

## The Role of Nominee Gender and Race at U.S. Supreme Court Confirmation Hearings

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We investigate an unexplored aspect of the U.S. Supreme Court confirmation process: whether questioning senators treat female and minority nominees differently from male and white nominees. Applying out-group theory, we argue that senators will ask female and minority nominees more questions about their “judicial philosophies” in an effort to determine their competence to serve on the Court. This out-group bias is likely to be exacerbated for nominees not sharing the senator’s political party. Our results do not support racial differences, but they do provide strong evidence that female nominees receive more judicial philosophy-related questions from male senators. This effect is enhanced when the female nominee does not share the partisan affiliation of the questioning senator. Together, these findings indicate that female nominees undergo a substantively different confirmation process than male nominees. We further find that this effect may be most intense with nominees like Justice Sotomayor, whose identities align with more than one out-group.

**B**iased and discriminatory behavior toward gender, racial, and ethnic minorities continues to affect many sectors of American society today. The 2016 U.S. presidential election provides the most recent high profile example of this phenomenon. Vigorous debate erupted throughout the campaign about the ways in which gender shaped public perceptions of both candidates, and the extent to which Hillary Clinton was harmed or helped by being the first woman nominated for president by a major political party. Underlying this public debate is a rich academic literature, exploring how race and gender affect the way we select and assess public and private leaders, including politicians, judges, lawyers, business leaders, university deans and professors, and many

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others (e.g., Boddery et al. 2016; Christensen et al. 2012; Collins et al. 2017; Haynie 2002; Lennon 2013).

Despite the abundance of work in this area, very little of it considers the role of race and gender bias concerning the selection and evaluation of U.S. Supreme Court nominees. Nonetheless, we have good reason to expect that even for the highest court in the United States, female and racial minority nominees will face similar challenges as females and minorities in other professions. As revealed in many other settings, implicit and explicit biases among interviewers impose obstacles for female and minority candidates that do not exist for their similarly situated white, male counterparts (e.g., Biernat and Kobryniewicz 1997; Eagly and Karau 2002). While the female or minority candidate may ultimately get the job or promotion she seeks, she often must first overcome a “presumption of incompetence” that frequently follows female and minority candidates, including those that are objectively as or more qualified than their white, male competitors.

The U.S. Supreme Court’s selection process provides an ideal arena for further assessing and documenting the obstacles that even highly successful female and minority candidates may face. Selection as a modern U.S. Supreme Court justice requires navigating the Supreme Court confirmation hearings held before the Senate Judiciary Committee. The questions asked and answers given (or not given) at the hearings can affect the fate of the nominee in the full Senate (Collins Jr. and Ringhand 2013a; Farganis and Wedeking 2014), shape the ideological orientation of the Supreme Court (Epstein and Segal 2007), and contribute to our understanding of what is and is not “settled” as a matter of contemporary constitutional law (Collins Jr. and Ringhand 2013a).

The Supreme Court confirmation hearings also have symbolic value. The U.S. Supreme Court is one of the least public political institutions in the United States and much of its work occurs far outside of the public’s eye. The confirmation hearings provide a unique and very public view into this otherwise illusive entity. Indeed, these hearings are a national event, attracting substantial media attention, reporting, and gavel-to-gavel television coverage (Bybee 2011; Collins Jr. and Ringhand 2013a; Farganis and Wedeking 2014; Vining Jr. 2011). As such, they provide a salient and unique opportunity for Americans to directly observe nominees and, in many cases, develop opinions about the nominees and the Court (Gimpel and Wolpert 1996). Simultaneously, the hearings allow average citizens to see and learn from how the nominees are treated and assessed by other high-profile elites—in this case, the senators serving on the Senate’s Judiciary Committee.

The implications of a disparate and biased Supreme Court confirmation process are vast. Public displays of bias against women

and people of color in positions of power may discourage ambition among young lawyers who perceive bias-based barriers to success (Williams 2008) or aggravate a sense among women and people of color that our governing institutions do not represent them or understand their concerns (Campbell and Wolbrecht 2006). Further, a biased Supreme Court confirmation process may perpetuate negative stereotypes about women and minorities and cast doubt on their ability to serve in elite institutions like the Supreme Court. By shaping negative perceptions of a future justice's fitness to serve on the Court, senatorial bias toward certain nominees also could contribute to increased skepticism among the general public regarding that nominee's qualifications. It can also foster a culture of incivility in which advocates and other justices demonstrate disrespect for and call into question the credibility of their nontraditional colleagues (Feldman and Gill 2016; Jacobi and Schweers 2017). Thus, while Senate Judiciary Committee members may not be aware of their biases and may not be "consciously disrespectful," their behavior nonetheless could have "the 'real world' consequence of delegitimizing knowledge, experience, and ultimately, leadership" (Han and Heldman 2007: 22). Evidence of bias in such a high profile setting also could harm the public's perceptions of the legitimacy of both the Supreme Court and the confirmation process itself (e.g., Gibson and Caldeira 2009), while the lack of such a finding would provide a noteworthy exception to the large literature documenting such bias in other settings.

Drawing on data from U.S. Supreme Court confirmation hearings from 1967 to 2010, we evaluate whether female and racial minority Supreme Court nominees are treated substantively differently than white, male nominees when they appear to testify before the Senate Judiciary Committee. We find that female nominees do in fact face a different confirmation context than do male nominees. Specifically, they receive a substantially higher proportion of questions that call for them to explain their judicial philosophies, questions that, as we explain, engage the core professional competency expected of Supreme Court justices: the ability to "correctly" interpret the U.S. Constitution. This effect is particularly strong when the female nominees do not share the partisan affiliation of the questioning senator. We do not find a similar empirical result for nonwhite nominees, although the one female, racial minority nominee in our data—Sonia Sotomayor—faced a substantial amount of judicial philosophy questioning relative to earlier nominees. While limited by the small number of female and racial minorities nominated to the U.S. Supreme Court thus far, these findings provide a point of departure for future work examining the barriers faced by nontraditional legal and political officials, including lower court judges, bureaucrats, lawyers, and politicians.

## Racial and Gender Bias, Stereotypes, and Out-Groups

Implicit biases in our public and private interactions remain an ongoing problem in American society. While the issue is complex and contentious, many scholars agree that group stereotypes, driven by limited information about and first-hand experience working with minority group members, are important to understanding bias and discrimination (Arvey 1979; Christensen et al. 2012; Davison and Burke 2000; Dovidio and Gaertner 2000; Fiske and Taylor 2013; Quillian 2006). Gender and race can serve as “status cues” that may “signal individuals to subconsciously assume that members of nonmajority classes are of different status than majority class members” (Christensen et al. 2012: 627). Inherent in this dynamic is a grouping process. Majorities, usually white men, constitute an “in-group,” while minorities, usually women and members of racial and ethnic minority groups, constitute an “out-group.” Bias occurs when this difference becomes salient and provides a foundation for stereotyping of out-group members. Those whose identities align with more than one out-group can face additional stereotyping challenges not based simply on either race or gender, but on the variable interplay of both (Collins and Moyer 2008; Crenshaw 1992; Rosette et al. 2016). For women of color, for example, there are “sometimes-distinct ways that race may play out both between men and women and also among women” (Crenshaw 2012: 1438).

For members of the in-group—the majority group—“less is known about the out-group” than about fellow members of the in-group (Davison and Burke 2000: 231). Consequently, in-group members are likely to view out-group members “as more similar to and more interchangeable with one another” (Dovidio et al. 1992: 170)—in short, as stereotypes. Those stereotypes then inform the in-group’s understanding of the nature of out-group members (Davison and Burke 2000). Out-group members are then judged consistently with the stereotypical, homogeneous group expectation (Biernat and Kobrynowicz 1997), while in-group members are more likely to be trusted (Collins et al. 2017), evaluated individually (Davison and Burke 2000), and “viewed as distinctive and positive on subjectively important dimensions” (Fiske and Taylor 2013: 441).

### Out-Group Assessment Bias in Employment Settings

In the employment hiring and management context, out-group theory predicts that implicit or explicit biases and stereotypes can have a significant negative impact on interviewers’ and employers’ evaluation of the professional competence of women

and racial minorities, creating a “presumption of incompetence” (Arvey 1979; Biernat and Kobrynowicz 1997; Cuddy et al. 2008; Davison and Burke 2000; Eagly and Karau 2002). Competence in this context refers broadly “to the ability to do well on a task judged to be valuable” in the field of interest (Foschi 2000: 22). This presumption of incompetence is likely to be present even when out-group applicants’ relevant application records and previous job performance are, objectively speaking, equivalent or even stronger than those belonging to in-group (male, white) applicants (Eagly et al. 1992; Firth 1982; Inesi and Cable 2015; Lott 1985). Low-status, out-group members will need more evidence of their ability for the task (Biernat and Fuegen 2001). At the same time, out-group members will be allowed less latitude than in-group members in the face of evidence of ability or experience insufficiencies (Biernat and Kobrynowicz 1997). To overcome this imbalanced assessment, lower status interviewees and employees must “jump through more hoops” and “work twice as hard” (Biernat and Kobrynowicz 1997: 546) to prove their professional aptitude for the position or task. This use of double standards in the evaluation of competence is a “subtle exclusionary practice” (Foschi 2000).

Experimental and observational studies confirm the strong presence of this competence bias against women and racial minorities in the employment setting. Women’s likelihood of being devalued is particularly high when they occupy male-dominated roles or are evaluated by men (Eagly et al. 1992; Heilman and Haynes 2005; Inesi and Cable 2015). Quillian’s (2006) review of race discrimination studies similarly uncovered that “subordinate groups have predominately negative stereotypic attributions when evaluated by dominant group members” (320).

Female and minority political elites seem to be as vulnerable to competence bias and stereotyping threats, as are other females and minorities, particularly when the evaluators themselves also are elites, such as lawyers, judges, and politicians.<sup>1</sup> For example, state legislators rate their black colleagues’ legislative effectiveness much lower than that of white legislators (Haynie 2002), even after controlling for relevant experience, bill introductions, committee membership, partisanship, and seniority factors. Female Cabinet Secretaries-designates are less likely to be granted insider status during their Senate confirmation hearings than their male

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<sup>1</sup> While earlier studies revealed a relative reluctance among white, male voters to support minority and female candidates (Philpot and Walton 2007), recent empirical studies find that voters generally do not make voting decisions based on stereotypes (e.g., Brooks 2013; Dolan 2014) unless those stereotypes have been activated during the campaign (Bauer 2015).

counterparts with similar career paths (Borrelli 1997). Research on lawyers and law firms reveals that “[t]he perception of difference, sex stereotyping, and treating women as a category rather than individually, provide serious obstacles” to female lawyers’ advancement in the legal profession (Epstein et al. 1995: 304).

Within the judiciary, male judges hold significantly more negative stereotypes about female lawyers than do female judges (Martin et al. 2002). Specifically, surveyed male judges were more likely than female judges to agree with statements, such as:

- “By and large female attorneys lack the competence of their male colleagues.”
- “Generally speaking, men are more credible than women.”
- “A woman who is outspoken or strongly adversarial is obnoxious” (Martin et al. 2002: 693).

Similarly, Sen (2014) finds that female, racial, and ethnic minority federal district court judicial nominees were more likely to receive lower ratings from the American Bar Association than white and male nominees. This was the case even after controlling for key factors like party affiliation, education, and experience. As Sen notes, “we cannot rule out the possibility of implicit bias against these sorts of nominees” (63). In addition, Gill et al. (2011) demonstrate that female and minority state judges receive lower judicial performance evaluations than their male and white colleagues, providing further evidence for the possibility of unconscious biases in the evaluation of members of the judiciary.

At the U.S. Supreme Court, two recent studies find striking gendered effects in the presence of interruptions during the Court’s oral arguments. Feldman and Gill (2016) find that female justices on the Court are interrupted more frequently by fellow justices than are their male colleagues, and Jacobi and Schweers (2017) find that female justices are interrupted at disproportionate rates by male lawyers. Szmer et al. (2010) also reveal that Supreme Court justices were nearly 9% less likely to vote in favor of legal positions favored by women attorneys than those favored by male attorneys. In addition, recent experimental work reveals that judicial decisions were perceived as more authoritative when labeled as authored by “Anthony Kennedy” than by “Sandra Day O’Connor” (Bodderly et al. 2016). Nor is this phenomenon limited to the U.S. Supreme Court: a recent study demonstrated that some black male and white female state Supreme Court justices were found to be less likely than their traditional colleagues to receive opinion-writing assignments (Christensen et al. 2012).

Together, this evidence seems to suggest that some legal and political elites make biased evaluations of female and racial minority candidates. Within the legal system and judiciary, much of this

lingering bias seems rooted in stereotyping of the legal profession as a male's field of work.<sup>2</sup> Indeed, Justice Ruth Bader Ginsburg once recounted her understanding that: "men of the bench and bar" generally held "the unyielding conviction that women and lawyering, no less judging, do not mix" (Ginsburg 2007: 1).

With this theory and prior research in mind, we now turn to our primary question: whether and to what degree these biases manifest themselves during U.S. Supreme Court confirmation hearings.

### **The Supreme Court Confirmation Hearings Connection**

As most scholars of American politics and legal institutions know well, candidates nominated to the U.S. Supreme Court are now regularly called to testify before the Senate Judiciary Committee. At the heart of the confirmation hearings rests the question-and-answer sessions during which each Committee member questions the nominee for a set time on the topics of his or her choosing. Although some scholarly accounts of the hearings, based largely on anecdotes, question their value (e.g., Carter 1994), more rigorous evidence demonstrates that the hearings do play an important role in the Supreme Court selection process and the answers nominees give (or do not give) can have vast implications for nominees (Collins Jr. and Ringhand 2013a; Farganis and Wedeking 2014).

If the confirmation process is subject to the type of out-group bias discussed above, the hearings are likely to be where it is most visible. Accounts from some nominees themselves suggest that such bias is present. Justice Sonia Sotomayor, the first Latina to go through the process, reported afterward her belief that female judicial candidates are treated differently than their male counterparts. "There are expectations about how women and men should behave," she told a group of law students 2 years after her nomination. "I am probably a bit more aggressive, but to hear people describe me as brash, and rude, the language used suggests a difference in expectations about what's OK for people's behavior" (Ward 2011). Justice Clarence Thomas also famously spoke about bias at his hearing, particularly in relation to the allegations of

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<sup>2</sup> These gendered stereotypes about judges may be less likely to hold in civil law countries, where judges are viewed to hold less power. As Rémiche (2015) notes, over 60% of the judges in the ordinary court system in France are women (compared to approximately 32% federal judges in the United States). Underlying these frequency differences, Rémiche argues, are legal cultures that assign different levels of "power" to judges. The French judge is viewed as "a knowledgeable automaton mechanically applying the law entirely created by the Parliament," (96) while the American judge has more discretion and decision-making power.



sexual harassment brought by Anita Hill (Morrison 1992). In starkly racialized language, he referred to his experience before the Senate Judiciary Committee as a “high-tech lynching for uppity blacks” (United States Senate 1991: 157). Commentators have made similar observations over the years (Collins Jr. and Ringhand 2013a: 169–170; Kenney 2014: 230).

Out-group theory provides a useful way to quantitatively evaluate these claims. Given the historical and contemporary dominance of male and white senators in Congress generally and on the Senate Judiciary Committee specifically, male and white nominees appearing before the Committee for hearings are likely to be in most senators’ in-group and to benefit from in-group favoritism, including being evaluated in a subjectively positive way. By contrast, female and nonwhite nominees appearing before the Committee generally belong to the out-group and, as such, are likely to be evaluated consistently with their out-group’s stereotypical expectations. As discussed above, these stereotypes can be quite negative: women nominees may be perceived as inappropriately aggressive or emotional, while racial minority nominees may be perceived as less smart or lazy.

By coupling out-group theory with the bias in hiring literature and applying both to the Supreme Court confirmation hearings process, we can begin to develop expectations regarding how the hearings may play out differently for in and out-group nominees. These theories, as well as the experimental and observational studies underlying them, give us good reason to believe that the “hiring”<sup>3</sup> senators are likely to view female and racial minority nominees as inherently “different” in some way from more traditional, in-group white and male nominees. This is particularly true given the above-discussed research finding that elites are particularly likely to be affected by out-group stereotypes, and that there are strong historically rooted stereotypes that judging is and should be dominated by white males. Even in the face of objective qualifications that are equal to or even exceed those of previous Supreme Court nominees, therefore, theory predicts that male or white senators will tend to lack relative confidence in out-group nominees’ professional competence to serve on the Court.

If such bias is present at the hearings, it is likely to emerge implicitly rather than explicitly. In many cases, the questioning senators may not even be aware that they are treating in-group nominees differently from out-group nominees. Therefore, instead of explicitly biased treatment, we would expect skeptical senators to use their questioning time to require out-group

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<sup>3</sup> During the Gorsuch hearing, Senator Al Franken (D-MN) specifically referred to the hearings as the nominee’s “job interview” (United States Senate 2017: 129).



nominees to more elaborately prove that they have the professional competence required to sit on the high court.<sup>4</sup>

Professional competence at this level cannot be captured by educational pedigree or job experience. All nominees to the Supreme Court are likely to be among the most talented and experienced lawyers of their generations. Consequently, we would expect perceptions of competence at Supreme Court confirmation hearings to be tied to something else: a nominee's ability, in the eyes of the questioning senator, to get the Constitution "right" by using the "correct" method of constitutional interpretation.<sup>5</sup> As Senator Orin Hatch (R-UT) stated at the Sotomayor hearing, "a judicial nominee's qualifications include not only legal experience but, more importantly, judicial philosophy" (United States Senate 2009: 11). If, as Foschi and others have asserted, the definition of professional competence is "the ability to do well on a task judged to be valuable" in the field of interest (Foschi 2000: 22), then the core professional competence of a Supreme Court justice is to correctly interpret the U.S. Constitution. To do otherwise is to fail at the essential task required of the job.

The senators and nominees are quite clear on this point. When Senator Strom Thurmond (R-SC) wanted to make Thurgood Marshall look unfit to sit on the high court, he launched an elaborate attack on Marshall's ability to correctly understand and interpret the original understanding of the Fourteenth Amendment (United States Senate 1991: 523). Likewise, Senator Chuck Schumer (D-NY) opened the Alito hearing by describing a nominee's "most important qualification" as the nominee's "judicial philosophy" (United States Senate 2006: 37), and Senator Jeff Sessions (R-AL) skeptically informed Sonia Sotomayor in his opening statement at her hearing that the senators would "inquire into how your philosophy, which allows subjectivity in the courtroom, affects your decision-making" (United States Senate 2009: 8). Justice Alito, testifying before the Committee in 2006, captured the sentiment succinctly, stating simply that "the job of a Supreme Court Justice [is] to interpret the Constitution" (United States Senate 2009: 465).

There is unquestionably deep disagreement about what the "correct" method of constitutional interpretation is, and senators

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<sup>4</sup> Note that this is a different question than whether the senator believes the nominee will or will not vote in favor of the senator's preferred outcomes. A senator could sensibly believe that a nominee was both incompetent and likely to advance the senator's preferred constitutional outcomes.

<sup>5</sup> These questions are coded in our data as involving "judicial philosophy." Questions in this category include queries about constitutional interpretation, original intent, "living constitutionalism," *stare decisis*, judicial activism, and the use of empathy. Moreover, this category of questions excludes those in which the judicial philosophy inquiry was wedded to a particular subject (such as "is *Roe v. Wade* an example of judicial activism?").

are likely to form their preferences on the matter in ways that advance their underlying policy goals (Post and Siegel 2006). Nonetheless, in the context of the confirmation hearings, questioning nominees about their judicial philosophies is a tool senators use to explore how, as future justices, nominees would execute that core task. When senators perceive a nominee as using the wrong interpretive methods, the senators will also view the nominee as unqualified to sit on the Supreme Court. In addition, while senators may well be skeptical of the judicial philosophy of *all* nominees named by opposing-party presidents, the theory here predicts that opposition party in-group nominees will enjoy much more of a presumption of mainstream, professional competence in this regard, while similarly situated female and minority nominees may enjoy no such presumption. Rather, stereotypes and negative perceptions of these nominees will lead them to be perceived as less willing or able to behave in a similarly professional manner.

In the Supreme Court confirmation hearing context, therefore, we would expect questioning senators to express this skepticism by requiring minority and female nominees to demonstrate their professional competence (or reveal their lack thereof) by spending more of their confirmation hearing time answering questions about their judicial philosophies. The out-group status of these nominees would tend to lead senators to implicitly or explicitly view them as less skillful and trustworthy than in-group nominees, and the senators would try to expose this tendency by probing more deeply in this area. Equally qualified in-group nominees, in contrast, might receive more latitude during confirmation questioning regarding judicial philosophy, as in-group senators will have more confidence in the professionalism of in-group nominees, or see casting doubt on the nominee's professional competencies as a less fruitful line of attack. In-group nominees therefore should expect to receive a lower proportion of questions in the areas of judicial philosophy than out-group nominees.

We formalize these expectations for in and out-group gender and racial minority nominees in Hypothesis 1.

*Hypothesis 1a: Female Supreme Court nominees will receive a higher proportion of judicial philosophy questions from male senators than will male nominees.*

*Hypothesis 1b: Racial minority Supreme Court nominees will receive a higher proportion of judicial philosophy questions from white senators than will white nominees.*

## The Conditioning Effect of Politics on Out-group Bias

We turn now to the potential conditioning effect that politics can have on the magnitude of out-group bias during Supreme Court confirmation hearings. Whether out-group stereotyping leads to discriminatory behavior may depend on the presence of an attitude-behavior link (Davison and Burke 2000). This opens the door for preferences to affect whether discrimination will take place. When an out-group member shares a person's values, ideals, and policy priorities, people may be able to control stereotypes and biased perceptions of out-group members and, to some degree, inhibit their activation or lessen their impact (Kawakami et al. 2000). By contrast, when those preferences do not align, stereotypes are more likely to be adopted and acted upon. Indeed, the effects of these stereotypes may be negatively magnified, leading to much higher levels of discriminatory behavior toward out-group members.

Previous research finds a strong connection between political attitudes and preferences and the magnitude of activated out-group stereotypes. This includes evidence that, for Senate candidates, there is a strong link between political preferences and perceptions of women (Koch 2000) and race (Sigelman et al. 1995). At the U.S. Supreme Court, while justices were less likely to vote for legal positions favored by women attorneys than those favored by male attorneys, there is about a 10% higher likelihood of support for the female lawyer's position if it is consistent with the justice's ideology (Szmer et al. 2010).<sup>6</sup>

In the context of Supreme Court confirmation hearings, we expect that partisan congruence between the questioning senator and the nominee will serve an important conditioning role on the presence and level of out-group bias. The modern Senate is highly polarized along party lines (Lee 2008), and committee membership reflects the partisan composition of the full Senate (Epstein and Segal 2007). Senate parties act as "teams," with coordination on important issues like presidential agenda items and procedural control (Lee 2009). Importantly, ideological proximity and policy agreement are not the only reasons that Senate partisans support one another; rather, some members will work with their party "because they understand the value of team play" (Lee 2009: 47).<sup>7</sup>

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<sup>6</sup> Szmer et al. (2010) also find that, in addition to this ideological congruence effect, conservative justices have a 0.7% lower likelihood of supporting the woman attorney's legal position than liberal justices.

<sup>7</sup> As Lee (2009) notes, another difficulty with focusing solely on ideological proximity is that "[n]o methodology that looks only at the patterns in vote outcomes can isolate what is meant by the concept of 'ideology' and differentiate it from team play" (50).

It would be “quite surprising if Democrats were not more likely to support Democratic presidents than were Republicans and vice versa” (Segal 1987: 1001). Moreover, this is exactly what the evidence indicates for the Senate’s confirmation process: nearly all senators of the same party as the president support his Supreme Court nominees, but significantly fewer opposition party senators do so (Epstein and Segal 2007; Farganis and Wedeking 2014).

How might this “partisan climate” in the Senate’s deliberations over Supreme Court nominees (Epstein and Segal 2007) differentially affect in-group and out-group nominees? Recall that out-group evaluation bias toward Supreme Court nominees often stems from a lack of specific information about and trust in the predictability of an out-group nominee’s future behavior and decisions. In the case of out-group nominees (and their appointing president), who share the questioning senator’s party, much of this uncertainty or distrust, will, inevitably, be lessened. Shared party provides a set of common expectations for the senator and nominee that may help avoid the strong activation of out-group biases. By contrast, when the nominee hails from the opposite party as the senator, stereotypes are likely to be magnified. In these cases, there is no shared set of expectations to stand in the way of gender and racial stereotyping leading to biased behavior. Moreover, because partisan divisions are piled on top of out-group status stereotyping, senators are likely to be particularly wary of the competence of these nominees. As a result, we expect to see a higher percentage of judicial philosophy questions asked of opposite party,<sup>8</sup> out-group nominees.

Therefore, our resulting conditional hypothesis includes:

*Hypothesis 2a: Female Supreme Court nominees not from the senators’ political party will receive a higher proportion of judicial philosophy questions from male senators than same party female nominees.*

*Hypothesis 2b: Racial minority Supreme Court nominees not from the senators’ political party will receive a higher proportion of judicial philosophy questions from white senators than same party racial minority nominees.*

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<sup>8</sup> We use “opposite party” and “party affiliation” to refer to the party of the questioning senator and the party of the nominating president. For the sake of simplicity, we do this even when the reference is directly to the nominee. This means we will on occasion refer to a nominee in a way that implies he or she has a “party,” despite the fact that party affiliation is not a formal part of the judicial selection process.

## Data and Methods

We test our hypotheses by utilizing the *U.S. Supreme Court Confirmation Hearing Database* developed by Collins Jr. and Ringhand (2013b). This data set contains information on the subject matter of every statement made at every open, transcribed Supreme Court confirmation hearing held before the Senate Judiciary Committee from 1939 to 2010.<sup>9</sup> In our model that focuses on nominee gender, we begin our analysis in 1981, which was the first time a female nominee (Sandra Day O'Connor) appeared before the Committee. Our model that focuses on nominee race begins in 1967, which was the first time a nominee of color (Thurgood Marshall) testified before the Committee. Moreover, these years mark significant institutional developments related to an increase in the volume of questions about precedent (1967) and gavel-to-gavel television coverage of the hearings (1981), the latter of which resulted in lengthening the hearings overall (Collins Jr. and Ringhand 2016). Thus, by focusing on these periods, we can make comparisons across nominees who faced the Committee in similar institutional environments.<sup>10</sup>

Because we are interested in the relative amount of attention senators devote to questioning nominees on their judicial philosophies, the unit of analysis is the senator-nominee dyad. This means that there is one observation for every senator who questioned a nominee at their confirmation hearing (e.g., one observation for Senator Coburn during the Sotomayor hearing and one observation for Coburn during the Kagan hearing). Our empirical analysis is tailored to reflect out-group theory's focus on the status of *both* the senator and the nominee and the dominance of white men on the Senate Judiciary Committee over time. We limit our primary analysis to male senators' questions (for gender-related tests) and white senators' questions (for racial minority-related tests) during Supreme Court confirmation hearings. In the models that test for gender differences, the data set excludes the 10 observations pertaining to female senators. In the models

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<sup>9</sup> The data do not include the testimony at the Clarence Thomas hearing related to the allegations of sexual harassment brought by Anita Hill. While raising important issues of race and gender that have been well covered in the literature (see, e.g., Crenshaw 1992; Davis and Wildman 1992), that dialogue is excluded from this project since the scope of senatorial questioning during that portion of the hearing was formally limited to the allegations of sexual harassment and thus did not include the discussions of judicial philosophy being examined here (Yalof 2008: 163).

<sup>10</sup> When we include data from the entire 1939–2010 time frame, the results from the gender and racial models remain consistent with those reported below, with one exception. The gender model from the longer time frame reveals that female nominees receive 9% more judicial philosophy questions from different party senators than same-party male nominees.

that tests for racial differences, the data set excludes the 10 observations relating to minority senators. Thus, the gender models allow us to examine whether male senators treat female nominees differently than male senators treat male nominees, and the racial models allow us to investigate whether white senators treat minority nominees differently than white senators treat white nominees.<sup>11</sup> After our main empirical analyses, we present a descriptive analysis of the questioning behavior of the limited number of female senators in the data.

While the relatively small number of female and racial minority nominees does have the potential to bias the results against finding statistically significant effects (e.g., King et al. 1994), we note that although female and racial minority nominees appear before the Judiciary Committee far less frequently than more traditional white, male nominees, there is nonetheless sufficient variation to make statistical investigation appropriate. For example, female nominees make up 33.5% of observations in the 1981–2010 data and racial minority nominees constitute 13% of observations in the 1967–2010 data.

Our dependent variable represents the proportion of senatorial questions devoted to explorations of the nominees' judicial philosophies.<sup>12</sup> As noted above, questions about judicial philosophy include those that involve a nominee's judicial philosophy and constitutional interpretation as a concept, but do not include questions about constitutional interpretation that arise in the context of a specific issue area or are related to particular constitutional outcomes or cases. The coding of the dependent variable used here was found to be extremely reliable by Collins Jr. and Ringhand (2013b: 77–80): there is 94% intercoder agreement on the issue area variable used to identify judicial philosophy questions ( $\kappa = 0.921$ ).

Because our dependent variable is a proportion that cannot take on negative values and cannot exceed 1, the use of ordinary least squares regression is inappropriate. Accordingly, we employ a fractional logit model. The fractional logit model is a quasi-likelihood method that is estimated as a generalized linear model and allows us to account for the bounded nature of the dependent variable (Papke

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<sup>11</sup> When we include all senators in the models, we obtain substantively and statistically similar results. However, doing so likely masks any unique behavior of these senators due to the very small number of female and racial minority senators on the Judiciary Committee. We explore this in further detail below.

<sup>12</sup> As an alternative, we used the proportion of comments made by *both* nominees and senators devoted to judicial philosophy. This alternative variable is correlated with the dependent variable used here at the 0.99 level. Substituting it does not change the results.

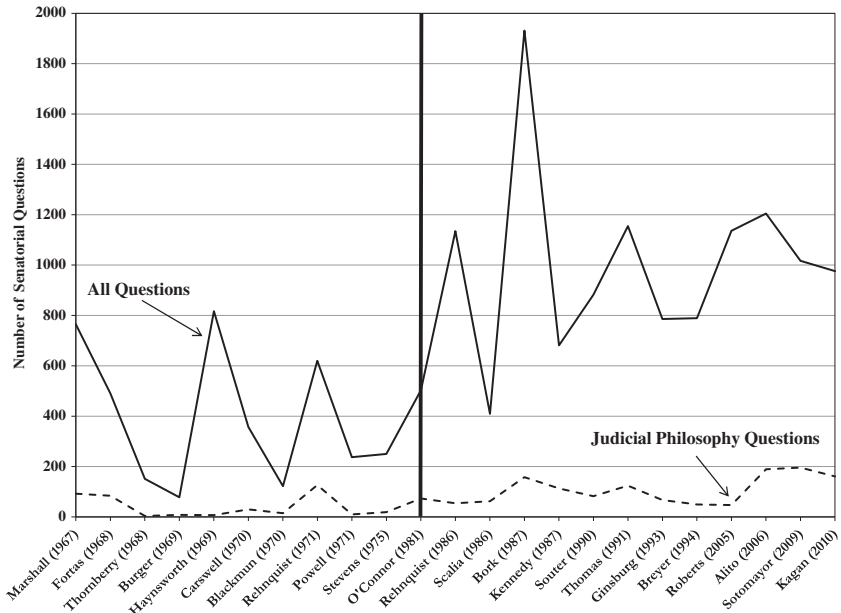
and Wooldridge 1996). As nominees appear in the data more than once, we use robust standard errors, clustered on nominee.<sup>13</sup>

Figure 1 reports the number of overall questions and judicial philosophy questions asked of nominees from 1967 to 2010, based on the data used in the statistical analyses that follow. The solid vertical line identifies the O'Connor hearing in 1981, which is the first hearing in the gender models. As this figure indicates, there was a slight increase in the overall questioning of nominees leading to William Rehnquist's hearing for the Chief Justice position in 1986. At that point, the overall number of questions evened out, although it is evident that Robert Bork received a particularly large number of questions. Overall, 12.4% of questions asked by senators involve querying nominees about their judicial philosophies. This makes this the second most common substantive topic of questioning at the hearings after civil rights (Collins Jr. and Ringhand 2013a: 103). Indeed, both Alito (2006) and Kagan (2010) saw almost a fifth of their hearing devoted to this topic. In addition, Figure 1 also provides some preliminary evidence regarding gender and racial disparities among the nominees. For example, for female nominees, an average of 18.6% of the questions asked by senators were judicial philosophy questions, compared to 12.9% for male nominees ( $p = .006$ ). Racial minority nominees received an average of 15.3% of judicial philosophy questions, compared to 13.5% for white nominees ( $p = .21$ ). We now turn to analyzing these differences in a more rigorous manner.

To test our hypotheses, we set up a series of variables that allow us to capture the gender, race, and party affiliation of the questioning senator and the nominee. *Female Nominee* is scored 1 for questions asked by male senators to female nominees (Ginsburg, Kagan, O'Connor, and Sotomayor) and 0 for questions asked by male senators to male nominees, based on information in Epstein et al. (2013) and United States Senate (2016a). *Male Nominee* is coded in the opposite way (1 for male senator-male nominee questions; 0 for male senator-female nominee questions). *Minority Nominee* is scored 1 for questions asked by white senators to minority nominees (Marshall, Sotomayor, and Thomas) and 0 for questions asked by white senators to white nominees (Epstein et al. 2013; United States Senate 2016b). *White Nominee* is coded in the opposite way (1 for white senator-white nominee questions; 0 for white senator-minority nominee questions). *Same Party* is scored 1 if the senator questioning the nominee shares the partisan affiliation of

<sup>13</sup> We obtain substantively and statistically similar results when we employ ordinary least squares regression, Tobit, and random effects models, and when we do not cluster on the nominee.





**Figure 1. The Number of Overall and Judicial Philosophy Questions Asked of Each Nominee, 1967–2010**

the president who appointed the nominee and 0 if the senator and nominee have opposing party affiliations (Carroll et al. 2015; Epstein et al. 2013). *Different Party* is coded in the opposite way.

Based on these constituent variables, our modeling below focuses primarily on the four possible combinations for a nominee's out-group status and party affiliation (for a similar modeling technique see Owens 2010). Doing so allows us to better understand the conditionality present between these statuses and how they compare with one another when it comes to the proportion of questions asked about judicial philosophy. For nominee gender, the four resulting combinations are: (1) *Female Nominee/Same Party*, (2) *Male Nominee/Different Party*, (3) *Male Nominee/Same Party*, and (4) *Female Nominee/Different Party*. Every senator-nominee pair within the data belongs to one (and only one) of these groups. For nominee race, the four similarly designed groupings are: (1) *Minority Nominee/Same Party*, (2) *White Nominee/Different Party*, (3) *White Nominee/Same Party*, and (4) *Minority Nominee/Different Party*.

Based on our hypotheses, we expect that the *Female Nominee/Same Party* variable will be negatively signed, indicating that female nominees receive a smaller proportion of questions regarding their judicial philosophies from same party senators, compared to opposite party senators. We expect the *Male Nominee/Different Party* variable will be negatively signed, revealing that

male nominees receive a smaller proportion of questions regarding their judicial philosophies from different party senators, compared to female nominees. We expect that the *Male Nominee/Same Party* variable will be negatively signed, indicating that male nominees receive a smaller proportion of questions regarding their judicial philosophies from same party senators, compared to opposite party senators questioning female nominees. The *Female Nominee/Different Party* variable serves as the baseline in our statistical models. Our expectations for the variables pertaining the race and party of the nominee and senator also follow this logic.<sup>14</sup>

We include three additional variables in the models to account for other factors that might affect the proportion of questions asked by senators about judicial philosophy. First, we control for each nominee's qualifications, which is intended to capture senators' views of each nominee's professional preparation for the Supreme Court. *Nominee Qualifications* are based on the assessment of a nominee's professional credentials for the Court that appeared in newspaper editorials in four leading newspapers: *Chicago Tribune*, *Los Angeles Times*, *New York Times*, and *Washington Post* (Cameron et al. 1990). This variable ranges from 0 to 1, with higher values indicating more qualified nominees, and was obtained from Segal (2016).<sup>15</sup> We expect this variable will be negatively signed, indicating that senators ask nominees perceived to be more professionally qualified for the Court a smaller proportion of questions about judicial philosophy.

Second, we include a variable that indicates whether or not the nominee had prior judicial experience. *Nominee Judge* is coded 1 if the nominee served as a judge on a state or federal court and 0 otherwise, based on information in Epstein et al. (2013). We expect senators to ask nominees with judicial experience a lower proportion of questions regarding their judicial philosophies, as these individuals have established interpretation track records on this issue that are accessible to senators. This allows senators to focus their questioning on other issue areas at the hearings. Accordingly, we expect this variable to be negatively signed.<sup>16</sup>

<sup>14</sup> As alternatives to this modeling approach, we estimated separate models that included variables capturing: (1) the absolute ideological distance between the nominee and senator, whether the nominee is a member of the senator's out-group, and an interaction between these variables; and (2) whether the nominee is a member of the senator's political party, whether the nominee is a member of the senator's out-group, and an interaction between these variables. The results of those alternative model specifications corroborate the conclusions stemming from Tables 2 and 4.

<sup>15</sup> Because Segal (2016) does not provide a qualification score for Homer Thornberry, we calculated Thornberry's score (0.6875) based on Segal's coding protocols.

<sup>16</sup> To be clear, this variable is distinct from a nominee's qualifications. The two variables are correlated at 0.09 (1967–2010). Simply put, judicial experience does not in-and-of-itself make one qualified for the Supreme Court.

Finally, we include a *Senator Reelection Year* variable that captures whether the senator questioning the nominee was up for reelection during the year of the hearing, based on information in United States Senate (2016c). This variable is coded 1 if the senator was up for reelection and 0 otherwise. Because senators can use the questions they ask at the hearings to promote their reelection prospects, we expect them to ask more questions about judicial philosophy than senators who are not up for reelection. This is because senators can use these questions to demonstrate to their constituents that they take their position on the Committee very seriously and are willing to rigorously engage nominees on matters relevant to their fitness for the bench (Collins Jr. and Ringhand 2013a; Collins Jr. and Ringhand 2016). Accordingly, we expect this variable will be positively signed.<sup>17</sup> Table 1 reports the means and standard deviations of the dependent and independent variables, as well as the expected direction for each of the independent variables.

## Results

Table 2 reports the results of the statistical models that explore whether male senators ask female nominees a higher proportion of questions regarding their judicial philosophies. As described above, we test our hypotheses by assessing the proportion of judicial philosophy questions asked of nominees based on their combined out-group status and shared party affiliation. Table 2's modeling sets female nominees receiving questions from opposite party senators (*Female Nominee/Different Party*) as the baseline for statistical comparison. This means that the proportion of judicial philosophy questions received by nominees in the other three possible groupings—*Female Nominee/Same Party*, *Male Nominee/Different Party*, and *Male Nominee/Same Party*—are being compared to female nominees from a different party than the questioning senator. If hypothesis 1a holds, we would expect to see negative signs on the *Male Nominee/Different Party* and *Male Nominee/Same Party* variables since, in these two situations, male

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<sup>17</sup> We also estimated models that included a variety of other variables, including various controls for time, the presence of divided government, the questioning senator's age, whether the questioning senator was previously a lawyer or a judge, the nominee's ideology, the senator's ideology, the ideological distance between the senator and the nominee, the number of years left in the appointing president's term, and whether the nomination was critical (see Binder and Maltzman 2002 for variable details). None of those variables demonstrated a statistically significant influence on the dependent variable. Additionally, we estimated models that included dummy variables for the president who appointed each nominee to account for how the political climate of the presidency might influence hearing content. The results of those models corroborate those reported here.

**Table 1.** Summary Statistics

	Expected Direction	Male Senator Model (Table 2)	White Senator Model (Table 4)
		1981–2010	1967–2010
Dependent variable	[Not applicable]	0.135 (0.154)	0.124 (0.170)
Female or minority nominee/same party	–	0.2 (0.401)	0.081 (0.272)
Male or white nominee/different party	–	0.345 (0.477)	0.429 (0.496)
Male or white nominee/same party	–	0.32 (0.468)	0.441 (0.497)
Female or minority nominee/different party	[Baseline]	0.135 (0.343)	0.050 (0.218)
Nominee qualifications	–	0.778 (0.203)	0.758 (0.247)
Nominee judge	–	0.915 (0.280)	0.832 (0.374)
Senator reelection year	+	0.13 (0.337)	0.137 (0.344)

Notes: Entries are the means of the dependent and independent variables. Entries in parentheses are the standard deviations of those variables.

nominees are receiving questions from male senators. Moreover, if hypothesis 2a holds and there is a conditioning partisan effect, we would expect the negative sign to also extend to the *Female Nominee/Same Party* variable where female nominees receive questions from partisan allies. Because the coefficients from a fractional logit model cannot be directly interpreted, Tables 2 and 3 provide marginal effects to permit substantive interpretations.

The results are striking. Female nominees being questioned by opposite party senators are asked 10% more questions about judicial philosophy than are male nominees being questioned by

**Table 2.** The Proportion of Senate Questions Regarding Judicial Philosophy Asked by Male Senators, 1981–2010

Female nominee/same party	–0.537* [–6.6%*] (0.21)
Male nominee/different party	–0.917* [–10%*] (0.39)
Male nominee/same party	–0.128 (0.34)
Female nominee/different party	[Baseline]
Nominee qualifications	1.272* [+4.0%*] (0.644)
Nominee judge	–0.497* [–6.2%*] (0.24)
Senator reelection year	0.027 (0.19)
Constant	–2.017* (0.50)
AIC	0.644
BIC	–992.06
Observations	200

\* $p < .05$  (one-tailed tests)

Notes. The dependent variable is the proportion of questions asked by male senators involving judicial philosophy. Entries are fractional logit regression coefficients. Numbers in parentheses are robust standard errors, clustered on nominee. The marginal effects of the coefficients of the statistically significant independent variables appear in brackets.

**Table 3.** Marginal Effects for Gender Models, 1981–2010

Gender Group	Baseline Group	Marginal Effect
Female nominee/different party	Male nominee/different party	+10% questions
Female nominee/different party	Male nominee/same party	NS
Female nominee/different party	Female nominee/same party	+6.6% questions
Female nominee/same party	Male nominee/different party	NS
Female nominee/same party	Male nominee/same party	NS
Male nominee/same party	Male nominee/different party	+8% questions

opposite party senators. In other words, preemptively skeptical (opposing party) senators grill female nominees much harder than they do similarly situated male nominees about the nominee's ability to competently perform the core professional task of constitutional interpretation.

Interestingly, as shown in Table 3, same party senators are not responding to the increased judicial philosophy questioning from opposite party senators by generating a corresponding increase of their own in friendly questioning in this area. This type of "tit for tat" ritual is readily observable in the hearings, but our data show that it is not happening here: same party senators do not respond to the increased skeptical questioning of opposite party senators in this area by providing their same-party female nominees with increased opportunities to rebut that skepticism under friendly questioning. Instead, the results show that female nominees receive 7% fewer judicial philosophy questions from same party senators than they do from opposite party senators. This is consistent with the shared values conditioning effect discussed above, which holds that stereotyping is most likely to be triggered when out-group members are seen as also having different values than the higher status individual. However, it may have the unfortunate effect of depriving female nominees of the opportunity to rebut increased skeptical questioning about their judicial philosophies through a compensatory increase in friendly questioning in this issue area.

Stereotypes regarding female nominees' professional competence, reflected through questioning about judicial philosophy, thus may harm female nominees in three distinct ways. First, female nominees are subjected to more rigorous questioning in this area by opposite party senators who may see such questioning as revealing a perceived weakness. Second, their male counterparts enjoy the privilege of not being subjected to a similar rigorous questioning by opposing party senators, and therefore do not have their professional competence publicly challenged in the same way. In fact, male opposite party nominees receive 8% fewer judicial philosophy questions than male same party nominees, as illustrated in Table 3. Third, female nominees are not provided

**Table 4.** The Proportion of Senate Questions Regarding Judicial Philosophy Asked by White Senators, 1967–2010

Minority nominee/same party	-0.314 (0.358)
White nominee/different party	-0.561 (0.433)
White nominee/same party	-0.603 (0.44)
Minority nominee/different party Nominee qualifications	[Baseline] 0.962 (0.612)
Nominee judge	-0.437 (0.358)
Senator reelection year	0.457* [+5.5%*] (0.211)
Constant	-1.888* (0.562)
AIC	0.627
BIC	-1743.25
Observations	322

\* $p < .05$  (one-tailed tests)

Notes. The dependent variable is the proportion of questions asked by white senators involving judicial philosophy. Entries are fractional logit regression coefficients. Numbers in parentheses are robust standard errors, clustered on nominee. The marginal effects of the coefficients of the statistically significant independent variables appear in brackets.

compensatory opportunities by same party senators to demonstrate their professional competence through a similarly friendly questioning from same party senators.

Turning now to the control variables, the model reveals that more qualified nominees receive a higher proportion of questions regarding their judicial philosophies than less qualified nominees. A one standard deviation increase in this variable, making a nominee more qualified, results in a 4% increase in questions regarding the nominee's judicial philosophy. This suggests that nominees who appear to be qualified are not immune from competency-based questions regarding their judicial philosophies. The model also reveals that, as expected, nominees with previous judicial experience receive about 6% fewer questions about their judicial philosophies. Since these nominees have a track record, via their opinions, that speaks to their judicial philosophies, senators apparently choose to focus more on other types of questions during their hearings.

Table 4 reports the results of the model that explores whether white senators ask minority nominees a higher proportion of questions regarding their judicial philosophies. Unlike the model that explores gender differences, this model fails to reveal racial differences, conditioned or unconditioned on shared party affiliation, on this measure. As others have demonstrated (and as even a cursory review of the hearing transcripts reveals) there is nonetheless evidence that minority nominees are subjected to unique confirmation hearing experiences (e.g., Collins Jr. and Ringhand 2013a; Davis and Wildman 1992; Dworkin 2009; Greene 1989).

For example, Ringhand and Collins Jr. (2011) show that minority nominees receive more questions on other issues areas, such as criminal justice. Why no difference appears on the measure examined here is a question warranting additional study.

We do, however, have one possible explanation for this nonresult. As noted above, our research design anticipates senators' unwillingness to use the hearing process to explicitly and directly call out minority nominees for their perceived lack of professional competence. We therefore use questioning about judicial philosophy as a vehicle through which this senatorial skepticism about the minority nominee's competence will be manifested. It may be the case, however, that senators do not require any such proxy concerning nominees who are racial minorities because the purported professional incompetence of these nominees is being discussed directly and explicitly.

This certainly was the case concerning Thurgood Marshall's confirmation hearing (Greene 1989) and may have been in play at the hearings of Clarence Thomas as well (Davis and Wildman 1992; Wills 1995). The issue of competence repeatedly and directly came up at the Marshall hearing, including when Senator Strom Thurmond (R-SC) engaged in a series of not-so-thinly-veiled attacks on Marshall's fitness for the Court by grilling him on esoteric aspects of the history of the Thirteenth and Fourteenth Amendments (Collins Jr. and Ringhand 2013a: 169–170). At the Thomas hearing, issues of competence likewise often came up directly, frequently in response to the view of two members of the American Bar Association's Standing Committee on the Judiciary that Thomas was not competent to serve on the Court (e.g., United States Senate 1991: 523).

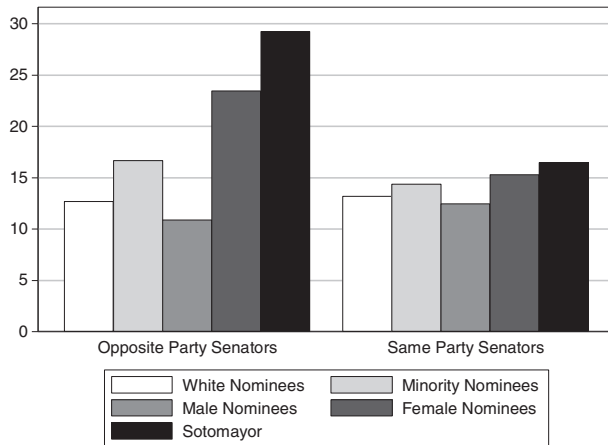
Sonia Sotomayor's hearing provides another interesting example. Sotomayor is the only nominee in our data to be both a woman and a member of a racial minority, and her nomination was explicitly intended to diversify the Court (Steigerwalt et al. 2013). As such, she may be subject to a unique set of biases and stereotypes and her competence may be particularly called into question (Rosette et al. 2016). Our findings support this.

Figure 2 reports the percentage of judicial philosophy questions that nominees received from opposite and same party senators from 1967 to 2010, based on the data used in our empirical models.<sup>18</sup> The data indicate that Sotomayor received a higher percentage of judicial philosophy questions than the average for all other categories nominees to the Court—white, minority, male, and white female. Overall, 19% of the questions asked of

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<sup>18</sup> When we restrict the data to the 1981–2010 time frame, the graphical representation of the data is virtually identical.





**Figure 2. The Percentage of Judicial Philosophy Questions Nominees Received from Opposite and Same Party Senators, 1967–2010**

Sotomayor involved grilling her on matters pertaining to her judicial philosophy, more than any other nominee in the data, save for Justices Alito and O’Connor, who were asked the same percentage of judicial philosophy questions. These included questions related to whether it was appropriate for judges to exhibit “empathy” when deciding cases and those relating to Sotomayor’s ability to be impartial in light of her comment regarding “wise Latinas” (Dworkin 2009; Kenney 2013). These results echo recent empirical findings that Sotomayor is the justice most commonly interrupted at Supreme Court oral arguments, providing another measure of disrespect directed disproportionately at the Court’s only female, racial minority nominee in terms of race and gender (Jacobi and Schweers 2017).

### The Next Step: Female Senators’ Behavior

Our findings reveal that male senators ask in-group members—i.e., male nominees—a lower percentage of judicial philosophy questions than female nominees. This leads to the natural related question of whether female senators are similarly favorable to their in-group members (female nominees) in their questioning behavior.<sup>19</sup> While our robustness checks reveal that the inclusion of female senators in the analyses above has no substantive effect on the results, any plausible effect is almost certainly masked by the small number of female senators in the data. There

<sup>19</sup> There is only one instance in our data where a racial minority senator questioned a racial minority nominee. In 1967, Senator Fong questioned nominee Thurgood Marshall and did not ask him any judicial philosophy questions.

were just three female senators on the Senate Judiciary Committee through 2010 (Senators Feinstein, Klobuchar, and Moseley-Braun),<sup>20</sup> which amounts to only 10 senator-nominee dyad observations in the data set.

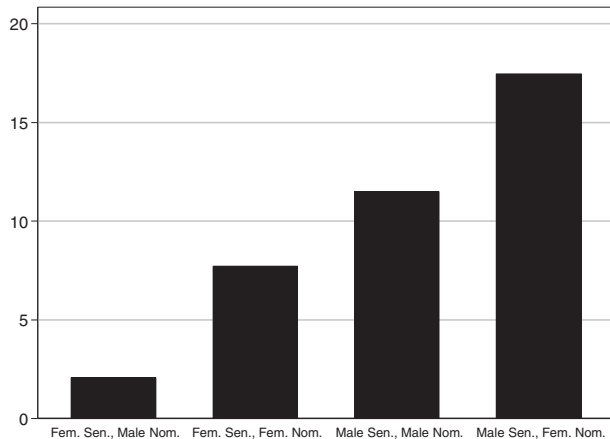
For female senators, out-group theory as strictly applied would predict that female senators would be more likely to favor and defer to those in their in-group (i.e., female nominees) than those in their out-group (i.e., male nominees). Simultaneously, the theory would expect that female senators would be more likely to implicitly call into question male nominees' competence to serve on the Court. However, prior research indicates that when evaluators, employers, or interviewers are themselves of a lower status, they are much less likely than higher status evaluators to apply differing standards of competence to objectively similar candidates (Foschi 2000). Applied to the Supreme Court confirmation hearings setting, these prior results would predict little-to-no difference in the questioning of male and female nominees by female senators. Finally, gender-based stereotype threat may lead female senators to adhere to the stereotypes of their group (Latu et al. 2015; Pinel 1999). Within our data, stereotype threat could manifest itself through female senators, just like their male colleagues, questioning female nominees' competence to serve on the Court more aggressively than male nominees' competence.

To provide a preliminary assessment of the behavior of female senators on the Senate Judiciary Committee in their questioning of male and female nominees regarding their judicial philosophies, we turn to the descriptive data from this project. Because of the small number of female senators, systematic regression analysis would be unwise. Figure 3 reports the percentage of judicial philosophy questions female and male senators asked of female and male nominees from 1981 to 2010.

Two key findings emerge. First, female senators ask both female and male nominees fewer judicial philosophy questions (5.5%) than male senators (12.7%). Second, like male senators, female senators ask more judicial philosophy questions of female nominees (7.7%), as compared to male nominees (2.1%). Although these findings are very preliminary (due to the small number of female senators on the Judiciary Committee and our corresponding inability to account for confounding factors), they nonetheless provide some support for theories of stereotype threat that suggest that female senators might invoke the same stereotypes as male senators when it comes to evaluating female nominees. It also is plausible that the qualitative content of female senators' judicial

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<sup>20</sup> Senators Mazie Hirono (D-Hawaii) and Kamala Harris (D-California) joined the Committee in 2016 and 2018, respectively.



**Figure 3. The Percentage of Judicial Philosophy Questions Nominees Received from Female and Male Senators, 1981–2010**

philosophy questions to female nominees may be different from that of male senators, a topic that we leave for future research to fully assess. Regardless, it is evident that additional study into this area will shed important light on this important issue.

## Conclusions

The female nominees who sit before the Senate Judiciary Committee are among the most accomplished lawyers of their respective generations. Nonetheless, as our results reveal, these female nominees are often subjected to a very different confirmation process than are their male colleagues. As predicted by out-group theory and prior studies of gender bias in hiring, male senators grill female nominees on their judicial philosophies—questions representing the core professional skill expected of U.S. Supreme Court justices—more so than they press male nominees. Further, this questioning comes disproportionately from opposite party—and presumably skeptical—senators. This effect was most acute for Sonia Sotomayor, although our statistical results do not indicate that the other minority nominees face a similarly difficult set of questions compared to white nominees. Finally, our preliminary descriptive analysis of the small number questions asked by female senators revealed that female senators, on average, tend to ask nominees, and particularly male nominees, a lower percentage of judicial philosophy questions than male senators.

The fact that female nominees are very publicly subjected to a different type of confirmation process by male senators than are male nominees serves to perpetuate negative stereotypes that male judges are more believably prepared to serve in the judiciary

and, specifically, as Supreme Court justices. As more and more female and minority nominees participate in the confirmation process, this differential treatment could cast the legitimacy of the process and the Court itself into doubt, particularly if there is not a corresponding increase in female and minority senators (another high-profile and strongly white, male stereotyped profession) capable of reducing the out-group dynamics.

As the first study to rigorously explore the differential treatment of female and minority Supreme Court nominees at the hearings, this paper opens the door to a wide array of future research. Perhaps most obviously, it will be important to apply the theory and methods advanced here to the selection of other judicial and political actors. Future study of judicial nominees to the federal district courts and courts of appeals and executive branch nominees within the Department of Justice (such as U.S. Attorneys), for example, offers great potential to examine a larger number of female and racial minority nominees who testify before the Senate Judiciary Committee (e.g., Dancey et al. 2011; Dancey et al. 2013; Martinek et al. 2002; Scherer 2005; Steigerwalt 2010). Nominees to these institutions undergo somewhat similar scrutiny from the Judiciary Committee and tend to be more diverse in terms of their race and gender. They may also allow for a closer investigation into whether female, racial minority nominees face particularly intense scrutiny from the Judiciary Committee. We note, however, that this future area for research does not come without its own difficulties. Nominees to the lower federal courts and Department of Justice posts generally face a shorter and less salient confirmation process than Supreme Court justices. For example, lower federal court nominees' hearings typically last just a few minutes (O'Brien 2002), with the average federal district court nominee receiving only 6.9 questions from the Senate Judiciary Committee (Dancey et al. 2013: 799). By comparison, Supreme Court nominees frequently testify for days with each nominee receiving an average of 717 questions (using the data in Figure 1 from 1967 to 2010).

It also will be useful to explore whether social role stereotypes (Eagly et al. 2000) lead female and minority nominees to receive heightened questioning from senators beyond those questions involving their judicial philosophies. For example, black politicians are stereotyped as being empathetic and disproportionately good at handling issues of concern to the black community like civil rights and affirmative action while, at the same time, being perceived to be less strong than other politicians on issues related to the economy, military and national security, and taxes (Schneider and Bos 2011: 224, 229). Whether these stereotypes hold for an individual or not, the theory in this area expects that out-group members are judged consistently with the stereotypical,

homogeneous group expectation (Biernat and Kobrynowicz 1997). It is therefore plausible that senators might use questions about crime and criminal justice as a proxy for matters relating to racial issues, pressing minority nominees on this issue (e.g., Ringhand Collins Jr. 2011).

As our study indicates, the examination of the role of race and gender in the selection of legal and political actors continues to be relevant and important. We hope that our design and findings help to foster a robust line of inquiry into this topic across institutions, jurisdictions, decision-making stages, and time.

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