting here talking about the youth of a nominee to the Supreme Court, but I am. Heck, you are 6, 7 years younger than I. I am 48. How old are you, Judge? Forty-two? Forty-three?

Judge THOMAS. Well, I have aged over the last 10 weeks.

[Laughter.]

But I am 43.[89]

Flattering senators like Ginsburg does has obvious benefits; being well-liked by those tasked with confirming you is a clear interpersonal strategy to obtain "yea" votes. Calling attention to the grueling confirmation process as Thomas does is also a recurring trend in hearing humor. The Advice and Consent period presents a stressful and strenuous period for all parties, not just the nominees. Senators must endure long hearings and make high-stakes voting decisions. Thus, by pointing out that the confirmation process "aged" him, Thomas emphasizes the common experience he shares with the Judiciary Committee, strengthening the sense of camaraderie between himself and those tasked with voting on his confirmation.

Humor also helps candidates from underrepresented backgrounds volunteer positive information about themselves. Facing a polarized Senate and a contentious confirmation process where the democratic members of the Judiciary Committee did not even attend the Committee vote in protest of the proceedings,[90] nominee Barrett volunteered several lighthearted comments about being a mother in her hearing.

Senator FEINSTEIN. Mr. Chairman, Judge, it is wonderful to see you also with the family I have been observing. They sit still, quiet, you've done a good job.

Judge BARRETT. I have eyes in the back of my head.

[Laughter.][91]

Since her children were observing the hearing, Barrett was able to showcase being a mother rather than just talking about it. Moreover, her comment that she has "eyes in the back of [her] head" playfully communicates that being a mother and keeping an

89. *Thomas Hearing Transcript*, *supra* note 81, at 5.

90. *Amy Coney Barrett Confirmation Hearings and Votes*, BALLOTPEDIA, https://ballotpedia.org/Amy_Coney_Barrett_confirmation_hearings_and_votes [https://perma.cc/ZC2N-SF3U] [https://web.archive.org/web/20231010212742/https://ballotpedia.org/Amy_Coney_Barrett_confirmation_hearings_and_votes] (last visited Nov. 16, 2023).

91. *Barrett Confirmation Hearing, Day 2 Part 1*, C-SPAN (Oct. 13, 2020), https://www.c-span.org/video/?476316-1/barrett-confirmation-hearing-day-2-part-1 [https://perma.cc/J4N7-XWP5] [https://web.archive.org/web/20231010212846/https://www.c-span.org/video/?476316-1/barrett-confirmation-hearing-day-2-part-1].

eye on her children are not put on pause, even during a hearing to be confirmed to the most powerful court in the country.

Similarly, Justice Jackson, the first Black woman to be confirmed to the Supreme Court, humorously referenced her husband, a white man, when recounting her first semester of college:

> I get there and whoa, so different. I am from Miami, Florida. Boston is very cold. It was rough. It was different from anything I had known. There were lots of students there who were prep school kids like my husband [laughter] who knew all about Harvard and that was not me. I think the first semester, I was really homesick. I was really questioning do I belong here?[92]

This lighthearted aside about her husband serves two purposes. First, Jackson preempted negative questions about her husband's background by getting the first word in about his privileged upbringing. Second, by distinguishing herself from her husband, she also called attention to her inspiring, and potentially relatable humble beginnings as a Black student from Miami at Harvard.

In sum, in the four decades since the first publicly broadcast hearing, political polarization and nominee obfuscation have surged. Interestingly, and perhaps relatedly, the use of humor in hearings has also increased substantially. Nominees across the board use humor to their advantage to evade, justify, flatter, bond, and otherwise increase their odds of confirmation in the game of Advice and Consent.

III. IT'S ALL FUN AND GAMES UNTIL SOMEBODY GETS CONFIRMED: CHANGING HOW WE VIEW CONFIRMATION HUMOR

In confirmation hearings, hot button legal issues like abortion, balance of powers, and other unresolved constitutional questions are bound to crop up. When they do, nominees often respond humorously, either dodging the question, mocking a premise of the question, or otherwise goofing off. Comparing these instances of humor with post-confirmation decisions reveals humor's truth-telling, predictive ability; when nominees humorously evade or make light of certain questions, their disposition towards an issue is often, ironically, revealed.

Jacobi and Sag illustrate how humor in Supreme Court oral arguments can serve as a predictive measure for decision-making.[93] In reviewing oral argument transcripts from the 1950s to the mid-2010s, they found that "Justices do in fact use laughter overwhelmingly against their foes as a descriptive matter" and thus we can predict which argument a given Justice would favor based on who is "the butt of his or her jokes."[94] While humor is not the *only* indicator of disapproval—Jacobi and Sag noted

92. *Jackson Confirmation Hearing, Day 3 Part 4*, C-SPAN (Mar. 23, 2022), https://www.c-span.org/video/?518343-104/jackson-confirmation-hearing-day-3-part-4 [https://web.archive.org/web/20231014203637/https://www.c-span.org/video/?518343-104/jackson-confirmation-hearing-day-3-part-4].

93. Jacobi & Sag, *supra* note 48, at 1482–83.

94. *Id.* at 1482.

that pointed humor mirrors other instances of performative advocacy or aggressive dominance in the modern, highly politicized bench—it provides a lens through which we can parse otherwise "neutral" statements.[95]

In order to flesh out the correlation between confirmation humor and later decisions, I will explore three examples that illustrate humor as a predictive tool for future behavior on the bench: first, humor about *Roe v. Wade* and precedent from members of the majority in *Dobbs v. Jackson Women's Health Organization*; second, Justice Scalia's quips about delegation and constitutionality; and third, Justice Kagan's response to a hypothetical that mirrors a counterargument used against the passage of the Affordable Care Act.

A. ABORTION RIGHTS AND PRECEDENT IN THE WAKE OF *DOBBS*

For a topical example of confirmation hearing humor foreshadowing later decisions, we need look no further than the *Dobbs* majority's humorous comments about *Roe v. Wade*, abortion rights, and precedent. In 2022, the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*.[96] The decision was two pronged: First, that the Constitution does not confer a right to abortion and second, that the Supreme Court may overrule a wrongly decided constitutional question in spite of *stare decisis*.[97] In response to *Dobbs*, many pointed to the majority Justices' confirmation hearings, accusing them of misleading testimony surrounding *Roe* and the role of precedent.[98] Others argued that nothing misleading had been stated during the hearings.[99] Looking at the Justices' humorous responses to questions about abortion rights and precedent during their confirmation hearings may offer a new lens to explain the decision and the public's perception of it. Compare the following excerpts from Alito, Gorsuch, and Kavanaugh's hearings:

Chairman SPECTER.	Do you agree that Casey is a super precedent or a super stare decisis as Judge Luttig said?
Judge ALITO.	Well, I personally would not get into categorizing precedents as super precedents or super duper precedents, or any—

95. *Id.* at 1482–83.

96. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("We hold that *Roe* and *Casey* must be overruled.").

97. *Id.* at 229–32.

98. Dan McLaughlin, *What the Dobbs Majority Said at Their Senate Hearings*, NAT'L REV. (June 24, 2022), https://www.nationalreview.com/corner/what-the-dobbs-majority-said-at-their-senate-hearings/ [https://perma.cc/GN5B-B6X3] [https://web.archive.org/web/20231014205513/https://www.nationalreview.com/corner/what-the-dobbs-majority-said-at-their-senate-hearings/].

99. Rich Lowry, *No, Conservative Justices Didn't Lie About Roe at Their Confirmation Hearings*, N.Y. POST (June 27, 2022), https://nypost.com/2022/06/27/conservative-justices-didnt-lie-about-roe-at-confirmation-hearings/ [https://perma.cc/LBN5-T2YB] [https://web.archive.org/web/20231015074723/https://nypost.com/2022/06/27/conservative-justices-didn't-lie-about-roe-at-confirmation-hearings/].

Chairman SPECTER. Did you say "super duper?"

[Laughter.]

Judge ALITO. Right.

Chairman SPECTER. Good.

Judge ALITO. Any sort of categorization like that—

Chairman SPECTER. I like that.

[Laughter.]

Judge ALITO. [continuing]. Sort of reminds me of the size of laundry detergent in the supermarket.

[Laughter.]

Judge ALITO. I agree with the underlying thought that when a precedent is reaffirmed, that strengthens the precedent, and when the Supreme Court says that we are not—

Chairman SPECTER. How about being reaffirmed 38 times?

Judge ALITO. Well, I think that when a precedent is reaffirmed, each time it's reaffirmed that is a factor that should be taken into account in making the judgment about stare decisis, and when a precedent is reaffirmed on the ground that stare decisis precludes or counsels against reexamination of the merits of the precedent, then I agree that that is a precedent on precedent.[100]

Judge GORSUCH. Absolutely, Senator. And if I might, Mr. Chairman, go back just a moment to promises? I have offered no promises on how I would rule in any case to anyone, and I do not think it is appropriate for a judge to do so, no matter who is doing the asking.

And I do not because everybody wants a fair judge to come to their case with an open mind and to decide it on the facts and the law. One of the facts and one of the features of law that you have to decide it on is the basis of precedent, as you point out. And for a judge, precedent is a very important thing.

We do not go reinvent the wheel every day. And that is the equivalent point of the law of precedent. We have an entire law about precedent, the law of judicial precedent. Precedent about precedent, if you will.

100. *Alito Hearing Transcript*, *supra* note 87, at 321.

> And that is what that 800-page book is about. It expresses a mainstream consensus view of 12 judges from around the country appointed by, as you point out, Presidents of both parties, great minds. Justice Breyer was kind enough to write a foreword to it. It makes an excellent doorstop.
>
> [Laughter.][101]

Senator GRAHAM. So what kind of country have we become? None of this happened just a couple years ago. It is getting worse and worse and worse, and all of us have an obligation to try to correct it where we can.

Roe v. Wade, are you familiar with the case?

Judge KAVANAUGH.I am, Senator.

[Laughter.][102]

The use of humor in these excerpts may help explain the dissonance between the public perception of Justices respecting the precedent of *Roe* and their decision to overrule it in 2022. Alito dodges the question about *Casey* being a "super precedent" by mocking the term itself. By likening "super precedent" to laundry detergent, Alito implies that the term itself is arbitrary and frivolous. This conviction is buttressed by his following explanation that he agrees with the underlying reasoning behind strengthened precedent, but he is careful not to categorize *Roe* as a "super precedent."

Similarly, Gorsuch punctuates his discussion of precedent with a joke that minimizes it. Though he clearly states that precedent is "very important," Gorsuch's final statement emphasizes that the law of judicial precedent "makes an excellent doorstop." While this lighthearted quip refers to how lengthy the doctrine is, it also serves the Superiority function of humor wherein Gorsuch seems to place himself (and the Supreme Court) above the academic text. Gorsuch's initial lengthy, academic account of precedent does not actually admit any opinion; his punctuating joke, however, exposes his potential position on the doctrine while shrouding it in farse.

On the other hand, the laughter after Kavanaugh's simple "I am, Senator" demands that we focus not on Kavanaugh's words but on the audience's perception of them: Why is "I am, Senator" funny? This begs the introduction of context and could be an example of the Incongruity theory, since the audience's expectations clash with the answer, or of the Relief theory, where the statement resolves some sort of tension in the room. It could also simply be an example of the unique setting of confirmation hearings and how a deviation from the norm of serious, complete answers can then be humorous. Regardless, clearly the audience has some contextual understanding of Kavanaugh's attitudes towards *Roe*, or of *Roe*'s status as a controversial case, and thus the simple phrase "I am, Senator" provokes laughter.

101. *Gorsuch Hearing Transcript*, *supra* note 86, at 74.
102. *Kavanaugh Hearing Transcript*, *supra* note 71, at 157.

We can apply the correlation between humor and decisions to the *Dobbs* ruling and the majority's jokes about precedent and *Roe* during their hearings. Their scorn toward the importance of precedent is particularly pertinent in light of the *Dobbs* opinion's detailed argument for overturning long-settled law by weighing several factors including whether a precedent is erroneous, badly reasoned, or unworkable, as well as its effects on other areas of law and reliance interests.[103] So, while Alito may have agreed that precedent can be strengthened by reaffirmation, his mockery of "super precedents" in his confirmation hearing arguably foreshadows his majority opinion which questions what *kind* of precedent carries weight and what kind does not. Such glimpses of contempt in the midst of otherwise vague testimony may help explain why some believed that the *Dobbs* majority had deceived the Judiciary Committee while others felt they had been honest about their stances on the long-politicized issue. Focusing instead on the tone of nominees' replies to questions about abortion and precedent thus provides a more accurate picture of their stances on those issues than the substance of their replies did.

B. SCALIA'S CHARMING CONSERVATISM

Humor also serves as a predictive device for broader jurisprudential dispositions: Justice Scalia's use of humor during his confirmation hearing foreshadows his conservative jurisprudence with respect to administrative law.[104] Given Scalia's famously conservative jurisprudence, his road to the bench was relatively easy. While Bork failed to garner enough Senate votes in 1988, largely because of criticisms of his conservative views, Scalia was sworn in unanimously just two years earlier.[105] As detailed in Part II, though Scalia came to be known for his humor on the bench, he had one of the lowest total and individual numbers of "[Laughter.]" elicited during his hearings.[106] Bork's contentious confirmation hearing had almost four times as many total "[Laughter.]" notations as Scalia's, and Bork provoked more than double as many laughs as Scalia did, perhaps reflecting the high polarization around Bork's nomination as compared to the low polarization surrounding Scalia's.[107] Why Bork failed and Scalia succeeded may be due to any number of factors, but it is worth noting how the discussion around Scalia's nomination and the narratives fleshed out at the hearing may have greased the wheels of confirmation. For one, rather than focusing on Scalia's conservative jurisprudence as they did with Bork, the media and Judiciary Committee drew attention to his Italian-American heritage and his winning personality instead.[108] Moreover, Scalia's hearings came shortly after an intense, heated hearing for William

103. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 218–22 (2022).

104. *See* JUSTICE ANTONIN SCALIA: HIS JURISPRUDENCE AND HIS IMPACT ON THE COURT, CONG. RSCH. SERV. 8 (2016) ("Justice Scalia's opinions on administrative law can be seen to reflect his broader text-based approach to statutory interpretation and his commitment to bright-line rules.").

105. *Supreme Court Nominations (1789-Present)*, *supra* note 27.

106. *See* Figure 2.

107. *Id.*

108. Barry, *supra* note 38, at 9.

Rehnquist to become Chief Justice.[109] Following this exhausting and politically tense exercise, the young Judge Scalia faced little opposition from hearing-weary senators, coasting easily to the bench with evasive answers and defending his caginess by explaining that issues may come up on the Court of Appeals on which he sat or the Supreme Court for which he was nominated.[110] For instance, during an exchange with Senator Ted Kennedy, Scalia explained his decision on the D.C. Circuit about the delegation of power issue in *Bowsher v. Synar*, noting that the "excessiveness" of the delegation to Congress did not in and of itself constitute a constitutional violation and that determining constitutionality when it comes to congressional delegation should generally be "resolved by the Congress."[111]

Judge SCALIA.	Well, again, I am reluctant to talk about what Scalia will say in the future. I can talk about what he said in the past, and I think you have me on the wrong side on the matter
Senator KENNEDY.	That is good. Help me out.
Judge SCALIA	[continuing]. Of broad delegation. The fact is, in the Synar case that we were discussing earlier, the principal attack on the legislation was that it was unconstitutional because of the excessiveness of the delegation. And the three judges of the district court on which I sat rejected that argument. It did not sustain it. The article that you have there, which is an article from Regulation magazine, that I used to be editor of at one period, I do not think—I think you read it incorrectly if you view it as an attack on the constitutionality of broad delegation. To the contrary, I think, if I recollect the article you are referring to correctly, it displayed quite the opposite view, that it is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think it expressed the view that, in most cases, the courts are just going to have to leave that constitutional issue to be resolved by the Congress. Congress has an obligation to follow the Constitution as well.
Senator KENNEDY.	Well, would I be correct in saying that you would support then a broad congressional mandate in these areas?

109. *Rehnquist, Scalia Win Senate Confirmation*, *in* CQ ALMANAC 1986, at 67 (42d ed. 1986), https://library.cqpress.com/cqalmanac/document.php?id=cqal86-1149676 [https://perma.cc/8Q3X-8TFH] [https://web.archive.org/web/20231015081423/https://library.cqpress.com/cqalmanac/login.php?requested=%2Fcqalmanac%2Fdocument.php%3Fid%3Dcqal86-1149676].

110. *Id.*

111. Synar v. United States, 626 F. Supp. 1374, 1386 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986) ("The second contention that may be viewed as going to *per se* nondelegability of the authority conferred by the Act . . . concerns the breadth of the power allocated to administrative officials, which plaintiffs assert is constitutionally excessive. There is no doubt that the Act delegates broad authority, but delegation of similarly broad authority has been upheld in past cases.").

> Judge SCALIA. I would support a broad congressional mandate that is not unconstitutionally overbroad, yes.
>
> [Laughter.][112]

Scalia's seemingly vague reply to Kennedy's follow-up—"I would support a broad congressional mandate that is not unconstitutionally overbroad"—actually emphasizes his point. Whether Senators laughed because of Scalia's pedantic insistence on "constitutional broadness" rather than just "broadness" or his cheeky, circular answer, the resulting "[Laughter.]" in either case illustrates the Punctuation theory at work; Scalia uses humor as a rhetorical device to help articulate his earlier statement. Instead of focusing on the "broadness" of a delegation as Senator Kennedy does, Scalia inquires into the substance and nature of those powers as proscribed by the Constitution. Though this joke helped Scalia dodge a pointed question, it also illustrates his later jurisprudence on constitutional questions regarding separation of powers and delegation, holding, for example, that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[113] Thus, despite Scalia's short, uncontroversial, and unrevealing hearing replete with evasive answers,[114] his pointed humor offers kernels of candor about his future jurisprudence.

C. KAGAN AND THE "BROCCOLI HORRIBLE"

Humor in hearings may also predict future outcomes when a hypothetical argument used in questioning is later mirrored in a legal argument. For example, nominee Kagan responded humorously to a line of questioning about the scope of congressional power, presumably designed to mirror the debate around the Affordable Care Act's individual insurance mandate.[115]

112. *Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 99th Cong. 40 (1986).

113. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (citing Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); *see also* Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish—so that a gradual concentration of the several powers in the same department, can effectively be resisted." (internal quotation marks omitted)).

114. *Rehnquist, Scalia Win Senate Confirmation*, *supra* note 109.

115. Adam Gopnik, *"The Broccoli Horrible": A Culinary-Legal Dissent*, THE NEW YORKER (June 28, 2012), https://www.newyorker.com/news/news-desk/the-broccoli-horrible-a-culinary-legal-dissent [https://perma.cc/5EWF-LEWG] [https://web.archive.org/web/20231015082353/https://www.newyorker.com/news/news-desk/the-broccoli-horrible-a-culinary-legal-dissent] ("One of the really startling things about today's decision on the Affordable Care Act is that the whole broccoli issue, which one might have thought beneath the dignity of the Court, was not only raised in the various rulings and dissents but tossed around, argued back and forth, and made more or less central to the whole thing.").

Senator COBURN.	Let me go to one other thing. Senator Cornyn attempted to ask this, and I think it's a really important question. If I wanted to sponsor a bill and it said, Americans, you have to eat three vegetables and three fruits every day, and I got it through Congress and it's now the law of the land, you've got to do it, does that violate the Commerce Clause?
Ms. KAGAN.	Sounds like a dumb law.
	[Laughter.]
Senator COBURN.	Yes. I've got one that's real similar to it I think it equally dumb. I'm not going to mention which it is.
Ms. KAGAN.	But I think the question of whether it's a dumb law is different from whether the question of whether it's constitutional, and—and—and I think that courts would be wrong to strike down laws that they think are—are senseless just because they're senseless.[116]

Senator Coburn's hypothetical was later echoed in the majority opinion of *National Federation of Independent Business v. Sebelius* when Chief Justice Roberts refused to construe the Commerce Clause to allow Congress to mandate purchasing insurance: "Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables."[117] The partial-dissent, drafted by Justice Ginsburg and joined in part by Justice Kagan, refuted this "broccoli horrible" argument by pointing to several checks that would prevent a congressional mandate to buy vegetables to take hold, including the attenuated inferences a reviewing Court would need to find between buying vegetables and health, other constitutional provisions checking congressional activity, and the democratic process.[118] In light of these considerations, Ginsburg concluded that "[w]hen contemplated in its extreme, almost any power looks dangerous . . . . The Chief Justice accepts . . . specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate."[119]

The language used in the dissent parallels Kagan's response during her confirmation hearing. There, Kagan used Senator Coburn's question to showcase her understanding of legal arguments and constitutionality. By joking that the hypothetical vegetable mandate "sounds like a dumb law," Kagan exposes some contempt for the logical extreme she was being asked to contemplate. This statement also serves to emphasize her conclusion that not everything that is nonsensical is unconstitutional, which gives us a glimpse into her understanding of the soundness of legal arguments. In other words, there are set ways for something to be constitutional or not, and even if something is incredibly frivolous, that is not one of the prescribed checks on constitutionality in our existing legal framework. Even without specific mention of the

116. *Kagan Hearing Transcript*, *supra* note 76.
117. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 554 (2012).
118. *Id.* at 615–17 (Ginsburg, J., concurring in part and dissenting in part).
119. *Id.* at 616-17.

Affordable Care Act or the scope of the Commerce Clause, Kagan's humor illustrates her jurisprudence on the issues at play two years later, and it should come as no surprise that rejecting the "broccoli horrible" argument in 2010 would lead to her rejecting the same argument again on the bench.

IV. THE LAST LAUGH

The Supreme Court confirmation process may be broken, but our analysis of it does not have to be. As confirmation becomes more contentious and nominees more evasive, humor is increasingly deployed. Not only does humor serve defensive and deflective goals, but it also helps form key social bonds and create an appealing, likeable persona of the nominee. Moreover, understanding nominees' jokes helps predict how they will behave on the bench, especially when the substance of their answers leaves candor to be desired.

This Note does not purport to offer a complete guide to predicting future Supreme Court decisions based on nominees' humor during confirmation. Rather, I hope to draw attention to an interpretive tool that can supplement the information available to adequately perform Advice and Consent. So long as the Supreme Court becomes increasingly politically polarized and nominees continue being cagey about their jurisprudence during confirmation, the crisis of legitimacy around the hearings and the Court itself will persist. But by changing how we digest and interpret nominees' answers, looking not at the substance of their language but at other cues like humor, the public and Judiciary Committee alike may be able to discern more concrete jurisprudential stances from nominees. Shifting our perception could, as a result, bolster the democratic check at the heart of Advice and Consent or at the very least force nominees to be more candid about certain highly politicized issues. The joke doesn't have to be on us.