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**POLITICIZATION IN THE
FEDERAL JUDICIARY AND ITS
EFFECT ON THE FEDERAL
JUDICIAL FUNCTION**

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Abstract: During federal judicial confirmation hearings, the term “politicization” comes up as a frequent buzzword amongst political pundits and scholars. While the federal judiciary’s increasingly politicization, over the last few decades, is generally accepted this agreed-upon acknowledgment of judicial politicization does not imply agreement as to its value. There are clearly those who view politicization positively, accompanied by an almost equally loud chorus of those decrying it. But, regardless from where pro- or anti-politicization’s arguments proceed both generally view politicization as a question of judicial legitimacy. It is thus the relationship between politicization and the judiciary that this paper seeks to understand.

This paper attempts to define and measure the exact relationship between politicization and the judiciary. If politicization is really about judicial legitimacy, then what measurable affect does politicization have on it? If this connection fails (i.e., is not falsifiable) then what alternate connections can be found between the judiciary and politicization that can be backed up with falsifiable evidence?

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INTRODUCTION



hroughout Neil Gorsuch’s Supreme Court confirmation hearings the term “politicization” came up as a frequent buzzword amongst pundits and scholars.¹ Politicization broadly refers to a phenomenon in which a judiciary increasingly resembles other inherently political bodies, namely the legislative and executive branches. For example, legislatures and executives are generally understood to behave in a partisan manner concerning policy issues. Judiciaries, on the other hand, are not supposed to make partisan policy considerations (e.g., make determinations concerning the effectiveness of a statute or whether a regulation is overly burdensome on a particular industry).² Thus, by acting in a partisan manner concerning policy, a judiciary would be “politicizing” itself.

It is widely claimed that the federal judiciary has become increasingly politicized over the last few decades.³ However, agreed-upon acknowledgment of

¹ See Amber Phillips, *4 Takeaways from Neil Gorsuch’s Highly Politicized Confirmation Hearing*, WASH. POST (Mar. 21, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/03/21/4-takeaways-from-neil-gorsuchs-highly-politicized-confirmation-hearing/?utm_term=.08596c486a10; Matt Ford, *Judge Gorsuch Goes to Washington*, ATLANTIC (Mar. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/03/judge-gorsuch-goes-to-washington/520230/>.

² See ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 132–33 (1st ed. 2016).

³ See, e.g., Nina Totenberg, *Robert Bork’s Supreme Court Nomination Changed Everything, Maybe Forever*, NAT’L PUB. RADIO (Dec. 19, 2012), <http://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever>; Ford, *supra* note 1.

judicial politicization does not imply agreement as to its value. Broadly categorized, scholars generally fall into one of two camps when discussing politicization's value—pro-politicization and anti-politicization. Pro-politicization generally views politicization as an issue of accountability—we ensure accountability in the legislative and executive offices through majoritarian assent.⁴ Thus, the more majoritarian the judiciary becomes the more it matches the accountability we expect from inherently political branches.⁵ Anti-politicization, on the other hand, generally views politicization as an issue of independence—judicial independence protects the minority from majoritarian tyranny.⁶ Thus, greater judicial independence equates to greater counter-majoritarian protection.⁷

Regardless from where pro- or anti-politicization's arguments proceed (i.e., from either accountability or independence), both generally view politicization as a question of judicial legitimacy.⁸ It is thus the relationship between politicization and the judiciary that this paper seeks to understand. Specifically, this paper attempts to define and evaluate the exact relationship between politicization and the judiciary. If arguments about politicization center on judicial legitimacy, then what measurable affect does politicization have on judicial legitimacy? What hard evidence is there to back up either pro-politicization's or anti-politicization's arguments? Is this evidence falsifiable? If not, what alternate connections can be found between the judiciary and politicization, if at any all, in a way that can be backed up with falsifiable evidence?

Part I provides a background on politicization as a concept and frames how current scholarship addresses it. Part II attempts to find a measurable connection between politicization and judicial legitimacy, but ultimately finds the politicization/legitimacy hypothesis unfruitful and not falsifiable. Part III puts forward a new hypothesis—the politicization/judicial function hypothesis—as the correct way to understand politicization's relationship to the judiciary and ultimately finds this hypothesis fruitful and falsifiable.

I. CONTEXT: POLITICIZATION

Within the broader concept of politicization are two different manners in which politicization can occur—from the outside and from the inside.

⁴ See *infra* Section I.B.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Henry Paul Monaghan, *The Confirmation Process: Law or Politics*, 101 HARV. L. REV. 1202, 1207 (1988); see also Adam Liptak & Allison Kopecki, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES (June 2, 2012), <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html>.

A. Outside Politicization

Outside politicization occurs when outside actors impose characteristics on the judiciary that increases the degree to which it resembles an inherently political body. A classic example of outside politicization is judicial confirmations. In the federal arena, the Constitution gives the Senate the power to advise and consent to nominees to federal courts put forward by the President.⁹ At present, judicial confirmations are the Senate's primary means of exercising this power.¹⁰ For example, let us say that the President nominated someone to fill an appellate court seat.¹¹ Her confirmation process will likely proceed in the following manner—(1) after being nominated by the President, the Senate Judiciary Committee will gather information on the nominee in preparation for (2) hearings before the Committee, in which the nominee and other witnesses will testify to the Committee and answer Committee questions, after which the Committee will (3) vote on whether to send the nominee's nomination to a full Senate vote, and, if they do, the Senate will then (4) vote on whether to confirm her to the circuit court or not.¹²

Neither the Constitution, statutes, nor common law necessitates a political character to federal judicial confirmations.¹³ Nevertheless, the confirmation process has become an incredibly political affair, especially since Robert Bork's failed Supreme Court nomination.¹⁴ In 1987, Ronald Reagan nominated Robert Bork to fill Lewis Powell's seat on the Supreme Court.¹⁵ At the time, Bork was a judge on the U.S. Court of Appeals for the D.C. Circuit.¹⁶ Bork, a somewhat controversial pick for the Court, was widely praised by conservatives and widely despised by liberals, stemming from Bork's opposition to cases like *Griswold v. Connecticut*, *Reynolds v. Sims*, and statutes like the 1965 Voting Rights Act.¹⁷

From the very beginning, democratic Senators and liberal activist groups waged an all-out political war against Bork's nomination, ultimately succeeding when Bork's nomination was rejected in a full Senate vote.¹⁸ According to Tom

⁹ See U.S. CONST. art. II, §2, cl. 2.

¹⁰ See Monaghan, *supra* note 8, at 1202–03.

¹¹ See *Pending Nominees*, JUDICIAL NOMINATIONS, <http://judicialnominations.org/pending-nominees> (last visited Feb. 15, 2017).

¹² See *How the Confirmation Process Works*, JUDICIAL NOMINATIONS, <http://judicialnominations.org/how-the-confirmation-process-works> (last visited Feb. 15, 2017).

¹³ See Totenberg, *supra* note 3.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*; see also Voting Rights Act, 52 U.S.C. § 10301 (1965); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁸ For example, within hours of the announcement of Bork's nomination, Edward Kennedy, then-Senator from Massachusetts, made an impassioned speech on the Senate floor, saying that "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in

Goldstein, Bork's nomination changed the federal judicial nominating process forever. "Republicans nominated this brilliant guy to move the law in this dramatically more conservative direction. Liberal groups turned around and blocked him precisely because of those views. Their fight legitimized scorched-earth ideological wars over nominations at the Supreme Court[.]"¹⁹

The legacy of Bork's failed nomination lives on to this day with the use of the filibuster and other obstructionist tactics during Merrick Garland's nomination and Neil Gorsuch's confirmation. Republican senators essentially filibustered Garland's nomination by refusing to hold hearings.²⁰ Democratic senators actually did filibuster Gorsuch's nomination during the full Senate vote.²¹ In both of these instances, opposition to Garland's and Gorsuch's nominations did not derive from either judge's credentials or fitness for the position.²² Instead, opposition was merely a proxy fight between Democrats and Republicans much in the same way that these parties fight over appointments to a President's cabinet.²³ As such, judicial confirmations now exhibit high degrees of outside politicization as inherently political actors seek to treat judicial nominees in much the same way as they would other inherently political actors.

B. Inside Politicization

Inside politicization is the process in which inside actors—namely, judges or justices themselves—project characteristics on the judiciary that increases the degree to which it resembles an inherently political body. A recent example of inside politicization would be Ruth Bader Ginsburg's comments about Trump during the 2016 Presidential Election.²⁴ During an interview in July of 2016, Ginsburg said of Trump "I can't imagine what this place would be—I can't imagine what the

midnight raids, and schoolchildren could not be taught about evolution . . ." See Totenberg, *supra* note 3.

¹⁹ See *id.*

²⁰ See Editorial, *The GOP's Gamble on Merrick Garland Pays Off*, WASH. POST (Nov. 10, 2016), https://www.washingtonpost.com/opinions/the-gops-shameful-gamble-on-merrick-garland-pays-off/2016/11/10/05f79dd2-a780-11e6-8fc0-7be8f848c492_story.html?utm_term=.b377dcf6981f.

²¹ See Lisa Mascaro, *In History-Making Showdown, Senate GOP Breaks Democratic Filibuster of Trump's Supreme Court Pick*, L.A. TIMES (Apr. 6, 2017), <http://www.latimes.com/politics/la-na-pol-senate-gorsuch-showdown-20170406-story.html>.

²² See Monaghan, *supra* note 8, at 1202–03.

²³ See *id.*

²⁴ See Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?rref=collection%2Ftime-topic%2FGinsburg%2C%20Ruth%20Bader&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection&r=2.

country would be—with Donald Trump as our president[.]”²⁵ Ginsburg later called Trump a “faker.”²⁶

Ginsburg’s comments constitute inside politicization insofar as they align her with a political party on a manner of political concern. Even the act of aligning oneself with a political party on a policy matter would constitute inside politicization.²⁷ Yet, Ginsburg’s actions are further compounded by the fact that her actions imply an endorsement of one presidential candidate over another, which is an almost *per se* political act. Thus, like judicial confirmations, her actions increase the degree to which the judiciary resembles an inherently political body.

A further example of inside politicization can be seen in late-Justice Antonin Scalia’s comments concerning the 1965 Voting Rights Act and Congress’s routine renewal of the Act without alterations to its preclearance coverage.²⁸ Regarding Congress’ earlier determination as to which states fell under the Act, Scalia said “[m]aybe the whole country should be covered. Or maybe certain parts of the country should be covered based on a formula that is grounded in up-to-date statistics.”²⁹ Concerning the terms of Congress’ nearly unanimous reauthorization for the Act in 2006, Scalia said that it was “attributable, very likely attributable, to a phenomenon that is called perpetuation of racial entitlement. It has been written about. Whenever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes.”³⁰

Scalia’s comments exhibit inside politicization insofar as they directly address the appropriateness of Congress’ policy objectives in enacting and reauthorizing the 1965 Voting Rights Act. A judiciary is not supposed to engage in partisan discussions on legislative policy, as this paper earlier discussed. Thus, by doing so, Scalia increases the degree to which the judiciary resembles an inherently partisan body.

C. Politicization: For and Against

²⁵ *See id.*

²⁶ *See* Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a ‘Faker’, He Says She Should Resign*, CNN (July 13, 2016), <http://www.cnn.com/2016/07/12/politics/justice-ruth-bader-ginsburg-donald-trump-faker/>.

²⁷ According to this paper’s definition of judicial politicization.

²⁸ *See* Jillian Fama & Meghan Kiesel, *Scalia’s Two Cents: Justice Draws Criticism For Political Views in Decisions*, ABC (Mar. 14, 2013), <http://abcnews.go.com/Politics/OTUS/supreme-court-justice-antonin-scalias-political-outbursts/story?id=16694778>; *see also* § 10301; *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (holding that the coverage formula for federal preclearance in Section 4(b), which had not been updated by Congress in decades and was based on decades-old data, placed an unconstitutional burden on affected states).

²⁹ *See* Fama, *supra* note 28.

³⁰ *See id.*

Both the evidence as well as expert opinion and analysis appears to confirm that judicial politicization is occurring.³¹ Over the past thirty years, at least since the Bork hearings, the federal judiciary has increasingly resembled an inherently political body.³² However, the central point of disagreement is not whether the federal judiciary is being politicized or not, but rather what politicization's value, and effect on the judiciary, is.

1. The Pro-Politicization Argument

Those arguing for politicization generally tie their arguments to accountability. Specifically, citizens are as bound to federal judicial decisions as they are to congressional or presidential decisions. However, by dint of not having to stand for election, the judiciary is the least accountable federal branch of the three. Thus, politicization provides a quasi-ceiling on the degree to which judges can exercise their wide discretion by requiring a degree of majoritarian consent.

Interestingly, the most pertinent window of opportunity to enforce judicial accountability may be at the outset—the confirmation process.³³ According to Nina Totenberg, “[t]he only time a Supreme Court nominee is accountable at all to the public is before he or she is confirmed.”³⁴ This would explain the increasing politicization of the federal confirmation process over the past thirty years—as the need for judicial accountability rises, so does politicization of the confirmation process. However, far from finding the current degree of politicization in the federal confirmation process satisfactory, Totenberg advocates doubling the effort.³⁵ For Totenberg, a lack of politicization in the confirmation process risks a parade of horrors in terms of accountability, one in which the Senate shirks its duties and confirms judicial nominees of dubious character.³⁶

An alternative pro-politicization argument, tied to accountability, comes from Henry Paul Monaghan, who argues that politicization of the confirmation process is not about the courts at all, but instead serves as a proxy fight between the legislative and executive branches.³⁷ According to Monaghan,

³¹ See Totenberg, *supra* note 3.

³² See *id.*

³³ See Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1229 (1987).

³⁴ *Id.*

³⁵ See *id.* at 1218–19, 1229.

³⁶ See Totenberg, *supra* note 33, at 1216–18 (discussing the Fortas, Carswell, and Rehnquist confirmation hearings); see also BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 76–77 (Peter Berkowitz & Tod Lindberg eds., 1st ed. 2006) (discussing the Haynesworth confirmation hearing).

³⁷ See Monaghan, *supra* note 8, at 1203.

We take for granted that the President will nominate a person whose general constitutional philosophy the President endorses . . . For the President, the confirmation process itself is entirely political in the ordinary sense of the term. . . . [N]othing in the language of the appointments clause, in its origins, or in the actual history of the appointment process supports a constitutionally based presidential "right" to mold an independent branch of government for a period extending long beyond his electoral mandate.³⁸

Thus, for Monaghan, confirmation processes are really about the Senate checking the President, not whether the judge has any undiscovered dubiousness as Totenberg argues. That being said, both Totenberg and Monaghan would both likely agree that the Senate should demand in-depth answers from judicial nominees during confirmation hearings concerning matters of political concern.³⁹ As such, Totenberg and Monaghan would view Scalia's hearings, in which he refused to opine on any case, past or hypothetical, or his own academic scholarship, as anathema to democratic government.⁴⁰

2. *The Anti-Politicization Argument*

In contrast to pro-politicization, anti-politicization generally ties its argument to independence. According to Benjamin Wittes, nothing in the Constitution specifically disallows the Senate from engaging in a wholly political confirmation process.⁴¹ In this regard, he agrees with Totenberg and Monaghan that politicized confirmation processes have a firm constitutional basis.⁴² Instead, Wittes frames the present confirmation process as guided by a series of norms in which the Senate restrains itself from engaging in overt politics.⁴³ It is *these* norms, Wittes argues, that politicization directly attacks.⁴⁴ The more political the confirmation-process inquiry becomes, the more that it resembles an election, demanding ideological purity over legal qualification.⁴⁵

According to Wittes, once politicization fully erodes the norms of confirmation processes, a slippery-slope-type situation is inevitable, namely a path leading to the complete erosion of any norms governing confirmation processes.⁴⁶ For

³⁸ *Id.* at 1203–04.

³⁹ *See id.* at 1207; Totenberg, *supra* note 33, at 1229.

⁴⁰ *See* Totenberg, *supra* note 33, at 1219; WITTES, *supra* note 36, at 100.

⁴¹ *See* WITTES, *supra* note 36, at 86.

⁴² *See* Totenberg, *supra* note 33, at 1213; Monaghan, *supra* note 8, 1202–03.

⁴³ *See* WITTES, *supra* note 36, at 104–05.

⁴⁴ *See id.* at 91.

⁴⁵ *See id.* at 94.

⁴⁶ *See id.* at 104–05.

example, just as the Constitution allows politicizing the confirmation process, it also allows for other political tactics against the federal judiciary—budget stripping, impeachment, jurisdiction stripping, etc.⁴⁷ While Wittes argues that a politicized confirmation process might not significantly damage judicial independence, the erosion of other norms may.⁴⁸

D. Politicization as Primarily Related to Legitimacy

The foundations of each side's position (i.e., accountability and independence), can partially obscure the real heart of what politicization's current scholarship is really about. After all, accountability and independence are two completely different concepts. One could be easily forgiven for thinking that each side is talking past each other. This is not the case though.

Whether the conversation over politicization is really about accountability or independence is a secondary concern. Instead, the primary, though unstated, concern for both pro-and anti-politicization is a concern for the relationship between politicization and judicial legitimacy. For both viewpoints, the question is really about whether politicization bolsters or detracts from judicial legitimacy. Pro-politicization views politicization as an overall benefit because it makes the judiciary more accountable to the public, a universally accepted good in a democratic society. Anti-politicization views politicization as an overall evil because it erodes judicial independence, a similarly accepted good.

Even though both viewpoints tend to ignore the way in which the other side justifies its argument the central concern is always judicial legitimacy. Thus, the real question has to be, if politicization is really about legitimacy, what hard evidence exists to bolster either viewpoint? Put another way, can the politicization/legitimacy hypothesis be proved?

II. TESTING THE POLITICIZATION/LEGITIMACY HYPOTHESIS

Attempting to find a connection between politicization and legitimacy can be done in a number of ways from a data perspective. However, the ideal method for making a definitive determination would be to find a data set strongly correlated to judicial legitimacy with a sample size large enough to eliminate chance.

This paper argues that public support is the ideal data set for testing the hypothesis. In addition, this paper uses the Supreme Court as an analog for the federal judiciary as a whole because current scholarship often uses the Court as a

⁴⁷ *See id.* at 104–06.

⁴⁸ *See id.* at 106–07.

proxy for the federal judiciary as a whole.⁴⁹ According to Or Bassok, “[i]n the context of the Supreme Court’s authority, the normative aspect of its institutional legitimacy deals with the justification of the Court’s authority.”⁵⁰ Thus, Bassok argues that legitimacy is the primary means of the Court’s institutional authority, making it a necessary component of its continuing functionality.⁵¹

Public support is an ideal data set for two reasons. First, data on public support for the Supreme Court strongly correlates to federal judicial legitimacy. According to Bassok, public opinion is the best method for measuring the Court’s institutional legitimacy because, “[l]ike the legislative and executive branches, the judiciary depends on public support for its legitimacy.”⁵² Furthermore, the Court itself appears to view public opinion, through polling, as central to its own legitimacy. In discussing the Rehnquist Court, Bassok asserts that, over the course of the Twentieth Century, the Court transitioned from viewing expertise as its source of legitimacy to viewing public support as its source of legitimacy.⁵³ In fact, according to Bassok public opinion became so important to the Court’s legitimation that legal reasoning became a secondary concern at times. “[A] Court that adheres to the public confidence legitimation theory has created a situation in which legal reasoning capitulates to the demands of public opinion . . . to maintain its legitimacy, the [Court’s] institutional habit was to decide cases with a view of preserving public confidence in the Court.”⁵⁴

Second, public support is an ideal data set for evaluating the hypothesis because data for public support is plentiful. As a result of public opinion’s deep connection to judicial legitimacy, polling should represent the ideal data set for measuring politicization’s effect on legitimacy. According to Bassok, public support is best measured in opinion polling, making polling the definitive measuring instrument for judicial legitimacy. “Since the 1980s and the rise of the ‘public

⁴⁹ For example, by the mid-1990’s, district and circuit judge nominations were also considered to be heavily political. It is hard to tell whether this politicization primarily resulted from outside or insider politicization, but for a deeper look into how things happening in the Supreme Court trickle down to lower courts, see generally LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (1st ed. 2013). Supreme Court behavior would also trickle down via the binding nature of their decisions on the lower courts. *Id.*

⁵⁰ Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 155 (2013).

⁵¹ *See id.*

⁵² *See id.* at 160; see also David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, 36 CT. REV. 24, 24 (1999) (“A court that does not have the trust or confidence of the public cannot expect to function for long as an effective resolver of disputes, a respected issuer of punishments, or a valued deliberative body.”).

⁵³ *See* Bassok, *supra* note 50, at 166.

⁵⁴ *Id.* at 190.

opinion culture,' opinion polls have served in the public discourse as an authoritative democratic legitimator."⁵⁵ Furthermore, scholars from both the pro- and anti-politicization positions frequently use polling data to cite politicization's effect on public support, and thus on the Court's legitimacy. For example, Eric Hamilton uses recent polling data as indicative of Court's eroding public support, which he further attributes to increased politicization.⁵⁶

Indications of public support for the judiciary are often measured in the same way that they are for other branches of government—polling. Polling is the act of recording the opinion of a selected group of people based on previously devised questions.⁵⁷ For example Gallup, one of the largest polling companies in the United States, conducts polling mainly “based on interviews conducted by landline and cellular telephones.”⁵⁸ Generally, polling uses a small subset of randomly selected individuals as a means to broadly understand the opinions or preferences of larger groups of people.⁵⁹ For example, “Gallup’s U.S. surveys are based on the organization’s standard national telephone samples, consisting of [randomly-assigned] telephone samples using a proportionate, stratified sampling design. . . [of] is 1,000 national adults with a margin of error of ± 4 percentage points.”⁶⁰

A. Understanding Polling’s Implications on the Politicization/Legitimacy Hypothesis

Concerning the Supreme Court’s public support, Gallup’s polling data is the most expansive, containing over four decades of historical data. During these polling studies, Gallup asked individuals “do you approve of the way the Supreme Court is handling its job” or some variant thereof.⁶¹ It then recorded this each individual’s response and then inputted every response into its model to reach a publishable data set.⁶²

⁵⁵ *Id.* at 158.

⁵⁶ See Eric Hamilton, *Politicizing the Supreme Court*, Essay, 62 STAN. L. REV. ONLINE 35 (2012).

⁵⁷ See *How Does Gallup Polling Work*, GALLUP, <http://www.gallup.com/poll/101872/how-does-gallup-polling-work.aspx> (last visited May 9, 2017).

⁵⁸ *Id.*

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ See *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited May 9, 2017). Another variant of the accompanying text was “[n]ow I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one—a great deal, quite a lot, some, or very little?” *Id.*; see also Figures 1 and 2, *infra* notes 63–64.

⁶² See *id.*

Gallup's Supreme Court approval data goes as far back as 1973. From 1973 to 2016, confidence in the Supreme Court decreased by 20%, from 45% to 36% (Figure 1).⁶³ Furthermore, in a different poll from 2000 to 2016, which offered only two polling choices, approve or disapprove, the Court saw an even greater decrease in support, a 27% decrease from 62% to 45% (Figure 2).⁶⁴

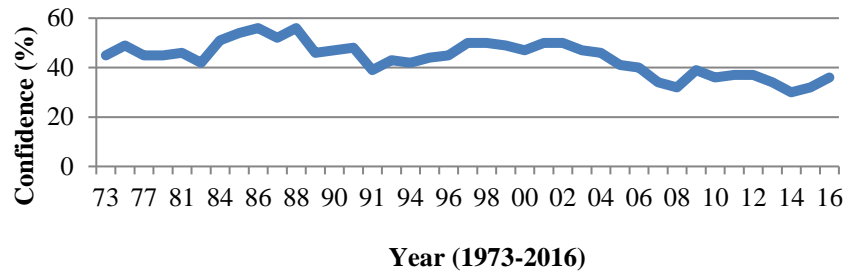


Figure 1. Gallup Polling on Supreme Court Confidence, 1973–2016.

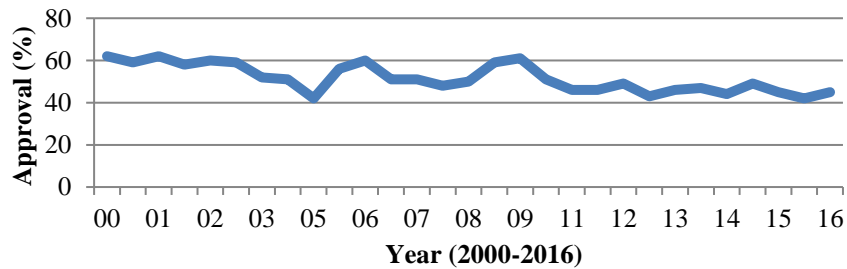


Figure 2. Gallup Polling on Supreme Court Approval, 2000–2016.

1. Possible Interpretations

Both the pro- and anti-politicization viewpoints claim that decreased public support for the Court bolsters their arguments for politicization's value. Pro-politicization proponents argue that declines in public support stem from the public's perception that the Court is becoming increasingly isolated, which decreases its accountability and thus its judicial legitimacy. According to Adam Liptak and Allison Kopecki, "many Americans do not seem to expect the court to decide the

⁶³ The data in Figure 1 reflects the percentage of respondents who answered "a great deal" or "quite a lot" to a Gallup Poll question asking "[n]ow I am going to read you a list of institutions in American society. Please tell me how much confidence you, yourself, have in each one — a great deal, quite a lot, some, or very little?" *See id.*

⁶⁴ The data in Figure 2 reflects the percentage of respondents who answered "approve" to a Gallup Poll question asking "[d]o you approve or disapprove of the way the Supreme Court is handling its job?" *See id.*

case solely along constitutional lines.”⁶⁵ As a result, according to Lee Drutman, the Court’s increasingly tendency to decide cases along political lines, while simultaneously eschewing majoritarian assent via life tenure, leads to erosions in public support and overall judicial delegitimization.⁶⁶ As John Robert’s almost presciently said in 1983, “[t]he federal judiciary today benefits from an insulation from political pressure even as it usurps the roles of the political branches.”⁶⁷

Alternatively, anti-politicization proponents argue that declines in public support for the Court signal that the public’s perception of judicial independence is eroding and thus negatively affecting judicial legitimacy. According to Hamilton, decreasing politicization is causal to declines in public support, resulting in decreasing countermajoritarian power and, ultimately, to an overall erosion in judicial legitimacy. “If the Court loses authority to check political power and make unpopular decisions, it cannot enforce the Constitution with the same effectiveness. Without enforcement of the Constitution, Congress is free to invade constitutional rights and exceed its lawful powers.”⁶⁸

2. Invalidating the Politicization/Legitimacy Hypothesis

As Liptak and Kopecki concede, even if we stretch out polling data over a period of years, the Court’s decreasing public support does not necessarily result from politicization. “The decline in the court’s standing may stem in part from Americans’ growing distrust in recent years of major institutions in general and the government in particular.”⁶⁹ If this is true, how does it affect the politicization/legitimacy hypothesis?

Consider the following—polling data indicates that public approval in the Court experienced a noticeable drop between 2006 and 2008.⁷⁰ During this exact same period, Congress and President George W. Bush also experienced similarly noticeable drops.⁷¹ Additionally, from 2009 to 2010 the Court had its single largest annual drop in public approval since Gallup began Court polling.⁷² During this

⁶⁵ See Liptak & Kopecki, *supra* note 8.

⁶⁶ See Lee Drutman, *How to End Some of the Destructive Warfare of the Supreme Court Confirmation Process*, CNBC (Feb. 1, 2017), <http://www.cnbc.com/2017/02/01/case-for-supreme-court-term-limits-has-never-been-stronger-commentary.html>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Liptak & Kopecki, *supra* note 8.

⁷⁰ See *Supreme Court*, *supra* note 61.

⁷¹ See *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited May 9, 2017); *Presidential Approval Ratings—George W. Bush*, GALLUP, <http://www.gallup.com/poll/116500/presidential-approval-ratings-george-bush.aspx> (last visited May 9, 2017).

⁷² See *Supreme Court*, *supra* note 61.

exact same period, Congress did not experience a similar drop.⁷³ What do the Court's 2006 to 2008 and 2009 to 2010 approval numbers say about the politicization/legitimacy hypothesis?

Concerning 2006 to 2008, this period overlaps in part with the Housing Bubble and Credit Crisis of 2007 to 2009.⁷⁴ Considering the fact that Congress experienced similar approval drops during this period these drops could very well stem from overall government distrust of the kind Liptak and Kopecki discuss rather than judicial politicization.⁷⁵ This guess is further bolstered by looking at polling data from 1988 to 1989, in which both the Court and Congress experienced similarly noticeable drops.⁷⁶ The Savings and Loan Crisis, a financial crash that famously saw the Dow Jones Industrial Average book its largest single day value loss in its history, occurred in 1988 to 1989.⁷⁷

Concerning 2010, this period coincides with the Court's now-infamous decision *Citizens United v. Federal Elections Committee*.⁷⁸ The general public almost universally disapproved of *Citizens United* at the time it was decided, seeing it as a "symbol for what people perceive to be a much larger problem, which is the undue influence of wealth in politics."⁷⁹ Considering the public's uniform disapproval of *Citizens United* the Court's approval drop from 2009 to 2010 is could alternatively be attributed to this decision. This guess is further bolstered when looking at polling data from 2009, the year of Justice Sonia Sotomayor's confirmation hearings.⁸⁰ Given that confirmation hearings are understood to be highly politicized, if politicization really had any effect on public approval one would expect to see some decline in Court approval from 2008 to 2009.⁸¹ But, from 2008

⁷³ See *Congress and the Public*, *supra* note 71.

⁷⁴ See Andrew Beattie, *Market Crashes: Housing Bubble and Credit Crisis (2007–09)*, INVESTOPEDIA (Nov. 14, 2017), <http://www.investopedia.com/features/crashes/crashes9.asp> (last visited May 9, 2017).

⁷⁵ See Liptak & Kopecki, *supra* note 8.

⁷⁶ See *Supreme Court*, *supra* note 61; *Congress and the Public*, *supra* note 71.

⁷⁷ See *Savings and Loan Crisis (S&L)*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/sl-crisis.asp?lgl=lg-mt> (last visited May 9, 2017); *Black Monday*, INVESTOPEDIA, <http://www.investopedia.com/terms/b/blackmonday.asp> (last visited May 9, 2017); see also *Setting the Record Straight on the Dow Drop*, N.Y. TIMES, (Oct. 26, 1987), <http://www.nytimes.com/1987/10/26/business/setting-the-record-straight-on-the-dow-drop.html>.

⁷⁸ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁷⁹ Greg Stohr, *Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot*, BLOOMBERG (Sept. 28, 2015), <https://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot> (quoting David Strauss). To this day, *Citizens United* continues to garnish wide public disapproval. A 2015 Bloomberg poll indicated that 78% of the general public thinks that *Citizens United* was wrongly decided. *Id.*

⁸⁰ See Robert Barnes, Amy Goldstein & Paul Kane, *In Senate Confirmation Hearings, Sotomayor Pledges Fidelity to the Law*, WASH. POST (July 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071301154.html>.

⁸¹ See Hamilton, *supra* note 56.

to 2009 the Court's approval rating increased by 27%, from 48% to 61%. Furthermore, in the next Gallup poll taken after *Citizens United*, the Court's approval rating dropped 16% from 61% to 51%.

The fact that polling numbers can be attributed to a multitude of factors, completely absent of politicization, seriously calls into question the current academic discussion concerning politicization and the judiciary. If current scholarship connects politicization to legitimacy, and legitimacy is best measured by public support through polling data, then a serious problem arises in the validity of current scholarship's assertions. If legitimacy (i.e., public support via polling data) cannot be definitively attributed, by amount, to politicization then neither pro- nor anti-politicizations' arguments can survive because neither argument is falsifiable. If someone argues that politicization has x effect on judicial legitimacy, but that effect cannot be definitely measured, then what value does that argument have?

III. REFRAMING: THE POLITICIZATION/JUDICIAL FUNCTION HYPOTHESIS

This paper agrees with the current scholarship concerning politicization insofar as it argues that politicization *is* occurring and that it has *some* effect on the judiciary. Thus, if the connection between politicization and legitimacy is impermissible, because an assertion about the connection between the two cannot be falsifiable, then what is politicization connected to?

This paper argues that politicization should instead relate to the judicial function concept, where the judicial function is a judiciary's expected value to a given society. As will be discussed below, politicization is better measured against a judiciary's judicial function than against a judiciary's legitimacy. As such, this paper replaces the politicization/legitimacy hypothesis with a different one—the politicization/judicial function hypothesis.

A. Defining "Judicial Function"

Even though this paper centers on the American federal judiciary, the judicial function, as a concept, is really something broader. As this paper defines it, the judicial-function concept is really about the purpose of any court, be it state or federal, American or foreign. As such, the judicial-function concept really starts with the question of why societies have courts? What purpose does a court, or judiciaries in general, serve to society?

This paper argues that defining why societies have courts is the same as defining what the judicial function is. The judicial function is the quantification of whatever value a judiciary has within a given society. If, for example, a judiciary's societal value was to protect the rule of law then its judicial function would be defined as such. Alternatively, if a judiciary's societal value were to ensure a certain ideological order then its judicial function would also be as such. Hence, in

the first example a show trial would clearly violate that judiciary's judicial function whereas in the second example a show trial might promote that judiciary's judicial function.

Determining the American judiciary's function might be harder to do than it appears at first glance. After all, if a judiciary's judicial function relates to its value to society then looking at the judiciary's opinion about its own judicial function has scant value. If a judiciary's value relates to society then society, receiving that value, is the one that defines how we measure it.

This paper argues that, in American society, the judiciary's core judicial function is to ensure egalitarian rule of law by formal guidance—formal guidance being precedent-setting interpretations of the Constitution in the federal arena and of a state's own constitution in the state arena.⁸² Courts are charged with adjudicating disputes in an egalitarian manner, best summed up by foundational revolutionary documents like the Declaration of Independence.⁸³ Thus, in emulating our founding principles, at the core of the American judiciary is the principle that an American court treat every person before it equally, regardless of that person's gender, wealth, race, ethnicity, etc., carrying out this duty by dictum of constitutions, supreme against all statutory and common law.⁸⁴

In addition to understanding what, in fact, the American judiciary's judicial function is, it is important to understand what it is not, namely another word for "legitimacy." Legitimacy is central to a judiciary's power. After all, a judiciary's inherent power is really a negative power, namely the power to decline the recognition of a law's validity. A judiciary relies on the executive to exert positive (i.e., enforcement) power to its interpretations—*Brown v. Board of Education* would have been of little value had Dwight Eisenhower declined to enforce desegregation.⁸⁵

⁸² See U.S. CONST. art. VI, cl. 2. ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . ."). According to Andrei Marmor:

Constitutions are, by their very nature, *precommitment* devices. When a legal system adopts a constitution, especially one that is fairly "rigid" (as the U.S. Constitution certainly is), the legal system basically recommitments to certain principles of governance and certain moral-political principles that are deliberately made difficult to change by the ordinary democratic process of legislation.

ANDREI MARMOR, *THE LANGUAGE OF LAW* 150 (2014). Formal guidance would thus refer to rigid documents committing a society or governmental system to a certain group of ideals that, though vague, influence all court decisions. See *id.*

⁸³ See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁸⁴ See *id.*

⁸⁵ See *Brown v. Board at Fifty: "With an Even Hand,"* LIB. OF CONG., <https://www.loc.gov/exhibits/brown/brown-aftermath.html> (last visited Feb. 15, 2017).

However, to say that legitimacy is all about power is incorrect because there are clearly situations in which a court's decision may be given power and yet be considered illegitimate in some way. For example, consider *Korematsu v. United States*, a case concerning the internment of Japanese-Americans presents the opposite scenario.⁸⁶ *Korematsu* was given power—the Roosevelt Administration interned over 100,000 people of Japanese ancestry during World War II.⁸⁷ Yet, today's society views *Korematsu* as almost universally delegitimizing for the Court. As Judge Marilyn Patel once said, *Korematsu* “stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.”⁸⁸

Thus, if legitimacy is not wholly about power then what is legitimacy really about? This paper argues that legitimacy is instead the degree to which a judiciary adheres to its judicial function. Legitimacy is thus intrinsically tied to society's expected value from a judiciary. A judiciary's failure to adhere to its judicial function would thus delegitimize the judiciary. In the American context, the judiciary's legitimacy would thus depend either on how egalitarian its adjudication was or how closely it adhered to its formal constitutional guidance.

B. Alternate Data as a Means to Proving the Politicization/Judicial Function Hypothesis

Clearly, polling data is not *completely* invalid as it relates to the Court's public support. The Court's public support has clearly eroded over the last few decades.⁸⁹ The problem with the politicization/legitimacy hypothesis was really more about the fact that polling data was an invalid source for linking politicization and legitimacy. So, can the politicization/judicial function survive the same degree of data-driven scrutiny?

If public opinion polling was the ideal data point for testing the politicization legitimacy hypothesis, what is the analog ideal data point for the politicization/judicial function hypothesis. The ideal data point for testing the politicization/judicial function hypothesis is likely a similar form of polling, but instead one quantifying the public's expected utility for the judiciary. For example, if the judicial function relates to expected utility then, ideally, we would want polls asking

⁸⁶ See *Korematsu v. United States*, 323 U.S. 214 (1944).

⁸⁷ See Avi Selk, *FDR Issued an Executive Order Sending Japanese Americans to Internment Camps—75 Years Ago*, WASH. POST (Feb. 19 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/02/12/the-supreme-court-reviewed-an-executive-order-result-one-of-the-worst-decisions-in-history/?utm_term=.03d261f5abe4.

⁸⁸ Dean M. Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 72 UCLA ASIAN PAC. AM. L.J. 72, 74 (1996) (quoting *re*litigation of *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984)).

⁸⁹ See Hamilton, *supra* note 56; Liptak & Kopecki, *supra* note 8.

questions like “do you find the American judiciary valuable” or “how much money would you have to receive to replace the American legal system with the (for example) French legal system?” Alternatively, polling data could approach measuring the American judiciary’s judicial function by asking questions like “how egalitarian do you feel the judiciary is” or “do you feel that the judiciary accords with fundamental American principles founded in documents like the Declaration of Independence, such as equal justice under the law?”

Unfortunately, there is no widely available data that gathers this sort of polling information. Hence, the ideal data point for testing the politicization/judicial function hypothesis is unavailable. Does this mean that the hypothesis is untestable? Not necessarily—instead, it merely implicates that testing must take place with a less desirable, though equally measureable, data point. In regards to politicization and the judicial function, there is an additional source that might begin to make a connection between politicization and some essential judicial element — diversity.

1. Diversity: The Data

According to the data, the Court has become homogenous in the last few decades, not in gender or ethnic composition but in resume. This paper defines “resume” to include educational background and previous work experience prior to become a judge. For example, a diverse court in terms of resume would have judges from a wide vary of law schools and prior work experiences. A homogenous court would see the opposite trend appear, namely a concentration of education and work experience. Thus, the process for testing the politicization/judicial function hypothesis requires both a compilation of data and some proof that this data validates some connection between politicization and the judicial function.

Much like analyzing legitimacy, the Supreme Court is an appropriate lens through which to analyze homogeneity because Court data is the most expansive and easiest to obtain. Concerning the Court’s resume diversity, since 1950 the diversity of educational backgrounds (i.e., law schools) decreased by 75% (Figure 3).⁹⁰ Furthermore, since 1950 the diversity of prior work experience also decreased. Every profession of every Court justice immediately prior to ascending to

⁹⁰ Figure 3 reflects the number of law schools from which sitting Supreme Court justices graduated over time. For example, in 1950, the nine Supreme Court justices together graduated from eight different law schools, whereas in 2017, the nine justices together graduated from only two different law schools, Harvard Law School and Yale Law School. The data on educational backgrounds was compiled by the author and can be found at *Justices*, OYEZ, <https://www.oyez.org/justices> (last visited Feb. 27, 2018). See also Richard E. Berg-Andersson, JUSTICES OF THE SUPREME COURT (BY TERM OF COURT), <http://www.thegreenpapers.com/Hx/JusticesUSSC.html> (last updated Oct. 2, 2017).

the bench fell into one of three broad categories—judge, political official, or private practice. Since 1950, the percentage of justices coming from private practice decreased by 100%, for political office it decreased by 86%, and for justices already serving as judges it increased by 800% (Figure 4).⁹¹ Thus, since 1950 resume diversity experienced a staggering concentration on the Court.

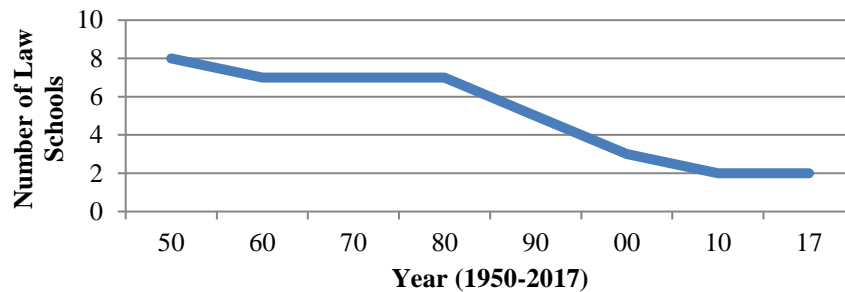


Figure 3. Number of Law Schools Represented on the Supreme Court.

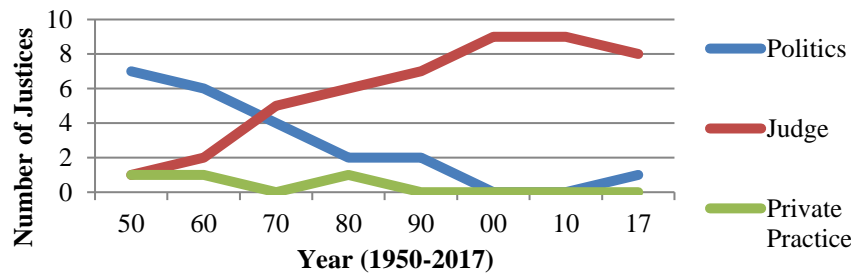


Figure 4. Number of Professional Backgrounds Represented on the Supreme Court.

2. Possible Interpretation

But why does a concentration in educational background and work experience have any bearing on the judicial function? Furthermore, even if resume concentration could be connected to politicization and the judicial function, how is this data falsifiable in a way that proves the politicization/judicial function hypothesis? After all, the downfall of the politicization/legitimacy hypothesis was its inability to prove itself with falsifiable data. Thus, falsifiable data is *necessary* for the politicization/judicial function hypothesis.

⁹¹ Figure 4 reflects the number of sitting Supreme Court justices by professional background over time. The data on professional backgrounds was compiled by the author and can be found at *Justices*, *supra* note 90. See also Berg-Andersson, *supra* note 90.

The judicial function contains the expectation that the judiciary will act in an egalitarian manner. According to Sonia Lawrence, one of the most important connections between the judiciary and the general public is “the connection between the identity characteristics of judges and the status hierarchies apparent in the larger social structure.”⁹² Lawrence offers a more in-depth description of this connection:

[T]he judiciary has strong social and identity connection to already powerful identity groups in an unequal society. This set the judiciary up as a symbol of social exclusion that may harm the democratic legitimacy of the institution (particularly to the perception of excluded groups). [Furthermore], the judiciary as a group is largely homogenous, and the institution and its individual members are largely able to pursue their work without facing “the challenge difference” from peers and colleagues[.]⁹³

If both Russell and Lawrence are correct, then resume concentration would have a direct effect on the federal judiciary’s judicial function. How can a court of such elitist resume concentration be expected to act in an egalitarian manner, especially without facing the “challenge difference” as Lawrence puts it?⁹⁴ Lawrence implies that, in regards to identity characteristics and status hierarchies, for the public, perception is reality.⁹⁵ Thus, the public perception of resume concentration in favor of elitism creates the reality—a reality that the federal judiciary is shirking its egalitarian mandate.⁹⁶ But, how does politicization play into resume diversity?

Increased politicization is generally thought to have resulted in an increasingly protectionist confirmation process whereby presidents endeavor to nominate persons who are as noncontroversial as possible. This, the logic goes, decreases the avenues of attack for partisan opponents to the nomination—it is harder to criticize the woman of impeccable credentials than it is to criticize the person who never went to college. Played out in practice, scholars argue that presidents now look to a very particular type of person to nominate to the Supreme Court—current

⁹² Sonia Lawrence, *Reflections: On Judicial Diversity and Judicial Independence*, in *JUDICIAL INDEPENDENCE IN CONTEXT 196–97* (Adam Dodek & Lorne Sossin eds., 1st ed. 2010) (discussing Peter Russell’s theories on judicial independence).

⁹³ *Id.* at 197.

⁹⁴ *Id.*

⁹⁵ *See id.* at 203–04.

⁹⁶ *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776); Lawrence, *supra* note 92, at 197 (“[W]e cannot ignore the connection between the judiciary and the other hierarchies which mark our society without allowing the judiciary to be an[other] symbol of hierarchy through difference.”).

judges who attended elite law schools, generally Harvard or Yale.⁹⁷ Thus, politicization causes protectionism, which causes resume diversity to decrease, directly affecting the judiciary's judicial function in a negative way.

The downfall of the politicization/legitimacy hypothesis was its inability to prove its relationship through falsifiable data. Though diversity, as a variable, is not as central to the politicization/judicial function hypothesis as public opinion was to the politicization/legitimacy hypothesis diversity has one key attribute—falsifiability. The diversity data point's falsifiability is what ultimately proves the politicization/judicial function hypothesis.

CONCLUSION

Both the politicization/legitimacy hypothesis and the politicization/judicial function hypothesis asked two basic questions—what is the connection between politicization and the judiciary, and what effect does politicization have on it? This paper argues that the politicization/legitimacy hypothesis is invalid and that, instead, politicization should be thought of in regards to its connection to the judicial function.

This paper not only validates the politicization/judicial function hypothesis, but also identifies data that indicates that politicization has a negative effect on the federal judiciary's judicial function. The negative effect is not of the kind that authors like Totenberg or Wittes honed in on—no data supports the argument that problems exist with the federal confirmation process.

This paper argues that, instead of discussing the current politicization of confirmation processes, we should be looking at something more fundamental—what do we want our courts to look like? If we want our courts to be egalitarian then they cannot just be egalitarian in their writing or their decision-making. They have to be egalitarian in background. The courthouse doors must be open—to any plaintiff seeking relief and to any legal mind fit to be a judge. The judicial function appears to demand so, and by that clarion call it should be done.



⁹⁷ See Dahlia Lithwick, *Yale, Harvard, Yale, Harvard, Yale, Harvard, Harvard, Harvard, Columbia*, NEW REPUBLIC (Nov. 13, 2014), <https://newrepublic.com/article/120173/2014-supreme-court-ivy-league-clan-disconnected-reality>.