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The Constitution and Congressional Committees, 1971-2000

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THE LEAST EXAMINED BRANCH

The Role of Legislatures in the Constitutional State

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19 The Constitution and Congressional Committees: 1971–2000

Keith E. Whittington, Neal Devins, and Hutch Hicken

The United States Congress delegates a significant portion of its legislative work to its committees. Even though the power and independence of committees has varied over time,¹ the observation of a young Woodrow Wilson in the late nineteenth century remains largely true today: “The House sits, not for serious discussion, but to sanction the conclusions of its Committees as rapidly as possible. It legislates in its committee-rooms; . . . so that it is not far from the truth to say that Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work.” Congress both “deliberates and legislates” in committee.²

Congressional committees are nonetheless largely uncharted territory for constitutional scholars. The new scholarly interest in extrajudicial constitutional interpretation largely ignores the congressional committee system generally and its routine work. When it focuses on the legislature at all, this scholarship limits its sights to floor debates or committee activities of extraordinary interest, such as the Senate Judiciary Committee hearings on the nomination of Robert Bork to the Supreme Court. But, if committees are the primary sites in which Congress both deliberates and legislates, an adequate picture of congressional efforts to interpret and implement the Constitution will have to take into account the normal work of the committees.

Committee hearings provide a useful window into congressional deliberation. Hearings do not provide direct access to the investigation and negotiation that ultimately produces legislative action. But as staged events for public consumption, hearings do provide useful information. They are an important platform for members of Congress to win public notice, shape public opinion, and advance favored causes. Committee hearings are an important vehicle by which legislators seek to build a public record, communicating with legislative colleagues, executive branch officials, interested activists, and the general public. In hearings, legislators put political relationships and concerns on display and establish warrants of authority for legislative action. They serve as “rituals for legitimizing decisions,” and it is precisely in those rituals of legitimization that we may expect the Constitution to be invoked.³

¹ See *infra* notes 14–15 (discussing how changes in the balance of power between party leaders and committee chairs impacts on congressional consideration of constitutional issues).

² Woodrow Wilson, *Congressional Government* (New York: Meridian Books, 1956) at 69, 62.

³ John Mark Hansen, *Gaining Access* (Chicago: University of Chicago Press, 1991) at 23.

This chapter takes a bird's-eye view of congressional committee hearings raising constitutional issues. It maps the patterns of such hearing activity in Congress during the last three decades of the twentieth century. As such, it does not delve into what happens inside individual hearings or consider the quality of congressional deliberation on constitutional matters. Such tasks remain for the future. Instead, this chapter examines the quantity and location of constitutional discourse within Congress and the basic structure of constitutional deliberation in Congress, and it seeks to identify the determinants of legislative attention to constitutional subjects.

Such a perspective on congressional engagement with the Constitution reveals a surprising consistency in congressional hearing activity. While individual issues come and go and individual hearings respond to transitory and idiosyncratic forces, Congress maintains a fairly consistent and constant level of activity in discussing constitutional issues. Congressional engagement with the Constitution is not an exceptional and rare event, but rather is a routine feature of legislative business and politics. While dramatic high points of presidential impeachments or constitutional amendments grab our attention, such episodes occur against a background of more workmanlike and routine discussion of the goals and constraints of constitutional government. As this chapter will demonstrate, the number of constitutionally oriented hearings is not significantly affected by whether Democrats or Republicans control Congress or whether the White House and Congress are controlled by the same party. Likewise, external factors (the president's policy agenda, Supreme Court decision making) do not meaningfully influence congressional hearing activity on constitutional issues. The two parties have held hearings focused on somewhat different constitutional issues, however, and the Nixon Administration did provoke an unusual number of hearings called to respond to executive actions. In other words, constitutionally oriented hearings are largely driven by the general legislative calendar and reflect tendencies common to other hearings in Congress.

Congressional committees, like courts, regularly encounter the Constitution in the course of carrying out their normal responsibilities. Over time, however, the Judiciary Committees have come to dominate congressional consideration of constitutional issues. While other committees hold fewer and fewer hearings on constitutionally related issues, the Judiciary Committees continue to hold roughly the same number of constitutionally oriented hearings.⁴ The continuing interest of the Judiciary Committees in constitutional issues is tied to the committee's mission and the interests of members who serve on these committees. The decline in the number of hearings held outside of the Judiciary Committees is harder to explain. Possible explanations include the ideological polarization in Congress, the increasing emphasis on constituent service by members, and the rise of position-taking legislation.

DATA AND APPROACH

The fact that committee hearings are generally public makes them a relatively accessible source of information about Congress. The fact that they are largely stage-managed raises questions about how that information can be leveraged so

⁴ As discussed below, the mid-1990s is an exception to this general pattern.

as to gain a useful perspective on the reality of congressional deliberation and law-making. Political scientists have used witness appearances at hearings to provide insight into the relationship between Congress and interest groups, and the content of the discussions at legislative hearings has provided a wealth of information about what issues and people legislators takes seriously. The presence or absence of hearings on a given subject and their location within Congress can also provide useful information on change in the public agenda and jurisdictional control over issue areas.⁵

For this chapter, we collected data from committee hearings in the U.S. House of Representatives and U.S. Senate from January 1, 1971, through December 31, 2000. The Congressional Information Service (CIS) publishes an abstract and witness list for public hearings held by the committees and subcommittees of Congress. CIS also assigns multiple topic keywords to each hearing. Using an online version of the CIS database accessible through LexisNexis, we searched for every congressional hearing between 1971 and 2000 containing a variation on the word "constitutional" anywhere in the CIS entry, including the abstract, keywords, hearing title, or witness identifiers. We then examined each entry in order to exclude those that did not make substantive reference to the U.S. Constitution, such as hearings discussing the constitution of Russia or including constitutional law professors testifying on the assets of Holocaust victims. This left a data set of 1,152 congressional hearings. We then recorded subject matter, date, congressional session, committee, whether the hearing focused centrally on the constitutional issues it raised, and whether the hearing was responding to executive or judicial actions.

Our data set is undoubtedly underinclusive of the entire set of hearings that raised constitutional issues during the period. Hearing abstracts and keywords only capture issues that formed a substantial part of the witness testimony. Consequently, this search procedure leaves out hearings that included only relatively brief mentions of constitutional issues. This procedure is also dependent on CIS coding of hearings, and it is possible that some types of constitutional issues and discussions would not be reflected in the CIS entries. Moreover, CIS employs a number of keywords that are relevant to constitutionalism. Although such a procedure would pick up a central CIS keyword ("constitutional law"), it would not necessarily locate others (e.g., "civil liberties"). Nonetheless, there is substantial overlap in the CIS coding (e.g., hearings with the keyword "civil liberties" are often also given the keyword "constitutional law"), and many additional hearings were included based not on the keyword but on terms elsewhere in the CIS entry. In sum, these 1,152 hearings are a sample of the total universe of hearings raising constitutional issues during the period, but it is a sample that is likely to capture a large proportion of the relevant universe and that is broadly representative of the types of constitutional issues that come before Congress.

The data set as a whole includes 1,152 hearings, with 610 in the House, 528 in the Senate, and 14 in joint committees. The House held an average of twenty hearings per year, and the Senate held an average of eighteen per year. Half of all

⁵ For a review of the literature making use of congressional hearings, see Keith E. Whittington, "Hearing about the Constitution in Congressional Committees" in Neal Devins and Keith E. Whittington, eds., *Congress and the Constitution* (Durham, N.C.: Duke University Press, 2005) at 87–109.

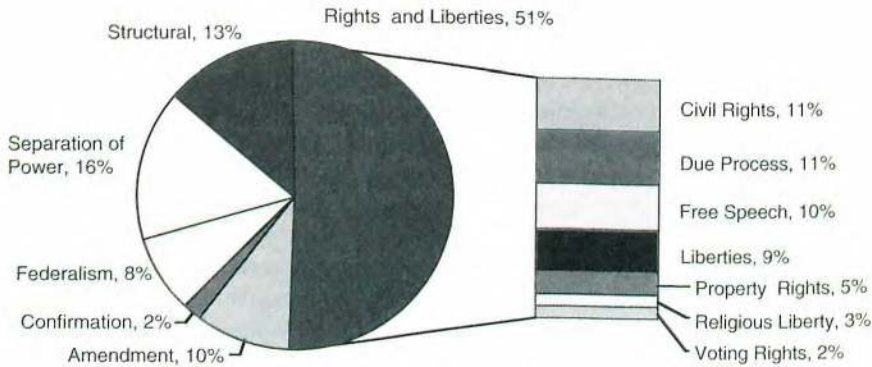


Figure 19.1. Subject Matter of Constitutional Hearings, 1971–2000.

the hearings in the sample addressed rights and liberties. The next most common subject of such hearings was the separation of powers at 16 percent, followed by issues of constitutional structure at 13 percent and constitutional amendment at 10 percent (see Figure 19.1).

Our data set allows us to examine how congressional committee hearings addressing constitutional issues are distributed across time, across the legislature, and across particular issue areas. We have three sorts of expectations as to how congressional attention to constitutional issues might be structured: those shaped by political parties, those shaped by internal institutions, and those shaped by external institutions.

We might expect the incidence of such hearings to respond to partisan pressures within Congress. The scheduling of committee hearings is a monopoly power held by the majority party in the congressional chamber, and so we might expect partisan factors to play a heavy role in determining whether constitutionally relevant hearings are scheduled. We consider three such possibilities. First, one party might be more prone to holding constitutionally oriented hearings than the other. We might imagine, for example, that one party has a greater ideological commitment to constitutionalism or includes more constituencies interested in constitutional issues than does the other party. The Republican Party, for example, is often identified with the “conservative social agenda.” Party leaders have sought to countermand the Supreme Court for rulings on abortion, school busing, religion in the public schools, and gay rights. House Republicans have also championed numerous structural reforms as part of their Contract with America, including term limits, the item veto, and unfunded mandates.⁶ On the other hand, it is a common perception that the Democratic Party is the more civil libertarian party, reflected in items ranging from 1988 Democratic presidential candidate Michael Dukakis’s proud affirmation that he was a “card-carrying” member of the American Civil Liberties Union to the party’s celebration of “activist” judicial decisions such as *Roe v. Wade*.⁷ If true, we might expect the two chambers of Congress to hold more hearings raising

⁶ In 1994, Republicans successfully sought majority control of the House by running on the so-called Contract with America. The Contract pledged a smaller federal government and a larger role for the states.

⁷ 410 U.S. 113 (1973).

constitutional issues when they are held by the Democratic Party than when they are held by the Republican Party.

Second, constitutionally oriented hearings may spike when there is a turnover in partisan control of a chamber of Congress, but the number of such hearings may decay over subsequent sessions as a single party retains control of the chamber and the legislative agenda. We might imagine, for example, that both parties have constitutionally oriented agendas, but that the in-party monopolizes the legislative agenda and the control of committee hearings, frustrating the ability of the out-party to publicize its own agenda items. As a consequence, when partisan control turns over, a burst of legislative activity may result as a new set of policies and hearings become politically feasible. Once this pent-up demand for legislative hearings has been met, however, there may be a declining need to hold additional hearings over time as long as the same party continues to control the agenda.

Third, partisan polarization within Congress might affect the number of constitutionally oriented hearings. Ideological polarization might result in members placing more emphasis on validating their policy priorities than on exploring the constitutional soundness of their handiwork. As such, the growing ideological divide that separates the two parties might result in a decline in the number of constitutionally oriented hearings. Alternatively, by expanding the "gridlock interval," the range of status quo policies that cannot be displaced by an existing legislative majority, ideological polarization may reduce legislative productivity. Increased hearing activity on politically symbolic issues may compensate politically for the decreased legislative output, or the environment of heightened ideological conflict may encourage additional hearings on contested constitutional terrain.⁸

We might expect the incidence of such hearings to respond to internal institutional features of Congress. First, the general legislative and electoral calendar affects the pace and timing of hearings. Legislators may hold more constitutionally oriented hearings in even-numbered (i.e., election) years as they generate issues and a public record as they enter the campaign season. Alternatively, legislators may decrease hearing activity in even-numbered years as campaigns put pressure on the calendar and the legislative session winds to a close. Second, we would expect the House to hold more such hearings than the Senate. Because the full House faces reelection every other year, there may be more pressure on House members to hold hearings to highlight issues of public concern. Moreover, the greater size of the House may simply enable it to be more active in holding hearings without putting undue pressure on individual members. Third, if constitutional issues are routinely encountered as part of normal legislative business, we would expect the number of hearings involving constitutional issues to be a function of the number of hearings held generally in Congress. Fourth, we might expect committee expertise to affect the distribution of hearings touching on constitutional issues. Committees with established expertise and interest in constitutional issues should be disproportionately likely to schedule hearings addressing constitutional subject

⁸ Keith Krehbiel, *Pivotal Politics* (Chicago: University of Chicago Press, 1998); Benjamin Ginsberg and Martin Shefter, *Politics by Other Means* (New York: Basic Books, 1990).

matter and more likely to recognize and hear testimony on constitutional issues that might be relevant to a given policy debate.⁹

Finally, we might expect the incidence of such hearings to respond to changes in the external environment of Congress. Bruce Ackerman has suggested that politicians may turn to constitutional deliberation out of frustration and in an effort to overcome some institutional obstacle to the realization of their policy preferences.¹⁰ Two features of the external environment are particularly notable in this regard. First, the judiciary might push Congress into deliberating on constitutional issues. Left to their own devices, legislators may be content to ignore the Constitution and focus on more bread-and-butter issues in American politics. Increased judicial activity – most notably, the nullification of statutes by federal courts on constitutional grounds – may force legislators to turn their collective attention to constitutional matters and force increased constitutional deliberation. It has been cogently argued, for instance, that Congress has only deliberated on the scope of federal powers when the Supreme Court has aggressively enforced the boundaries of federalism.¹¹ This might be the case generally, and if so we might expect to see increased hearing activity in response to increased levels of judicial invalidation of statutes. Second, conflict with the executive branch may lead Congress into deliberating on constitutional meaning. During periods of divided partisan control of the government, Congress may be more likely to hold hearings exploring the limits of executive power or the scope of congressional power under the Constitution. The impeachment of Democratic President Bill Clinton and the later investigation of his use of the pardon power by the Republican-controlled Congress may illustrate a broader tendency of institutionally based partisan warfare to lead to constitutional challenges and argumentation.

PARTISAN FACTORS

We first consider the three expectations based on partisan considerations regarding the incidence of such hearings. We find limited support for any of the three party-based hypotheses. The first such hypothesis was that the number of hearings held in a legislative chamber would vary depending on which party controlled that chamber. It does not. In the thirty years between 1971 and 2000, the Democratic Party controlled the House for twenty-four years and the Senate for eighteen years. The Democratic Senate held an average of nineteen hearings per year; the Republican Senate held an average of sixteen hearings per year. The Democratic House held twenty hearings per year; the Republican House held twenty-two. The number of hearings held in Democratic-controlled years is not statistically distinguishable from the number of hearings held in Republican-controlled years. Although the two parties may have had somewhat different substantive commitments when it comes to constitutional issues, one party was not noticeably more likely to sponsor hearings raising constitutional issues than was the other. With this

⁹ Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993).

¹⁰ Bruce Ackerman, *We the People*, vol. 2 (Cambridge: Harvard University Press, 1998).

¹¹ J. Mitchell Pickerill, *Constitutional Deliberation in Congress* (Durham, N.C.: Duke University Press, 2004).

data, we cannot rule out the possibility that one party is uniformly more likely to raise constitutional issues but is able to raise those issues in hearings even when it is in a minority (because the minority party is granted the right to call witnesses at hearings), but we do not believe this to be the case given the subject matter of the hearings held under each party.

If we break down the hearings held by each party by subject matter, some partisan differences do emerge, however. When in Republican hands, Congress held approximately five additional hearings to discuss possible amendments to the Constitution (all results significant at the .05 level). Although it is somewhat ironic that the more conservative political party would give more attention to constitutional reform than would the more liberal party, a variety of constitutional amendment proposals have been a prominent part of Republican politics over the past two decades, including amendments relating to such items as a balanced budget, flag burning, and congressional term limits. Constitutional hearings addressing matters of federalism were also far more strongly associated with Congress under Republican control than under Democratic control, which is in keeping with the rhetoric of Republican presidents and party platforms during this period as well.¹² When in Democratic hands, Congress spent more time discussing separation-of-powers questions and constitutional rights and liberties. Congress held approximately five more hearings involving the separation of powers when Democrats were in the majority, a record that received a substantial boost from Nixon-era conflicts and their aftermath. A Democratic Congress held approximately seven additional hearings touching on constitutional rights and liberties compared with a Republican Congress. While most areas of constitutional rights and liberties drew the attention of both parties, Democrats scheduled far more hearings addressing due process and voting rights issues than did Republicans.

Our second party-based hypothesis suggested that hearings raising constitutional issues spiked when party control of a congressional chamber turned over. Congressional chambers changed hands four times during these three decades: in the Senate in 1981, 1987, and 1995, and in the House in 1995. We can compare the congressional sessions controlled by a new party with those controlled by a previously incumbent party. The average number of hearings held in the Senate in sessions controlled by a new party is statistically indistinguishable from the number held in incumbent-controlled sessions. At thirty-seven, the number of hearings held by the newly Republican House in the 104th Congress was significantly above the norm for the House during this period. Although turnover in party control does not appear normally to lead to more constitutionally oriented hearings, the "Gingrich Revolution" in the House following the 1994 elections was noticeably different in this regard. This deviation is not at all surprising. By running on a "Contract with America" that included the line-item veto, term limits, and federalism initiatives, House Republicans made constitutional reform a centerpiece of the 104th Congress.

Our final party-based hypothesis suggested that hearings raising constitutional issues would vary with the ideological polarization of Congress. To examine this

¹² J. Mitchell Pickerill and Cornell W. Clayton, "The Rehnquist Court and the Political Dynamics of Federalism" (2004) 2:2 *Perspectives on Politics* 33.

hypothesis, we turned to the difference in absolute party medians in each chamber as measured by DW-NOMINATE scores. NOMINATE scores are a now-standard measure of the location of legislators in ideological space (ranging from 1.000 to -1.000) based on their overall voting behavior, and the difference in absolute party medians captures the degree of party polarization in any given session as reflected in voting behavior on roll-call votes.¹³ There is no statistically significant correlation between the degree of party polarization in a congressional chamber and the number of hearings involving constitutional issues.

INTERNAL INSTITUTIONAL FACTORS

We considered four expectations regarding the incidence of constitutionally oriented hearings and the internal institutional features of Congress. First, we expected that there would be variation across the legislative calendar of a two-year congressional session. There is indeed a robust relationship (at the .05 level) between the calendar and the number of hearings, with Congress holding an average of forty-seven hearings in odd-numbered years and thirty hearings in even-numbered years. Pending elections tend to crowd hearings off the legislative calendar, including those hearings that raise constitutional issues (see Figure 19.2).

We expected that the more populous and electorally pressured House would hold more hearings than the Senate. The House does hold a slight edge in the number of hearings raising constitutional issues, averaging twenty such hearings per year compared with the Senate's seventeen. This result is driven by the larger overall number of hearings held by the House, however. The number of hearings that raise constitutional issues in the Senate makes up a slightly higher percentage of that chamber's overall number of hearings than does that in the House. Hearings raising constitutional issues constituted 2.6 percent of the hearings held in the Senate during this period, but only 1.9 percent of those held in the House of Representatives. That percentage has also been much more stable in the Senate over these three decades than in the House. In the Senate, the number of hearings that raise constitutional issues is in part a function of the total number of hearings held (at the .05 level). Although the number of hearings raising constitutional issues in the Senate declined somewhat over this three-decade period, that decline tracks the reduced number of hearings held overall in the Senate. In the House, however, the number of constitutionally oriented hearings is independent of the total number of hearings held each year. The percentage of House hearings raising constitutional issues declined from a high in the early 1970s of over 4 percent to a low of under 1 percent in the mid-1980s before recovering somewhat in the late 1990s to levels that were comparable to the mid-1970s. Even as the House held more hearings overall in the late 1970s and 1980s, it held fewer addressing constitutional issues. The House began to hold more constitutionally oriented hearings in the 1990s, however, returning to the levels of the mid-1970s, even as the overall number of hearings declined.

Much of the upswing in House hearings, as already noted, is tied to the 1994 Republican takeover of Congress and, with it, the Contract with America's embrace of numerous constitutional reforms. In particular, the percentage of constitutional

¹³ Keith T. Poole and Howard Rosenthal, *Congress* (New York: Oxford University Press, 1997).

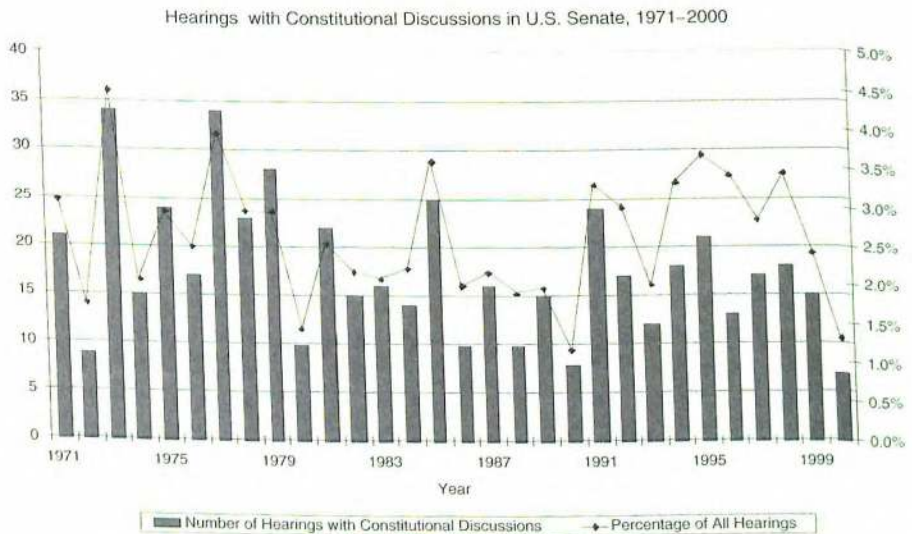
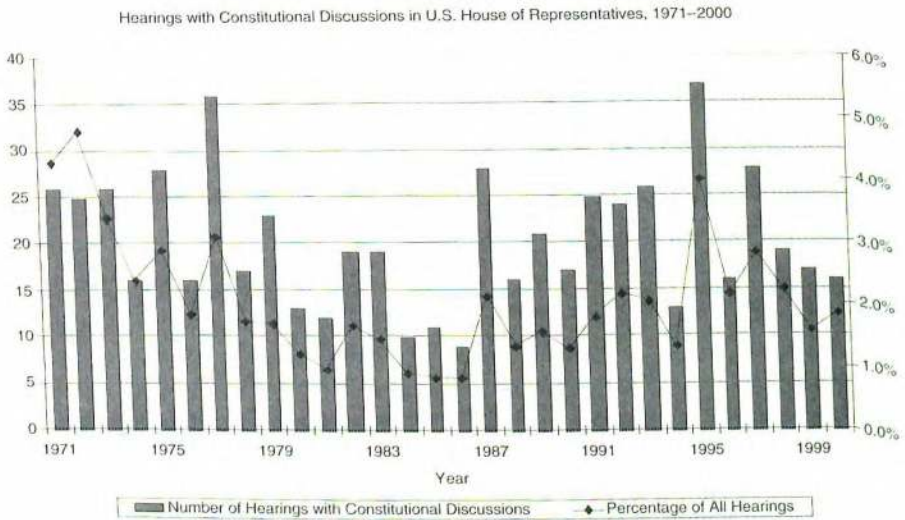


Figure 19.2. Hearings with Constitutional Discussions in U.S. House of Representatives and Senate, 1971–2000.

hearings from 1994 to 1997 matched the 1973 to 1977 period. More telling, by reforming the committee system in the House, the “Gingrich Revolution” shifted power away from the standing committees and toward majority party leadership.¹⁴ During the mid-1990s, House leaders pursued constitutionally oriented reforms while reining in the committees. During the 1980s, however, committee chairs were

¹⁴ See Steven S. Smith and Eric D. Lawrence, “Party Control of Committees in the Republican Congress” in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered*, 6th ed. (Washington, DC: CQ Press, 1997) 163–92.

more autonomous and House leadership was less interested in advancing a constitutional agenda. In other words, the power of House leadership to exert control over committee priorities helps explain swings in the number of constitutionally oriented hearings held in the House.

Unlike the House, Senate leadership exerts less influence over the legislative process and work product. The fact that the percentage of constitutionally oriented hearings in the Senate has been much more stable than in the House reflects institutional differences in the two bodies. Majority leadership lacks the tools to push through a party-driven agenda. Relatedly, the need to build supermajority coalitions results in a lawmaking process that is more deliberate, more decentralized, and more accommodating to the preferences of individual Senators.¹⁵

THE JUDICIARY COMMITTEES

Committee expertise is clearly an important factor in determining whether that committee will hold hearings addressing constitutional issues. In each chamber, the Judiciary Committee dominates constitutional discussions, even though constitutional issues are occasionally raised in the hearings of most committees.¹⁶ For the period as a whole, the House Judiciary Committee sponsored 43 percent of the hearings in the sample from that chamber. The Senate Judiciary Committee sponsored 55 percent. In both chambers, however, the Judiciary Committee has become more important as a site of constitutional discussion over the course of these three decades. From an average of 33 percent of the hearings in the first two Congresses in the sample, the House Judiciary Committee held an average of 66 percent in the last two Congresses. The story is not quite so dramatic in the Senate, but mostly because the Senate Judiciary Committee started at a much higher level. It held 46 percent of the hearings in the first two Congresses of the sample, but 62 percent in the last two Congresses (see Figure 19.3).

The Judiciary Committees did not become more active in holding such hearings; other committees became *less* active in deliberating on the Constitution. This partly reflects a fall-off from the widespread, although sporadic, consideration of constitutional issues in a large number of committees in the 1970s. But it also reflects the shrinking role of more regular participants in the constitutional dialogue. Committees such as the Government Affairs and Labor that once held multiple hearings raising constitutional issues every year averaged closer to one per year in the 1990s. Over the course of these three decades, the engagement with constitutional issues became a more specialized endeavor within Congress. At the same time, committees such as Foreign Relations and Education and Labor that once could plausibly claim to have an expertise of their own in addressing constitutional concerns as

¹⁵ See *ibid.* (explaining why the Senate did not pursue structural reforms during the 104th Congress and, in so doing, distinguishing the two bodies); Barbara Sinclair, "Party Leaders and the New Legislative Process" in *Congress Reconsidered*, 229–45.

¹⁶ The Judiciary Committees have jurisdiction over matters relating to the administration of justice in federal courts, administrative bodies, and law enforcement agencies. The committees also play an important role in impeachment proceedings. Through hearings and a committee vote, the Senate Judiciary Committee screens federal court nominees, including Supreme Court Justices. For additional discussion, see *infra* notes 17–18 and accompanying text.

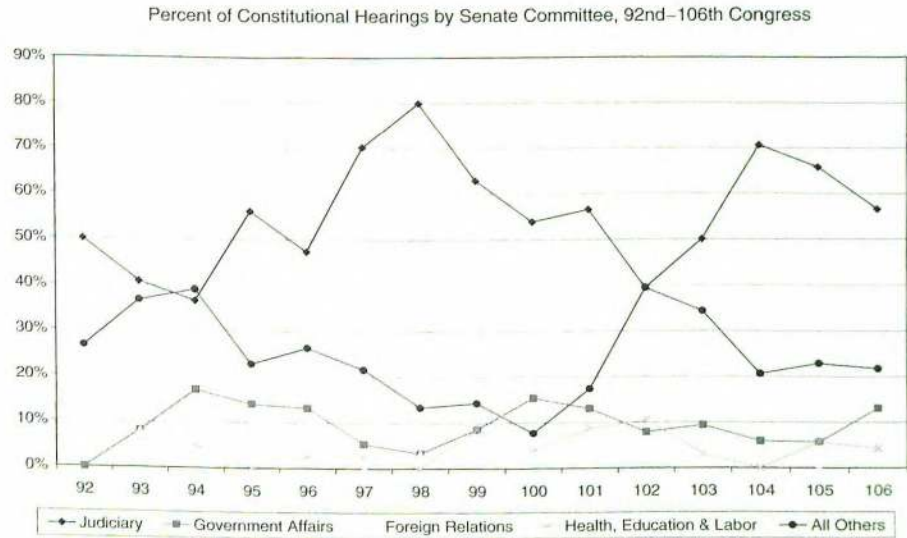
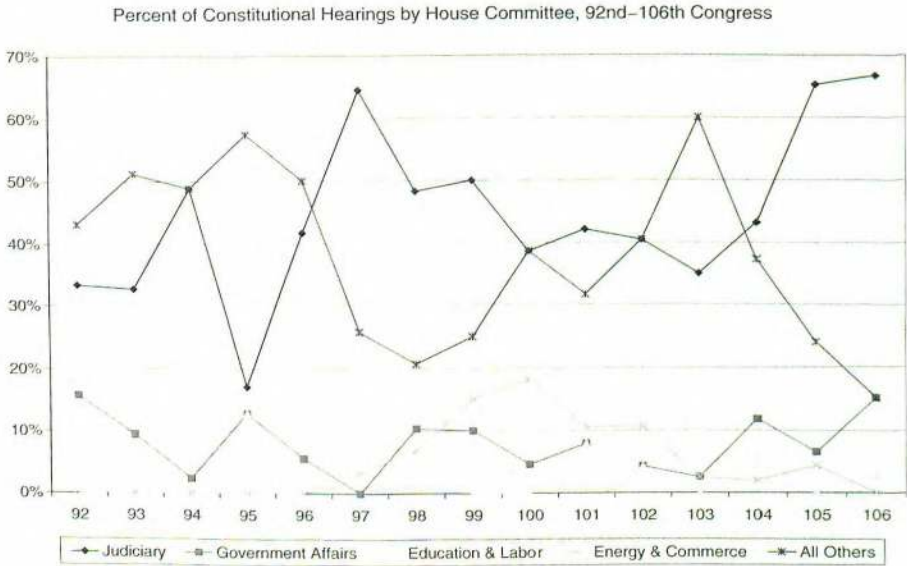


Figure 19.3. Percent of Constitutional Hearings by Committee, 92nd–106th Congress.

a result of their steady engagement with them, have largely ceded jurisdiction to the Judiciary Committees. Subject-specific concerns might still lead a committee into consideration of a constitutional topic to which they might bring substantive expertise or strong constituency interest, as when the Senate Committee on Indian Affairs turned its attention to religious liberty issues after the Supreme Court’s 1990 *Smith*¹⁷ decision or the House Energy and Commerce Committee contemplated

¹⁷ In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the Supreme Court upheld Oregon’s power to deny unemployment benefits to drug counselors who lost their jobs

employee drug testing and tobacco advertising regulation in the mid-1980s, but such encounters are now likely to be fleeting.

Differences between the Judiciary Committees and other committees are to be expected. Judiciary Committee members are overwhelmingly policy-oriented lawyers. They are comfortable with, even relish, legalistic arguments. Also, because the Judiciary Committees often deal with highly divisive social issues (abortion, affirmative action, gun control), lawmakers who seek out these committees tend to be "true believers," individuals who do not feel the heat for taking a stand on contentious constitutional questions.¹⁸ Moreover, Judiciary Committee members value a good legal argument, employ a "lawyer-like culture and deliberative style," and care a great deal about whether the Supreme Court will uphold their handiwork.¹⁹ Given the skills, interests, and norms of the Judiciary Committees, it is hardly surprising that these committees regularly deliberate about constitutional matters. Relatedly, because Judiciary Committee members are genuinely interested in holding hearings on constitutional questions, the number of constitutional hearings held by the Judiciary Committees is fairly stable. Sometimes these hearings are extremely consequential (the confirmation of Supreme Court nominees, the impeachment of Presidents Nixon and Clinton) and other times they are largely symbolic; the overall number of hearings, however, seems more a function of staffing issues than of the saliency of issues before the Committee.

The steady decline in the number of constitutional hearings by other committees is harder to explain. What follows are some plausible explanations, although it is unclear how much impact, if any, these explanations have had in affecting committee practices. First, for some committees, the decline may be tied to changing norms. For example, Congress has ceded more and more of its war powers to the president during the past thirty years.²⁰ The drop in constitutional hearings by the Senate Foreign Relations and House Foreign Affairs Committees may reflect the changing balance of power between Congress and the president. Second, the decline may also be tied to a relative diminution in the importance of constitutional issues to the national policy agenda. In the early to mid-1970s, Watergate and civil rights were dominant issues. Likewise, when Republicans took over the House in 1994, the Contract with America promised numerous constitutional reforms. A third (and related) explanation for the decline is that today's lawmakers are not especially interested in defending Congress's turf as an independent interpreter of the Constitution. Through expedited Supreme Court review provisions, lawmakers

because they had used peyote as part of a Native American Church religious ceremony. In response to this decision, Congress enacted legislation legalizing "the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes." 108 Stat. 3125 (1994). Congress also enacted legislation providing broader protections of religious liberty, legislation invalidated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁸ Christopher J. Deering and Steven S. Smith, *Committees in Congress*, 3rd ed. (Washington, DC: CQ Press, 1997); Mark C. Miller, "Congressional Committees and the Federal Courts": A Neo-Institutionalist Perspective" (1992) 45 *Western Political Quarterly* 949. For this very reason, most lawmakers do not want to serve on an ideologically polarized committee that deals with "no win" issues. Deering and Smith at 82.

¹⁹ Miller *supra* note 18 at 961; Roger H. Davidson, "The Lawmaking Congress" (Autumn 1993) 56 *Law and Contemporary Problems* 99.

²⁰ Louis Fisher, *Congressional Abdication in War and Spending* (College Station: Texas A&M University Press, 2001).

sometimes delegate their power of constitutional review to the courts.²¹ More telling, a recent survey of members of the 106th Congress (1999–2001) reveals that 71 percent of lawmakers adhere to a “joint constitutionalist” perspective whereby courts should give either “limited” or “no weight” to congressional assessments of the constitutionality of legislation.²² Another related explanation for the decline in constitutionally oriented hearings is the ever-growing ideological polarization in Congress. More than ever before, lawmakers may have hard-and-fast views about the rightness of their policy agenda. The question of whether their policy agenda is constitutional may matter less to today’s lawmakers. Correspondingly, Democratic and Republican leadership is increasingly concerned with “message politics,” that is, using the legislative process to make a symbolic statement to voters and other constituents. By focusing its efforts on the message its party is sending, lawmakers places less emphasis on whether a federal court will uphold legislation after it is enacted.²³ Likewise, through the growing use of position-taking legislation, today’s lawmakers place greater emphasis on “making pleasing judgmental statements” than on making “pleasing things happen.”²⁴

EXTERNAL INSTITUTIONAL FACTORS

Two external institutional factors seem likely to affect the amount of constitutional deliberation that occurs in Congress: the constitutional activism of the judiciary and the partisan control of the presidency. In the aggregate, the number of hearings raising constitutional issues has little correlation with how active the Supreme Court might be in striking down federal or state legislation. Even the unprecedented levels of judicial nullification of congressional legislation in the late 1990s had little effect on the number of constitutionally oriented hearings scheduled in Congress. Even in the specific area where the Rehnquist Court’s activism has been posited to increase congressional constitutional deliberation – federalism – Congress held nearly as many hearings in the 1970s as in the 1990s, and the hearings that it did hold in the 1990s were more associated with the newly empowered Republicans’ celebration of federalism in 1995 than with the Supreme Court.²⁵ Throughout the period Congress scheduled hearings specifically to respond to particular judicial actions, but these were just over 10 percent of the total and displayed no particular pattern. If heightened judicial scrutiny of federal legislation spurs greater congressional attention to constitutional issues, it does not make itself evident in the number or subject matter of congressional hearings.

²¹ See Neal Devins, “Congress as Culprit: How Lawmakers Spurred on the Court’s Anti-Congress Crusade” (2001) 51 *Duke L.J.* 435 at 441–7.

²² Bruce G. Peabody, “Congressional Attitudes Towards Constitutional Interpretation” in *Congress and the Constitution*, *supra* note 5 at 39–63.

²³ See C. Lawrence Evans, “Committees, Leaders, and Message Politics” in Lawrence C. Dodd and Bruce I. Oppenheimer, *Congress Reconsidered*, 7th ed. (Washington, DC: CQ Press, 2001) 217–39.

²⁴ David R. Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974) 161. For a discussion of how Congress’s use of position-taking statutes may be causally related to Rehnquist Court invalidations of federal statutes, see Keith E. Whittington, “Taking What They Give Us: Explaining the Court’s Federalism Offensive” (2001) 51 *Duke L.J.* 477 at 511–15 [“Taking What They Give Us”].

²⁵ Cf. J. Mitchell Pickerill, “Congressional Responses to Judicial Review” in *Congress and the Constitution*, *supra* note 5 at 151–72.

This is not to say that courts play no role in setting the constitutional agenda as it appears in congressional hearings. The federalism decisions did not prompt a legislative response because they did not prevent lawmakers and interest groups from pursuing their policy agenda. The Court, while limiting Congress's power, had not sought a return to *Lochner*-era restrictions. Far from hampering the current Congress, the Court's federalism revival matched growing populist and lawmaker distrust of Congress and reinforced the ideological inclinations of House and Senate Republicans.²⁶ In contrast, were the Supreme Court to regularly undermine first-order policy preferences, Court decision making could become a focal point of the national political agenda. Absent something as stark as the *Lochner* era (where Court hostility to the New Deal undermined first-order priorities),²⁷ however, the constitutional agenda in Congress appears to be primarily set independently, by Congress itself, rather than being driven by judicial decision making.

Congressional deliberation on constitutional issues in hearings is also largely independent of the partisan control of the presidency. Throughout the period, Congress scheduled hearings specifically to respond to particular executive actions, but the number of such hearings dropped dramatically after the Nixon era and averaged only 7 percent of the hearings in the sample after 1974. Although the Nixon Administration provoked more such hearings (significant at the .05 level), divided government as such did not increase the number of hearings held to respond to particular executive actions or to address separation-of-powers questions generally. Divided government also did not affect the total number of hearings touching on constitutional issues. During the Reagan era, for example, Congress held fewer hearings than any other time in this study. It did not matter that Reagan explicitly campaigned against judicial activism, supported constitutional amendments on abortion and school prayer, opposed school busing, nominated Robert Bork and other conservatives to fill judicial vacancies, and much more. Congress, although taking the note of the "Reagan Revolution" in all sorts of ways, did not step up its hearings on constitutional issues in response to Reagan's efforts to reshape constitutional law.

CONCLUSION

There is more routine discussion of constitutional issues in congressional committee hearings than would have been expected given the state of the scholarly literature. Congressional scholars largely ignore the content of congressional hearings and certainly ignore constitutional discourse in Congress. Constitutional scholars are increasingly interested in extrajudicial constitutional interpretation, but they have only just begun to explore congressional efforts to interpret the Constitution and have not yet given sustained attention to the primary site of congressional deliberation, the committees.

In fact, Congress regularly hears testimony in committee hearings on constitutional issues. Although such hearings form only a small part of the overall

²⁶ See Keith E. Whittington, "Taking What They Give Us," *supra* note 24; Neal Devins, "The Judicial Safeguards of Federalism" (2004) 99 *Nw. U. L. Rev.* 1131.

²⁷ But see Keith E. Whittington, "Congress Before the *Lochner* Court" (2005) 85 *B. U. L. Rev.* 85.

congressional workload, they evidence a regularized mechanism for congressional constitutional deliberation and provide a useful window into the nature and extent of congressional engagement with constitutional issues. Congress engages a wide range of constitutional subjects. A surprising proportion of that legislative attention during these three decades was aimed at proposals to amend the Constitution, surprising given that no amendments were sent by Congress to the states for ratification during this period. Congress also gives regular consideration to the framework features of the constitutional system: federalism, separation of powers, and structural matters. The majority of its hearings, however, concerned matters of rights and liberties, although this broad category included a variety of more discrete issues.

Perhaps the most basic driving force behind congressional hearing activity involving the Constitution has been the internal demands of the legislature itself. In the Senate at least, hearings relating to constitutional issues are a partly a function of overall hearing activity. The legislative calendar imposes a rhythm on the hearing schedule, with most committee activity occurring in the year following an election. The Judiciary Committees have dominated congressional discussion of the Constitution throughout the last three decades of the twentieth century, but that dominance has become more pronounced in recent years as fewer committees engage in constitutional discussion and those that still do so less often. Unlike the Judiciary Committees, the power and prestige of other committees is not at all tied to their constitutional deliberations. For a variety of reasons, these committees have less and less reason to examine constitutional questions independently. Consequently, in comparison even to the 1970s, Congress is now far more dependent on the specialized expertise and interest of the Judiciary Committees to identify and vet constitutional issues.

In important ways, Congress appears to set its own constitutional agenda. Judicial activity factors into congressional discussions, but constitutional deliberation in committees does not require or follow obvious judicial spurs. Likewise, divided government exercised a surprisingly small force on congressional hearing activity. Although neither political party appears more inclined to consider constitutional issues in Congress, the two parties do differ somewhat in the types of issues that they have tended to raise for discussion. Whereas Republican majorities have tended to schedule hearings to consider proposals for constitutional reform, Democratic majorities have been more inclined to discuss separation-of-power issues and rights and liberties.