Essays

THE ACADEMIC EXPERT BEFORE CONGRESS: OBSERVATIONS AND LESSONS FROM BILL VAN ALSTYNE'S TESTIMONY

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INTRODUCTION

Between 1968 and 1985, Professor Bill Van Alstyne testified on seventeen occasions before congressional committees.[1] That testimony, as well as Van Alstyne's writings on academic freedom, serve as a template for academics who want to speak out on public issues. Van Alstyne not only wrote about academics' fiduciary duty to maintain "standard[s] of professional integrity,"[2] but also served as living proof that an academic could live by this creed. His testimony

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† Goodrich Professor of Law and Professor of Government, College of William and Mary. Ever since my first year in law school, I have admired Professor Bill Van Alstyne. Initially, Van Alstyne's *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, convinced me that I could survive my constitutional law class. Over time, his writings helped shape my scholarship. His writings on academic freedom, for example, figured prominently in my decision to write an article about the need for law professors to have some expertise on a topic before signing joint letters. Soon after that article was published, Van Alstyne spent a memorable semester at William and Mary. I truly enjoyed getting to know him and very much resisted his departure. Little did I know that he would soon become one of my favorite colleagues! In writing this Essay, I benefitted from conversations with several individuals who have either worked for or testified before congressional committees. Thanks, in particular, to Bill Eskridge, Lou Fisher, Mike Glennon, Nelson Lund, Chris Schroeder, Bill Van Alstyne, and John Yoo for sharing their impressions with me. Thanks also to Keith Whittington for helping me think about the issues discussed in this Essay and to Tim Castor, Aaron Kimbler, and Jason Kirwan for truly outstanding research help.

1. For a list of these seventeen appearances (including information about articles Van Alstyne has written on the subjects he has testified about), see *infra* App. A.

2. William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59, 71 (Edmund L. Pincoffs ed., 1972).

was both scholarly and nonpartisan. Starting in 1986, however, Congress became less and less interested in hearing from Van Alstyne. He has testified only twice since 1985 and not at all since 1999.[3]

Why have congressional committees largely lost interest in hearing from Van Alstyne? For reasons I detail, attitudes in Congress toward academic experts have undergone a sea change. Over the past twenty-five years, committee staffers have increasingly turned away from nonpartisan, unpredictable academic witnesses like Bill Van Alstyne. The ever-growing divide that separates Democrats and Republicans explains this phenomenon.

Changes in Congress have been matched by changes in the academy. Today's academics appear increasingly partisan, increasingly political. Rather than defend (through word and deed) traditional understandings of academic expertise, they are increasingly willing to feign expertise to stake out positions on hot-button political issues.[4]

Let me begin by sharing a couple of stories—one from Van Alstyne and one from another friend of mine. Both stories center on their respective experiences before the Senate Judiciary Committee in the past few years. These stories, I think, put into focus the issues that this Essay will examine. Indeed, my decision to write this Essay was triggered by the quite different reactions that Van Alstyne and my other friend had toward Judiciary Committee Chair Orrin Hatch's apparent efforts to use committee hearings to advance partisan goals.

In 1999, after being asked by the committee to comment on proposed flag burning legislation, Van Alstyne wrote a letter in which he concluded that the act did not honestly serve a "constitutionally proper concern."[5] This position was contrary to Senator Hatch's political preferences, and the Senator concluded that the letter ought not to be published. Provoked, Van Alstyne distributed the letter to all members of the committee and, ultimately, Senator Patrick Leahy inserted the letter into the published hearings. In explaining why he

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3. *See infra* App. A.

4. *See infra* notes 106–15 and accompanying text.

5. *An Amendment to the Constitution of the United States Authorizing Congress to Prohibit the Physical Desecration of the Flag of the United States: Hearing on S.J. Res. 14 Before the Senate Comm. on the Judiciary*, 106th Cong. 142, 146 (1999) (letter to Senator Orrin G. Hatch, chairman of the Senate Judiciary Committee, from Professor William Van Alstyne).

had circulated the letter to the committee, Van Alstyne explained that he thought it wrong to squelch his views for partisan reasons.[6]

Three years later, Senator Hatch asked another friend of mine to testify. Hatch wanted testimony that would back up his position in an ongoing controversy involving the George W. Bush White House. My friend testified in a way that supported Hatch's views, prompting another witness at the hearing to tell my friend that Hatch owed him for preparing helpful testimony on short notice. Although I am certain that my friend worked diligently in preparing his testimony and that he believed in the correctness of his testimony, it is also clear to me that my friend understood and was not especially surprised by the fact that Hatch's staff contacted him because they thought he would prepare testimony that bolstered their position.

These stories show that today's academics see congressional hearings as increasingly partisan and politicized. Many of the experts now called before Congress consider themselves witnesses for Republicans or Democrats; that is, they see Congress as a highly partisan institution and the academic witness as someone who helps advance the agenda of one or the other party. Although partisanship certainly played a role in earlier hearings, today's Congress is much less interested in hearing from nonpartisan experts.

This Essay uses Bill Van Alstyne's experiences before Congress as a lens through which to contemplate larger changes in both Congress and the academy. Part I highlights Van Alstyne's view that academics must "answer at a professional level for the ethical integrity of [their] work"[7] and, correspondingly, explains how Van Alstyne's numerous appearances before congressional committees satisfied that high standard. Part II examines the reasons why an increasingly polarized Congress is less interested in hearing from academic experts, especially experts who are not readily identifiable as reliable "Democrat" or "Republican" witnesses. Finally, Part III discusses changes in the academy, especially the willingness of academics to sign joint letters and advertisements and to use a more flexible definition of academic expertise than that Bill Van Alstyne employed.

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6. Bill Van Alstyne shared this story with me in a conversation that we had in October 2003.

7. Van Alstyne, *supra* note 2, at 76.

I. LIVING BY EXAMPLE: LINKING BILL VAN ALSTYNE'S WRITINGS ON ACADEMIC EXPERTISE TO HIS TESTIMONY BEFORE CONGRESS

Academic freedom protects "the pursuit of truth by those persons whose lives are dedicated to . . . extending the realm of knowledge."[8] In his numerous writings on the subject, Bill Van Alstyne emphasizes that academic freedom is a "contingent privilege," one that places affirmative duties on academic experts to maintain professional standards.[9] Under this view, academic freedom is a quid pro quo. By making sure that they and others are making "ethical use" of their academic freedom, academics gain a unique liberty, one "marked by the absence of restraints or threats against its exercise."[10] For this very reason, Van Alstyne argues that the "maintenance of academic freedom contemplates an accountability in respect to [the professional integrity of] academic investigations and utterances."[11]

Likewise, Van Alstyne contends that academics are expected to meet the "fiduciary" standards that justify academic freedom and otherwise honor the "special critical role of the professional teacher."[12] When expressing an "expert opinion" through their writings or public appearances, academics must speak in their own voice and not follow another's script.[13]

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8. RUSSELL KIRK, ACADEMIC FREEDOM: AN ESSAY IN DEFINITION 3 (1955).

9. *E.g.*, Van Alstyne, *supra* note 2, at 76. In addition to these writings, Bill has held leadership roles at the American Association of University Professors (general counsel from 1972–74 and 1988–90; national president from 1974–76) and at the American Association of American Law Schools (chair of the committee on academic freedom from 1981–83).

10. Van Alstyne, *supra* note 2, at 71.

11. *Id.*

12. *Id.* at 76. Accordingly, academics ought not see themselves as "supercitizens," entitled to speak out on issues by virtue of their status. The ways of the scholar, as Professor Alexander Bickel put it, "appeal to men's better natures" because they are about thinking, training, and insulation, not the emotionalism of "the moment's hue and cry." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 25–26 (2d ed. 1986). That is not to say that academics cannot speak out on subjects that they care passionately about. But it is to say, as Van Alstyne puts it, that they might answer at a "professional level for the ethical integrity of [their] work." Van Alstyne, *supra* note 2, at 76.

13. Professor Arthur Lovejoy, whom Van Alstyne cites favorably, puts it this way: academic freedom "is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate" from those who control universities. Arthur O. Lovejoy, *Academic Freedom*, *in* 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 384, 384 (Edwin R.A. Seligman & Alvin Johnson eds., 1930), *quoted in* Van Alstyne, *supra* note 2, at 77.

In his seventeen appearances before congressional committees (principally the House and Senate Judiciary Committees),[14] Van Alstyne consistently adhered to the high standards enunciated in his writings. Not only was his testimony consistently scholarly, but it also reflected the academic's responsibility to speak "truth to power."[15] Rather than align himself with either political party, Van Alstyne thought it more important to make use of a methodology that favored neither.[16]

Before detailing the ways in which Van Alstyne's testimony was both scholarly and nonpartisan, let me say a few words on another of its distinguishing features: Van Alstyne's eloquence. In hearing after hearing, Van Alstyne has demonstrated his extraordinary gifts as a speaker. Here are two of my favorite examples. In 1970, Van Alstyne testified against Nixon Supreme Court nominee George Harrold Carswell. Following his testimony, Indiana Democrat Birch Bayh commented that he found Van Alstyne's testimony "particularly revealing" because they "did not see eye to eye on the previous [Nixon] nominee," Clement Haynsworth, on whose behalf Van Alstyne had testified.[17] South Carolina Republican Strom Thurmond then suggested that Senator Bayh "did not listen" to the earlier testimony. Without missing a beat, Van Alstyne interjected: "[W]ith regard to Senator Bayh's predicament, at least, I am reminded of a recollection of Justice Frankfurter who said that it is so seldom that wisdom ever comes, we ought not to be reluctant though it comes late."[18]

Van Alstyne's talents were also on full display in 1991, when he testified on whether Congress needs to declare war before the president can commit troops abroad. At that time, the first President Bush had just sent 350,000 troops overseas in anticipation of armed conflict with Iraq.[19] Not one to mince words, Van Alstyne argued that "the President must secure authorization from Congress for the

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14. *See infra* App. A.

15. Arthur Schlesinger Jr., *Intellectuals' Role: Truth to Power?*, WALL ST. J., Oct. 12, 1983, at A28.

16. *See infra* notes 32–41 and accompanying text.

17. *Nomination of George Harrold Carswell, of Florida, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong. 138 (1970) (statement of Senator Birch Bayh).

18. *Id.* (statement of Professor William van Alstyne).

19. Eric Schmitt, *Mideast Tensions; U.S. Declares Missions to Iraq are "Being Used,"* N.Y. TIMES, Nov. 7, 1990, at A15.

enforcement of our demands by war" and if he did not it would "mark the boldest usurpation of power by a President we will have seen in this country since Watergate and it should be treated in the same way."[20] Responding to Van Alstyne's suggestion that unilateral presidential war making was impeachable, Pennsylvania Republican Arlen Specter posed a hypothetical in which a Senate filibuster prevented Congress from declaring war. Van Alstyne did more than stand his ground. He turned Senator Specter's hypothetical on its head, claiming "by way of analogy" that the hypothetical is "no different" than the president unilaterally raising taxes against the backdrop of a Senate filibuster when "in the President's view the national fiscal crisis imperatively requires an increase in taxation and in his view we will face a horrendous depression, unless we raise a tax of a certain kind."[21] Van Alstyne then concluded, with a flourish, that "[t]he Congress must act, in order for the dog of war to be unloosed. The President may not unchain the dog."[22]

In testifying against unilateral presidential war making and against Carswell, Van Alstyne backed up the views of Democratic opponents of Presidents Richard Nixon and George H.W. Bush. On other occasions, however, Van Alstyne has defended the prerogatives of Republican presidents. Indeed, Van Alstyne's testimony—taken as a whole—reveals that he cannot be typecast. He has leant support to both political parties; he has backed both liberal and conservative positions; he has testified both in support of and in opposition to presidential prerogatives. Consider the following examples of Van Alstyne's nonpartisanship. First, as noted, Van Alstyne testified in favor of Clement Haynsworth and against George Carswell.[23] Second, on different occasions, Van Alstyne praised and criticized the leadership of the Reagan Justice Department's Civil Rights Division. In 1981, he contended that the Division was not sufficiently zealous in

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20. *The Constitutional Roles of Congress and the President in Declaring and Waging War, Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 194 (1991) [hereinafter *Constitutional Roles Hearing*] (statement of Professor William Van Alstyne). It should be noted that Bill was "not a critic of [the president's] policy" and believed that the President had been "wonderfully successful in international diplomacy." *Id.* at 211 (testimony of Professor William Van Alstyne). For additional discussion of Van Alstyne's willingness to stake out a position before Congress that does not necessarily square with his policy preferences, see *infra* notes 36–41 and accompanying text.

21. *Constitutional Roles Hearing*, *supra* note 20, at 212 (testimony of Professor William Van Alstyne).

22. *Id.*

23. *See supra* notes 17–18 and accompanying text.

its pursuit of racially motivated violence;[24] in 1985, he supported the nomination of then-Civil Rights Division head Brad Reynolds to become Associate Attorney General.[25] Finally, on hot-button social issues, Van Alstyne both supported and opposed conservative initiatives. In the early 1980s, he testified against two proposals backed by social conservatives. In 1981, he concluded that lawmaker efforts to decree that life begins at conception were "unconstitutional and wholly unworthy of Congress";[26] in 1982, he vigorously opposed a constitutional amendment to permit voluntary school prayer, concluding that the amendment "install[s] the first seeds of theocracy into our government institutions."[27] During the same period, however, Van Alstyne testified against race preferences, arguing that affirmative action creates a "highly destructive competition for racial spoils" and that legislation should be enacted "which would make quite clear that no variety of racial discrimination under the auspices of the Government of the United States will be allowed at all."[28]

One final example: impeachment. In 1991, Van Alstyne disappointed Republicans by arguing that unilateral presidential war making was an impeachable offense.[29] Eight years later, however, Van Alstyne was a Republican witness in House hearings on President Clinton's impeachment. Depicting the president's conduct as "disreputable," he said that he would be "disappointed," "astonished," and "surprised" by any member who did not think

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24. *Racially Motivated Violence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong. 387 (1981) (testimony of Professor William Van Alstyne) (discussing the Division's "puzzling conservative attitude" toward existing federal criminal civil rights statutes).

25. *Nomination of William Bradford Reynolds to be Associate Attorney General of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong. 169–70 (1985) (testimony of Professor William Van Alstyne) (suggesting that Reynolds' opponents, unlike "the overwhelming majority of Americans," were uninterested in giving the administration a "fair opportunity" to pursue policies that would prohibit all types of "racial discrimination," including affirmative action).

26. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong. 280 (1981) [hereinafter *Human Life Bill Hearings*] (letter to Representative Don Edwards, Chairman, House Subcommittee on Civil and Constitutional Rights, from Professor William Van Alstyne).

27. *Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong. 468 (1982) (testimony of Professor William Van Alstyne).

28. *Affirmative Action and Equal Protection: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 85 (1981) (testimony of Professor William Van Alstyne).

29. *See supra* notes 20–22 and accompanying text.

there was a plausible case for "impeachment within the definition of high crimes and misdemeanors."[30] No doubt, those comments did not sit well with Democrats. Moments later, however, Van Alstyne also undermined Republican efforts to push for a full blown impeachment trial. Arguing that the nation would be better served by Congress finding "a suitable means to express a sense of disappointment, if not despair or contempt,"[31] Van Alstyne thought public censure more appropriate than a trial.

Van Alstyne refused to take sides for a reason. That reason, as suggested above, is Van Alstyne's belief that academics cannot simply be advocates for either their personal beliefs or the views of one or another political party. Instead, when academics hold themselves out as experts, they have an affirmative duty to "answer at a professional level for the ethical integrity of [their] work."[32] In his testimony before Congress, Van Alstyne lived up to the high standards detailed in his writings on academic freedom.

In addition to being nonpartisan, Van Alstyne's testimony was a model of scholarly expertise. In his seventeen appearances before congressional committees, Van Alstyne repeatedly proved himself an expert on a range of subjects. In part, this expertise was tied to his academic writings. Not counting the three times that he testified about nominations to the Supreme Court or high ranking Justice Department positions, Van Alstyne had written articles related to the subject of his testimony on thirteen of fourteen occasions.[33] Because an academic witness need not have written on a subject to have sufficient expertise to testify,[34] what is more significant is that Van Alstyne's testimony is consistently scholarly. He almost always makes

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30. *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. 237–38 (1998) [hereinafter *Impeachment Hearing*] (testimony of Professor William Van Alstyne). For a more detailed treatment of Van Alstyne's views on impeachment, see Susan Low Bloch, 54 Duke L.J. 1659 (2005).

31. *Impeachment Hearing*, *supra* note 30, at 238 (testimony of Professor William Van Alstyne).

32. Van Alstyne, *supra* note 2, at 76.

33. The only exception was Van Alstyne's 1973 testimony on whether Congress could reduce the compensation of the Attorney General to make an end run around the Emoluments Clause. *To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the Senate Comm. on the Judiciary*, 93d Cong. 47 (1973). For a list of articles related to Bill's congressional appearances, see *infra* App. A.

34. *See generally* Neal Devins, *Misunderstood*, 82 B.U. L. REV. 293 (2002) (summarizing my views on what it means to be an academic expert).

use of a methodology that he has developed and perfected, a methodology that places primary emphasis on the constitutional text and secondary relevance on the framers' intent and historical commentary.[35]

Van Alstyne, finally, demonstrated his commitment to the academic ethic by reaching conclusions that did not align with his personal views.[36] In 1976, Van Alstyne testified that proposed legislation allowing for the use of electronic surveillance was constitutional.[37] In his testimony, Van Alstyne also noted that he disapproved of the bill and hoped that Congress would protect against improper applications of electronic surveillance by enacting more narrowly tailored legislation.[38] Likewise, in 1981, Van Alstyne provided qualified support for legislation he strongly opposed. When testifying on proposed legislation to strip the Supreme Court of appellate jurisdiction over school prayer and abortion, Van Alstyne argued that the scope of congressional power was uncertain and, consequently, that Congress might constitutionally limit the Supreme Court's appellate jurisdiction.[39] He minced no words, however, in explaining why such legislation would be unsound. Noting that Congress's proposal would leave it to state courts to sort out the constitutionality of highly divisive issues, Van Alstyne remarked that "this Congress ought itself not welcome a fragmented Constitution of the United States of no national supremacy at all, but merely a ludicrous document of vagrant 'meanings' unreviewably determined

35. For an entertaining elaboration of Van Alstyne's methodology, see Garrett Epps, *The Van Alstyne Method*, 54 DUKE L.J. 1553 (2005).

36. Van Alstyne's willingness to place "principle" ahead of "personal preferences" extends to his written scholarship. Professor Jesse Choper spoke about this trait at the conference on which this symposium is based, noting that Bill's scholarship was "consistently grounded in principle, not personal preferences, wherever these principles lead." Oral remarks of Professor Jesse Choper, University of California, Berkeley, Address at the Fifth Annual Public Law Conference: Honoring the Scholarship and Contributions of William van Alstyne (Apr. 16–17, 2005).

37. *Foreign Intelligence Surveillance Act: Hearings on H.R. 12750 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 94th Cong. 55 (1976) (statement of Professor William Van Alstyne).

38. *Id.* at 59 (statement of Professor William Van Alstyne).

39. *Oversight Hearings to Define the Scope of the Senate's Authority Under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong. 99 (1981) (testimony of Professor William Van Alstyne) (noting that there are no explicit limitations within the Exceptions Clause on Congress's power to restrict the Supreme Court's appellate jurisdiction).

by state courts."[40] Van Alstyne's willingness to provide lawmakers with the academic arguments that they needed to pursue a proposal that he disliked is remarkable,[41] another indication that Van Alstyne seems the gold standard for academic witnesses.

II. THE CONSTITUTION AND CONGRESSIONAL COMMITTEES: WHY CONGRESS HAS LOST INTEREST IN HEARING FROM NONPARTISAN EXPERTS

Why is it that Bill Van Alstyne testified seventeen times between 1968 and 1985 and only two times after 1985? In all nineteen of his appearances before congressional committees, Van Alstyne was eloquent, scholarly, principled, and nonpartisan. Likewise, Van Alstyne's stature among academics remained strong after 1985.[42] In other words, the fact that congressional committees have largely lost interest in Van Alstyne appears tied to changes in Congress, not changes in Van Alstyne's performance or reputation. In this Part, I examine this issue. By calling attention to fundamental changes in Congress, I argue that today's Congress does not want to hear from nonpartisan constitutional experts and, more generally, is not especially interested in hearing about the Constitution.[43]

Mapping Changes in Congress. Today's Congress is a much different place than the Congress of 1968–1985. In 1968, for example, George Wallace justified his third-party bid for the presidency by claiming that there was not a "dime's worth of difference" between

40. *Id.* at 134 (statement of Professor William Van Alstyne).

41. *See infra* Part III (discussing recent efforts by academics to influence political discourse).

42. On March 12, 2005, I did a Westlaw search using the terms "(William or Bill) w/1 ("Van Alstyne" or "vanalstyne")." From January 1, 1986, through March 12, 2005, Van Alstyne's work was cited 1543 times—placing him in the upper echelon of legal academics during that period.

43. With Professor Keith Whittington, I am now engaged in a research project on congressional committee consideration of constitutional questions. A portion of that research was presented at "Constitutionalism and Legislatures," a summer 2004 conference sponsored by the University of Alberta's Centre for Constitutional Studies. *See* Keith Whittington, Neal Devins, & Hutch Hicken, *The Constitution and Congressional Committees: 1971–2000*, *in* LEGISLATURES AND CONSTITUTIONS: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Tsvi Kahana & Richard Baumann eds., forthcoming 2005) (manuscript at 1, on file with the *Duke Law Journal*). The analysis in this Part is informed by that research. At the same time, this research project is still a work in progress and, as such, may reach somewhat different conclusions than the ones that I advance in this Essay.

Democrats and Republicans.[44] Today, however, the forces that pushed the Democratic and Republican parties toward the center have dissipated. The liberal "Rockefeller Republicans" and conservative "Southern Democrats" have given way to an era of ideological polarization in Congress.[45] In the South, conservative Democrats were replaced with southern Republicans.[46] By losing seats (and conservative members) in the South, Democrats became fewer in number and more liberal. For their part, Republicans moved to the right. In part, the addition of southern Republicans made the party more conservative.[47] Equally important, the ascendancy of "Ronald Reagan's GOP" in 1980 was linked to the defeat of the moderate-to-liberal wing of the Republican Party.[48]

Against this backdrop, it is not surprising that "[t]he polarization between the political parties is, perhaps, one of the most obvious and recognizable trends in Congress during the last twenty years."[49] Measures of ideology reveal that, in the House of Representatives, the most liberal Republican is more conservative than the most conservative Democrat.[50] In the Senate, with the exception of Zel

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44. Richard Pearson, *Former Alabama Governor George C. Wallace Dies*, WASH. POST, Sept. 14, 1998, at A1.

45. *See* David Von Drehle, *Political Split Is Pervasive: Clash of Cultures Is Driven by Targeted Appeals and Reinforced by Geography*, WASH. POST, Apr. 25, 2004, at A1 (suggesting that the divide between the two major political parties reflects the ideological division in the United States).

46. *See* Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971–2000*, 47 AM. J. POL. SCI. 305, 306 (2003) (tracking the exponential growth of southern Republicans as a percentage of southern representatives in the House of Representatives).

47. *See id.* (suggesting that the increase in the number of southern Republicans helped make the Republican Party more conservative).

48. *See* Kate O'Beirne, *Rockefeller Republicans Take Manhattan*, NAT'L. REV. ONLINE, July 7, 2004, *at* www.nationalreview.com/kob/obeirne200407070839.asp (noting that, in 2004, Rockefeller Republicans were no more than "mavericks and dissidents who represent a minority in Ronald Reagan's GOP" and complaining of the "decision to showcase [these] rogue elephants as representatives of the modern Republican Party" at the 2004 Republican Convention).

49. Sean M. Theriault, The Case of the Vanishing Moderate: Party Polarization in the Modern Congress 5 (2003) (unpublished manuscript, on file with the *Duke Law Journal*).

50. *See* 108th House Rank Ordering *at* http://voteview.com/hou108.htm (last updated Aug. 23, 2005) (on file with the *Duke Law Journal*) (noting that the "two parties are perfectly separated in the liberal-conservative ordering" and providing an ideological ranking of House members–beginning with the most liberal and ending with the most conservative). For an article detailing the methodology employed in these rankings, see Keith T. Poole and Howard Rosenthal, *D-Nominate after 10 Years: A Comparative Update to Congress: A Political-Economic History of Roll-Call Voting*, 26 LEG. STUD. QTLY. 5 (2001).

Miller (D-GA), no Democrat is as conservative as the most liberal Republican.[51]

The inevitable result of such an ideological divide is party polarization. Measures of party polarization in both the House and Senate reveal an ever-growing ideological gap separating the two parties.[52] Correspondingly, there is no meaningful ideological range within either the Democratic or Republican Party.[53] For example, the gap between Northern and Southern members of the two parties had largely disappeared by 1990.[54] In contrast, there was a sharp North-South (as opposed to Democrat-Republican) divide during the Civil Rights era of the 1960s.[55]

This ideological divide, which has increased every year since 1980, shows no signs of letting up. The reason: outside of presidential elections, Democrats and Republicans are not interested in appealing to centrist voters. Even though the number of centrist voters remains fairly stable,[56] political parties have discounted these voters for two

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51. 108th Senate Rank Ordering *at* http://voteview.com/sen108.htm (last updated Oct. 26, 2004) (on file with the *Duke Law Journal*).

52. *See* Senate: Party Polarization 1st to 107th Congresses *at* http://voteview.com/Senate_polarization_1789-2002.htm (last visited Oct. 10, 2005) (on file with the *Duke Law Journal*) (depicting the growing divide between the two parties in the Senate); House: Party Polarization 1st to 107th Congresses *at* http://voteview.com/House_polarization_1789-2002.htm (last visited Oct. 10, 2005) (on file with the *Duke Law Journal*) (same).

53. I do not mean to suggest, however, that there are never divisions within the parties. For example, in 2002 the pro-life contingent of the GOP stopped bankruptcy reform from passing despite the business lobby's (and the party leadership's) huge push for it. Philip Shenon, *Anti-Abortion Lobbyists Tying Up Bankruptcy-Overhaul Bill*, N.Y. Times, Sept. 24, 2002, at A22. At the same time, battles within the Democratic or Republican Party are unusual.

54. Roberts & Smith, *supra* note 46, at 306.

55. *See* The Ideological Structure of Congressional Voting *at* http://voteview.com/ideological_maps.htm (last visited Oct. 10, 2005) (on file with the *Duke Law Journal*) (discussing and providing spatial maps of this geographic divide).

56. In fact, today's voters are less likely to identify themselves with one or another political party. *See* Morris P. Fiorina, Whatever Happened to the Median Voter? 13 (1999) (unpublished manuscript, on file with the *Duke Law Journal*) (suggesting that, as a whole, the country is not as partisan today as it was in the 1950s). At the same time, voters who identify themselves with one or the other political party are more partisan today than ever before. Consequently, even though "the social attitudes of groups in civil society have converged," attitudes of Americans who identify with one or the other political party have polarized. Paul DiMaggio et al., *Have American Social Attitudes Become More Polarized?*, 102 AM. J. SOC. 690, 738 (1996). For example, a comparison of surveys of hot-button political issues reveals that the "issue opinions" of voters have become increasingly correlated with their party identification. Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, *in* POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA 5, 17–18 (Jon R. Bond & Richard Fleisher eds., 2000); *see also* Katharine Q. Seelye & Marjorie Connelly, *Delegates Leaning to Right of G.O.P. and the Nation*, N.Y. TIMES, Aug. 29, 2004, at 15-1 (reporting the results of a poll

reasons. First, with only one-half of eligible voters actually voting, there is greater emphasis on mobilizing the more partisan base.[57] Second (and more significantly), computer-driven redistricting has resulted in the drawing of district lines that essentially guarantee that each party will win particular seats in the House of Representatives.[58] In other words, the party primary controls who will win the election and, as such, candidates have incentive to appeal to partisans who vote in the primaries.[59]

Increasing emphasis on the party primary and, with it, the need to appeal to partisan voters has contributed to several significant changes in Congress. Most significantly, as already noted, there is much greater cohesion within the Democratic and Republican parties.[60] Retiring legislators have been replaced by new ones who are both more ideological and more loyal to their party.[61] Equally significant is that incumbent legislators have altered their voting patterns to facilitate party unity.[62]

Party leaders, especially in the House, have capitalized on the fact that lawmakers are more apt to see themselves as members of a party, not as independent power brokers. Through party caucuses, speaker-appointed task forces, and other techniques, party leaders have played an ever-growing role in shaping the party's agenda.[63]

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indicating that Republican delegates to the 2004 National Convention are more conservative than other Republicans).

57. *See* Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 426 (2004); Jeffrey Toobin, *Ashcroft's Ascent*, NEW YORKER, Apr. 15, 2002, at 50 (discussing the claim by President Bush's advisor Karl Rove that Republican victories are tied to the party's bringing religious conservatives to the polls).

58. *See* Issacharoff, *supra* note 57, at 428–31 (linking redistricting to both partisanship and noncompetitive races in the House of Representatives); Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 477–78 (2004) (highlighting the noncompetitiveness of House races and the corresponding ease with which incumbents win reelection).

59. *See* Fiorina, *supra* note 56, at 13–14 (noting that the greatest increase in polarization is in caucus and party primary electorates).

60. *See supra* notes 53–54.

61. Roberts & Smith, *supra* note 46, at 313. Although it may not appear intuitive, the shift to more ideologically motivated legislators is partly the result of the polarizing effects of redistricting. Professors Jason Roberts and Steven Smith found that these new legislators were more willing to vote along party lines than the legislators they replaced. *Id.*

62. *Id.* at 314 (noting the positive correlation between incumbents switching positions to match party positions and increased activism of party leaders).

63. *See* SUSAN WEBB HAMMOND, CONGRESSIONAL CAUCUSES IN NATIONAL POLICY MAKING 87–92 (1998) (noting the impact of party caucuses on Congress's agenda); DAVID W. RHODE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 35 (1991) (depicting party leaders as agents of the party caucus); BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW

Correspondingly, party leaders are increasingly concerned with "message politics," that is, with using the legislative process to make a symbolic statement to voters and other constituents.[64] Rather than allowing decentralized committees to define Congress's agenda, Democrats and Republicans alike see the lawmaking process as a way to stand behind a unified party message and, in this way, to distinguish their party from the other.[65]

Party cohesion and the corresponding shift of power to party leaders dovetails with changes in how lawmakers run for office. Specifically, by increasingly looking to party leaders both to set the party's agenda and to dictate how party-line votes should be cast, lawmakers have additional time to campaign for reelection.[66] Today's lawmakers strengthen their position with their constituents by "visit[ing] their districts and states extremely frequently (often three or four times a month). They and their staffs devote much of their time to constituency casework (with roughly one-third of members' staffs based in their district)."[67] By investing in their home districts and states, lawmakers trade off time that they otherwise would spend

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LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 132 (2d ed. 2000) (discussing House Speaker Dennis Hastert's (R-IL) convening of a party task force to make an end run around committee deliberations over the 1999 Patient's Bill of Rights).

64. *See generally* C. Lawrence Evans, *Committees, Leaders, and Message Politics*, *in* CONGRESS RECONSIDERED 217, 219 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2000).

65. In the House, committee leaders have more power for another reason. During the 1990s, Republican party leaders shifted power away from standing committees and toward majority party leadership. *See generally* Steven S. Smith & Eric D. Lawrence, *Party Control of Committees in the Republican Congress*, *in* CONGRESS RECONSIDERED (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 6th ed. 1997) (discussing this phenomenon and explaining why party leaders exercise more control in the centralized House than in the decentralized Senate). During the 1980s, Democrats also shifted power away from committee leaders. In an effort to countermand Republican control of the White House, Democratic members supported party leaders' efforts to alter bills after they came out of committee. This practice, known as postcommittee adjustment, was intended to give Democratic leaders control over Congress's work product. SINCLAIR, *supra* note 63, at 93; *see also* Barbara Sinclair, *The Emergence of Strong Leadership in the 1980s House of Representatives*, 54 J. POL. 657, 668 (1992) (explaining how greater party unity facilitated efforts by Democratic leaders to speak with the party's voice).

66. I do not mean to suggest that lawmakers think that the party agenda does not serve the public interest. Ideological polarization, by definition, means that party members are apt to agree with each other and, as such, be in sync with their party leaders. *See* Sinclair, *supra* note 65, at 668 (suggesting that in the 1980s, the Democratic Party's increased homogenization reduced internal party conflict).

67. ANTHONY KING, RUNNING SCARED: WHY AMERICA'S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE 49 (1997).

legislating. Likewise, as former representative Lee Hamilton (D-IN) explained in 1998, members "must spend a disproportionate amount of time fund-raising" and, consequently, have less time "discussing the issues and less time with colleagues forging legislation and monitoring federal bureaucrats."[68]

Today's lawmakers, as this discussion suggests, spend less time sorting out their policy preferences through committee work. Because they are more partisan, they are more likely to know their mind before the start of committee deliberations. Because their personal views are likely to be in sync with those of other members of their party, they are more likely to embrace party governance and, in so doing, look for signals from party leaders.[69] Because they invest more time in reelection and constituent service, they are likely to spend less time engaging in policy debates with their colleagues, committee staff, and personal staff. For reasons I will now detail, these changes in Congress have dramatically altered the role of the academic expert before congressional committees.

The Academic Expert and Congressional Committees. How has congressional committee consideration of constitutional questions been affected by party polarization and the increasing emphasis on reelection and constituent service? Let me suggest two ways, both of which bear on the role of the academic witness before Congress. First, Congress is somewhat less interested in holding hearings on constitutional questions. Second, when congressional committees hold hearings on constitutional issues, Congress is less likely to invite nonpartisan academic witnesses.

That Congress would hold fewer and fewer hearings on constitutional issues is tied, in part, to party polarization and increasing appeals to the party base. Members are both more ideological and less trusting of the other party. Correspondingly, members are far more interested in advancing a particular policy agenda than in sorting out the constitutionality of their handiwork.[70]

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68. *See* 144 CONG. REC. E1668 (daily ed. Sept. 9, 1998). There is a certain irony in lawmakers shifting more and more attention to reelection at the very time that redistricting ensures that there are next to no competitive races in the House of Representatives. *See supra* note 58 and accompanying text.

69. *See* Ortiz, *supra* note 58, at 480.

70. I do not mean to suggest, however, that party polarization is the only factor that affects lawmakers' interest in constitutional questions. The national policy agenda, for example, also influences the number of constitutionally oriented hearings. In the early 1970s, Watergate and

Moreover, by focusing their efforts on the message that their party is sending, lawmakers place less emphasis on whether federal courts will uphold legislation after it is enacted.[71]

Increasing lawmaker emphasis on constituent service and reelection also contributes to declining lawmaker interest in constitutional questions. No constituency values Congress's institutional interest in independently interpreting the Constitution. Instead, voters, interest groups, and political parties care about their substantive policy agendas.[72] Lawmakers therefore have little to gain by defending Congress's power as an independent interpreter of the Constitution.[73]

Consistent with the above analysis, lawmakers increasingly delegate their power of constitutional review to the courts. For example, expedited Supreme Court review provisions allow lawmakers to enact favored legislation without seriously considering the constitutionality of their handiwork.[74] More telling, a recent opinion poll of members of the 106th Congress (1999–2001) reveals that the vast majority of lawmakers adhere to a "joint constitutionalist" perspective whereby courts should give either

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civil rights were dominant issues. Not surprisingly, Congress held an unusually large number of constitutional hearings at that time. Whittington, Devins, & Hicken, *supra* note 43, at 23.

71. That is not to say that lawmakers only care about staking out positions that back up party views or bolster their position with voters. It is to say that today's lawmakers, as compared to the lawmakers in Congress from 1968–1985, are less interested in sorting out the constitutionality of their handiwork. For these and other reasons, Professors Beth Garrett and Adrian Vermuele have proposed structural reforms that will facilitate lawmaker consideration of constitutional issues. *See generally* Elizabeth Garrett & Adrian Vermule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001).

72. *See* Neal Devins, *The Rehnquist Court: The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 135 (2004) (explaining that lawmakers are willing to sacrifice federalism and the separation of powers when pursuing substantive policies).

73. This phenomenon is a variation of the "collective action" problem that pits the individual interests of members of Congress against Congress's institutional interests. Specifically, although each of Congress's 535 members have some stake in preserving its institutional prerogatives, lawmakers regularly trade off Congress's institutional interest in order to pursue favored policies. *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 144 (1999).

74. For a discussion of these provisions, see Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 442–44 (2001). *See also, e.g.*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 81 (providing special expedited review for challenges brought on constitutional grounds).

"limited" or "no weight" to congressional assessments of the constitutionality of legislation.[75]

The practices of congressional committees likewise reveal diminishing lawmaker interest in constitutional questions.[76] Data collected from 1971 to 2000 shows that there has been a decline in congressional committee hearings on constitutional questions.[77] Committees that once paid significant attention to constitutional issues, including foreign relations and education, experienced a noticeable drop in the number of constitutionally oriented hearings.[78] Indeed, outside of the House and Senate Judiciary Committees, no congressional committee regularly considers constitutional questions. An equally telling manifestation of committee practices is Congress's response to 1990s Rehnquist Court decisions invalidating federal statutes. Between 1995 and 2000, the Rehnquist Court struck down all or part of twenty-three statutes, and, in so doing, revived federalism-based limits on congressional power.[79] These decisions, however, did not trigger renewed congressional interest in the Constitution. From 1990 to 1999, the number of constitutionally oriented hearings declined.[80] And although Congress occasionally held hearings to explore the ramifications of the Court's decisions, lawmakers seemed indifferent to the fact that the Court's revival of federalism was limiting congressional power.[81]

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75. Bruce G. Peabody, *Congressional Attitudes Towards Constitutional Interpretation*, *in* CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington eds., forthcoming) (manuscript at 83, on file with the *Duke Law Journal*). Nonetheless, more than 60 percent of lawmakers who responded to Professor Peabody's survey think that Congress *ought* to independently evaluate constitutional questions. *Id.*

76. Congressional committees are where "[m]uch of the important work of Congress is done," as they are the primary sites on which Congress both deliberates and legislates. Keith E. Whittington, *Hearing about the Constitution in Congressional Committees*, *in* CONGRESS AND THE CONSTITUTION, *supra* note 75, at 147, 147. As such, congressional efforts to interpret the Constitution are very much tied to the work of committees. For a useful treatment of the ways in which party leaders work with congressional committees in shaping the legislative agenda, see John H. Aldrich & David W. Rhode, Congressional Committees in a Partisan Era (unpublished manuscript, on file with the *Duke Law Journal*).

77. Whittington, Devins, & Hicken, *supra* note 43, at 6, 19–20 (reporting data about both the total number of hearings on the constitutionality of legislation and the number of constitutional hearings in several specific committees).

78. *Id.*

79. Stuart Taylor, Jr., *Judiciary: The Tipping Point*, 32 NAT'L J. 1810, 1811 (2000).

80. *See* Whittington, Devins, & Hicken, *supra* note 43, at 19–20.

81. Congress's blasé attitude toward the Supreme Court's hostility to congressional decisionmaking is tied to changing lawmaker practices. Most significantly, lawmakers were able to advance constituent interests by making use of alternative sources of power. Because there is

Congress's uninterest in defending its institutional turf and, more generally, the diminishing importance of the Constitution to Congress has also had an impact on the types of witnesses that Congress calls to testify on constitutional questions. An increasingly ideological, increasingly polarized Congress has little to gain by hearing from nonpartisan witnesses. Instead, with each party engaged in a "perpetual campaign[] through confrontation,"[82] hearings are opportunities for one or the other side to explain its views to the public. As such, each party will want to hear from witnesses who will back up its positions. Today's witnesses, in other words, may be more readily identifiable with one or another party than witnesses in earlier eras.[83] And when witnesses are not identifiable with one of the

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no discrete constituency pushing lawmakers to value Congress's power to interpret the Constitution, lawmakers saw no reason to strike back at the Court. *See id.* at 23. (discussing this phenomenon). Furthermore, several of the bills struck down were "expressive," that is, lawmakers supported the bill to send a message to constituents, not to accomplish a particular programmatic objective. *See id.* at 24 (discussing the rise of message politics); *see also* Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 513 (2001) (explaining that the Rehnquist Court did not pay a political price for invalidating "position taking" legislation on federalism grounds, and, in so doing, quoting a definition of "position taking" legislation from DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 62 (1974)). For a discussion of why neither the American people nor elected officials (state as well as federal) care about federalism, see Devins, *supra* note 74, at 448.

82. DONALD R. WOLFENSBEGER, CONGRESS AND THE PEOPLE: DELIBERATIVE DEMOCRACY ON TRIAL 270 (2000).

83. Many of the academic experts who testify before Congress have held positions with Democratic or Republican administrations. Others have worked for interest groups whose views are closely allied with one or the other party. That is not to say that they are not experts, nor is it to say that they are not stating their views when testifying. At the same time, these witnesses understand that they are being called on by their political party to testify in ways that strengthen the position of their party.

To test this proposition, I selected three academics who had worked in Republican or Democratic administrations (two Republicans and one Democrat, to reflect the fact that Republicans currently control Congress). Each of these three—John McGinnis, Vicki Jackson, and Douglas Kmiec—had testified before Congress on at least two occasions since 2000. I identified the number of hearings in which at least one of these three scholars had testified (nine total) and determined the number of academics who had testified at these hearings (twenty-three total). The results are striking: fifteen of the twenty-three who testified had worked for either Democratic or Republican administrations (twelve Republican, two Democratic, one who worked for both but had recently consulted the George W. Bush administration). Of the remaining eight, two had worked with ideologically identifiable interest groups (one conservative, one liberal). Not surprisingly, these witnesses overwhelmingly testified in support of positions consistent with the party or interest group they had worked for. Let me hasten to add, however: I know many of these individuals and I think that their reputations are beyond reproach. The phenomenon I identify calls attention to Congress's interests in reaching out to witnesses who have ties to one of the parties, identifiable views, or both (based, in part, on their

parties, it may be that committee staff have spoken to these witnesses in sufficient detail to know what they will say.[84]

Consider, for example, the practices of the Senate Judiciary and Foreign Relations Committees.[85] Each of these committees has strict rules allocating the number of witnesses that the majority and minority party may call.[86] Needless to say, in this era of polarized politics, party staff often use these slots to advance the agenda of the committee's chair or ranking minority member.[87] As compared to the 1970s (when several Senate committees made use of unified staffs and operated in a bipartisan way), today's hearings often operate as "formalized press conference[s]" in which each side seeks to bolster its case.[88] Indeed, today's hearings can be analogized to a trial. Expert witnesses are called to fortify preexisting views or to rebut the other side's experts. Nonpartisan experts cannot be counted on to support one or the other side and, consequently, are "deselected."[89]

I do not mean to suggest that today's lawmakers never see hearings as an opportunity to educate themselves. Nor am I suggesting that the 1970s was a golden age, in which all hearings were bipartisan searches for truth. Nevertheless, today's hearings reflect party polarization and, as such, are more likely to showcase Republican and Democratic witnesses whose testimony matches the preexisting views of party leaders. Unlike the period before 1985 (when committee and subcommittee chairs were generally

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work with interest groups). For an inventory of witnesses and hearings, see Memorandum from Aaron Kimbler to Professor Neal Devins (Nov. 5, 2004) (on file with the *Duke Law Journal*).

84. When I was called on to testify on proposed item veto legislation, for example, committee staff asked me whether my testimony would match my writings on the item veto. I have heard similar stories from others.

85. Claims made in this paragraph are based on interviews with John Yoo, Professor of Law, University of California, Berkeley School of Law and general counsel to the Senate Judiciary Committee from 1995 to 1996, and Michael Glennon, Professor of International Law, Fletcher School of Law & Diplomacy, Tufts University and legal counsel to the Senate Foreign Relations Committee from 1979 to 1980.

86. *Id.*

87. The more polarizing the issue, the more likely it is that the process will operate as an effort to strengthen the preexisting views of the majority party over those of the minority. On the Senate Judiciary Committee, for example, issues such as gay rights, abortion, and school prayer were especially polarizing. In contrast, technical issues were less polarizing. On Sentencing Guidelines, for example, social scientists were brought in to educate the committee and its staff. These hearings were less polarized and, consequently, operated more as a search for truth. Interview with John Yoo, *supra* note 85.

88. *Id.*

89. Interview with Michael Glennon, *supra* note 85.

conciliatory toward the minority in both agenda control and witness selection),[90] today's hearings are often "orchestrated," "stage-managed" events showcasing witnesses who will reinforce the views of the party that asked them to testify.[91]

When it comes to constitutional law experts, moreover, it is especially likely that party polarization will impact the selection of witnesses. These witnesses are not reporting on empirical studies that they have conducted; instead, they are making arguments grounded in contested theories of interpretation.[92] These arguments, moreover, are often on hot-button issues that divide the two parties.[93] And because there is rarely an academic consensus on these issues, committee staffers can always find what they are looking for—a constitutional law expert who will back their position.

Against this backdrop, it is quite understandable that congressional staff would no longer use one of their valuable chits on a nonpartisan expert like Bill Van Alstyne. Not only did Van Alstyne fail to line up behind one or the other party, he rarely presented testimony that one or the other side would consider a slam dunk. He would reveal conflicts between his personal views and his constitutional opinions; his analysis would sometimes note strengths and weaknesses of competing arguments.[94] In contrast, majority and minority staff are increasingly interested in putting on advocates for their party's position.

The question remains: in addition to the changes in Congress detailed in this Part, have there been corresponding changes in the

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90. *See* Christine DeGregario, *Leadership Approaches in Congressional Committee Hearings*, 45 W. POL. Q. 971, 980 (1992).

91. ROGER H. DAVIDSON & WALTER OLSZEK, CONGRESS & ITS MEMBERS 214–15 (9th ed. 2004) ("Hearings, in brief, are often orchestrated as a form of political theatre . . . ."); Richard E. Cohen, *Crackup of the Committees*, 32 NAT'L. J. 2210, 2215 (1999) ("In recent years, a growing number of members seeking to learn about issues have often found committee hearings so stage-managed as to be useless.").

92. For an argument that academic experts who rely on "soft" normative arguments provide less useful information to lawmakers than experts whose testimony is based on "hard" empirical evidence, see Ward Farnsworth, *Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13, 24–25 (2001); *see also supra* note 87 (discussing how Senate Judiciary Committee hearings featuring social scientists were less politicized).

93. Van Alstyne's numerous appearances before Congress bolster this claim. Abortion, affirmative action, impeachment, war powers, and the confirmation of controversial judicial and executive branch nominees are hot-button issues that divide the parties. *See supra* Part I (detailing Van Alstyne's appearances before congressional committees).

94. *See supra* Part I.

academy? This Part explains why today's Congress is especially interested in finding witnesses that would back up one or the other party. But has the legal academy changed in ways that facilitate lawmaker efforts to increasingly turn hearings into "formalized press conferences"? Correspondingly, do today's academics embrace Bill Van Alstyne's views on what it means to be an academic expert? The next and final Part of this Essay explores these questions.

III. PROFESSORS AND POLITICS

Today's academics seem more political than academics at other times. In part, the politicization of congressional committees explains this phenomenon. With Republicans and Democrats "deselecting" witnesses who will not say what they want to hear,[95] academic witnesses may be seen as willing participants in a partisan process. Correspondingly, the increasing tendency of Republican and Democratic staffers to call witnesses with political ties to their party signals that many academic witnesses have strong loyalties to one or the other party. Moreover, today's academics, as compared to 1968–1985 (when Van Alstyne regularly testified before congressional committees), are far more likely to stake out positions on divisive political issues by taking out full page advertisements in major newspapers and signing onto joint letters to Congress.[96] In so doing, the legal academics who have spearheaded these efforts have articulated a vision of academic expertise that diverges from Van Alstyne's call for academics to "answer at a professional level for the ethical integrity of [their] work."[97] And although today's academics almost certainly believe in the truthfulness of the assertions they make in congressional statements, joint letters, and advertisements, it also seems likely that today's academics would not find it surprising to be labeled a Democratic or Republican expert.

There are several prominent examples of today's academics speaking out on policy issues. One is an advertisement signed by 554 law professors attacking the Supreme Court's decision in *Bush v.*

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95. *See supra* note 89 and accompanying text.

96. Following the Supreme Court's *Bush v. Gore* decision, for example, 554 law professors took out an advertisement in *The New York Times* "protest[ing]" the decision and arguing that "[b]y taking power from voters, the Supreme Court has tarnished its own legitimacy." Advertisement, *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7 (placed by People for the American Way).

97. Van Alstyne, *supra* note 2, at 76.

Gore.[98] The joint letters to Congress on the Clinton impeachment are another example: one (signed by 450) concluded that Clinton did not commit any impeachable offensives and another (signed by 96) reached the opposite conclusion. The joint letters on whether the Senate should confirm Supreme Court nominee Robert Bork are a third; one (signed by 2,000) opposed the nomination and another (signed by 100) supported Judge Bork. Other examples include a joint letter by law professors and other academics opposing gun control legislation and a joint letter signed by more than 300 law professors urging Congress to address coercive interrogation techniques in Iraq.[99]

The frequency with which today's academics send such missives to Congress is a dramatic departure from past practices. Since 1986, academics have sent at least thirty letters to Congress. From 1968 to 1985, in contrast, there are hardly any examples of joint letters to Congress.[100] Academics wrote letters opposing both the Carswell Supreme Court nomination and legislation that would have declared that life begins at conception.[101] I could not, however, locate joint letters on the Vietnam War, the Nixon impeachment, or school busing.

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98. 531 U.S. 98 (2000); *see also supra* note 96.

99. For a news story about the Iraq letter, see Risheng Xu, *Law Professors Draft Petition on Iraq Abuse*, THE HARVARD CRIMSON, June 8, 2004, *available at* http://www.thecrimson.com/article.aspx?ref=502751. For descriptions of the other letters, see Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 166–79 (1999); John McGinnis et al., *Ideology in the Elite Legal Academy: A Preliminary Investigation*, 93 GEO. L.J. (forthcoming 2005) (manuscript at 30–34, on file with the *Duke Law Journal*).

100. I relied principally on law review articles in conducting this research, and it may be that I failed to uncover some of the joint letters submitted to Congress. At the same time, the gap between the pre- and post-1986 period is so stark as to suggest a dramatic shift in academic letter writing. Devins, *supra* note 99, at 166–79, and McGinnis et al., *supra* note 99, at 30–34, reference several of the post-1986 letters.

101. The Carswell letter is discussed in William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 20–21 (1990). Like many of today's joint letters, the Carswell letter was signed by numerous scholars ("[h]undreds of law professors"), many of whom did not teach or write about the issues discussed in the letter. *See id.* at 21 n.109 (noting four schools in which at least 19 (and as many as 35) faculty signed the letter). In contrast, the human life letter was signed by a handpicked, ideologically diverse group of eleven constitutional law scholars. *See also* Stuart Taylor, Jr., *Bill to Ban Abortions is Assailed by Scholars as Unconstitutional*, N.Y. TIMES, Apr. 22, 1981, at A25. For that reason, Bill Van Alstyne favorably references that letter in his testimony on human life legislation. *See Human Life Bill Hearings*, *supra* note 26, at 275–76.

The willingness of today's academics to play a more overtly political role, in part, speaks to changes in the legal academy's understanding of what it means to be an academic.[102] Over time, the traditional image of the academic as dispassionate truth seeker gave way to postmodernism, critical legal studies, and, more generally, the belief that constitutional arguments "can be manipulated to advance the particular policy goal of the advocate who makes them."[103] By 1986 (the very time that Congress became less interested in hearing from Bill Van Alstyne), this belief helped fuel law professor efforts to back up favored positions by signing joint letters.[104] Correspondingly, these letter writing campaigns signaled to lawmakers and committee staffers that many law professors were willing to play their part in advancing the political goals of one or the other party. Indeed, law professors worked in tandem with members of Congress in organizing several letter writing campaigns.[105]

Further reflecting changes in the academy, today's academics seem to embrace a more flexible standard of what it means to be an academic expert than the one enunciated by Bill Van Alstyne. Consider, for example, the arguments of Professors Cass Sunstein

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102. A vivid illustration (albeit well before Van Alstyne's time) of earlier academic practices is the law professor response to Franklin Delano Roosevelt's Court-packing proposal. *See generally* Kyle Graham, *A Moment in Time: Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151 (2002). A handful of faculty at Harvard, Chicago, and Northwestern law schools submitted joint letters opposing the plan. *Id.* at 158. But a more systemic effort launched by the American Association of Law Schools (AALS) fizzled. *Id.* at 159. At that time, many law professors (even those who saw law as a "social institution") believed that academics must "foster a perception of nonpartisanship" and, consequently, that "overt political action threatened the law school's reputation as a disinterested body of scholars." *Id.* at 155. And although norms in the legal academy were beginning to change, the AALS effort was in tension with existing practices.

103. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 90 (1996).

104. A statistical analysis of law professors who both contribute to political campaigns and sign joint letters demonstrates that partisan beliefs (liberal or conservative) figure prominently in the decision to sign a joint letter. McGinnis et al., *supra* note 99, at 30. And although some academics are willing to cross party lines to defend principles that matter to them, it is also true that academics are more willing now than ever before to see their communications with Congress as an opportunity to advance policy preferences. *See id.* at 33 (noting that 4 of 114 law professors who contribute to one or the other party signed letters taking issue with their party's position).

105. *See* NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 143 (1998) (discussing the coordination between law professors and members of Congress regarding a letter on Bork's Supreme Court nomination); Devins, *supra* note 99, at 180 (same with respect to an anti-impeachment letter); *id.* at 179 (same for intelligence spending).

(who helped organize a letter opposing the impeachment of President Bill Clinton) and Steve Griffin (who organized a letter to the Florida legislature, calling upon them to follow the Florida Supreme Court opinion in *Bush v. Gore*). For Cass Sunstein, it was not at all problematic that most of the law professors who signed his impeachment letter did not teach constitutional law. Instead, recognizing that "[e]very signature really counts,"[106] Sunstein thought it enough that these professors "believed that they knew enough—from training and from substantive conversations with colleagues—to have a reasonably informed opinion" about the issue.[107] In other words, the key question—as Sunstein puts it—is whether these professors "thought, in good faith, that they knew enough about the [issue]."[108]

For Steve Griffin (who limited signatories of his letter to professors of constitutional law), it was not important whether the professor had familiarity with the issues before the Florida court and Florida legislature. It was enough, instead, that the signatories simply have "the ability, common among constitutional scholars, to create and evaluate constitutional arguments."[109] For this reason, Griffin included in his letter soliciting signatures the following plea: "Sign or not, but don't fail to sign because you feel you are not an expert. That is a formula for the abdication of public responsibility by scholars who ought to know better."[110]

These arguments are very different than Van Alstyne's claim that academic experts have a fiduciary duty to maintain "standard[s] of professional integrity,"[111] including the obligation to make sure that other academics are making "ethical use of [their] academic freedom."[112] Unlike Van Alstyne, Professors Sunstein and Griffin do not think it necessary that academics who hold themselves out as

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106. Devins, *supra* note 99, at 173 (quoting E-mail from Cass Sunstein, Karl N. Llewellyn Dist. Service Prof. of Jurisprudence, University of Chicago, to Neal Devins, Goodrich Professor of Law and Professor of Government, College of William and Mary (Oct. 29, 1998)).

107. Cass R. Sunstein, *Professors and Politics*, 148 U.PA. L. REV. 191, 195 (1999).

108. *Id.*

109. Stephen M. Griffin, *Scholars and Public Debates: A Reply to Devins and Farnsworth*, 82 B.U. L. REV. 227, 231 (2002).

110. *Id.* at 256 n.128 (quoting Posting of Stephen M. Griffin, sgriffin@law.tulane.edu, to conlawprof@listserv.ucla.edu (Dec. 5, 2000)). In making this plea, Griffin argued that academics ought not to bow to pressure from academics, like myself, who enunciate a more demanding standard of academic expertise. For my reply to Griffin, see Devins, *supra* note 99.

111. Van Alstyne, *supra* note 2, at 71.

112. *Id.* at 76.

constitutional experts should actually study the issues on which they comment. In particular, neither Sunstein nor Griffin ask that academics who hold themselves out as constitutional experts actually study the issue on which they comment. Instead, it is enough that they engage in substantive conversations with colleagues and/or are familiar with the modes of constitutional argumentation.

That today's academics embrace a relaxed definition of academic expertise corresponds to the increasing willingness of legal academics to make use of newspaper advertisements and letter writing campaigns to stake out expert opinions that comport with their personal beliefs.[113] Changes in academic practices and changes in Congress are also mutually reinforcing. Just as lawmakers have lost interest in hearing from nonpartisan experts on questions of constitutional interpretation, academics increasingly embrace a definition of academic expertise that allows individuals to register partisan preferences without studying the relevant literature.

Against this backdrop, it is easy to understand why today's academics would see their testimony as helping one or another political party. Congress has changed in ways that make it far more likely that academic testimony will be solicited for purely partisan purposes. More than that, the academy has changed in ways that suggest that academics are more willing than ever before to be part of such an overtly partisan process.

Although partisan politics also figured into earlier hearings,[114] the increasing partisan polarization in academic attitudes and in lawmakers' desires have becoming mutually reinforcing phenomena. The more that academics stake out positions on divisive issues before Congress, the more lawmakers seek out reliable Democratic or Republican witnesses (and vice versa). For this very reason, it is to be expected that Van Alstyne's writings on academic expertise would be less salient in today's politicized academy.[115]

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113. *See supra* note 104 (noting the correlation between political contributions and positions staked out in academic letter writing campaigns).

114. Consider, for example, the confirmation hearing of Supreme Court nominee Harold Carswell. As suggested earlier, there was a sharp split between Democratic and Republican Senators. *See supra* notes 17–18. It is also the case that at least one pre-1986 letter writing campaign allowed academics to register their personal preferences. *See supra* note 101 (discussing academic opposition to Carswell's confirmation).

115. I do not mean to suggest, however, that academics who testify before Congress are neither well prepared nor sincere. I think that they are. I also think, for reasons detailed in Parts

IV. CONCLUSION

By calling attention to changes in Congress and the academy, this Essay has tried to make sense of the diminishing appeal of unpredictable, nonpartisan witnesses to congressional committees. Today's Congress is far more partisan than it was from 1968 to 1985, when Bill Van Alstyne regularly appeared before congressional committees.[116] As such, the party who calls academic witnesses wants to make sure that their testimony will back up preexisting party positions. For its part, the academy has become more politicized. Today's academics are more likely to make use of joint letters, newspaper advertisements, and the like to send a political message to lawmakers and to the American people. Furthermore, when signing these letters and advertisements, academics often make use of a relaxed definition of what constitutes academic expertise.

From my vantage point, this state of affairs is unfortunate. Bill Van Alstyne's testimony before Congress exemplifies what academic testimony should be: expert, nonpartisan, and consistently employing a distinctive methodology. Notwithstanding my disappointment in changes both in Congress and the academy, I must say that I feel very grateful to have had a chance to survey Van Alstyne's extraordinary contribution to constitutional discourse in Congress.

II and III of this Essay, that they are more readily identifiable with one or the other political party.

116. In understanding why this is so, I have highlighted three interrelated phenomena, namely, increasing party polarization, the accompanying growth of party leadership, and changes in how lawmakers run for office.

APPENDIX A

Hearings at which Bill Van Alstyne Testified, and Corresponding Writings:

The Supreme Court: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong. 163–204 (1968).

- *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973).
- Panel Discussion, *Legislation to Limit the Jurisdiction of the Federal Courts*, 96 F.R.D. 275 (1983).

George Harrold Carswell: Hearing Before the Senate Comm. on the Judiciary, 91st Cong. 133–38 (1970).

To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the Senate Comm. on the Judiciary, 93d Cong. 47–67 (1973).

Extension of the Voting Rights Act of 1965: Hearing on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong. 789–802 (1975).

- *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.
- *The Administration's Anti-Literacy Test Bill: Wholly Constitutional But Wholly Inadequate*, 61 MICH. L. REV. 805 (1963).

Foreign Intelligence Surveillance Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong. 54–86 (1976).

- *Academic Freedom and Tenure: The Enlargement of the Classified Information System*, ACADEME, Jan.–Feb. 1983, at 9a.
- *The University at Odds with Itself: Furtive Surveillance on Campus*, ACADEME, Mar.–Apr. 1983, at 13a.

Equal Rights Amendment Extension: Hearing on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong. 115–21 (1978).

- *What Do You Think About the Twenty-Seventh Amendment?*, 10 CONST. COMMENT. 9 (1993).
- *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933.
- *The Proposed Twenty-Seventh Amendment: A Brief, Supportive Comment*, 1979 WASH. U. L.Q. 189.

Constitutional Convention Procedures: Hearing on S. 3, S. 520, and S. 1710 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 96th Cong. 286–302 (1979).

- *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985.
- *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295.

Racially Motivated Violence: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 97th Cong. 385–400 (1981).

Affirmative Action and Equal Protection: Hearing on S.J. Res. 41 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong. 81–94 (1981).

- *A Preliminary Report on the* Bakke *Case*, 64 A.A.U.P. BULL. 286, 288 (1978).
- *Equality for Individuals or Equality for Groups: Implications of the Supreme Court's Decision in the* Manhart *Case*, 64 A.A.U.P. BULL. 150, 151 (1978).
- Affirmative *Actions*, 46 WAYNE L. REV. 1517 (2000).
- *Affirmative Action and Racial Discrimination Under Law: A Preliminary Review*, 1 SELECTED AFFIRMATIVE ACTION TOPICS 180 (United States Commission on Civil Rights 1985).

Oversight Hearings to Define the Scope of the Senate's Authority Under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong. 98–135 (1981).

- *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973).
- Panel Discussion, *Legislation to Limit the Jurisdiction of the Federal Courts*, 96 F.R.D. 275 (1983).

The Human Life Bill: Hearing on S. 158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong. 275–305 (1981).

- *Closing the Circle of Constitutional Review From* Griswold v. Connecticut *to* Roe v. Wade*: An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L.J. 1677.
- *The Cycle of Constitutional Uncertainty in American Abortion Law*, in ABORTION, MEDICINE AND THE LAW (J. Butler & D. Walbret eds., 4th ed. 1992).
- *Notes on the Marginalization of Marriage in America: Altered States in Constitutional Law*, in PROBLEMS AND CONFLICTS BETWEEN LAW AND MORALITY IN A FREE SOCIETY (James Wood, Jr. & Derek Davis eds., 1994).

Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearing on S.J. Res 199 Before the Senate Comm. on the Judiciary, 97th Cong. 387–468 (1982).

- *If the School Prayer Amendment Becomes Law*, LIBERTY MAG., 1983, at 4.
- *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.
- *What is "An Establishment of Religion"?*, 65 N.C. L. REV. 909 (1987).

Freedom of Expression: Hearing Before the Senate Comm. on Commerce, Science, and Transportation, 97th Cong. 92–112 (1982).

- *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. REV. 539 (1978).

Constitutional Convention Procedures: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 99th Cong. 95–99 (1985).

- *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985.
- *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295.

Nomination of William Bradford Reynolds to be Associate Attorney General of the United States: Hearing Before the Senate Comm. on the Judiciary, 99th Cong. 169–170 (1985).

The Constitutional Roles of Congress and the President in Declaring and Waging War: Hearing Before the Senate Comm. on the Judiciary, 102d Cong. 189–219 (1991).

- *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972).
- *The Constitutionality of the War Powers Act*, 43 U. MIAMI L. REV. 17 (1988).
- *Presidential Ability to Launch an Attack*, 148 CONG. REC. S10, 642–44 (daily ed. Oct. 17, 2002) (statement of Sen. Byrd, quoting letter from William Van Alstyne).

Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong. 237–242 (1998).

- *President Nixon: Toughing it Out with the Law*, 59 ABA J. 1398 (1973).
- *A Political and Constitutional Review of* United States v. Nixon, 22 UCLA L. REV. 116 (1974).
- *The Third Impeachment Article: Congressional Bootstrapping*, 60 ABA J. 1199 (1974).