

## Chapter 4: Judicial Appointments and the Specter of Politicization

Constitutional adjudication is bound up with the fear of, or the desire for, politicization. Much of this has to do with judicial appointments. Scholars and political observers alike frequently complain that the selection of new constitutional justices tends to politicize the court to which the justices are appointed.<sup>683</sup> Conversely, they sometimes criticize politicians for not politicizing constitutional adjudication enough.<sup>684</sup> While the justices themselves do not necessarily consider their court politicized, they may fear that judicial appointments make the public perceive it as such.<sup>685</sup>

At the same time, there are surprisingly few succinct accounts of judicial politicization generally and of politicization by judicial appointment specifically. Therefore, my first aim in this chapter is to describe what it means for the appointment process to politicize constitutional adjudication. I will show that politicians politicize a constitutional court when they staff it with justices whose constitutional positions mirror specific partisan policy preferences. Thus, a constitutional court is politicized as a result of the judicial-selection system when it is subject to party-political capture.

However, the concept of politicization by judicial appointment leaves a few questions unanswered. The first pertains to the confirmation process, i.e., that part of the appointment process in which the parliamentarians

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683 See, e.g., Pierre Rosanvallon, *La légitimité démocratique: Impartialité, réflexivité, proximité* (Éditions du Seuil, Paris, 2008) 256–7; David Leonhardt, ‘How to End the Politicization of the Courts’, *The New York Times*, 4 April 2017, available at <https://perma.cc/AG4G-DEUA>; Gerald F Seib, ‘Supreme Court Opening Adds to Pressure on American Institutions’, *The Wall Street Journal*, 21 September 2020, available at <https://perma.cc/HEH6-AY5H>; and many of the contributions to the debate on ‘How to Fix the Supreme Court’, *The New York Times*, 27 October 2020, available at <https://perma.cc/6QJJ-MV57>.

684 Heribert Prantl, ‘Politische Entpolitisierung: Die Union beruft einen Spitzenrichter für weniger Einmischung’, *Süddeutsche Zeitung*, 25 November 2018, available at <https://perma.cc/5KQE-98JH>.

685 See, e.g., Robert Barnes, ‘The political wars damage public perception of Supreme Court, Chief Justice Roberts says’, *The Washington Post*, 4 February 2016, available at <https://perma.cc/3H8C-98RP>, and Helene Bubrowski and Reinhard Müller, ‘Spielball der Politik? Neue Sorgen um Akzeptanz und Statik des Bundesverfassungsgerichts’, *Frankfurter Allgemeine Zeitung*, 21 February 2018, p 8.

vote to confirm or reject a candidate nominated by a different institution. We will often blame this stage for contributing to politicization by judicial appointment; in the United States, for instance, the senators are sometimes faulted for politicizing the Supreme Court.<sup>686</sup> However, the senators have little control over whom the president nominates, which means that their confirmation vote may help politicize the Supreme Court even though they may not have intended to capture the Court for their political parties. For that reason, we should analyze more closely what kind of confirmation behavior falls within the meaning of politicization by judicial appointment.

The second question concerns politicization's effect on constitutional adjudication. We fear politicization by judicial appointment because we believe it will cause people to perceive the constitutional court as politicized and will make them support it less, thereby diminishing the authoritative-ness of its decisions. So far, however, there is little empirical proof that this will transpire, at least in the United States. In any event, the justices themselves can likely counteract a decline in their institutional legitimacy. In fact, the odd ideologically surprising judgment may be enough to restore the Supreme Court's authoritative-ness. Perhaps, then, politicization's drawbacks do not always outweigh its benefits.

The third question is specific to the German system for selecting new justices. On the one hand, the Federal Constitutional Court does not commonly exhibit a partisan divide. On the other hand, the interparty agreement that assigns each justiceship on the Court to a specific party leaves out two parties that are currently represented in the *Bundestag* but are situated on its ideological fringe. Therefore, it is possible that the interparty agreement seeks not only to balance the constitutional bench ideologically but also to keep the fringe parties' ideologies off the Court. In that case, the Constitutional Court may deserve to be called politicized after all.

Therefore, my second aim in this chapter is to refine the concept of politicization by judicial appointment and to apply it to the US Supreme Court as well as the German Federal Constitutional Court. I do so in part by analyzing the concept in the light of Niklas Luhmann's early systems theory, in particular his early political sociology. Central to this theory is the concept of differentiation—both of the political system, internally, and of society, functionally.

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686 See, e.g., Geoffrey R Stone, 'Understanding Supreme Court Confirmations', 2010 Sup Ct Rev 381, 396 (2010).

Firstly, Luhmann's model of the political system's internal differentiation into a subsystem of party politics and another of governmental decision-making helps us better understand the confirmation process's role in politicizing constitutional adjudication: By highlighting that the parliamentarians belong to both subsystems and can choose in which capacity to act when they vote on a judicial nominee, it demonstrates that parliamentarians only contribute to politicization when they act as party politicians. Secondly, Luhmann's analysis of the judiciary's role in an internally differentiated political system and his concept of a functionally differentiated society paint a nuanced picture of politicization's effect on constitutional adjudication. Whether politicization is detrimental turns on two things, they suggest: whether the political parties represent society well and whether the constitutional justices know when to step away from the partisanship that characterizes their day-to-day business.

Mine is not the first attempt at a systems-theoretical analysis of judicial politicization. Nor is it the first to draw on Niklas Luhmann's systems theory.<sup>687</sup> But as far as I can tell, it is the first to be based on the early phase of that theory,<sup>688</sup> in which social systems are open, not closed, and consist of actions, not self-referential communications.<sup>689</sup> I will argue that this allows for a better analysis of politicization.

To familiarize readers with the German system for selecting constitutional justices, section I briefly presents its chief characteristics. Section II sets out the concept of politicization by judicial appointment. Section III discusses the points that the concept leaves open, and section IV analyzes some of these points from a Luhmannian, systems-theoretical perspective.

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687 See Alfons Bora, 'Recht und Politik. Krisen der Politik und die Leistungsfähigkeit des Rechts', in Armin Nassehi and Markus Schroer (eds), *Der Begriff des Politischen* (Nomos, Baden-Baden, 2003) 189; Basil Bornemann, 'Politisierung des Rechts und Verrechtlichung der Politik durch das Bundesverfassungsgericht? Systemtheoretische Betrachtungen zum Wandel des Verhältnisses von Recht und Politik und zur Rolle der Verfassungsgerichtsbarkeit', 28 *Zeitschrift für Rechtssoziologie* 75 (2007); and Michael Hein and Stefan Ewert, 'Die Politisierung der Verfassungsgerichtsbarkeit. Eine ideengeschichtliche und systematische Begriffsrekonstruktion', in Jörn Knobloch and Thorsten Schlee (eds), *Unschärferelationen: Konstruktionen der Differenz von Politik und Recht* (Springer VS, Wiesbaden, 2018) 103, 120–3.

688 For research that uses a more holistic approach to Luhmann's theory, see Gert Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory', 29 *J Law & Soc'y* 258 (2002).

689 On the later phase, Niklas Luhmann, 'Law as a Social System', 83 *Nw U L Rev* 136 (1989), and Hubert Rottleuthner, 'Niklas Luhmann on the Autonomy of the Legal System', 23 *Law & Soc'y Rev* 779 (1989).

I. The Judicial-Appointment Process in Germany

Like its American counterpart, the German judicial-appointment process distinguishes the nomination of judicial candidates from their subsequent parliamentary confirmation.<sup>690</sup> But unlike in the United States, both the nomination phase (A) and the confirmation process are opaque (B).<sup>691</sup>

A. The Nomination Phase

The Basic Law provides that the *Bundestag* and the Federal Council shall each confirm half of the nominees for the Constitutional Court's justiceships.<sup>692</sup> But it does not specify who may put forward a nomination. Legislation has partially filled this void by granting a special committee the right to propose candidates for the vacancies assigned to the *Bundestag*. This committee, whose twelve-member composition reflects the *Bundestag*'s,<sup>693</sup> decides on a nomination by a two-thirds majority.<sup>694</sup> There exists no comparable law for the vacancies entrusted to the Federal Council.

What does exist is a system of political patronage, that is, a tradition of interparty agreements that allocate the Court's justiceships to different parties, thus allowing the latter to determine in advance whose name the

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690 See U.S. Const. art II, § 2, cl 2, whereby the president 'shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [...] Judges of the Supreme Court'.

691 For other accounts of the German appointment process, see, e.g., Uwe Kischel, 'Party, pope, and politics? The election of German Constitutional Court justices in comparative perspective', 11 Int'l J Con L 962 (2013), and Anuscheh Farahat, 'The German Federal Constitutional Court', in Armin von Bogdandy, Peter M Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law*, vol 3 (OUP, Oxford, 2020) 279, 299–302.

692 Art 94 para 1 cl 2. In addition, sec 5 para 1 cl 2 of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*) specifies that the two chambers shall select half of the eight justices in each senate of the Court. Each justiceship is tied to a particular chamber, which means that the latter will vote on the successor of a justice it had previously confirmed. Christian Walter, 'Art. 94', in Günter Dürig and others (eds), *Grundgesetz: Kommentar* (loose-leaf, 95<sup>th</sup> delivery, CH Beck, Munich, 2021) para 16.

693 On its composition over the years, Nicole Schreier, *Demokratische Legitimation von Verfassungsrichtern: Eine rechtsvergleichende Analyse am Beispiel des Bundesverfassungsgerichts und des United States Supreme Court* (Nomos, Baden-Baden, 2016) 171–3.

694 Sec 6 paras 1, 2 and 5 of the Act on the Federal Constitutional Court.

*Bundestag*'s selection committee will put forward (1).<sup>695</sup> The effect of these agreements has been to create a bench of party-affiliated justices (2). Their purpose, moreover, is to help implement the supermajority requirement for judicial appointments.<sup>696</sup> This requirement follows not from the Basic Law but from the Act on the Federal Constitutional Court. Thus, nominees for vacancies entrusted to the *Bundestag* must obtain a two-thirds majority in that chamber as well as a majority of the votes of all *Bundestag* members.<sup>697</sup> By the same token, vacancies entrusted to the Federal Council will only be filled if the nominee obtains two thirds of its votes.<sup>698</sup>

### 1. The Interparty Agreement

The concrete allocation of justiceships has varied over the years. In the beginning,<sup>699</sup> both the Social and the Christian Democrats claimed four seats in each senate, with three of the four justiceships earmarked for party members or affiliates and one seat reserved for a 'neutral' jurist. Eventually, the two parties began to offer one of their three 'party seats' to their smaller coalition partner, that is, the Liberals and the Green Party.<sup>700</sup> Once the latter became involved in most of the *Länder* governments, thereby changing the composition of the Federal Council in its favor, the existing arrangement became untenable, and the Green Party obtained the right to fill every fifth vacancy assigned to the Federal Council.<sup>701</sup>

The new arrangement proved short-lived, however, for the Christian Democrats appear to have resisted giving up one of 'their' seats once it was time to do so. Moreover, the Court let journalists know that it was

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695 See, e.g., Christian Walter, 'Art. 94' (n 692) para 27, and Benedikt Grünewald, '§ 6 BVerfGG', in Christian Walter and Benedikt Grünewald (eds), *Beck'scher Online-Kommentar Bundesverfassungsgerichtsgesetz* (13<sup>th</sup> edn, CH Beck, Munich, 2022) para 7.

696 See, e.g., Johannes Masing, '§ 15: Das Bundesverfassungsgericht', in Matthias Herdegen and others (eds), *Handbuch des Verfassungsrechts: Darstellung in transnationaler Perspektive* (CH Beck, Munich, 2021) para 67.

697 Sec 6 para 1 cl 2 of the Act on the Federal Constitutional Court.

698 Sec 7 of the Act on the Federal Constitutional Court.

699 The parties first agreed on an inter-party allocation in 1975. Ernst-Wolfgang Böckenförde, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation', 52 *Neue Juristische Wochenschrift* 9, 16 n 31 (1999).

700 See, e.g., Uwe Kischel, 'Party, pope, and politics?' (n 691) 965.

701 Christian Rath, 'Neue Abrede für BVerfG-Richterwahlen', *Legal Tribune Online*, 1 June 2018, available at <https://perma.cc/7L2Z-2LWB>.

concerned about its legitimacy, as the new agreement might have tilted the balance in the first Senate toward an even greater liberal majority.<sup>702</sup>

The newly amended, current arrangement apparently grants the Social and the Christian Democrats three seats each and allocates the two remaining seats in each senate to the Liberals and the Green Party, respectively. It does not matter to which parliamentary chamber the vacancy is assigned.<sup>703</sup> By contrast, the leftist *Die Linke* and the far-right *AfD* are not parties to the agreement.

The question of which parliamentary chamber holds the right to confirm the nominee is thus less relevant than the question to which party the unwritten convention assigns the vacant seat on the bench. But it is not immaterial. First, it determines which caucus within the relevant party may designate the nominee: If the duty to fill a vacancy falls to the Federal Council, the prime ministers of the *Länder*<sup>704</sup> that are governed by that party decide among themselves whom to nominate;<sup>705</sup> if the duty falls to the *Bundestag*, members of the relevant party's parliamentary group select a suitable candidate, taking into consideration the guidelines or suggestions of their party superiors.<sup>706</sup> Second, a smaller party has a greater chance of influencing the selection of candidates in the Federal Council, where it can force a *Land* government of which it is a part to abstain from participating in the confirmation vote, than in the *Bundestag*, where it is more easily outnumbered.<sup>707</sup>

This insight prompts a more general inquiry: whether the interparty agreement grants the other parties the right to reject a candidate before their nomination is put to a formal confirmation vote, or whether the parties must help confirm any candidate the designated party has nominated. There is no simple answer to this question. One source reports that under

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702 Helene Bubrowski and Reinhard Müller, 'Spielball der Politik?' (n 685) p 8.

703 Christian Rath, 'Neue Abrede für BVerfG-Richterwahlen' (n 703).

704 Or their ministers of justice. Andreas Voßkuhle, 'Art. 94', in Herrmann von Mangoldt and others (eds), *Grundgesetz: Kommentar* (7<sup>th</sup> edn, CH Beck, Munich, 2018) para 14.

705 See, e.g., Christian Rath, 'Eine öffentliche Wahl', *Legal Tribune Online*, 16 June 2020, available at <https://perma.cc/KPC8-Q6T7>.

706 See Uwe Kischel, 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter', in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol 3 (3<sup>rd</sup> edn, CH Beck, Munich, 2005) 1233, 1245–6, and Andreas Voßkuhle, 'Art. 94' (n 704) para 14.

707 See Christian Rath, 'Werden die Grünen ausgebremst?', *Legal Tribune Online*, 12 February 2018, available at <https://perma.cc/3WUF-UHD7>.

the initial agreement, the two (formerly) large parties required each other's consent for candidates for 'neutral' justiceships; by contrast, they were comparatively free to choose candidates for 'party' justiceships, provided the other side did not voice pressing concerns.<sup>708</sup> A different source suggests that every candidate required the consent of the other party.<sup>709</sup> It is also possible that the parties debate individual candidacies less than they used to.<sup>710</sup>

It remains to be seen how the parties choose to implement the new convention.<sup>711</sup> But regardless of how explicitly the other parties must consent to a candidate, we can assume that no party will venture a nomination which the other parties will consider beyond the pale.<sup>712</sup> The supermajority requirement gives each party to the agreement sufficient leverage because it renders credible the threat of abandoning the agreement—and dooming the candidacy in question—should the other parties not cooperate. Thus, there is no law that allows the governing coalition to appoint a new justice by a simple majority if the regular process fails to yield a consensus candidate.<sup>713</sup>

Disputes are resolved in small inter-party working groups,<sup>714</sup> which include high-ranking party members—lawyers by profession—from both the *Bundestag* and the Federal Council.<sup>715</sup> To win the opposite side's approval, the groups will often suggest package deals that seek agreement not only on

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708 Ernst-Wolfgang Böckenförde, 'Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation' (n 699) 16 n 31. See also Stefan Koriath, 'Stellung und Einrichtung des Bundesverfassungsgerichts', in Klaus Schlaich and Stefan Koriath, *Das Bundesverfassungsgericht: Stellung, Verfahren, Entscheidungen* (12<sup>th</sup> edn, CH Beck, Munich, 2021) para 45.

709 Dieter Grimm, 'Politikdistanz als Voraussetzung von Politikkontrolle', 27 *Zeitschrift für Europäische Grundrechte* 1, 2 (2000).

710 Andreas Voßkuhle, 'Art. 94' (n 704) para 14.

711 When the Christian Democrats considered nominating Stephan Harbarth, they did ask the Greens for their consent. Helene Bubrowski, 'Grüne unterstützen Harbarths Wahl', *Frankfurter Allgemeine Zeitung*, 10 November 2018, available at <https://perm.a.cc/8WMZ-MWU2>. It is possible, however, that they did so because they hoped to promote Harbarth to the Court's presidency two years later.

712 See also Meinhard Schröder, 'Verfassungsrichterwahl im transparenten Konsens?', 30 *Zeitschrift für Gesetzgebung* 150, 154 (2015).

713 For the rules in case of delayed appointment, see sec 7a of the Act on the Federal Constitutional Court.

714 Generally on the power brokers within the parties, Uwe Kischel, 'Party, pope, and politics?' (n 691) 967.

715 See, e.g., Uwe Kischel, 'Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter' (n 706) 1245–6, and Friedrich K Fromme, 'Verfassungsrichterwahl', 53 *Neue Juristische Wochenschrift* 2977, 2978 (2000).

a currently vacant justiceship but on vacancies that will arise in the not too distant future; at times, the deals will encompass other high government offices, such as the presidency of the Federal Court of Audit, the office of the Attorney General, or even the Federal Presidency.<sup>716</sup>

Given the recent upheaval of the party-political landscape in many Continental European democracies,<sup>717</sup> the current convention may prove as impermanent as its immediate predecessor. Unless it is repealed, however, the supermajority requirement for confirming constitutional justices will continue to make some form of pre-nomination arrangement inevitable. Of course, such repeal is possible: If they wish, the parties in government can abrogate the supermajority requirement by a simple majority,<sup>718</sup> the same way the Senate majority has eliminated the filibuster for US Supreme Court nominees.<sup>719</sup>

## 2. Party-Political Affiliations

Unsurprisingly, the current regime has turned party affiliation into one of the most significant selection criteria for Constitutional Court justices.<sup>720</sup> That is not to say that all justices are card-carrying members of a political

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716 For examples and caustic critique, see Rüdiger Zuck, 'Politische Sekundärtugenden: Über die Kunst, Pakete zu schnüren', 47 *Neue Juristische Wochenschrift* 497 (1994).

717 On the crisis of constitutional adjudication in Poland, Piotr Tuleja, 'The Polish Constitutional Tribunal', in *The Max Planck Handbooks in European Public Law*, vol 3 (n 691) 619, 658–72.

718 Provided the Constitutional Court does not declare this amendment unconstitutional. See Andreas Voßkuhle, 'Art. 94' (n 704) para 9 (suggesting that it may be unconstitutional to eliminate the supermajority requirement).

719 On the filibuster's effect on judicial appointments, John O McGinnis and Michael B Rappaport, 'In Praise of Supreme Court Filibusters', 33 *Harv JL & Pub Pol'y* 39, 40–4 (2010). On its demise, Byron Tau and Siobhan Hughes, 'Senate Eliminates Filibuster for Supreme Court Nominees', *The Wall Street Journal*, 6 April 2017, available at <https://perma.cc/DEC8-AANV>.

720 See, e.g., Gerd Roellecke, 'Zum Problem einer Reform der Verfassungsgerichtsbarkeit', 56 *JuristenZeitung* 114, 115 (2001). Merit is also important, however. See Uwe Kischel, 'Party, pope, and politics?' (n 691) 971. So is, to a lesser extent, regional diversity: In 2020, the Social Democrats insisted that a vacant seat be filled with a former East German for the first time. See Anne Hähnig, Martin Machowecz and Heinrich Wefing, 'Eine Richterin als der ultimative Kompromiss', *Die Zeit*, 1 July 2020, available at <https://perma.cc/4Q7H-7LCU>.



party,<sup>721</sup> let alone that the parties seek to staff the Court with high-ranking politicians. In fact, loyal troopers who have repeatedly bloodied their nose in partisan conflicts may be perceived as too one-sided.<sup>722</sup> One might hypothesize instead that the parties have no qualms putting active politicians on the Court but that they tend to eschew well-known—and therefore possibly controversial—figures.<sup>723</sup> Whether they do so to avoid sullyng the Court, to facilitate the confirmation of their candidate, or both, is hard to tell.

Be that as it may, in most cases party membership primarily acts as evidence of sufficient ideological proximity to the party nominating the candidate.<sup>724</sup> If the vacant seat is ‘neutral’, the party will seek to ascertain this proximity through other means.<sup>725</sup> In other words, the German nomination process does not stigmatize ideology or party affiliation *per se*. Instead, it encourages an equilibrium between divergent judicial philosophies.<sup>726</sup>

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721 From 1975 to 2000, for instance, a near third of all justices were not members of a political party. Uwe Wagschal, ‘Der Parteienstaat der Bundesrepublik Deutschland. Parteipolitische Zusammensetzung seiner Schlüsselinstitutionen’, 32 *Zeitschrift für Parlamentsfragen* 861, 881 (2001).

722 When the Social Democrats suggested appointing their deputy chairwoman, Hertha Däubler-Gmelin, to the Court, the Christian Democrats rejected Däubler-Gmelin for being a ‘pronounced party politician’. *Id.*, 880–1. In 2018, the justice Michael Eichberger criticized the parties for giving the public the impression that appointing new justices is simply a matter of haggling over political positions. Wolfgang Janisch, ‘Institution in Gefahr’, *Süddeutsche Zeitung*, 12 October 2018, available at <https://perma.cc/N479-RXHS>.

723 When he was appointed to the Court, the President-elect, Stephan Harbarth, was a member of the Christian Democrats’ national board as well as the deputy chairman of their parliamentary group. See Heinrich Wefing, ‘Etwas zu politisch?’, *Die Zeit*, 14 November 2018, available at <https://perma.cc/EY5X-YZH3>. But he was not particularly well-known to outsiders: When Heribert Prantl, a journalist at the *Süddeutsche Zeitung*, suggested in February of 2020 that Harbarth become the Christian Democrats’ chairman, he conceded that ‘hardly anybody knows his name’. Heribert Prantl, ‘Der lachende Vierte’, *Süddeutsche Zeitung*, 12 February 2020, available at <https://perma.cc/7GW8-RW58>.

724 Uwe Kischel, ‘Party, pope, and politics?’ (n 691) 971.

725 Uwe Kischel, ‘Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter’ (n 706) 1244.

726 See, e.g., Uwe Kischel, ‘Party, pope, and politics?’ (n 691) 971–2, and Klaus Renner, ‘Legitimation und Legitimität des Richters’, 70 *JuristenZeitung* 529, 537 (2015). On European constitutional courts in general, John Ferejohn, ‘Judicializing Politics, Politicizing Law’, 65 *Law & Contemp Probs* 41, 65 (2002).

## B. The Confirmation Process

The confirmation process is similarly opaque, for three reasons: the committee that officially proposes the nominees for vacancies entrusted to the *Bundestag* does not conduct public hearings (1); there is no floor debate on the nominee prior to the confirmation vote; and the vote in the *Bundestag* is secret, not public (2).

### 1. To Hear or Not to Hear

In decades past, the committee that formally submits nominations for vacancies entrusted to the *Bundestag* did not conduct hearings of its own. It merely voted on the nomination of the candidate upon whom the political parties had previously settled. This may have changed in 2010, but there is no way to know for sure; if there is a hearing of sorts, it is not public.<sup>727</sup> Be that as it may, candidates generally present themselves to the parties' parliamentary groups (in cases in which the *Bundestag* fills the vacancy).<sup>728</sup> As these sessions are conducted in private, we do not know which questions the parliamentarians ask. Accordingly, it is hard to state with any confidence whether the visits represent courtesy calls, a functional equivalent to rigorous committee hearings, or something in between, such as an informational session for the parliamentarians.

The third option may come closest to the truth. On the one hand, the contenders will only pay their visit once the relevant political parties have agreed on their candidacy; because this virtually guarantees their confirmation, non-deferential, probing questions during the visit seem both pointless and improbable. On the other hand, the informality of the unwritten convention theoretically means that the party which did not select the candidate may withdraw its consent. Consequently, an extended visit to the parliamentary group of that party can serve to quell a parliamentarian's

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727 See, e.g., Uwe Kischel, 'Party, pope, and politics?' (n 691) 968.

728 See Reinhard Müller, 'Es allen recht machen', *Frankfurter Allgemeine Zeitung*, 3 November 2010, available at <https://perma.cc/8VT8-N4EQ>; Katja Gelinsky, 'Wise Old Men and Wise Old Women. Vom Rätselraten über den Einfluss der Frauen am Bundesverfassungsgericht und am Supreme Court', in Michael Stolleis (ed), *Herzkammern der Republik: Die Deutschen und das Bundesverfassungsgericht* (CH Beck, Munich, 2011) 82, 93; and Dieter Wiefelspütz, 'Die Bundesverfassungsrichter werden vom Deutschen Bundestag direkt gewählt!', 65 *Die Öffentliche Verwaltung* 961, 962 (2012).

lingering doubts about whether the candidate suits the job—doubts that could, if uncontested, prompt the party to ‘veto’ the candidate after all.<sup>729</sup>

The opaqueness of this process is not coincidental, but very much characteristic of the entire post-selection phase. Thus, the law commits the members of the *Bundestag*’s selection committee to ‘confidentiality concerning the personal circumstances of the candidates which become known to them in the course of their work in the committee, the selection committee’s discussions on this issue, and the casting of votes’.<sup>730</sup> As a result, any hearings that were to take place after all would have to be conducted in private.<sup>731</sup>

Some scholars have criticized this regime. For Ulrich K Preuß, for example, a parliamentary confirmation vote can only legitimate the Court if it can claim to represent the will of the people. For that to occur, the deliberative process prior to the vote must be public.<sup>732</sup> Yet the process also has its defenders. For instance, Uwe Kischel argues that public hearings will necessarily politicize the court. To him, the Bork hearings in the US stand for public humiliation, not frank constitutional debate.<sup>733</sup> Where Americans often consider the intense scrutiny of public figures paramount,<sup>734</sup> Germans will frequently be more solicitous of the candidates’ privacy.<sup>735</sup>

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729 See Katja Gelinsky, ‘Wise Old Men and Wise Old Women’ (n 728) 93 (suggesting that Green-Party candidate Susanne Baer, by introducing herself to the Christian Democratic parliamentary group, managed to convince it that she had what it takes to join the bench).

730 Sec 6 para 4 of the Act on the Federal Constitutional Court.

731 While there is no comparable provision for the Federal Council, there is no indication that the Council wishes to conduct hearings in the foreseeable future. Andreas Haratsch, ‘§ 7 BVerfGG’, in Bruno Schmidt-Bleibtreu and others (eds), *Bundesverfassungsgerichtsgesetz: Kommentar* (loose-leaf, 61<sup>st</sup> delivery, CH Beck, Munich, 2021) para 8.

732 Ulrich K Preuß, ‘Die Wahl der Bundesverfassungsrichter als verfassungsrechtliches und -politisches Problem’, 21 *Zeitschrift für Rechtspolitik* 389, 393–4 (1988). See also Rolf Lamprecht, ‘“Bis zur Verachtung”’, 48 *Neue Juristische Wochenschrift* 2531, 2532–3 (1995), and Jerzy Montag, ‘Transparenz und Legitimität: Notwendige Reform der Wahl der Richterinnen und Richter zum Bundesverfassungsgericht’, 44 *Recht und Politik* 139, 141 (2008).

733 Uwe Kischel, ‘Party, pope, and politics?’ (n 691) 973–4, and ‘Amt, Unbefangenheit und Wahl der Bundesverfassungsrichter’ (n 706) 1254–5.

734 See, e.g., *Hustler v. Falwell*, 485 U.S. 46 (1988).

735 See, e.g., Andreas Haratsch’s discussion of potential hearings before the Federal Council. ‘§ 7 BVerfGG’ (n 731) para 9.

## 2. A Silent Parliament

The fear of judicial politicization (and concern for the nominees' privacy rights) likewise explains why neither the *Bundestag*<sup>736</sup> nor the Federal Council<sup>737</sup> holds a debate on whether to confirm the nominee.<sup>738</sup> Thus, parliamentarians are not supposed to confirm a nominee simply because they like them.<sup>739</sup> Furthermore, scholars worry that the justices' authority might suffer if the parliamentarians publicly dissect a nominee's previous record.<sup>740</sup> The Constitutional Court itself agreed with this rationale in 2012, finding the *Bundestag* committee's duty of confidentiality to be constitutional. It wrote that people perceive the Court as more independent if they hold it in high esteem and that this will safeguard the effectiveness of constitutional adjudication.<sup>741</sup>

Finally, the confirmation vote in the *Bundestag* is secret.<sup>742</sup> Scholars have made out two reasons for this rule. Firstly, the secret ballot is meant to protect the legislators from having to explain their vote to the public. Secondly, the justices will not be able to advocate a constitutional position just because their supporters in the *Bundestag* do so if they do not know who voted to confirm them.<sup>743</sup>

## II. The Concept of Politicization by Judicial Appointment

To date, there have been few attempts to describe in detail the causes, meaning, and effect of politicization by judicial appointment. In fact, scholars frequently fail to explain what they mean by judicial politicization in

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736 Sec 6 para 1 cl 1 of the Act on the Federal Constitutional Court.

737 Andreas Haratsch, '§ 7 BVerfGG' (n 731) para 8.

738 See Parliamentary Document (*Bundestags-Drucksache*) 18/2737, 7 October 2014, p 4, available at <https://perma.cc/MSF8-DSPB>.

739 Benedikt Grünewald, '§ 6 BVerfGG' (n 695) para 6. See also Nicole Schreier, *Demokratische Legitimation von Verfassungsrichtern* (n 693) 197.

740 Andreas Haratsch, '§ 6 BVerfGG', in Bruno Schmidt-Bleibtreu and others (eds), *Bundesverfassungsgerichtsgesetz: Kommentar* (n 731) para 35, and '7 BVerfGG' (n 731) paras 8–9.

741 BVerfGE 131, 230 – *Selection of Constitutional Justices* (2012).

742 Sec 6 para 1 cl 1 of the Act on the Federal Constitutional Court.

743 Andreas Haratsch, '§ 6 BVerfGG' (n 740) para 36.

the first place.<sup>744</sup> To remedy this problem, I begin with a brief look at the concept of (judicial) politicization generally (A) before elaborating on politicization by judicial appointment more specifically (B).

## A. The Concept of (Judicial) Politicization

The concept of politicization can mean many different things. It makes sense, therefore, to draw a series of distinctions. The first asks whether politicization takes place within one entity or between two or more entities (I). The second—which only applies to politicization that occurs between two or more entities—asks where the effects of politicization occur: within the politicizing entity or within the entity targeted by politicization (II).

### 1. Politicization Within One Entity vs. Between Entities

Applied to judicial politicization (or, more specifically, the politicization of constitutional adjudication), the first distinction means that a constitutional court can both politicize itself and be politicized by a different entity. Of course, the two variants are frequently interwoven: An entity can continue down a path of politicization another institution charted for it; a constitutional court can further politicize itself after being politicized by someone else. Thus, we will see below that politicization is not an isolated

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744 See, e.g., Carl Schmitt, 'Der Hüter der Verfassung', 55 *Archiv des öffentlichen Rechts* 161, 173 (1929); HLA Hart, 'American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream', 11 *Ga L Rev* 969, 972 (1977); José María Maravall, 'The Rule of Law as a Political Weapon', in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (CUP, Cambridge, 2003) 261; Jonathan Remy Nash, 'Prejudging Judges', 106 *Colum L Rev* 2168, 2173 (2006); Björn Dressel, 'Judicialization of politics or politicization of the judiciary? Considerations from recent events in Thailand', 23 *Pac Rev* 671 (2010); Eric Hamilton, 'Politicizing the Supreme Court', 65 *Stan L Rev Online* 35 (2012); Moohyung Chong, Jason D Todd and Georg Vanberg, 'Politics, Polarization, and the U.S. Supreme Court', in Anna-Bettina Kaiser, Niels Petersen and Johannes Saurer (eds), *The U.S. Supreme Court and Contemporary Constitutional Law: The Obama Era and Its Legacy* (Nomos, Baden-Baden, 2018) 41, 42; Mary L Volcansek, 'Judicialization of Politics or Politicization of the Courts in New Democracies?', in Christine Landfried (ed), *Judicial Power: How Constitutional Courts Affect Political Transformations* (CUP, Cambridge, 2019) 66; and Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court', 129 *Yale LJ* 148, 152 (2019).

incident but embedded in larger, more general processes.<sup>745</sup> Nevertheless, we commonly try to keep different instances of politicization apart, the better to analyze the precise impact on the institution in question.<sup>746</sup>

For instance, we say that a constitutional court politicizes itself when its internal decision-making process begins to involve tactics that are more commonly associated with the ‘political’ branches (that is, the legislature or the executive)<sup>747</sup>. Consider what the New York Times’ Supreme Court reporter Adam Liptak wrote after a draft opinion overturning *Roe v. Wade* was leaked to the press, possibly to pressure the justices in the presumptive majority not to withdraw their vote.<sup>748</sup> ‘Now, as the court appears to be on the cusp of eliminating the constitutional right to abortion, it looks sparsely different from the other branches: Rival factions leak and spin sensitive information in the hope of gaining political advantage [...]’<sup>749</sup> Furthermore, we may say that a court politicizes itself when it starts taking its decisions’ political ramifications into account.<sup>750</sup>

Here, we can largely neglect these kinds of internal politicization, however. Politicization *by judicial appointment* refers to politicization that occurs between two distinct entities, for it falls to the other branches of government, not the court, to appoint new members to the Supreme Court or the German Federal Constitutional Court.<sup>751</sup> The question, then, is who is being politicized when judicial appointments politicize constitutional adjudication.

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745 See notes 774–776 and accompanying text.

746 See notes 753, 757–759, and 761 (each focusing on isolated, specific instances of politicization).

747 On the legislature and the executive as the ‘political branches’, Jesse H Choper, ‘The Supreme Court and the Political Branches: Democratic Theory and Practice’, 122 U Pa L Rev 810, 815 (1974).

748 See Michael D Shear and Zolan Kanno-Youngs, ‘As Leak Theories Circulate, Supreme Court Marshal Takes Up Investigation’, *The New York Times*, 4 May 2022, available at <https://perma.cc/6EDP-4ZUJ>.

749 Adam Liptak, ‘A Leaky Supreme Court Starts to Resemble the Other Branches’, *The New York Times*, 11 May 2022, available at <https://perma.cc/D39H-5C5S>.

750 Cf Christoph Möllers, ‘Why There Is No Governing with Judges’, 30 September 2014, p 30, available at <https://ssrn.com/abstract=2503729> (criticizing the German Federal Constitutional Court for arguing in a too self-referential fashion and heeding the political context too little).

751 See n 690 and Art 94 para 1 cl 2 of the Basic Law.

## 2. The Two Angles to Politicization Between Two or More Entities

As mentioned above, the concept of politicization between two or more distinct entities has two possible angles—a subjective and an objective one. The subjective angle adopts the perspective of the entity that is said to politicize a different entity. By contrast, the objective angle describes a change in the entity targeted by politicization.

The subjective angle describes politicization as a catalyst of political action—such as public attention, discussion, or decision—in the politicizing entity.<sup>752</sup> It is most prevalent in political science.<sup>753</sup> However, the precise definition of politicization varies. Scholars who distinguish between innate and converted political subject matters define politicization as ‘the demand for, or the act of, transporting an issue or an institution into the sphere of politics’.<sup>754</sup> By contrast, scholars who argue that the political always presupposes prior politicization describe the latter as ‘naming something as political’, as creating politics in the first place.<sup>755</sup>

According to the objective angle, the entity targeted by politicization comes to be or appears to be political. The attribute ‘political’ can mean different things in this case. Thus, we may wish to say that the object of politicization has become conscious of and knowledgeable about the political system.<sup>756</sup> But we may also want to say that it has started considering or

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752 See, e.g., Colin Hay, *Why We Hate Politics* (Polity Press, Cambridge, 2007) 81, and Michael Zürn, Martin Binder and Matthias Ecker-Ehrhardt, ‘International authority and its politicization’, 4 *Int’l Theory* 69, 73–4 (2012).

753 See, e.g., Carol H Weiss, ‘The Politicization of Evaluation Research’, 26 *J Soc Issues* 57 (1970), and Liesbet Hooghe and Gary Marks, ‘Politicization’, in Erik Jones, Anand Menon and Stephen Weatherill, *The Oxford Handbook of the European Union* (OUP, Oxford, 2012) 840.

754 Michael Zürn, ‘Politicization compared: at national, European, and global levels’, 26 *J Eur Pub Pol’y* 977, 977–8 (2019).

755 See Kari Palonen, ‘Four Times of Politics: Policy, Polity, Politicking, and Politicization’, 28 *Alternatives* 171, 181–2 (2003), and Claudia Wiesner, ‘Rethinking politicisation as a multi-stage and multilevel concept’, 18 *Contemp Pol Theory* 255, 256–7 (2019).

756 See, e.g., David Easton, ‘An Approach to the Analysis of Political Systems’, 9 *World Pol* 383, 397–400 (1957).

pursuing the interests of public welfare.<sup>757</sup> Finally, we may wish to state that the politicized entity has become hostage to a particular partisan agenda.<sup>758</sup>

As a result, a statement such as that ‘children are (being) politicized’ can mean two things. According to the subjective angle, it means that the decision whether to have children is more political today than it used to be.<sup>759</sup> In other words, it suggests that public debate has extended to an area we previously considered private;<sup>760</sup> *we* have directed our political attention to it. Pursuant to the objective angle, by contrast, the statement declares that the children *themselves* have become political.<sup>761</sup>

It follows that the concept of judicial politicization can likewise mean two things: firstly, that the public has started to debate constitutional adjudication in political terms; secondly, that the constitutional court has become or appears political. Pursuant to the subjective angle, politicization *by judicial appointment* would then signify that judicial appointments direct the public’s attention to constitutional courts. According to the objective angle, it would mean that judicial appointments make the court (appear) political.

The first option (i.e., that judicial appointments direct the public’s attention to constitutional courts) is not implausible.<sup>762</sup> In fact, there is a specific branch of legal scholarship that explores public discussions about, and

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757 See, e.g., David Solomons, ‘The Politicization of Accounting’, 146 *J Accountancy* 65 (1978).

758 See, e.g., Susan Wright, ‘The Politicization of “Culture”’, 14 *Anthropology Today* 7, 8 (1998), and Toby Bolsen and James N Druckman, ‘Counteracting the Politicization of Science’, 65 *J Commun* 745, 746–7 (2016).

759 For an example of a political discussion on the merits of having children, see Jennifer Ludden, ‘Should We Be Having Kids in The Age of Climate Change?’, *npr.org*, 18 August 2016, available at <https://perma.cc/D9D8-Y7N2>.

760 Generally on the public/private dichotomy, Nancy Fraser, ‘Politics, culture, and the public sphere: toward a postmodern conception’, in Linda Nicholson and Steven Seidman, *Social Postmodernism: Beyond Identity Politics* (CUP, Cambridge, 1995) 287. Generally on politicization and the notion of spheres, Colin Hay, *Why We Hate Politics* (n 752) 78–80.

761 See, e.g., Diana Owen and Jack Dennis, ‘Gender Differences in the Politicization of American Children’, 8 *Women & Pol* 23 (1988).

762 For such use of the concept, see David A Strauss and Cass R Sunstein, ‘The Senate, the Constitution, and the Confirmation Process’, 101 *Yale LJ* 1491, 1513 n 102 (1992); Diarmuid F O’Scannlain, ‘Today’s Senate Confirmation Battles and the Role of the Federal Judiciary’, 27 *Harv JL & Pub Pol’y* 169, 175 (2003); and Andreas Voßkuhle, ‘Art. 94’ (n 704) para 15.



criticism of, courts.<sup>763</sup> Generally, however, that is not what we mean when we speak of judicial politicization. What we commonly imply is that the court itself—not our attitude toward it—has changed.<sup>764</sup> In other words, we wish to say that the selection system makes the constitutional court (appear) political.

## B. Transforming Constitutional Adjudication into ‘Politics by Other Means’

The next question is what it means for constitutional adjudication to be or appear ‘political’ as a result of politicization by judicial appointment (1). Furthermore, we should specify in what way the confirmation process causes this kind of politicization (2) and what effects the latter has on constitutional adjudication (3).

### 1. What It Means for Constitutional Adjudication to Be or Appear Political

Put simply, constitutional adjudication is political as a result of politicization by judicial appointment when the constitutional court turns into a partisan institution.<sup>765</sup> This occurs when the court’s members espouse constitutional positions that mirror the preferences of the political party to which we can attribute the nomination.<sup>766</sup> Scholars have used different

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763 On the different forms of political criticism, Ximena Soley and Silvia Steininger, ‘Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights’, 14 *Int’l J Law in Context* 237 (2018).

764 See above, notes 683–685, and Michael Hein and Stefan Ewert, ‘Die Politisierung der Verfassungsgerichtsbarkeit’ (n 687) 103–4.

765 See Lee Epstein and Eric Posner, ‘If the Supreme Court Is Nakedly Political, Can It Be Just?’, *The New York Times*, 9 July 2018, available at <https://perma.cc/4K2Z-5YG4>, and Daniel Epps and Ganesh Sitaraman, ‘How to Save the Supreme Court’ (n 744) 153.

766 See John Ferejohn, ‘Judicializing Politics, Politicizing Law’ (n 726) 63–5; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP, Cambridge, 2003) 122; Stephen M Griffin, ‘The Age of *Marbury*: Judicial Review in a Democracy of Rights’, in Mark Tushnet (ed), *Arguing *Marbury v. Madison** (Stanford University Press, Stanford, 2005) 104, 126–7; David L Weiden, ‘Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia’, 62 *Pol Res Q* 335, 336 (2011); Michael Hein and Stefan Ewert, ‘How Do Types of Procedure Affect the Degree of Politicization of European Constitutional Courts? A Comparative Study of Germany, Bulgaria, and Portugal’, 9 *Eur J Legal Stud* 62, 64 (2016); Moohyung Chong, Jason D Todd and Georg

descriptions for this transformation. They say that the court represents yet ‘another forum in which political battles over individual rights are played out’,<sup>767</sup> that it ‘replicates the political majority/minority relationships’,<sup>768</sup> that its jurisprudence constitutes ‘politics by other means’,<sup>769</sup> or that the justices become the appointers’ ‘agents’.<sup>770</sup> To be sure, the justices will not see themselves as their appointers’ pawns. But their rulings will seem politically—not legally—motivated because a model of ideological voting will be able to predict them accurately.<sup>771</sup>

Politicians frequently resort to politicization because of a phenomenon within politics called judicialization:<sup>772</sup> The more judicial review cabins the exercise of political power, the more they will desire to shape judicial outcomes in their favor, thereby restricting political power in ways that suit them most.<sup>773</sup> But the roots of politicization go far beyond that, as John Ferejohn has pointed out with regard to the Supreme Court. Turning

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Vanberg, ‘Politics, Polarization, and the U.S. Supreme Court’ (n 744) 42, 46; and Christoph Hönnige, *Verfassungsgericht, Regierung und Opposition: Die vergleichende Analyse eines Spannungsdreiecks* (Verlag für Sozialwissenschaften, Wiesbaden, 2007) 52, 108. I write ‘attribute’ because neither in the United States nor in Germany do political parties have the formal constitutional power to nominate a judicial candidate.

767 Stephen M Griffin, ‘The Age of *Marbury*: Judicial Review in a Democracy of Rights’ (n 766) 104, 126.

768 Christoph Möllers, ‘Legality, Legitimacy, and Legitimation of the Federal Constitutional Court’, in Matthias Jestaedt and others, *The German Federal Constitutional Court: The Court Without Limits* (Jeff Seitzer tr, OUP, Oxford, 2020) 131, 146.

769 John Ferejohn, ‘Judicializing Politics, Politicizing Law’ (n 726) 63–4.

770 See Viet D Dinh, ‘Threats to Judicial Independence, Real and Imagined’, 95 *Geo LJ* 929, 937 (2007).

771 John Ferejohn, ‘Judicializing Politics, Politicizing Law’ (n 726) 65–6. See also David L Weiden, ‘Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia’ (n 766) 336, and Michael Hein and Stefan Ewert, ‘How Do Types of Procedure Affect the Degree of Politicization of European Constitutional Courts?’ (n 766) 64. For an example of such a model, see, e.g., Jeffrey A Segal and Harold A Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (CUP, Cambridge, 2002) 110.

772 Generally on judicialization, John Ferejohn and Pasquale Pasquino, ‘Rule of Democracy and Rule of Law’, in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (n 744) 242, 247–50.

773 See, e.g., John Ferejohn, ‘Judicializing Politics, Politicizing Law’ (n 726) 63–4; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford, 2000) 195; and Ran Hirschl, ‘The Judicialization of Politics’, in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (OUP, Oxford, 2008) 119, 120.

constitutional adjudication into politics by other means requires jurists whose convictions approximate party-political demands closely enough, and politicians cannot conjure such nominees out of thin air. Accordingly, the parallelism between party-political and constitutional positions begins to develop much earlier.

Ferejohn argues that American lawyers learn from the get-go how to translate ideological positions into law. Thus, 'every interest is entitled to competent legal representation and articulation' in a liberal society.<sup>774</sup> This process is amplified by interest groups, which 'recruit and nurture articulate advocates for [their] views, and [place] them in positions of legal power', especially in the United States.<sup>775</sup> Over time, party politics has come to overlap with these ideological positions.<sup>776</sup> In consequence, there now exists a reservoir of politicized jurists that politicians can tap into at will.

## 2. How the Confirmation Process Helps Politicize Constitutional Adjudication

There are two ways in which the confirmation process is said to contribute to politicization by judicial appointment. Firstly, the parliamentarians help politicize the constitutional court when they vote to confirm a partisan nominee.<sup>777</sup> The confirmation process in the US Senate facilitates this kind of politicization because it allows a bare majority of senators to confirm ideologically proximate nominees.<sup>778</sup> Secondly, some scholars argue that the senators politicize constitutional adjudication when they elicit declarations

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774 John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 64.

775 *Ibid.* See also Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court' (n 744) 169–70 (describing 'the rise of polarized schools of legal interpretation, polarized elite communities of lawyers, and a polarized political culture') and Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 768) 147 (highlighting that the parallelism between political and constitutional positions is more pronounced in the United States than elsewhere, making judicial politicization harder to ascertain in other countries).

776 On the American party system's gradual alignment with ideological coalitions, see, e.g., Hans Noel, *Political Ideologies and Political Parties in America* (CUP, New York, 2013) 133–6.

777 John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 64–5.

778 *Id.*, 65. See also Andreas Haratsch, '§ 6 BVerfGG' (n 740) para 37 (pointing out that a supermajority requirement for confirming judicial nominees helps prevent a partisan divide among the justices).

of ideological intent from the nominees and the latter feel bound to their promises once they join the bench.<sup>779</sup>

### 3. The Effects of Politicization on Constitutional Adjudication

Scholars see two potential downsides to politicization by judicial appointment. The first is that a politicized constitutional court is less likely to deliberate civil-liberties cases with the kind of coherence that, according to many constitutional theorists, makes it more effective than the legislature at protecting our fundamental rights.<sup>780</sup> 'A continual war of bitter 5 to 4 decisions [makes] it implausible that the Court can perform a special function in educating the citizenry or assuming a vanguard role to promote a national dialogue on rights.'<sup>781</sup>

The second disadvantage is that politicization may make people *perceive* the court as politicized.<sup>782</sup> We commonly believe that such perceptions make the court less authoritative.<sup>783</sup> For instance, Vicki Jackson suggests that perceived politicization may impair people's trust<sup>784</sup> in the judiciary and that this makes it more difficult for a court to hand down unpopular,

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779 See Diarmuid F O'Scannlain, 'Today's Senate Confirmation Battles and the Role of the Federal Judiciary' (n 762) 174, Jonathan Remy Ash, 'Prejudging Judges' (n 744) 2173, and Viet Dinh, 'Threats to Judicial Independence, Real and Imagined' (n 770) 937.

780 Stephen M Griffin, 'The Age of *Marbury*: Judicial Review in a Democracy of Rights' (n 766) 126–7. For a discussion of the claim that judicial review of legislation is normatively legitimate because constitutional courts are better than legislators at protecting our fundamental rights, see Chapter 3, subsection II.D.1.

781 *Id.*, 127.

782 See Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?' (n 765), and Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court' (n 744) 155.

783 I use the term 'authoritative' as a synonym for 'likely to be obeyed'. For this use, see, e.g., Richard H Fallon, Jr, 'Legitimacy and the Constitution', 118 Harv L Rev 1787, 1828 (2005).

784 I take 'public trust' to mean diffuse, and not specific, support in this context. On diffuse support, David Easton, 'A Re-Assessment of the Concept of Political Support', 5 Br J Pol Sci 435, 444–57 (1975), and James L Gibson, 'The Legitimacy of the United States Supreme Court in a Polarized Polity', 4 J Empirical Legal Stud 507, 510–3 (2007). On the concept of trust, James L Gibson, 'A Note of Caution About the Meaning of "The Supreme Court Can Usually Be Trusted ..."', 21 Law & Cts: Newsletter of the Law & Courts Section of the American Political Science Association 10 (2011).

countermajoritarian decisions.<sup>785</sup> Some scholars fear that people's trust in the law, and thus the rule of law itself, will be the next to go.<sup>786</sup>

### III. Observations on the Concept of Politicization by Judicial Appointment

Some parts of the concept of politicization by judicial appointment remain fuzzy. Others, moreover, appear underinclusive. Thus, we should specify whether only partisan confirmation votes politicize constitutional adjudication or whether unanimous ones can do so, too (A); what the purpose of the confirmation process is (B); and whether only individual parties can politicize the constitutional court or whether a group of them can do so as well (C). Lastly, we should ascertain whether empirical research bears out the assumption that perceived politicization makes a constitutional court less authoritative (D).

#### A. Partisan vs. Unanimous Confirmation Votes

As we saw above, parliamentarians are said to politicize constitutional adjudication whenever they confirm a partisan nominee. But it is unclear whether this includes unanimous confirmation votes that are (possibly) based primarily on the nominee's professional qualifications.

This question is far from impertinent. In 1986, for example, the Senate confirmed Antonin Scalia, a Republican appointee, by a vote of 98 to 0. Seven years later, it confirmed Ruth Bader Ginsburg, a Democratic

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785 See Vicki C Jackson, 'Packages of Judicial Independence: The Selection and Tenure of Article III Judges', 95 *Geo L J* 965, 979 (2007). German constitutional justices have voiced comparable concerns. See Helene Bubrowski and Reinhard Müller, 'Spielball der Politik?' (n 685). See also Steven G Calabresi and James Lindgren, 'Term Limits for the Supreme Court: Life Tenure Reconsidered', 29 *Harv JL & Pub Pol'y* 769, 813–4 (2006) (arguing that 'rancorous confirmation battles lower the prestige of the Court' and that the 'increased politicization of the confirmation process' has lessened 'the ability of the Supreme Court itself to function effectively'), and James L Gibson and Michael J Nelson, 'Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?', 59 *Am J Pol Sci* 162, 163 (2015) (fearing for the Supreme Court's independence once it starts losing its sociological legitimacy).

786 Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court' (n 744) 167–8.

appointee, by a vote of 96 to 3. But in the time period from 1995 to 2004,<sup>787</sup> 70 percent of the votes Scalia cast to overturn a federal law tended in a conservative direction, and more than 80 percent of Bader Ginsburg's votes tended in a liberal direction.<sup>788</sup> In theory, then, the Senate politicized constitutional adjudication when it confirmed Scalia and Bader Ginsburg. For three reasons, however, it makes more sense to link only contentious, partisan confirmation processes to politicization by judicial appointment and to attribute other instances of politicization solely to the nominating institution (such as the US president).

Firstly, scholars describe politicization as something proactive, as a deliberate move to gain control of the constitutional court.<sup>789</sup> In my opinion, a nearly unanimous vote does not fit this mold: Different parties will hardly believe that the same candidate will reliably vote in favor of their policy preferences.

Of course, it is possible that partisanship lurks behind unanimous confirmation votes, too. Perhaps the opposition-party legislators allow the nominating institution to politicize constitutional adjudication because they know that they, too, will eventually get to pick a candidate of their own. In this case, one might argue that the parliamentarians politicize constitutional adjudication whenever they fail to insist on a candidate who will likely not contribute to a partisan divide on the court. But that may be too demanding a test. Thus, it is difficult to predict how a justice will evolve on the bench. For instance, Stephen Breyer was considered a 'moderate' or 'centrist' when Bill Clinton nominated him in 1994,<sup>790</sup> but more than 78 percent of Breyer's votes to invalidate a federal law tended in a liberal direc-

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787 This time period corresponds to the time in which there were no personnel changes on the Rehnquist Supreme Court.

788 Lori A Ringhand, 'Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court', 24 Const Comment 43, 55 (2007).

789 Cf John Ferejohn, 'Judicializing Politics, Politicizing Law' (n 726) 65 (stating that 'political actors will try to shape and influence [court decisions] for their own political reasons'), Tom Ginsburg, *Judicial Review in New Democracies* (n 766) (describing how having multiple political bodies appoint constitutional justices can prevent politicization by guaranteeing 'mutually assured politicization' if one body seeks to make a political appointment), and David L Weiden, 'Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia' (n 766) 336 (linking high degrees of politicization to selection systems that prioritize partisan considerations over a candidate's qualifications and merit).

790 See Paul Richter, 'Clinton Picks Moderate Judge Breyer for Supreme Court Spot', *Los Angeles Times*, 14 May 1994, available at <https://perma.cc/S68E-N546>.

tion.<sup>791</sup> Moreover, the classes from which judicial nominees are commonly drawn—the upper-middle and upper classes<sup>792</sup>—tend to be less moderate than others: ‘Affluent, educated Americans are disproportionately represented among both strong liberals and strong conservatives, while less affluent and educated citizens are more inclined to be political moderates’.<sup>793</sup>

Secondly, scholars link perceived politicization, which is crucial to the concept of politicization by judicial appointment because we suspect it of making a court less authoritative,<sup>794</sup> to contentious confirmations, not unanimous votes. Thus, Vicki Jackson has argued that closely fought, partisan confirmation votes may lead the public to believe there is no meaningful difference between politics and the law,<sup>795</sup> presumably because they imply that the nominee won the vote solely because their ideology matched the Senate majority’s party-political preferences.<sup>796</sup>

This fear of contentious confirmations has been shared by political observers. When President Reagan nominated Antonin Scalia to the Supreme Court, the *New York Times* noted that Reagan’s choice represented the ‘capstone’ of his administration’s efforts to ‘reverse the course of the Federal judiciary’,<sup>797</sup> but it did not suggest that these efforts constituted some form of illicit political interference. By contrast, the stormy confirmation hearings for Robert Bork one year later prompted the same correspondent to note that the Democrats were ‘waging the most openly ideological campaign in the recent history of Supreme Court nominations’, and that Bork supporters feared the hearings could ‘undermine the court’s majesty as a bastion of principle’.<sup>798</sup>

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791 Lori A Ringhand, ‘Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court’ (n 788) 55.

792 E.g., Michael J Klarman, ‘What’s So Great about Constitutionalism?’, 93 *Nw U L Rev* 145, 189 (1998).

793 Mark A Graber, ‘The Coming Constitutional Yo-Yo: Elite Opinion, Polarization, and the Direction of Judicial Decision Making’, 56 *Howard LJ* 661, 695 (2013).

794 See notes 782–786.

795 See Vicki C Jackson, ‘Packages of Judicial Independence’ (n 785) 979, 1000.

796 See William P Marshall, ‘Constitutional Law as Political Spoils’, 26 *Cardozo L Rev* 525, 537 (2005).

797 Stuart Taylor, Jr, ‘Scalia’s Views, Stylishly Expressed, Line Up with Reagan’s’, *The New York Times*, 19 June 1986, available at <https://perma.cc/KT9K-JS75>.

798 Stuart Taylor, Jr, ‘Politics in the Bork Battle; Opinion Polls and Campaign-Style Pressure May Change Supreme Court Confirmations’, *The New York Times*, 28 September 1987, available at <https://perma.cc/EPU6-59E5>.

Lastly, treating all confirmation votes as equal makes it more difficult to characterize a remarkable development in Supreme Court confirmations: the change from frequently unanimous to consistently partisan votes. In 1986, the Senate confirmed Antonin Scalia by a vote of 98 to 0 even though there was little doubt that President Reagan was trying to make the Court more conservative.<sup>799</sup> Thirty years later, the Republican Senate majority refused to schedule as much as a hearing for Merrick Garland,<sup>800</sup> whom the Wall Street Journal described as a ‘middle-of-the road judge who has avoided strong ideological opinions’.<sup>801</sup> More, in the last five confirmation votes, only 6, 0, 2, 6, and 12 percent, respectively,<sup>802</sup> of out-party senators voted for the nominee, compared to 100, 98, 100, 100, and 98 percent of in-party senators.<sup>803</sup> In fact, Amy Coney Barrett became the first justice in one and a half centuries to be confirmed without a single vote from the minority party,<sup>804</sup> whereas her predecessor, Ruth Bader Ginsburg, had sailed through the Senate on a vote of 96 to 3.

## B. The Purpose of the Parliamentary Confirmation Process

Concluding that the parliamentary confirmation process only politicizes constitutional adjudication if the confirmation vote splits along party lines gives rise to a different problem, however. Political contention is germane to parliamentary bodies, just as disagreement is germane to politics in

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799 See n 797.

800 Nina Totenberg, ‘170-Plus Days And Counting: GOP Unlikely To End Supreme Court Blockade Soon’, *npr.org*, 6 September 2016, available at <https://perma.cc/DSN9-BFK7>.

801 Jess Bravin and Brent Kendall, ‘For Supreme Court Nominee Merrick Garland, Law Prevails Over Ideology’, *The Wall Street Journal*, 16 March 2016, available at <https://perma.cc/Q7YB-NU2N>.

802 Beginning with the latest confirmation vote and ending with the oldest. I count as Democrats independent senators who caucus with the Democratic Party.

803 See also Geoffrey R Stone, ‘Understanding Supreme Court Confirmations’ (n 686) 422–6, and Christopher N Krewson and Jean R Schroedel, ‘Modern Judicial Confirmation Hearings and Institutional Support for the Supreme Court’ 1, 2–4 (forthcoming, Soc Sci Q), available at <https://perma.cc/SM9P-F7SR>.

804 See, e.g., Gillian Brockell, ‘The last Supreme Court nominee confirmed without bipartisan support never heard a single case’, *The Washington Post*, 27 October 2020, available at <https://perma.cc/3NXB-ZFXD>.



general<sup>805</sup>. This includes the US Senate, where partisan votes are now the rule, not the exception.<sup>806</sup> When they politicize constitutional adjudication, the parliamentarians are thus behaving the way they always do; and this raises the question of why we involve them in the appointment process in the first place.

In Germany, the *Bundestag* and the Federal Council are involved in the appointment process because their input makes the Constitutional Court more democratically legitimate.<sup>807</sup> There is a ‘chain of legitimation’ between the justices and the electorate, the argument goes, because the latter elects the legislators, who, in turn, get to confirm judicial nominees.<sup>808</sup> In the United States, this claim would fail to gain traction, as Americans tend to characterize the Supreme Court justices as ‘unelected’.<sup>809</sup> Here, the right to confirm judicial nominees is said to allow the senators to ‘ameliorate the “countermajoritarian difficulty”’, that is, to make sure that the justices do not diverge too strongly from the people’s elected representatives’ ideology.<sup>810</sup> In times of divided government, this turns the Senate into a potential check on the president, who may wish to nominate a partisan candidate whose views differ from the Senate majority’s.<sup>811</sup>

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805 See Robert Post, ‘Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics’, 98 Cal L Rev 1319, 1336–40 (2010).

806 See, e.g., Daryl J Levinson and Richard H Pildes, ‘Separation of Parties, Not Powers’, 119 Harv L Rev 2311, 2333 (2006), and Richard H Pildes, ‘Why The Center Does Not Hold: The Causes of Hyperpolarized Democracy in America’, 99 Cal L Rev 273, 276–81 (2011) and the references cited therein.

807 See, e.g., Ernst-Wolfgang Böckenförde, ‘Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation’ (n 699) 15, and Andreas Voßkuhle, ‘Art. 94’ (n 704) para 8. See also Susanne Baer, ‘Who cares? A defence of judicial review’, 8 J Brit Acad 75, 90 (2020) (arguing that constitutional courts cannot be considered undemocratic as long as members of parliament have to confirm them).

808 Ernst-Wolfgang Böckenförde, *Verfassungsfragen der Richterwahl: Dargestellt anhand der Gesetzentwürfe zur Einführung der Richterwahl in Nordrhein-Westfalen* (2<sup>nd</sup> edn, Duncker & Humblot, Berlin, 1998) 73–4.

809 See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge MA, 1980) 8.

810 Henry Paul Monaghan, ‘The Confirmation Process: Law or Politics?’, 101 Harv L Rev 1202, 1203 (1988).

811 See *ibid.* and David A Strauss and Cass R Sunstein, ‘The Senate, the Constitution, and the Confirmation Process’ (n 762) 1515.

## 1. The United States

Interestingly, the two functions ascribed to the Senate yield diametrically opposed outcomes when it comes to the politicization of constitutional adjudication. When government is divided, the Senate's right to refuse a partisan nominee of the opposite camp will likely prompt the president to nominate a somewhat more moderate candidate, i.e., someone who is less prone to adhering closely to one of the two party-political sides.<sup>812</sup> (I will disregard the possibility that the Senate starts refusing to consider any candidate nominated by a president from the other party.<sup>813</sup>) In other words, the senators' involvement serves to depoliticize constitutional adjudication; if at all, it will politicize the *appointment process*.<sup>814</sup> But when the president and the Senate majority hail from the same party, the senators' power to make sure that 'the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities'<sup>815</sup> will contribute to the Court's politicization once the Senate majority confirms a partisan nominee.

It is thus more accurate to describe the function of the confirmation process as granting the parliamentarians a *choice*: They can either politicize constitutional adjudication or decouple it from partisan politics. I consider the idea of choice preferable to the vaguer assertion that judicial selection systems involve 'two conflicting goals: one, that triadic conflict resolvers be independent; two, that lawmakers be responsible to the people'<sup>816</sup>. On my conception of politicization by judicial appointment, the crux of involving

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812 See David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1515 (hoping for a 'moderate candidate of genuine distinction'). But see notes 790–793 and accompanying text.

813 See Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?' (n 765) (considering this a distinct possibility) and Henry Paul Monaghan, 'The Confirmation Process: Law or Politics?' (n 810) 1203 (arguing that there is no constitutional obligation for the Senate to consider judicial nominees). The reason I disregard this potential development is that it would arguably raise more questions of *perceived* politicization than of politicization as such. After all, the Court's composition would remain unchanged.

814 See David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1513.

815 Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', 6 J Pub L 279, 285 (1957) (rejecting the premise that the Supreme Court is a countermajoritarian institution).

816 Martin Shapiro, *Courts: A Comparative and Political Analysis* (The University of Chicago Press, Chicago, 1981) 34.

parliamentarians is that they get to decide which of the two goals to prioritize.

## 2. Germany

For two reasons, this conclusion does not seem to apply to Germany. Firstly, the idea of getting to choose between politicization and depoliticization fits uneasily with the confirmation vote's official function of providing the Constitutional Court with democratic legitimacy. After all, this function can be discharged regardless of whether the politicians wish to politicize or depoliticize constitutional adjudication; in both cases, their vote creates a chain of legitimation between the constitutional justices and the electorate.

However, I suspect there is more to the confirmation process in Germany, too. We saw above that the confirmation vote is little more than a rubber stamp for judicial candidates nominated pursuant to an interparty agreement that assigns a specified number of justiceships to different political parties. German constitutional scholars defend this set-up as striking the right balance between too little and too much politicization.<sup>817</sup> It is necessary to involve the parties in the selection system, they argue, because the Constitutional Court can only discharge its function properly if the political branches—which are also staffed by the parties—accept it.<sup>818</sup> Here, too, then, the political system is supposed to exercise some degree of control over constitutional decision-making, and I suggest we conceptualize this control as a question of choice between two options—politicization and depoliticization.

The second reason that may prevent characterizing politicization as a question of rightful choice lies in the supermajority requirement for confirming judicial nominees in the *Bundestag*.<sup>819</sup> By making it harder for the party to which a vacant Court seat is assigned to nominate a clearly partisan nominee,<sup>820</sup> this requirement seemingly seeks to prevent politicians from opting for politicization over depoliticization. But I will argue in subsection (D) that we should not confine the concept of politicization to one single party trying to control constitutional adjudication. Instead, the coalition that commands a parliamentary supermajority politicizes

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817 See, e.g., Andreas Voßkuhle, 'Art. 94' (n 704) para 15.

818 Christian Walter, 'Art. 94' (n 692) para 28.

819 Sec 6 para 1 cl 2 of the Act on the Federal Constitutional Court.

820 See Johannes Masing, '§ 15: Das Bundesverfassungsgericht' (n 696) para 67.

constitutional adjudication if it keeps parties outside the coalition from nominating candidates of their own.

### C. Politicization by Judicial Appointment and Institutional Legitimacy

Parliament's involvement in the appointment process suggests that politicization may at times be desirable. This prompts us to subject the claim that it makes a constitutional court less authoritative to closer scrutiny: Perhaps politicization is not always as detrimental to constitutional adjudication as we fear.

The question, then, is whether politicization makes a constitutional court less authoritative because it leads people to think of it as politicized and, for that reason, as less legitimate. I will stipulate that a loss in institutional legitimacy<sup>821</sup> will indeed make people less likely to acquiesce in the justices' decisions.<sup>822</sup> But the question remains, firstly, whether perceptions of politicization lead to a drop in institutional legitimacy (1) and, secondly, how persistent such a drop tends to be (2). In the following, I will focus on the Supreme Court, as most of the empirical research hails from the United States.

#### 1. Perceived Politicization and Institutional Legitimacy

In 2017, a study tried to measure whether people who perceive the Supreme Court as politicized support it less. It found that respondents who agreed with one of two statements (namely, that Supreme Court justices are 'little more than politicians in robes' and that they base their decisions 'on their own personal beliefs') or disagreed with the claim that the justices 'can be trusted to tell us why they actually decide the way they do' did exhibit weaker diffuse support for the Court.<sup>823</sup> This appears to corroborate scholars' fear of politicization by judicial appointment.

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821 By 'institutional legitimacy', I mean the sociological legitimacy of the institution in question (i.e., the constitutional court). See, e.g., James L Gibson, Gregory A Caldeira and Lester Kenyatta Spence, 'Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment', 58 *Pol Res Q* 187, 195 (2005).

822 See Chapter 3, subsection IV.C.

823 James L Gibson and Michael J Nelson, 'Reconsidering Positivity Theory', 14 *J Empir Legal Stud* 592, 601, 609–12 (2017).

However, the study's authors admit that the relationship between perceived politicization and institutional legitimacy may, in fact, be inverse. Thus, people who consider the Court legitimate may tend to think of it as suffering from little to no politicization, and *vice versa*.<sup>824</sup> Moreover, the study conceptualized politicization differently. Thus, the statements quoted above may well describe a 'political' court, but they do not necessarily capture a *politicized* one, that is, a court whose members are in thrall to their appointers' party-political preferences. For instance, one can think of the Supreme Court's members as 'politicians in robes' without believing that Democrat-appointed justices always vote in a liberal direction and Republican-appointed justices in a conservative one. Perhaps some people think of the Court as politicized because the justices behave like politicians prior to handing down a decision—e.g., by leaking a draft opinion<sup>825</sup>—and not because the bench splits along predictable partisan lines.

Other studies measuring perceived politicization have likewise used a broad concept of politicization. For example, asking whether the Court 'gets too mixed up in politics' or hands down decisions that 'favor some groups more than others'<sup>826</sup> does not get to the core of judicial politicization either—namely, a partisan Court whose decisions represent politics by other means. Asking respondents whether they believe that the justices' party-political affiliation plays a big role in their decision-making is likely more accurate in detecting politicization perceptions.<sup>827</sup> But to date, no study has investigated the impact of such perceptions on institutional legitimacy.

## 2. Contentious Appointments and Institutional Legitimacy

We are thus thrown back on studies that focus on the effect of contentious appointments on the Supreme Court's legitimacy. Because a contentious appointment does not necessarily result in a partisan court, these studies

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824 *Id.*, 613.

825 See notes 748–749 and accompanying text.

826 See Brandon L Bartels and Christopher D Johnston, 'Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process', 76 *Pub Opin Q* 105, 110 (2012); Brandon L Bartels, Christopher D Johnston and Alyx Mark, 'Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a "Political" Institution?', 49 *Law & Soc'y Rev* 761, 771 (2015); and Benjamin Woodson, 'Politicization and the Two Modes of Evaluating Judicial Decisions', 3 *J Law & Cts* 193, 199, 200–1, 205 (2015).

827 See, e.g., John M Scheb II and William Lyons, 'The Myth of Legality and Public Evaluation of the Supreme Court', 81 *Soc Sci* 928, 932 (2000).

thus investigate what effects the *act* of politicization has on constitutional adjudication, not the effects of politicization itself.

For starters, a study conducted after Brett Kavanaugh's confirmation found that his appointment did indeed decrease the Supreme Court's institutional legitimacy.<sup>828</sup> A study conducted after Amy Coney Barrett's confirmation corroborated this result.<sup>829</sup> Admittedly, it found that her confirmation weakened diffuse support only among supporters of the Democratic party and that 53 percent of the respondents believed the Court was either just as or more legitimate than prior to the confirmation.<sup>830</sup> However, Democrats are most likely to disagree with a conservative Court, which makes their support all the more important.<sup>831</sup>

However, focusing on an isolated event such as a judicial appointment raises the question of whether a drop in institutional legitimacy persists over time. Crucially, a study that included a survey right after Kavanaugh's confirmation and a second one ten weeks later found that any correlation between negative views of Kavanaugh and decreased institutional legitimacy had disappeared, with both Democrats and Republicans having roughly the same perception of the Supreme Court's legitimacy.<sup>832</sup>

This finding is plausible because it corroborates what we know about the effect of isolated Supreme Court decisions on diffuse support. It seems

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828 See Nathan T Carrington and Colin French, 'One Bad Apple Spoils the Bunch: Kavanaugh and Change in Institutional Support for the Supreme Court', 102 Soc Sci Q 1484, 1488–92 (2021).

829 Christopher N Krewson, 'Political Hearings Reinforce Legal Norms: Confirmation Hearings and Views of the United States Supreme Court' 1, 7–8 (forthcoming, Pol Res Q, 2022).

830 *Ibid.* See also Jon C Rogowski and Andrew R Stone, 'How Political Contestation Over Judicial Nominations Polarizes Americans' Attitudes Toward the Supreme Court', 51 Brit J Pol Sci 1251, 1262–6 (2021) (finding that partisan rhetoric during the appointment process makes people who do not support the president's party—so-called outpartisans—perceive the nominee to be less impartial, and the Court to be less deserving of support, while the opposite holds for supporters of the president's party—the so-called co-partisans); and Brandon L Bartels and Eric Kramon, 'All the President's Justices? The Impact of Presidential Copartisanship on Supreme Court Job Approval', 66 Am J Pol Sci 171, 181–3 (2022) (finding that Democrats approved less of the job the Supreme Court was doing after Neil Gorsuch's confirmation—i.e., after the confirmation of a Republican appointee).

831 See Jon C Rogowski and Andrew R Stone, 'How Political Contestation Over Judicial Nominations Polarizes Americans' Attitudes Toward the Supreme Court' (n 830) 1267.

832 See Christopher N Krewson and Jean R Schroedel, 'Modern Judicial Confirmation Hearings and Institutional Support for the Supreme Court' (n 803) 8–9.

that such decisions do *not* make the Court less authoritative in the long term: While one study found that one single decision<sup>833</sup> sufficed to make people who disagreed with the decision consider the Court less legitimate within a month,<sup>834</sup> a long-term study concluded that this loss had virtually disappeared after four years.<sup>835</sup>

Of course, contentious confirmations occur less frequently than controversial decisions.<sup>836</sup> In consequence, the mechanisms that prevent individual decisions from permanently tarnishing the Court's legitimacy may likewise suffice to keep partisan confirmations from doing so.<sup>837</sup> Once the raucous confirmation fades from public memory, the Court's routine business may be more relevant to its legitimacy than what transpired during the appointment.

It should be stressed that these mechanisms are still shrouded in uncertainty.<sup>838</sup> According to one camp, people support the Supreme Court because they associate it with principled, not self-serving, decision-making.<sup>839</sup>

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833 Namely, on President Obama's Affordable Care Act. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

834 See Dino P Christenson and David M Glick, 'Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy', 59 *Am J Pol Sci* 403 (2015).

835 See Michael J Nelson and Patrick Tucker, 'The Stability and Durability of the U.S. Supreme Court's Legitimacy', 83 *J Pol* 767, 768–9 (2021). It remains to be seen whether this also holds for the Supreme Court's decision to eliminate a federal constitutional right to abortion. See *Dobbs v. Jackson Women's Health Org.*, 2022 U.S. LEXIS 3057, and James L Gibson, 'Losing Legitimacy: The Challenges of the Dobbs Ruling to Conventional Legitimacy Theory', last revised 5 January 2023, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4206986](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206986).

836 There were none between 1994 and 2005, for instance.

837 In fact, the Supreme Court's job-approval rating hit a ten-year high in 2020. See Justin McCarthy, 'Approval of Supreme Court Is Highest Since 2009', *Gallup*, 5 August 2020, available at <https://perma.cc/NF2Z-SEN3>. But see Dahlia Lithwick, 'Why I Haven't Gone Back to SCOTUS Since Kavanaugh', *Slate*, 30 October 2019, available at <https://perma.cc/JAL8-AEKH>.

838 See James L Gibson and Michael J Nelson, 'Reconsidering Positivity Theory' (n 823) 614. There is also a debate about how to measure institutional legitimacy. See Gregory A Caldeira and James L Gibson, 'The Etiology of Public Support for the Supreme Court', 36 *Am J Pol Sci* 635, 639–41 (1992), and Alex Badas, 'The Applied Legitimacy Index: A New Approach to Measuring Judicial Legitimacy', 100 *Soc Sci Q* 1848 (2019).

839 James L Gibson and Gregory A Caldeira, 'Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?', 45 *Law & Soc'y Rev* 195, 209 (2011). 'Principled decision-making' may be synonymous with the rule of law and the protection of minorities. See James L Gibson, 'The Legitimacy of the United States Supreme

Visible judicial symbols such as the Court building, the justices' robes, and the decorum of oral arguments mitigate people's disappointment with rulings they dislike because they reinforce three beliefs that Americans may have internalized as children: that the judiciary differs from the political branches; that it does so because it seeks to be fair; and that this fairness makes it especially deserving of support.<sup>840</sup>

According to another camp, people's subjective ideological proximity to the justices' individual decisions is much more important for institutional legitimacy.<sup>841</sup> If this is correct, politicization bodes ill for the Court's authoritativeness in the medium term: A consistently partisan and conservative bench is less likely to deliver the odd liberal ruling that allows supporters of the Democratic party to feel ideologically close to the Court.

### 3. Conclusion

In the end, then, it is not clear whether and to what extent politicization by judicial appointment makes the Supreme Court less authoritative. Moreover, the Court's partisanship has only been persistent of late.<sup>842</sup> Therefore, we must wait for future empirical research to investigate whether the justices' politicization has a tangible and long-lasting effect on people's diffuse support for them. Of course, the justices, not wanting to learn the answer to this question, may well de-escalate their partisanship before we can find out.

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Court in a Polarized Polity' (n 784) 528–30. But perceptions of procedural fairness may bolster diffuse support as well. See Mark D Ramirez, 'Procedural Perceptions and Support for the U.S. Supreme Court', 29 *Pol Psychol* 675, 691–2 (2008).

840 See, e.g., James L Gibson, 'Legitimacy Is for Losers: The Interconnections of Institutional Legitimacy, Performance Evaluations, and the Symbols of Judicial Authority', in Brian H Bornstein and Alan J Tomkins, *Motivating Cooperation and Compliance with Authority: The Role of Institutional Trust* (Springer, Cham, 2015) 81, 108–11. On childhood socialization and public support for the Supreme Court, Jeffery J Mondak and Shannon I Smithy, 'The Dynamics of Public Support for the Supreme Court', 59 *J Pol* 1114, 1124 (1997).

841 See Brandon L Bartels and Christopher D Johnston, 'On the Ideological Foundations of Supreme Court Legitimacy in the American Public', 57 *Am J Pol Sci* 184, 188–94 (2013), and Alex Badas, 'The Applied Legitimacy Index' (n 838) 1855–6. For criticism of subjective ideological proximity as a gauge of public support, James L Gibson, Miguel M Pereira and Jeffrey Ziegler, 'Updating Supreme Court Legitimacy: Testing the "Rule, Learn, Update" Model of Political Communication', 45 *Am Pol Res* 980 (2017).

842 See n 899 and accompanying text.



#### D. The Meaning of Partisanship

The final question is to what extent the concept of politicization covers or ought to cover the German judicial selection system. In the United States, the partisanship we associate with judicial politicization refers to the split between the two major parties.<sup>843</sup> On this understanding, the German Constitutional Court exhibits a very low degree of politicization. While a study of a conservative justice's voting behavior concluded that his (few) dissenting votes and opinions tended to align with other members nominated by the Christian Democrats, it also concluded that party affiliation was not the only indicator of his voting behavior.<sup>844</sup> More important, the twelve-year time period analyzed in the study yielded only twenty decisions in which at least one justice voted against the majority and opted to have their name published in the ruling.<sup>845</sup> According to the justices themselves, many seem to make a conscious effort not to be perceived as overly influenced by their membership in a party.<sup>846</sup>

But perhaps the Constitutional Court would exhibit a party-political split if the two parties that are represented in the *Bundestag* but are nevertheless excluded from the interparty agreement on the appointment of new justices<sup>847</sup> got to nominate candidates of their own. Of course, there is no way to tell whether these candidates would frequently vote against the majority upon joining the bench. Perhaps the high degree of self-referentiality in the Court's jurisprudence<sup>848</sup> would prevent a split between the justices nominated by the other parties and those selected by *Die Linke* or the *AfD*. More, one of the Court's characteristics is that the justices try to

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843 See, e.g., Lee Epstein and Eric Posner, 'If the Supreme Court Is Nakedly Political, Can It Be Just?' (n 765).

844 Benjamin Engst and others, 'Zum Einfluss der Parteienähe auf das Abstimmungsverhalten der Bundesverfassungsrichter – eine quantitative Untersuchung', 72 *Juristen-Zeitung* 816, 822–4 (2017).

845 *Id.*, 820–1.

846 Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (Verlag für Sozialwissenschaften, Wiesbaden, 2010) 235. On the institutional and sociological mechanisms that may help distance the justices from the parties that appointed them, Anuscheh Farahat, 'The German Federal Constitutional Court' (n 691) 302–4.

847 See n 703 and accompanying text.

848 See Christoph Möllers, 'Legality, Legitimacy, and Legitimation of the Federal Constitutional Court' (n 768) 181–3.

compromise when they adjudicate a case;<sup>849</sup> perhaps, then, the justices in the majority would seek compromise with their new colleagues, too. But I believe that the radicality of at least the *AfD*'s positions would make such continued concordance unlikely.<sup>850</sup> And even if it did persist, the Court's jurisprudence would likely change permanently, for it would have to start taking the fringe parties' ideologies into account.

This suggests that the parties which concluded the agreement did so in part to prevent the Court from reflecting these ideologies. For that reason, I argue that the German Constitutional Court is well and truly politicized. The only difference is that a group of parties—not one single party—tries to steer the Court in a particular ideological direction. In other words, the parties to the agreement do not merely seek to balance the Court ideologically, as supporters of the agreement like to point out;<sup>851</sup> they also control where on the ideological spectrum the balance lies.

From the perspective of political science, we can characterize this form of politicization as the established parties' attempt to minimize the non-established parties' share of political power. A party is non-established the smaller and younger it is and the less it gets to participate in government.<sup>852</sup> According to this definition, the leftist *Die Linke* and the far-right *AfD* arguably constitute non-established parties: Neither has participated in government at the federal level, the vote share of the former is small,<sup>853</sup> and the latter is comparatively young;<sup>854</sup> moreover, the established parties have, for the time being, more or less excluded the non-established parties from entering into coalition governments with them.<sup>855</sup> The supermajority

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849 Marlene Grunert and Reinhard Müller, 'Was kann Karlsruhe? 70 Jahre Bundesverfassungsgericht – Dieter Grimm und Andreas Voßkuhle über Fehler, Leistungen, Corona und Europa', *Frankfurter Allgemeine Zeitung*, 23 September 2021, p 8, and Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (n 846) 181–5.

850 For some of the *AfD*'s positions, see, e.g., Jonathan Olsen, 'The Left Party and the *AfD*', 36 *German Pol & Soc'y* 70, 78–9 (2018).

851 See n 726.

852 Werner Krause and Aiko Wagner, 'Becoming part of the gang? Established and nonestablished populist parties and the role of external efficacy', 27 *Party Pol* 161, 164, 166 (2021).

853 *Die Linke* obtained 4.9 percent of the vote. *Bundeswahlleiter*, 'Bundestagswahl 2021: Ergebnisse', available at <https://perma.cc/Z7DZ-KHYY>.

854 The *AfD* was founded in 2013. Nicole Berbuir, Marcel Lewandowsky and Jasmin Siri, 'The *AfD* and its Sympathisers: Finally a Right-Wing Populist Movement in Germany?', 24 *German Pol* 154 (2015).

855 See, e.g., Aiko Wagner, 'Typwechsel 2017? Vom moderaten zum polarisierten Pluralismus', 50 *Zeitschrift für Parlamentsfragen* 114, 127–8 (2019).

requirement for confirming judicial nominees in the *Bundestag* offers the non-established parties no protection because they currently only hold 16.6 percent of the seats in parliament.<sup>856</sup>

Of course, the German case of politicization is distinct from the American in that it does not become apparent from the Constitutional Court's rulings: By keeping the non-established parties' candidates off the bench, the established parties minimize the risk of overt partisanship, which is linked to perceived politicization and, eventually, to a drop in judicial authoritativeness.

Firstly, however, this difference does not make the Court any less politicized. If the Republicans or the Democrats succeeded in appointing all the Supreme Court's members, there would no longer be a party-political split there either, yet no one would hesitate to call the Supreme Court partisan. Secondly, the absence of a split does not mean that the German form of politicization is necessary to preserve the Constitutional Court's authoritativeness. As mentioned above, the justices' propensity for compromise might prevent a party-political split even if the non-established parties got to nominate candidates of their own. In addition, a study has shown that while people dislike the idea of staffing the Court with party affiliates, they especially dislike the idea of staffing it with affiliates of the non-established parties.<sup>857</sup> I presume, therefore, that they would not support the Court any less if the non-established parties joined the agreement and the justices they appointed frequently dissented from the Court's rulings. Instead, people would likely welcome the fact that the majority does not compromise with jurists whose party-political background they reject.

I find this thought experiment insightful, for it suggests that people's ideological attitude toward a constitutional court is more relevant than whether they believe the court to be 'political'. If this is true, politicization does not imperil the court just because it makes people realize that constitutional law can mirror politics; it only becomes dangerous once enough people frequently disagree with its jurisprudence. This would lend support to those American scholars who argue that perceived ideological distance matters for the Supreme Court's institutional legitimacy. The following

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856 Together, the two non-established parties currently hold 122 of the 736 seats in the *Bundestag*. *Bundeswahlleiter*, 'Bundestagswahl 2021: Ergebnisse' (n 853).

857 See Benjamin Engst, Thomas Gschwend and Sebastian Sternberg, 'Die Besetzung des Bundesverfassungsgerichts: Ein Spiegelbild gesellschaftlicher Präferenzen?', 61 *Politische Vierteljahresschrift* 39, 51–2 (2020).

section will show that Niklas Luhmann's early systems theory corroborates my hunch.

#### IV. Discussing Politicization from a Systems-Theoretical Perspective

Niklas Luhmann's early systems theory lends itself to the task of underlining and corroborating some of the above observations because its concept of systemic differentiation describes the kind of autonomization and de-autonomization processes that characterize politicization by judicial appointment. With its help, we can better understand at what point the parliamentarians asked to confirm a judicial nominee contribute to constitutional adjudication's politicization; what kind of ramifications we can expect from politicization; and what kind of party-political control over the court qualifies as 'partisan capture' within the meaning of judicial politicization.

I begin the following paragraphs with a brief introduction to Luhmann's concepts of social systems and systemic differentiation (A). Then, I describe the concept of politicization by judicial appointment in systems-theoretical terms and what follows therefrom for the confirmation process (B). In subsection (C), I apply these findings to the confirmation process in the United States. I then discuss what systems theory teaches us about politicization's possible effect on constitutional adjudication (D) before addressing a possible objection to my conceptual lens—namely, that Luhmann's later, more advanced systems theory may offer a better one (E).

#### A. The Concepts of Social Systems and Systemic Differentiation

In general systems theory, a system describes an interaction between parts.<sup>858</sup> A social system is a system whose parts consist of the actions of different individuals.<sup>859</sup> According to Luhmann, these parts interact by

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858 See Ludwig von Bertalanffy, *General Systems Theory: Foundations, Developments, Applications* (George Braziller, New York, 1968) 19.

859 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' in *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme* (6<sup>th</sup> edn, Westdeutscher Verlag, Opladen, 1991) 113, 115.

virtue of their meaning.<sup>860</sup> In consequence, a social system designates a meaningful relation between a plurality of actions.<sup>861</sup>

For Luhmann, meaning designates an intersubjective and invariant complex of possible experiences and actions, a complex that simultaneously refers to other, more distant possibilities.<sup>862</sup> It is this coupling of the actual and the potential, Luhmann argues, that allows humans to confront the complexity of the world: By diminishing and yet preserving complexity, meaning prevents the world from suddenly narrowing to only one concrete instance of experience in the individual's consciousness.<sup>863</sup> It explains the evolutionary advantage mankind holds over other organisms.<sup>864</sup>

Therefore, a social system's function is to create a differential of complexity between itself and its environment.<sup>865</sup> For Luhmann, systems are thus primarily distinctions between the inside and the outside, not relations between a whole and its parts.<sup>866</sup> To amplify their function, systems can

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860 Niklas Luhmann, 'Organization, membership and the formalization of behavioural expectations [1964]', 37 *Syst Res Behav Sci* 425, 426 (2020).

861 *Ibid.*

862 Niklas Luhmann, 'Reform und Information: Theoretische Überlegungen zur Reform der Verwaltung', in *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung* (4<sup>th</sup> edn, Springer, Wiesbaden, 1994) 181, 183. The transcendental element distinguishes Luhmann's theory from his mentor's, Talcott Parsons, as it allows Luhmann to relate social systems to the openness of the world, not to a problem that requires systemic structures. See, e.g., John W Murphy, 'Talcott Parsons and Niklas Luhmann: Two Versions of the "Social System"', 12 *Int Rev Mod Soc* 291 (1982), and Richard Münch, 'Luhmann und Parsons', in Oliver Jahraus and others (eds), *Luhmann-Handbuch: Leben – Werk – Wirkung* (JB Metzler, Stuttgart, 2012) 19–21.

863 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?* (Suhrkamp, Frankfurt am Main, 1971) 25, 31–9. Complexity designates the variety of experiences or actions an actor within the social system may have or engage in. See, e.g., Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 859) 115, and *Legitimation durch Verfahren* (10<sup>th</sup> edn, Suhrkamp, Frankfurt am Main, 2017) 41.

864 Niklas Luhmann, 'Normen in soziologischer Perspektive', 20 *Soziale Welt* 28, 30 (1969).

865 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 859) 113, 116, and *Legitimation durch Verfahren* (n 863) 41.

866 Niklas Luhmann, 'Organization, membership and the formalization of behavioural expectations [1964]' (n 860) 426. For a conception of the legal system as a whole, see, e.g., Henry M Hart and Arthur M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative edn, Cambridge MA, 1958) Preface ('a coordinated, functioning whole made up of a set of interrelated, interacting parts'),

enter a process of differentiation. They do so by ‘reduplicat[ing] [...] the difference between system and environment within [themselves]’,<sup>867</sup> that is, by generalizing new, more specific behavioral expectations that demarcate actions pertaining to the new subsystem from those that belong to its environment.<sup>868</sup>

The newly differentiated subsystem is more selective still than the system from which it originated (and which is now its environment): Not everything that transpires within the larger system will have an immediate effect on the subsystem. The infinite outside world becomes more definite and more manageable as a result, and the individuals who partake in the subsystem through their actions have more actual, feasible possibilities of experience and action.<sup>869</sup> The more subsystems there are, the more selectivity there can be overall.<sup>870</sup> Therefore, differentiation is a way for the larger system to manage complexity.

In the following subsection, we will see that the political system manages complexity by differentiating into a subsystem of party politics and a bureaucratic, decision-making subsystem. An increase in the former’s influence over the latter leads to politicization.

## B. Systems Theory and Politicization by Judicial Appointment

There are at least two types of differentiation at the societal level.<sup>871</sup> The first, segmentary differentiation, occurs when society differentiates into equal subsystems.<sup>872</sup> Thus, world society has differentiated into distinct yet equal political systems, of which there are as many as there are independent states.<sup>873</sup> The second type of differentiation, functional differentiation, occurs when each differentiated subsystem has a specific function.<sup>874</sup> Within

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and Lawrence M Friedman, *Law and Society: An Introduction* (Prentice-Hall, Englewood Cliffs, 1977) 5 (‘a working process, a breathing, active machine’).

867 Niklas Luhmann, ‘Differentiation of Society’, 2 *Can J Soc* 29, 31 (1977).

868 See Niklas Luhmann, ‘Soziologie als Theorie sozialer Systeme’ (n 859) 121.

869 See Niklas Luhmann, ‘Differentiation of Society’ (n 867) 30, 31–2.

870 *Ibid.*

871 On stratification as yet another form of differentiation, *id.*, 33–5.

872 Niklas Luhmann, ‘Differentiation of Society’ (n 867) 33.

873 *Id.*, 41.

874 *Id.*, 35.

each independent state, for instance, society, the largest possible system, creates the political system to provide collective and binding decisions.<sup>875</sup>

The political system's differentiation from society means that not every societal input translates into a preordained political output. While the political system does not exist in a vacuum, it can decide according to its own criteria which input to process and how to do so.<sup>876</sup> One of the ways in which it may wish to process societal input is through internal differentiation.<sup>877</sup> For instance, the political system erects an artificial barrier between the public and the decision-makers by creating a bureaucracy that renders its decisions according to a predetermined program.<sup>878</sup>

The bureaucracy is the subsystem of the political system that is dedicated to making binding decisions.<sup>879</sup> It includes legislation, administration, and adjudication<sup>880</sup>—in short, the government.<sup>881</sup> The judiciary constitutes a subsystem of the bureaucracy.<sup>882</sup> Moreover, each judicial proceeding within the judiciary constitutes a subsystem of its own that harnesses its autonomy to isolate the disputants and shield the political system from their conflict.<sup>883</sup>

Luhmann writes that the subsystem of (party) politics exists alongside the bureaucracy. Its function is to 'articulate interests' and to 'promote demands', to 'condense, generalize, and spread political topics, to form and consolidate power, consensus, and political support for persons and programs'.<sup>884</sup> He adds that party politics and the bureaucracy are interwoven in different ways. The legislature, for one, is fully subject to party-political influence.<sup>885</sup> Because legislation is not programmed, it must manage a

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875 See *id.*, 38.

876 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 160.

877 Niklas Luhmann, *Politische Soziologie* (André Kieserling ed, Suhrkamp, Berlin, 2010) 116.

878 See Niklas Luhmann, 'Lob der Routine', in *Politische Planung* (n 862) 113, 117.

879 See *Legitimation durch Verfahren* (n 863) 184.

880 E.g., Niklas Luhmann, *Politische Soziologie* (n 877) 151.

881 Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System', in *Politische Planung* (n 862) 49.

882 *Id.*, 46.

883 See Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 82–128, and *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2014) 164–5, 257–8 (eBook).

884 Niklas Luhmann, *Politische Soziologie* (n 877) 254. See also *Legitimation durch Verfahren* (n 863) 183–4.

885 Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System' (n 881) 49.

particularly high degree of complexity;<sup>886</sup> to decrease this complexity and make law, parliament relies on its members' party affiliation.<sup>887</sup> By contrast, the executive branch is only partly subject to such influence, for it is also bound to the law that parliament enacts.<sup>888</sup>

Finally, the judiciary is not subject to party-political influence in Luhmann's model. Its function is to protect the legislature and the executive from transgressive party-political demands, for both the legislators and the members of the executive can refuse such demands by pointing out that the resulting legislation would be incompatible with the courts' case law.<sup>889</sup> This means the judiciary is essential to maintaining the political system's internal differentiation: By allowing the legislature and the executive branch to alternate between party-political influence and relative independence, the courts render the political system's decision-making simultaneously responsive and autonomous.<sup>890</sup>

According to this model, politicization by judicial appointment occurs when the party-political subsystem extends its influence into the constitutional court and staffs it with justices who will agree with the parties' policies instead of shielding the legislature and the executive from them. The first insight we can draw from this is that a group of parties—not all of which need to be ideologically close—can politicize constitutional adjudication just as well as one single party. After all, Luhmann links politicization to the subsystem of party politics as such, not to an individual party. This provides conceptual support for my claim that the German political parties' agreement on filling vacancies on the Constitutional Court has politicized that institution.

The systems-theoretical lens also allows us to distinguish more clearly between politicizing and non-politicizing behavior during the confirmation process. As members of the legislature, the parliamentarians who are asked to confirm judicial nominees are members of two subsystems, the party-political and the bureaucratic one. Thus, they wear two hats, as decision-makers and as party politicians, and depending on which one they choose, they either contribute to the party-political subsystem's politicization of constitutional adjudication or not.

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886 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 179.

887 See *Legitimation durch Verfahren* (n 863) 184 and *Politische Soziologie* (n 877) 156.

888 Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System' (n 881) 49.

889 *Ibid.*

890 *Ibid.*



In other words, parliamentarians contribute to politicization by judicial appointment when their party-political membership trumps that in the bureaucratic subsystem—that is, when their party affiliation determines how they vote. In the following subsection, I apply this test to the confirmation process in the US Senate.

### C. Politicization by Judicial Appointment and the Confirmation Process in America

Generally, senators rely on one or more of the following four factors when deciding whether to support a nominee: whether the nominee is sufficiently meritorious; whether the president nominating the candidate is from their own party; how ideologically distant the nominee is; and whether the nomination threatens to affect the Court's ideological balance.<sup>891</sup>

The last three factors are arguably party-political in nature. This may not be evident when it comes to the nominee's (or the Court's) ideology. After all, ideology is sometimes used as a synonym for 'judicial philosophy',<sup>892</sup> which we might define as 'the judge's understanding of the role of courts in our society, of the nature of and values embodied in our Constitution, and of the proper tools and techniques of interpretation, both constitutional and statutory'.<sup>893</sup> However, the different judicial philosophies run more or less parallel to the Republican and the Democratic parties' preferences.<sup>894</sup> That is why scholars also lump 'ideology' together with partisanship or, quite simply, 'politics'.<sup>895</sup>

Of course, several factors may inform a senator's decision. The Republicans who voted to confirm Amy Coney Barrett presumably did so because they deemed her well-qualified, the president who nominated her was a

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891 See Lee Epstein and Jeffrey A Segal, *Advice and Consent: The Politics of Judicial Appointments* (OUP, New York, 2005) 102–13. See also Jonathan P Kstellec, Jeffrey R Lax and Justin H Phillips, 'Public Opinion and Senate Confirmation of Supreme Court Nominees', 72 J Pol 767 (2010) (finding that public opinion in their home state likewise influences the senators' decision).

892 E.g., Geoffrey R Stone, 'Understanding Supreme Court Confirmations' (n 686) 391.

893 Elena Kagan, 'Confirmation Messes, Old and New', 62 U Chi L Rev 919, 935 (1994).

894 See n 775.

895 See Lee Epstein and Jeffrey A Segal, *Advice and Consent* (n 891) 102, and Lee Epstein and others, 'The Changing Dynamics of Senate Voting on Supreme Court Nominees', 68 J Pol 296, 302 (2006) ('politics, philosophy, and ideology').

Republican, Barrett was perceived to be conservative, and her appointment was thought to solidify the conservative majority on the bench.<sup>896</sup>

However, the absence of a secret ballot for Senate confirmation votes<sup>897</sup> partly defuses this problem, for it allows us to ascertain whether the vote splinters along partisan lines. If it does, we can presume that party-political considerations weighed heavily in the senators' minds; it is sufficiently unlikely that the partisanship is coincidental, especially if several confirmation votes in a row are partisan.

### 1. From Unanimous to Partisan Confirmation Votes

As we saw above, the last few confirmation votes in the Senate have indeed been partisan.<sup>898</sup> This means that the senators have contributed to the Supreme Court's politicization if the latter exhibits the kind of partisan divide that scholars associate with judicial politicization. It does: 'since Elena Kagan succeeded John Paul Stevens in 2010, every Justice who was appointed by a Democratic president has had a more liberal voting record than every Republican appointee.'<sup>899</sup>

It bears emphasizing that the justices do not always divide along partisan lines in constitutional cases. There will always be unanimous constitutional decisions,<sup>900</sup> just as there will be non-unanimous ones that do not pit all Democratic against all Republican appointees.<sup>901</sup> In some cases, there may be a good explanation for the Court's unanimity, one that does not call into doubt our general finding of partisanship. For instance, not every

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896 See Nicholas Fandos, 'Senate Confirms Barrett, Delivering for Trump and Reshaping the Court', *The New York Times*, 26 October 2020, available at <https://perma.cc/P3RT-8Y5E>.

897 When the Senate debated abandoning secret confirmation deliberations, Senator Norris argued that '[p]ublic business should be transacted in public. [...] No democratic government can continue to endure if its public business is transacted behind closed doors.' 'Publicity on West Agitates Senate', *The New York Times*, 24 January 1929, p 5. For modern instances of accountability, see, e.g., Sheryl Gay Stolberg, 'Susan Collins, A Fixture in Maine, Has Twin Troubles: Trump and Kavanaugh', *The New York Times*, 6 July 2019, available at <https://perma.cc/N28L-UPLM>.

898 See notes 802–804 and accompanying text.

899 Neal Devins and Lawrence Baum, 'Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court', 2016 Sup Ct Rev 301, 309 (2016). For evidence, see *ibid*.

900 E.g., *Caniglia v. Strom*, 141 S. Ct. 1596 (2021).

901 E.g., *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

constitutional issue involves strong ideological questions that trigger the familiar party-political divide.<sup>902</sup> Nevertheless, it bears asking how often the justices must divide along party-political lines for us to deem the Court ‘partisan’. I will not pursue this inquiry further, however, as my objective in this chapter is chiefly conceptual, not empirical. Therefore, I will defer to the verdict that the current partisan trend on the Court is ‘extreme—and alarming’.<sup>903</sup>

In the past, scholars have linked partisan confirmation votes to the politicization of the appointment process, not of constitutional adjudication.<sup>904</sup> After all, the principle of judicial independence allows Supreme Court justices to depart from the ideology that made a majority of the senators vote to confirm them; in other words, there is no guarantee that a partisan confirmation vote will help create a partisan Court.<sup>905</sup> Now that the Court does appear to be increasingly partisan, this distinction is obsolete, however, and we can make the following statement: The senators contribute to constitutional adjudication’s politicization when the justices vote in accordance with their appointer’s political preferences and the senators, in confirming the nominees, politicize the appointment process.

Implementing the systems-theoretical lens becomes more difficult when the confirmation vote is (nearly) unanimous, as it was nine out of fourteen times between 1974 and 2005.<sup>906</sup> It seems that the senators confirmed any meritorious justice who was not too ideologically distant from the Senate majority.<sup>907</sup> Therefore, it is likely that the senators in the majority voted

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902 For instance, two of the Court’s unanimous constitutional decisions in its 2020–2021 term involved the Fourth Amendment, which prohibits ‘unreasonable searches and seizures’. See *Caniglia v. Strom* (n 900) and *Lange v. California*, 141 S. Ct. 2011 (2021).

903 Lee Epstein and Eric Posner, ‘If the Supreme Court Is Nakedly Political, Can It Be Just?’ (n 765).

904 See, e.g., David A Strauss and Cass R Sunstein, ‘The Senate, the Constitution, and the Confirmation Process’ (n 762) 1493–4, 1513; Vicki C Jackson, ‘A Democracy of Rights: The Dark Side? – A Comment on Stephen M. Griffin’, in Mark Tushnet (ed), *Arguing Marbury v. Madison* (n 766) 147, 154–5; and Geoffrey R Stone, ‘Understanding Supreme Court Confirmations’ (n 686) 450, 453–4, 459 n 165, 462.

905 See Vicki C Jackson, ‘A Democracy of Rights: The Dark Side?’ (n 905) 155.

906 The total number of nominations includes William Rehnquist’s elevation to chief justice. For an overview of the confirmation votes, see Lee Epstein and others (eds), *The Supreme Court Compendium: Data, Decisions, and Developments* (6<sup>th</sup> edn, SAGE, Los Angeles, 2015) 410ff.

907 See, e.g., Lee Epstein and others, ‘The Changing Dynamics of Senate Voting on Supreme Court Nominees’ (n 895) 302–6.

to confirm the nominee for two reasons: because they considered the candidate well-qualified and because they could live with the candidate's ideology. If these senators belonged to the same party as the president, the latter factor may even have been more important.<sup>908</sup> Consequently, it is possible that, in times of unified government, most senators primarily voted to confirm for party-political reasons.

This would spell trouble, conceptually speaking, if the Supreme Court exhibited a partisan divide during this time: While systems theory would indicate that the senators contributed to this politicization, the concept of politicization by judicial appointment would probably suggest otherwise, given the confirmation vote's unanimity.<sup>909</sup> However, we just saw that the Court only became partisan when Elena Kagan joined the bench, and by that time, the Senate confirmation votes had turned into party-political affairs as well: 98 percent of Democratic senators, but only 12 percent of Republicans, voted to confirm her.

## 2. The Confirmation Hearings

According to Luhmann's systems theory, the senators do not contribute to judicial politicization when they make their vote solely contingent on the nominee's qualifications. In times of divided government, this divests the senators in the majority from counteracting the president's attempt to steer the Court in the president's ideological direction. For that reason, many constitutional scholars have advocated for a more proactive senatorial role, regardless of whether it can be said to politicize constitutional adjudication.<sup>910</sup>

It bears emphasizing, however, that a systems-theoretical lens does not categorically suggest restraining the senators either. For example, it does not keep them from using the confirmation *hearings* to try to influence—within the boundaries of the law—the justices-to-be. Scholars have often

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908 In fact, a senator was still likely to confirm a mediocre nominee if there was little ideological distance between the two. Charles M Cameron, Albert D Cover and Jeffrey A Segal, 'Senate Voting on Supreme Court Nominees: A Neoinstitutional Model', 84 *Am Pol Sci Rev* 525, 531 (1990).

909 See subsection III.A.

910 See, e.g., David A Strauss and Cass R Sunstein, 'The Senate, the Constitution, and the Confirmation Process' (n 762) 1493–4, 1513, and Robert Post and Reva Siegel, 'Questioning Justice: Law and Politics in Judicial Confirmation Hearings', 115 *Yale LJ Pocket Part* 38, 49–51 (2006).

taken a dim view of the hearings, criticizing them for producing nothing but ‘platitudinous statement and judicious silence’<sup>911</sup> or a ‘choreographed minuet’.<sup>912</sup> Recently, however, they have started to look at them with fresh eyes. Thus, Paul Collins and Lori Ringhand argue that the colloquy, by teaching the future justices how the public views constitutional law, elevates the hearings into a forum that ratifies past constitutional change and expands the ever-growing canon of ‘indispensable’ seminal cases.<sup>913</sup> Others have suggested that the senators’ questions allow them to represent their constituents even when it is clear their individual votes will not help block the nominee’s confirmation.<sup>914</sup>

Consequently, the senators can confront the nominees, during the confirmation hearings, with their conception of constitutional justice: They can debate questions of constitutional interpretation with the candidate as well as, if need be, among themselves. If we briefly conceptualize politicization from a subjective angle,<sup>915</sup> we might say that the senators may politicize constitutional decision-making by debating it in public, and that this politicization is beneficial.

#### D. Politicization’s Effect on Constitutional Adjudication and the Political System

In this subsection, I discuss what systems theory can teach us about politicization’s effect on constitutional adjudication. We saw above that scholars fear for the quality as well as the authoritativeness of a politicized constitutional court’s decisions.<sup>916</sup> I believe that Luhmann’s sociology helps us refine both points. On the one hand, it indicates that a partisan court may disrupt the political system’s internal differentiation into party politics and bureaucracy (1). On the other hand, its concept of functional differentiation

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911 Elena Kagan, ‘Review: Confirmation Messes, New and Old’ (n 893) 928.

912 Ronald Dworkin, ‘Justice Sotomayor: The Unjust Hearings’, *The New York Review of Books*, 24 September 2009, available at <https://perma.cc/BA4F-V5XH>.

913 Paul M Collins, Jr, and Lori A Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change* (CUP, Cambridge, 2013) 140ff. See also Neal K Katyal, ‘Legislative Constitutional Interpretation’, 50 *Duke LJ* 1335, 1339–46 (2001).

914 Jessica A Schoenherr, Elizabeth A Lane and Miles T Armaly, ‘The Purpose of Senatorial Grandstanding during Supreme Court Confirmation Hearings’, 8 *J Law & Cts* 333, 347, 353 (2020).

915 See above, notes 752–760 and accompanying text.

916 See subsection II.B.3.

suggests that a partisan court can, under certain circumstances, maintain people's trust in it (2).

### 1. Partisan Capture and the Political System's Internal Differentiation

Luhmann's model of the political system's internal differentiation into party politics and bureaucracy suggests that a constitutional court's partisan capture can be disadvantageous for two reasons. The more constitutional adjudication is beholden to party politics, the more the latter's deficiencies become a problem for society. Furthermore, the political system becomes less flexible once its decision-making potential remains tethered to the political parties' programs.

Firstly, Luhmann reminds us that political parties prioritize winning elections over matters of substance, rely on personal relationships to protect those in positions of authority, and are susceptible to societal influences that are difficult to check. And he adds that one of the reasons we can accept this is that the judiciary is not subject to party-political influence.<sup>917</sup> In other words, constitutional adjudication's politicization can be detrimental because it leaves society defenseless against the political parties' quirks and deficiencies.

I believe the Supreme Court's politicization is instructive in this regard. Recall that the American electorate has undergone partisan sorting, with liberals voting for Democrats and conservatives siding with Republicans.<sup>918</sup> Crucially, however, partisan sorting does not mean that people are more polarized with regard to political issues. In fact, it seems that the public suffers from behavioral polarization more than from issue polarization: While conservatives and liberals are a bit farther apart ideologically than they used to be, they still tend to agree on many things.<sup>919</sup> By contrast, the Republican and the Democratic *parties* are subject to strong issue

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917 See Niklas Luhmann, 'Funktionen der Rechtsprechung im politischen System' (n 881) 49–50.

918 See n 776.

919 See Lilliana Mason, 'The Rise of Uncivil Agreement: Issue Versus Behavioral Polarization in the American Electorate', 57 *Am Behav Scientist* 140, 147–55 (2013), and "I Respectfully Disagree": The Differential Effects of Partisan Sorting on Social and Issue Polarization', 59 *Am J Pol Sci* 128, 133–4 (2015). Behavioral polarization is characterized by 'increasing partisan strength, partisan bias, activism, and anger'. 'The Rise of Uncivil Agreement' 141.

polarization.<sup>920</sup> And because the parties, not the public, get to determine the ideology they would like to see implemented on the constitutional bench, the politicization of constitutional adjudication means that people are saddled with more constitutional issue polarization than they may want.

This ‘disconnect’ between the American political class and the mass public<sup>921</sup> dilutes politicization’s democratic benefits. In theory, politicization helps politicians ensure that the Supreme Court does not stray too far from voters’ policy preferences.<sup>922</sup> In practice, however, the politicians will likely overshoot the mark and satisfy the ideological fringe more than the center of American politics.

Secondly, Luhmann teaches us that politicization decreases the amount of complexity the political system can manage. One of internal differentiation’s benefits is that the political system can transfer, to the bureaucracy, issues which the party-political subsystem struggles with. Where the political parties fall short, the legislature, the executive, and the judiciary can step in to adjudicate—or, in Luhmann’s terms, ‘depoliticize’—the issue in need of resolution.<sup>923</sup> Once party politics have come to dominate the constitutional court, however, this potential is lost, and society is stuck with the political parties’ capacity for addressing its problems.

On this view, the predictability that inheres in a partisan court is not only potentially detrimental because it may make people think of the justices as the parties’ pawns; it is also disadvantageous because it makes the court less flexible, and hence reduces the jurisprudential variety it can offer society. As we will see presently, this variety is crucial, from a systems-theoretical perspective, to maintaining constitutional adjudication’s authoritativeness.

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920 See, e.g., Geoffrey C Layman, Thomas M Carsey and Juliana Menasce Horowitz, ‘Party Polarization in American Politics: Characteristics, Causes, and Consequences’, 9 *Ann Rev Pol Sci* 83, 87–9 (2006) and the references cited therein.

921 Morris P Fiorina and Matthew S Levendusky, ‘Disconnected: The Political Class versus the People’, in Pietro S Nivola and David W Brady (eds), *Red and Blue Nation? Characteristics and Causes of America’s Polarized Politics*, vol 1 (Brookings Institution Press, Washington, DC, 2006) 49, 51–2.

922 See notes 810–811 and accompanying text.

923 See Niklas Luhmann, ‘Funktionen der Rechtsprechung im politischen System’ (n 881) 49.

## 2. Functional Differentiation and Judicial Authoritativeness

Systems theory characterizes society as differentiated into a multitude of functionally specific subsystems.<sup>924</sup> Functional differentiation requires a variety of very different personalities, writes Luhmann, because the specialization that accompanies it necessitates a multitude of talents and dispositions.<sup>925</sup> This has ramifications for the political system's stability: Because of their diversity, people will disagree about many things, and the challenge of any political system under these circumstances is to ensure its stability without relying on consensus.<sup>926</sup>

Luhmann argues that the political system's proceedings—such as its legislative or judicial proceedings—are central to mastering this challenge. Thus, the political system ensures its stability if its proceedings achieve three things: absorb potential protest; make people trust in the political system's overall functioning; and give them the feeling that everyone can, from time to time, obtain or witness a favorable policy outcome.<sup>927</sup>

For that reason, I suggested in Chapter 3 that constitutional courts can remain authoritative, on Luhmann's view, if they attend to the ideological variety of their decisions, thus giving most people the feeling that they, too, could obtain a victory in court. It follows that Luhmann's systems-theoretical lens jibes with what my summary of the research on diffuse support for the Supreme Court designated the 'second camp'.<sup>928</sup> According to Luhmann and this camp, a constitutional court need not be less authoritative if people only support it to the extent they feel ideologically close to its rulings; what is important is that it grants both conservatives and liberals victories at more or less the same pace.

At first blush, this spells trouble for constitutional adjudication: A partisan court is less likely to issue ideologically diverse rulings. Yet we saw above that courts that we consider politicized—such as today's Supreme

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924 See n 874.

925 Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (5<sup>th</sup> edn, Duncker & Humblot, Berlin, 2009) 48.

926 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 250–2.

927 Niklas Luhmann, *Legitimation durch Verfahren* (n 863) 30, 193, and 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft', in Rüdiger Lautmann, Werner Maihofer and Hartmut Schelsky (eds), *Die Funktion des Rechts in der modernen Gesellschaft* (Bertelsmann-Universitätsverlag, Bielefeld, 1970) 175, 188–9.

928 See n 841 and accompanying text.



Court—do, at times, abandon their party-political divide.<sup>929</sup> The more they do so, the less they risk losing their authoritativeness. The less they do so, the harder it will be for out-partisans to think of the Court as a place where they, too, can achieve a constitutional victory.

Accordingly, the negative effects of politicization do not occur more or less automatically once we consider the justices sufficiently partisan to call their court politicized. Instead, the degree of politicization is more significant; not every court that arguably deserves the characterization ‘politicized’ risks quickly becoming ineffective.

Two observations follow from this conclusion. Firstly, the problem with politicization by judicial appointment is not that it renders a constitutional court less authoritative but that it places the burden of maintaining that authoritativeness squarely on the justices’ shoulders. Crucially, that may not be enough to counsel against politicization in the United States, which has a hard-nosed yet romantic appreciation of its judges.<sup>930</sup>

Secondly, the politicians involved in judicial appointments can use politicization to our democratic advantage if they have reason to believe that the justices can shoulder their responsibility and maintain the court’s authoritativeness despite an increasingly partisan bench. Americans, for instance, may have a greater say in the composition of the constitutional bench once the confirmation vote in the US Senate splits along party-political lines: If the parties state in advance which kind of nominee they will support, citizens can choose the party whose hypothetical nominee better matches their own preferences.<sup>931</sup>

Admittedly, the abovementioned disconnect between the parties’ and people’s ideological preferences means that not every nominee will fit that mold. Perhaps, however, the Supreme Court’s persistent politicization means that potential nominees’ qualifications will matter somewhat less in the future, resulting in a more diverse group of eligible jurists.

In Germany, by contrast, the Constitutional Court presumably need not fear for its authoritativeness. Because the Court’s politicization originates

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929 See notes 900–901 and accompanying text.

930 See Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Harvard University Press, Cambridge MA, 1997) 3. Generally on the significance of character and experience for judicial review, Mark Tushnet, ‘Constitutional Interpretation, Character, and Experience’, 72 B U L Rev 747 (1992).

931 On judicial appointments as an example of popular constitutionalism, Robert Post and Reva Siegel, ‘Popular Constitutionalism, Departmentalism, and Judicial Supremacy’, 92 Cal L Rev 1027, 1030–1 (2004).

in the non-established parties' exclusion from the informal agreement to divvy up the justiceships among the political parties, the lack of decisions that appeal primarily to the fringe parties' voters will likely not imperil its diffuse support. Thus, both parties received only slightly more than 15 percent of all votes in 2021.<sup>932</sup>

But in my opinion, this does not make the Constitutional Court's politicization a net positive. True, most people agree with the decision to exclude justices nominated by the non-established parties.<sup>933</sup> But a closer look at the interparty agreement reveals it to be democratically deficient after all. Firstly, voters cannot change the allocation of an upcoming vacancy. If a seat is allocated to the Social Democrats, for instance, that party will get to fill it regardless of whether it won or lost votes in the last election. Secondly, the electorate has little say over the total number of justiceships allocated to a party. When the Social and the Christian Democrats first concluded the interparty arrangement, the Social Democrats had nearly 46 percent of the national vote to show for the four justiceships it claimed in each senate of the *Bundesverfassungsgericht*. Today, the Social Democrats claim three seats, thereby decreasing their share by a quarter; but in 2017, their share of the national vote had dropped by more than half, to 20.5 percent.<sup>934</sup>

#### E. The Likely Objection to My Conceptual Lens

In closing, I wish to address a likely objection to the systems theory I apply in this chapter. This objection challenges the use of Luhmann's early, as opposed to late, systems theory and argues that the later version offers a more sophisticated lens. That is presumably why previous systems-theoretical analyses of politicization have favored it over the conception I follow in this chapter.<sup>935</sup>

I will stipulate that the later version of Luhmann's theory is indeed more sophisticated. What we need to ask, therefore, is whether the increase in sophistication warrants abandoning our conceptual lens, or, conversely, whether the latter possesses some redeeming features that trump the socio-

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932 See n 853.

933 See n 857.

934 See *Bundestagswahlleiter*, 'Bundestagswahl 2017: Ergebnisse', available at <https://perma.cc/NQ9H-XM72>.

935 See above, n 687.

logical currency of Luhmann's later work. Before answering that question, we will take a brief look at that work.

## 1. Autopoietic Closure

In the second half of the twentieth century, general systems theory gradually shifted its focus from input (into social systems) to closure (of social systems). In each case, organisms—that is, living systems—provided a paradigmatic example.

Thus, von Bertalanffy conceptualized organisms as open systems because they maintain themselves 'in a continuous inflow and outflow, a building up and breaking down of components'.<sup>936</sup> Roughly a decade later, by contrast, Francisco Varela, Humberto Maturana, and Ricardo Uribe qualified organisms as autopoietic organizations.<sup>937</sup> An autopoietic organization is closed, not open, because it produces its components through the network of its components, that is, recursively.<sup>938</sup> It is not only autonomous in its capacity to self-organize; it is also autonomous in that it itself is the product of its operation.<sup>939</sup>

Luhmann decided to harness the concept of autopoiesis for his analysis of social systems.<sup>940</sup> He argued that a social system can only maintain itself if each element within the system provides the nexus for future elements. Accordingly, there is no contact between the elements of a social system and its environment.<sup>941</sup> To provide a nexus, an element is self-referential; this means it contains within itself the unity between identity and difference.<sup>942</sup> Thus, communication—the (new) base unit of social systems—is

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936 Ludwig von Bertalanffy, *General Systems Theory* (n 858) 39.

937 Francisco Varela, Humberto Maturana and Ricardo Uribe, 'Autopoiesis: The Organization of Living Systems, its Characterization and a Model', 5 *BioSystems* 187, 189 (1974).

938 See, e.g., Milan Zeleny, 'Self-Organization of Living Systems: A Formal Model of Autopoiesis', 4 *Int'l J General Sys* 13 (1977).

939 Francisco G Varela, Humberto R Maturana and Ricardo Uribe, 'Autopoiesis' (n 937) 188.

940 Niklas Luhmann, 'Autopoiesis, Handlung und kommunikative Verständigung', 11 *Zeitschrift für Soziologie* 366 (1982), and 'The Autopoiesis of Social Systems [1986]', 6 *J Sociocybernetics* 84 (2008).

941 Niklas Luhmann, *Social Systems* (John Bednarz, Jr, tr with Dirk Baecker, Stanford University Press, Stanford, 1995) 33.

942 Niklas Luhmann, 'Autopoiesis, Handlung und kommunikative Verständigung' (n 940) 369–70.

self-referential because it refers both to itself (the utterance) and, hetero-referentially, to the information the utterance conveys.<sup>943</sup> In other words, communication creates the boundary between the system in which takes place (as an utterance) and the information it conveys, which may lie in its environment.

As a result of social systems' operative closure, the legal system is differentiated from society<sup>944</sup> once legal operations refer to prior legal operations in the system.<sup>945</sup> To that end, communications within the legal system are characterized by a binary code of justice/injustice (or lawful/unlawful).<sup>946</sup> 'Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system's future operations.'<sup>947</sup>

## 2. Autopoietic Closure and Politicization Research

In consequence, we can no longer stipulate that constitutional adjudication is contained within the political system and thus susceptible to de-differentiating influences.<sup>948</sup> In Luhmann's later theory, the relationship between the political and the legal system plays out instead through 'structural coupling'.<sup>949</sup>

Structural coupling describes the reciprocal relations between different systems. They arise whenever one system presupposes something that exists

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943 Niklas Luhmann, 'The Autopoiesis of Social Systems' (n 940) 86, and 'Operational Closure and Structural Coupling: The Differentiation of the Legal System', 13 *Cardozo L Rev* 1419, 1423–4 (1992).

944 Luhmann introduced the concept of a specific legal system before his scholarship embraced autopoiesis but after he had published the works on which this chapter is based. See Niklas Luhmann, 'Ausdifferenzierung des Rechtssystems', 7 *Rechtstheorie* 121 (1976).

945 Generally on the significance of codes for functional differentiation, Niklas Luhmann, "Distinctions Directrices": Über Codierung von Semantiken und Systemen', in *Soziologische Aufklärung 4: Beiträge zur funktionalen Differenzierung der Gesellschaft* (Westdeutscher Verlag, Opladen, 1987) 13, 19–20.

946 Niklas Luhmann, 'Law as a Social System' (n 689) 139–41, and 'Operational Closure and Structural Coupling' (n 943) 1427–8.

947 Niklas Luhmann, 'Law as a Social System' (n 689) 139.

948 On the strict separation of law and politics as two closed social systems, Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1993) 417–22.

949 For the conceptual antecedent in biology, see Humberto Maturana, 'The Organization of the Living: A Theory of the Living Organization', 7 *Int'l J Man-Machine Stud* 313, 326–8 (1975).

in its environment.<sup>950</sup> For instance, social systems require psychic systems because there is no communication without the latter. Structural coupling does not affect autopoiesis as such, for each system decides itself how to react to external irritations.<sup>951</sup> But it does influence the structures the system chooses to create.<sup>952</sup> To that end, it limits, and hence focuses, the irritations that reach the boundaries of the social systems linked by structural coupling.<sup>953</sup> For example, language provides the structural coupling between social and psychic systems because it limits irritations to things that can be expressed ‘through language or the language-like use of signs’.<sup>954</sup>

According to Luhmann, constitutions provide the structural coupling between the political and the legal system<sup>955</sup> because they channel the reciprocal relations between politics and the law.<sup>956</sup> By limiting the points of (superficial) contact between both, they increase the likelihood of contact occurring in the first place.<sup>957</sup> Under a constitution, the legal system can decide itself whether to react to policy proposals and enact legislation; and the political system can learn to accommodate the effects of judicial intervention—such as declarations of unconstitutionality—because the intervention originates in an external system, and not within politics itself.<sup>958</sup>

On this view, constitutional courts are organizations that deal with issues of structural coupling.<sup>959</sup> But they remain part of the legal system because and as long as their operations use the code lawful/unlawful (or, to be exact, constitutional/unconstitutional). Consequently, politicization describes

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950 Niklas Luhmann, ‘Operational Closure and Structural Coupling’ (n 943) 1432.

951 *Ibid.*

952 Niklas Luhmann, *Organization and Decision* (Dirk Baecker ed, Rhodes Barret tr, CUP, Cambridge, 2018) 328.

953 Niklas Luhmann, ‘Verfassung als evolutionäre Errungenschaft’, 9 *Rechtshistorisches Journal* 176, 204–5.

954 Niklas Luhmann, *Organization and Decision* (n 952) 329.

955 Niklas Luhmann, ‘Operational Closure and Structural Coupling’ (n 943) 1436–8.

956 *Id.*, 1436 and Niklas Luhmann, ‘Verfassung als evolutionäre Errungenschaft’ (n 953) 205–6 (1990).

957 Niklas Luhmann, *Das Recht der Gesellschaft* (n 948) 470.

958 Niklas Luhmann, ‘Verfassung als evolutionäre Errungenschaft’ (n 953) 207, and *Das Recht der Gesellschaft* (n 943) 478–80.

959 See Niklas Luhmann, *Organization and Decision* (n 952) 329–30, Alfons Bora, ‘Politik und Recht’ (n 687) 208–9, and Basil Bornemann, ‘Politisierung des Rechts’ (n 687) 87–8.

the moment in which a court ceases to use the code of the legal system and resorts to the political code of government/opposition.<sup>960</sup>

The problem with this conception of judicial politicization is that it is far too narrow to be of any practical use. The day seems far off when judicial appointments create a Supreme Court that strikes down a statute for the official reason not that it contravenes constitutional law but that it runs counter to the legislative majority's best interests (e.g., the interest in being re-elected). Of course, judicial rulings may reflect the national mood.<sup>961</sup> But to do so, they will claim that a law is either constitutional or unconstitutional, not that it is good or bad policy. What a code-based conception of politicization describes, then, is not so much the transformation of constitutional adjudication as its dissolution.

Systems theorists are aware of this conceptual deficiency.<sup>962</sup> For that reason, an alternative approach suggests extending the autopoietic conception of politicization to cases in which the legal code persists but is merely a façade for party-political considerations.<sup>963</sup> I do not consider this correction an improvement, however, for it describes a similarly implausible scenario. It requires us to assume that constitutional justices experience constitutional law not as real internal constraints but as putty in their hands, and we have no reason to do so.<sup>964</sup> It is not a coincidence, I believe, that the concept of politicization by judicial appointment does not involve the constitutional justices reasoning in bad faith and simply requires their behavior to be predictable, in party-political terms, from an *outsider's* perspective.<sup>965</sup>

Of course, one could go a step further and extend the autopoietic conception of judicial politicization to cases in which the legal and the political code yield similar outcomes. But in that case, we would simply be reformulating the traditional concept of politicization by judicial appointment, without any additional analytical insight. For these reasons, I submit that the theory of open social systems is more instructive than its successor

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960 Alfons Bora, 'Politik und Recht' (n 687) 207. On the political system's code, Niklas Luhmann, 'Theorie der politischen Opposition', 36 *Zeitschrift für Politik* 13, 19–20 (1989), and *Das Recht der Gesellschaft* (n 943) 421.

961 See generally Robert A Dahl, 'Decision-Making in a Democracy' (n 815).

962 Basil Bornemann, 'Politisierung des Rechts' (n 687) 90, and Michael Hein and Stefan Ewert, 'Die Politisierung der Verfassungsgerichtsbarkeit' (n 687) 122.

963 See Michael Hein and Stefan Ewert, 'Die Politisierung der Verfassungsgerichtsbarkeit' (n 687) 123.

964 See, e.g., David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press, Princeton, 2010) 21.

965 See n 771 and accompanying text.

because it makes explicit just how closely interwoven the political system and constitutional adjudication can—but need not—be.

*VI. Conclusion*

Politicization by judicial appointment has come to affect both the Supreme Court and the Federal Constitutional Court. What happens now is anyone's guess, however. A lot depends on the justices' cunning. Thus, it remains to be seen whether the justices on the Supreme Court are savvy enough to stave off potential threats to their institutional legitimacy. Furthermore, we have yet to find out how the parties who currently divvy up the Federal Constitutional Court's seats among themselves would react to a rise in the non-established parties' vote share. If they decide to share their power with the latter, it will be interesting to see how the justices react to their new, less ideologically temperate colleagues.

