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Jeremy Kidd

INTRODUCTION	786
I. INNOVATIVE METRICS	790
A. <i>Measuring Scalia-ness</i>	790
1. <i>Originalism</i>	791
2. <i>Textualism</i>	792
3. <i>Willingness to write separately</i>	793
4. <i>Putting it all together</i>	793
5. <i>How did Gorsuch do?</i>	794
B. <i>Scalia-ness redux</i>	797
1. <i>Originalism</i>	798
2. <i>Textualism</i>	799
3. <i>Writing separately</i>	799
4. <i>Ghostwriting</i>	800
5. <i>Years as a law professor</i>	801
6. <i>Percentage of life outside D.C.</i>	801
7. <i>Putting it all together</i>	802
8. <i>How did Kavanaugh do?</i>	803
C. <i>What's next?</i>	805
II. COMPOSITE METRICS	806
A. <i>Clerk-Based Martin-Quinn scores</i>	807
B. <i>How did Kavanaugh score?</i>	809
CONCLUSION	810

NEW METRICS AND THE POLITICS OF JUDICIAL SELECTION

Jeremy Kidd*

Recent Supreme Court nomination hearings have become increasingly rancorous, revealing the increasing political importance of the judiciary in our system of government. We need to know more about those who are chosen to wield this power, but those being considered have strong incentives to obscure all but the most basic characteristics of integrity, decorum, intellect, and courtesy. One of the most important decisions in our democracy is therefore made with far less information than would be ideal. Only through development of new metrics and refinement of existing metrics can we begin to cut through obfuscation and identify the goals and methodologies of potential judges and justices. Multiple new metrics are discussed, particularly as they pertain to the confirmations of Justices Neil Gorsuch and Brett Kavanaugh, as an example of what can be achieved if the importance of metrics in this area is recognized.

INTRODUCTION

Watching conservatives react to open seats on the United States Supreme Court can lead one to wonder whether conservatives are capable of learning from the past. Regardless of whether you agree with the judicial goals of conservative voters and politicians, it is clear that many prior “conservative” nominations—Stevens, Kennedy, Souter, and Roberts—have turned out to be disappointments to the conservatives that supported them.¹ Notwithstanding the salience of that fact to so many, the two most recent nominees—Neil Gorsuch and Brett Kavanaugh—were often described only as “conservative,”² by friend and foe alike. There is nothing inherently wrong with some-

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1. See, e.g., *No More Souters*, WALL ST. J. (July 19, 2005), <https://www.wsj.com/articles/SB112173866457289093>.

2. See, e.g., Elliott Ash & Daniel L. Chen, *Kavanaugh Is Radically Conservative. Here’s the Data to Prove It*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/07/10/kavanaugh-is-radically-conservative-heres-the-data-to-prove-it/?utm_term=.10566954f578; Ryan Black & Ryan Owens, *Neil Gorsuch Could Be the Most Conservative Justice on the Supreme Court*, WASH. POST (Mar. 20, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/15/neil-gorsuch-could-be-the-most-conservative-justice-on-the-supreme-court/?noredirect=on&utm_term=.a988ecd9f72a; Kevin Cope & Joshua Fischman, *It’s Hard to Find a Federal Judge More Conservative Than Brett Kavanaugh*, WASH. POST (Sept. 5, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/05/its-hard-to-find-a-federal-judge-more-conservative-than-brett-kavanaugh/?utm_term=.80f2fa8c67b5; Oliver Roeder & Amelia Thomson-DeVeaux, *How Conservative Is Brett Kavanaugh?*, FIVETHIRTYEIGHT (July 17, 2018), <https://fivethirtyeight.com/features/how-conservative-is-brett-kavanaugh/>; Jason Russell, *Neil Gorsuch Is Even More Conservative Than Antonin Scalia Was*, WASH. EXAMINER (Jan. 31, 2017), <https://www.washingtonexaminer.com/neil-gorsuch-is-even-more-conservative-than-antonin-scalia-was>.

one choosing a conservative worldview,³ and many Republican-appointed judges may have done so. It is also not inherently problematic to consider whether a judge is “conservative” or “liberal.” The problem arises in the inherently imprecise nature of that term as it is typically applied to the judiciary.⁴

That imprecision raised its head in the public debate over those thought to be strong candidates for elevation under President Trump. Inevitably, that debate centered not on the complex nature of the process of adjudication but on how candidates were likely to vote on changing existing precedents like *Citizens United*,⁵ *Heller*,⁶ *McDonald*,⁷ or *Roe*.⁸ In a sense, this is understandable since the candidates’ public speeches and prior decisions might be more easily discernible than their respective processes of adjudication. And yet, this is akin to the proverbial drunk looking for his keys under the lamp—not because they are likely to be there, but because that is where the light is. The law is just as much about process—perhaps more so—than it is about outcomes, and the nomination debates could be about process if only we had more precision in our metrics.

This Essay argues that more precision is possible, using as examples two metrics for assessing the probability that Republican-nominated jurists will apply a particular type of methodology once confirmed to the bench. Methodology is arguably more important than ideology when it comes to judicial outcomes because a consistent methodology will lead to more consistent and defensible outcomes, whereas ideology may be more prone to persuasion and ambiguity and, therefore, to greater variance and uncertainty. For example, if presented with a question about government regulation of wholly intrastate marijuana cultivation,⁹ a committed originalist would consider whether that regulation was within the scope of power granted to Congress under the power to regulate interstate commerce. A conservative ideologue, however, would have to balance a desire to avoid excessive governmental power with a desire to avoid excessive drug use.

It should be obvious that the range of possible answers to the first question is inherently narrower than the range of possible outcomes to the balancing act required by the second. Perhaps less obvious is whether the range of answers to the first question is more defensible than the range of answers to

3. At least, this Essay will remain neutral on the issue.

4. Justice Souter’s appointment was hailed as “a home run for conservatives” by then-White House Chief of Staff John Sununu. Linda Greenhouse, *The Power of Supreme Court Choices*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/opinion/bush-supreme-court-thomas.html>. It is still unclear what that means and, given the range of meanings that *might* attach to the term, whether it was demonstrably wrong.

5. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

6. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

7. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. See generally *Gonzales v. Raich*, 545 U.S. 1 (2005).

the second. This Essay is hardly the proper venue for a restatement of the long-standing debate between realists and originalists about whether perceived constraints on judges are more than a convenient fiction,¹⁰ and the question presented here resides entirely outside that debate. The question presented here is whether it is possible to develop quantitative metrics that will permit politicians to judge the nature of the individuals being nominated, including their jurisprudential methodology, to give those politicians and their supporters greater certainty in the outcomes that those judges will reach.¹¹

During the 2016 Presidential election, then-candidate Trump promised that he would “appoint judges very much in the mold of Justice Scalia.”¹² This is the type of campaign promise designed to shore up support amongst a segment of the electorate. Trump was signaling to the Republican base that he was committed to avoiding the same type of judicial nominations that had disappointed Republican voters in the past.¹³ That Scalia once referred to himself as a “faint-hearted originalist”¹⁴ would seem to have made him an imperfect target for achieving the judicial predictability and consistency that Republican voters craved.¹⁵ Nevertheless, the promise was likely enough for

10. See, e.g., ERIC J. SEGALL, ORIGINALISM AS FAITH xiv–xv (2018).

11. It may be that certainty of outcomes is an undesirable trait from a societal perspective. However, from the perspective of political parties, certainty in judicial outcomes is a positive trait—one that can be presented to voters. Metrics that add to certainty are therefore a private good.

12. See *Transcript of the Second Debate*, N.Y. TIMES (Oct. 10, 2016), http://www.nytimes.com/2016/10/10/us/politics/transcript-second-debate.html?_r=0.

13. It is worth pointing out as a preliminary matter that it is unlikely that any judge could long avoid rendering a judgment that would irritate the constituency that either elected the judge or elected the politician that appointed the judge. As stated by Justice Neil Gorsuch, “A judge who likes every outcome he reaches is very likely a bad judge, stretching for results he prefers rather than those the law demands.” *Full Transcript and Video: Trump Picks Neil Gorsuch for Supreme Court*, N.Y. TIMES (Jan. 31, 2017), <https://nyti.ms/2jTtSzu>.

14. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). But see Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/> (“I described myself as [a faint-hearted originalist] a long time ago. I repudiate that.”).

15. Scalia’s dalliances from the past were likely overshadowed in the minds of conservative voters by the more salient perceived betrayal by Chief Justice John Roberts in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), in which the Chief voted to uphold the Patient Protection and Affordable Care Act as constitutional, even after finding that the Interstate Commerce Clause did not grant Congress the power to mandate that individuals purchase health insurance. In the presidential election of 2008, Republican nominee John McCain promised voters that Chief Justice Roberts and Justice Alito “would serve as the model for [his] own nominees.” Juliet Eilperin, *McCain Says He Would Put Conservatives on Supreme Court*, WASH. POST (May 7, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/06/AR2008050602527.html>. In the presidential election of 2012, Republican nominee Mitt Romney promised to appoint Justices “in the mold of Chief Justice Roberts and Justices Scalia, Thomas, and Alito.” Eric Ostermeier, *What Does Mitt Romney Think About Chief Justice John Roberts?*, SMART POLITICS (June 28, 2012) (questioning whether Roberts would remain on Republican candidates’ list of exemplars after his opinion in *NFIB v. Sebelius*). Most other Republican hopefuls had made similar pledges earlier in the primaries. See *id.* (pointing to similar statements by Newt Gingrich, Michele Bachmann, and Jon Huntsman). By the time 2016 rolled around, Roberts’s name had disappeared from the list of Republican judicial exemplars. This was almost certainly due in part to the salience of Scalia’s recent passing but also in part the result of Roberts’s perceived betrayal.

Trump to gain the support of the conservative base and gain the electoral victory he sought.

Once installed as President, Trump moved quickly to fill the seat vacated by Scalia, who had passed away nearly a year earlier on February 13, 2016. He did so by elevating Judge Neil Gorsuch from the Tenth Circuit to the Supreme Court. Justice Gorsuch was confirmed by the Senate on April 7, 2017. A year later, Trump nominated Judge Brett Kavanaugh, then sitting on the D.C. Circuit, to fill the seat vacated when Justice Anthony Kennedy retired on July 31, 2018. After a bruising confirmation battle, Justice Kavanaugh was confirmed by the Senate on October 6, 2018.

In elevating these two judges to seats on the United States Supreme Court, did President Trump fulfill his pledge to nominate individuals who are like the late Justice Scalia? How would we know? By what criteria would we judge? Do we have any concrete metrics?

It is impossible to know what Trump's personal intent was or what each individual voter understood the promise to mean, but Scalia was known for a number of things: his originalism,¹⁶ his textualism,¹⁷ his generally conservative leanings, and his sometimes-acerbic writing style. There are also any number of more negative terms that opponents might use to describe Scalia,¹⁸ but since Trump was using the promise as a way of generating support amongst Republicans, it is unlikely his intent was to channel Scalia's negative reputation.

There are a number of commonly referenced indices for measuring the political leanings of judges, based largely on a perceived left-right political spectrum. Those metrics can be helpful in certain circumstances but are largely useless when attempting to measure whether a judge is, like Scalia, someone who purported to value process as much as—or more than—outcomes. Even in circumstances where political leanings are helpful, we can certainly do better than judging judges based solely on outcomes.

The process of judging is far more complicated than the application of political preferences to factual scenarios. Some judges certainly operate in such simplistic fashion, but others do not, and those that do may be far more

16. Scalia had a particular interpretive method in mind when he spoke of originalism, but his influence has changed the way that many view that method, leading some to claim that "we are all originalists now." See ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011). *But see* James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1788–89 (2013) (arguing that "old originalism" inappropriately excludes other sources of constitutional understanding).

17. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

18. See, e.g., Barney Frank, *Justice Scalia Is a Homophobe*, POLITICO MAG. (June 26, 2015), <https://www.politico.com/magazine/story/2015/06/justice-scalia-gay-marriage-ruling-119480>; Julianne Malveaux, *Supreme Court Justice Antonin Scalia Defends Racism from the Bench*, BLACK PRESS USA (Dec. 18, 2015), <https://www.blackpressusa.com/supreme-court-justice-antonin-scalia-defends-racism-from-the-bench/>.

likely to diverge in a particular case because their interpretation of political necessities may be unique. In a world with high levels of computing power, greater access to data, and improved analytical techniques, better metrics are possible and should be developed.

This Essay will use the nominations of Justices Gorsuch and Kavanaugh to present two advances in judicial nomination metrics. The first of these metrics, designed to test the “Scalia-ness” of those on Trump’s short list,¹⁹ illustrates how the prior decisions of sitting judges can be used to define their judicial methodology far more precisely than before. The second, which combines two current modes of thought in judicial metrics,²⁰ illustrates how creative composites of existing metrics can lead to greater understanding. These metrics are not the destination but merely signposts on the path to better measurement of potential judicial nominees, whatever the relevant characteristics to be measured.

I. INNOVATIVE METRICS

The first type of metric that should be pursued is that which makes use of available data in new and innovative ways. In many areas of our lives, data has improved our understanding of the world around us. Technology companies aggregate the data they collect from us and use that information to offer us products and services that we likely did not realize would make our lives better. That same innovative spirit should motivate our search for metrics that will help us better understand those who are being considered for influential positions like federal judgeships or, most importantly, seats on the United States Supreme Court.

A. *Measuring Scalia-ness*

An example of this kind of metric was developed to test how much like the late Justice Antonin Scalia were the individuals proposed by then-candidate Donald Trump when he promised to nominate someone like Scalia to fill the late Justice’s seat. At first blush, it seems fanciful to presume to measure whether President Trump’s nominees meet that criteria, but a little creativity can go a long way when developing metrics. The process itself is

19. *See generally* Jeremy Kidd et al., Searching for Scalia: Measuring the “Scalia-ness” of the Next Potential Member of the U.S. Supreme Court (Jan. 27, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2874794>; Jeremy Kidd & Ryan D. Walters, Searching for Scalia in 2018: Measuring the “Scalia-ness” of President Trump’s Supreme Court Shortlist (Jan. 12, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3100298>.

20. *See generally* Jeremy Kidd, How Conservative Will President Trump’s Next Supreme Court Nominee Be?: A Short Empirical Investigation (July 6, 2018) (unpublished manuscript), <https://ssrn.com/abstract=3209602>.

quite simple: first, identify what factors are to be measured; and second, identify data that can reasonably approximate those factors. Complications may arise at either step, depending on the nature of the factors to be measured and the state of the data.

In the case of measuring “Scalia-ness,” step one required identifying those characteristics that differentiated Justice Scalia as a jurist.²¹ Of the many things that made Scalia a recognized figure in the legal arena, three of the most prominent were his originalism, his textualism, and his willingness to write separately.²² Kidd et al. conducted a first-of-its-kind analysis of candidate Trump’s short list, generating new metrics for each of these Scalia qualities.

1. *Originalism*

First, the study measured how potential nominees promoted originalism in their judicial writings.²³ This meant, of course, that not every individual on Trump’s list was tested, as Senator Mike Lee had never been a sitting judge and therefore had no judicial writings.²⁴ Many consider Senator Lee to be within the broad originalist camp; not testing him simplifies the analysis but imposes a cost of some reduced validity on the results. Likewise, not all the judges on the short list would have had the same freedom to espouse originalism in their opinions. State supreme court justices would be free to espouse originalist interpretations of their state constitutions, but lower federal court judges might feel more constrained by existing Supreme Court precedent and be uncomfortable offering what might be viewed as an originalist critique of that precedent.²⁵

This illustrates one difficulty that can arise when constructing metrics for measuring judicial nominations: the more diverse the background of potential nominees, the more difficult it will be to derive a single metric for judging relevant characteristics. This does not mean that the task is impossible but merely that it is more complex.

Kidd et al. identified every case in which the judge had either “discussed originalism positively, encouraged the use of originalism, or engaged in

21. See Kidd et al., *supra* note 19, at 2.

22. *Id.* at 3–5.

23. See *id.* at 5–7.

24. *Id.* at 2. Others were not included because the authors believed their age to be disqualifying. *Id.* at 2–3. As distasteful as that sounds, the political realities of judicial nominations to the Supreme Court mean that those over the age of 60 are unlikely to be selected, since their age would limit their longevity on the court. Similarly, the authors did not analyze any federal district court judges, both because elevation from a district court is highly unlikely and also because one of the metrics used—willingness to write separately—is inapplicable to district court judges, who act alone. See *id.* at 2.

25. Nothing in the strict judicial hierarchy would prohibit an originalist discussion in dicta, of course, but the lack of regular originalist discussion might be more a signal of a judge’s respect for decorum and informal norms than a statement about the judge’s lack of dedication to originalism. Were the judge on the Supreme Court, however, he would be able to espouse originalism more freely.

originalist analysis.”²⁶ The intent was to capture every case in which *originalism*, *originalist*, and any variation on the term *original* were used in the same sentence as a variation on *meaning* and *understood*.²⁷ Each opinion was then visually scrutinized to make sure that the opinion was, in fact, about originalism.²⁸ Finally, each judge was given a score based on the percentage of opinions in which originalism played a role.

2. Textualism

Next, the study attempted to identify how closely the short-listers adhered to a textualist methodology for interpreting statutes and the Constitution.²⁹ Scalia believed that actual text was to be given primacy over the intent of the author in determining what the law means.³⁰ In his opinions, Scalia stressed that point and regularly relied on the various canons of construction, which complicates the search for a metric that will represent Scalian textualism. It is important to focus on textualism as practiced by Scalia because textualism as an interpretive methodology spans a broad spectrum. For example, philosopher Ronald Dworkin shares the title of “textualist” with Scalia,³¹ but few Scalia supporters would be satisfied with someone like Dworkin on the Supreme Court.

Kidd et al. chose to measure the short-listers’ textualism by identifying how often they cite to Scalia’s nonjudicial writings. Doing so avoids some double counting with the originalism metric because Scalia’s nonjudicial writings are typically not about legal substance (what particular clauses of the Constitution mean, for example) but about the method jurists should use to determine that meaning. This metric could be underinclusive in that judges might prefer to cite to judicial precedent, but it might also avoid overinclusiveness. For example, the nonprecedential nature of Scalia’s nonjudicial writings means that any citation will be a purely affirmative choice by the judge rather than an obligatory reference to binding precedent, thereby more accurately measuring the judge’s true textualist preferences (or lack thereof).

26. *Id.* at 3 n.7.

27. *Id.* The precise search threads were as follows: “(1) ORIGINALIS! (2) ORIGINAL! /S MEAN! (3) ORIGINAL! /S UNDERST!”

28. *Id.* The results were also scrutinized to make sure they were not just in a common document (as when another judge had used the relevant terms in a separate opinion, concurrence, or dissent).

29. *See id.* at 4.

30. SCALIA, *supra* note 17, at 17 (“[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”).

31. *See id.* at 118 (noting Dworkin’s comment, “[Scalia and I] agree on the importance of the distinction . . . between the question of what a legislature intended to say in the laws it enacted . . . and the question of what the various legislators as individuals expected or hoped the consequences of those laws would be . . .”).

3. *Willingness to write separately*

Justice Scalia was well-known for being willing to write separately, a characteristic that could be attributed to his dedication not only to outcomes but also to the legal reasoning behind his decisions. Kidd et al. noted that, between 1995 and 2004, Scalia wrote separately in 25.9% of the cases where he was not assigned the majority opinion.³² Whether in concurrence or dissent, Scalia would often describe the errors committed by the majority in reaching its decision in what might be described as “judicial chutzpah” or, by his opponents, as an unnecessary and inappropriately acerbic style. Regardless, this willingness to write separately to detail what the “correct” legal reasoning should look like was a defining characteristic of the late Justice.

Kidd et al. therefore measured how willing short-listers were to write separately, measured by the percentage of reported cases where the judge was involved in which the judge wrote separately.³³ For judges on state supreme courts and the U.S. Court of Appeals for the Armed Forces, where all cases are heard en banc, the denominator includes all reported cases;³⁴ for federal circuit court judges, it includes all reported cases where the judge was on the panel. In both cases, generating the numerator required identifying all opinions written by the judge and subtracting off those where the judge wrote the majority opinion.³⁵

4. *Putting it all together*

Each of the three measures raises potential concerns, such as the combination of under- and over-inclusiveness, the difficulty in measuring short-listers who come to the position from vastly different circumstances, and—most importantly—the inability to derive a score for all short-listers on all three measures.³⁶ Similarly, because there is no objective score for Justice Scalia, the measures cannot be interpreted as absolute measures of Scalia-ness but merely as comparisons against the other candidates. Finally, the process of aggregating the scores for originalism, textualism, and willingness to write separately can easily raise points of dispute regarding the weight to give each

32. Kidd et al., *supra* note 19, at 4 n.10.

33. *See id.* at 8–9.

34. As noted by the authors, the measure might overestimate the denominator because it could include cases where the judge was recused or cases that were reported after the judge was seated but argued before that date. *See id.* at 5 n.11.

35. *Id.*

36. *See id.* at 5 n.11, 15–16.

factor,³⁷ as well as whether the factors are comparable enough to be aggregated.³⁸

On this final point, Kidd et al. standardized each factor by transforming each candidate's score into a z-score³⁹ and offer two alternative weighting schemes.⁴⁰ In the first, the three factors are weighted equally, and in the second, originalism is weighted far more heavily, at 60% of the total score.⁴¹ The authors stress that there is no weighting scheme that should be given a presumption of superiority but that the appropriate weighting will be in the eye of the beholder.⁴²

These and other potential concerns are properly viewed as building blocks for future development of similar metrics if it matters that we know more about judicial nominees. Given the increasing importance of the judiciary in establishing legal rules, critiquing cultural norms, and preserving individual rights, it should be viewed as a matter of utmost concern, and the task of developing better metrics should be taken seriously.

5. *How did Gorsuch do?*

Prior to his elevation to the Court, Neil Gorsuch was profiled by many news organizations—as is only proper—and was cast as a conservative “[s]traight out of central casting.”⁴³ Many believed that a Justice Gorsuch would be very similar to Justice Scalia, if elevated.⁴⁴ The analysis conducted by Kidd et al. concluded that, of the fifteen judges evaluated, Gorsuch was likely to be the second or third most Scalia-like.⁴⁵

On the originalism scale, Gorsuch scored higher than all but Justice Thomas Lee of the Utah Supreme Court.⁴⁶ Lee used the language of original-

37. *Id.* at 10.

38. *See id.* at 9–10.

39. Z-scores show how many standard deviations a particular number is from the mean of that particular sample. A z-score of 0 would represent a score precisely at the mean of the sample, while positive z-scores represent higher-than-average numbers and negative z-scores represent less-than-average numbers. Z-scores above 2.0 or below -2.0 are rare, representing numbers below the 2nd percentile or above the 98th percentile. *See, e.g.*, Demetris Athienitis, University of Florida, Standard Normal Probabilities, <http://www.stat.ufl.edu/~athienit/Tables/Ztable.pdf> (last visited Jan. 10, 2019).

40. *See* Kidd et al., *supra* note 19, at 10.

41. In the “unequal weights” index, citation to Scalia’s nonjudicial writings was weighted at 30% and willingness to write separately at 10%. *Id.*

42. *See id.*

43. Richard Wolf, *Who Is Neil Gorsuch? A Guide to the Supreme Court Nominee*, USA TODAY (Mar. 20, 2017), <https://www.usatoday.com/story/news/politics/2017/03/20/who-is-neil-gorsuch-supreme-court-nominee/99392876/>.

44. *See, e.g.*, Audrey Taylor & Geneva Sands, *Judge Neil Gorsuch: What You Need to Know About the Next SCOTUS Justice*, ABC NEWS (Apr. 7, 2017) (citing Professor Jonathan Turley), <https://abcnews.go.com/Politics/judge-neil-gorsuch-scotus-nominee/story?id=45008516>.

45. *See* Kidd et al., *supra* note 19, at 11.

46. *Id.* at 7.

ism in 5.33% of his opinions, while Gorsuch used the language of originalism in 2.55%.⁴⁷ Given that state supreme court justices are more free to discuss originalism in connection with their state constitutions, and that a federal appellate judge, like Gorsuch, might have less opportunity to do so, Gorsuch's placement indicates a strong likelihood that he would be a voice for originalism on the Court.

It is worth noting that, of the fifteen judges scrutinized, nine had never used the language of originalism,⁴⁸ even though they were offered as being in the mold of Scalia—the country's most well-known originalist. Judge Diane Sykes, the only short-lister to have sat on a state supreme court and a federal appellate court, used the language of originalism in a small fraction of the federal opinions she authored but never used it while sitting on the Wisconsin Supreme Court, where she would have had more freedom to do so.⁴⁹

On the textualism scale, Gorsuch did not score as highly, citing Scalia's nonjudicial writings in only 0.85% of his opinions, good enough for sixth place out of the possible candidates.⁵⁰ This contrasts with 5.64% of the opinions written by Judge William Pryor of the Eleventh Circuit, and 5.33% of the opinions written by Justice Lee.⁵¹ Once again, six of the fifteen never cited to Scalia's nonjudicial writings, although it is possible for a judge to apply Scalian textualism without ever citing to Scalia's writings.

On the short-listers' willingness to write separately, Gorsuch was in tenth place and below the mean with a score of 5.3%.⁵² Those at the top of the rankings in this category were Judge Margaret Ryan of the U.S. Court of Appeals for the Armed Forces, Justice Allison Eid, then of the Colorado Supreme Court, and Justice Lee of the Utah Supreme Court, with scores of 17.6%, 16.4%, and 15.8%, respectively.⁵³ The lowest was Justice Blackwell of the Georgia Supreme Court, who wrote separately only 0.6% of the time.⁵⁴ This wider disparity might be the result of a difference in intellectual diversity on the various courts. A jurist sitting on a court with other jurists who think in similar terms might be less inclined to write separately, while judges who write separately on a more frequent basis might be intellectual outliers relative to their colleagues.

After standardization of the scores and creation of an index out of the three measures, Gorsuch scored fourth on the equal-weights index and sec-

47. *Id.*

48. *See id.*

49. *See id.* at 21.

50. *Id.* at 8.

51. *See id.*

52. *See id.* at 9.

53. *See id.*

54. *See id.*

ond on the unequal-weights index.⁵⁵ His originalism z-score was quite high, but that was balanced out by negative scores for the other two measures, leaving him with an equal-weights index score of 0.27 and an unequal-weights index score of 0.74.⁵⁶ Interestingly, although Gorsuch ranked well in the analysis, he was not that much of an outlier in terms of his propensity to be a Scalia-like justice. Given the importance that the Republican base appears to have placed on replacing Scalia, and given the fact that over half of the field of candidates exhibited zero evidence of originalism—perhaps Justice Scalia’s most recognizable trait—Republicans perhaps should have been more concerned about whether any of the potential nominees could be trusted to replace Scalia.⁵⁷

How do these results compare with other measures available at the time? In one analysis, researchers compared sitting Justices and Scalia with the possible nominees to identify where on the ideological spectrum, and in proximity to which sitting Justices, each potential nominee would fall.⁵⁸ For the Justices, the authors used Martin-Quinn scores,⁵⁹ which are meant to identify the policy preferences of the Justices as a predictor of whether they will vote for the “conservative” or “liberal” outcome in any given case.⁶⁰ For the potential nominees who were sitting federal judges, the authors assigned the ideology scores of their home-state senator or senators, or of the President, based on a simple algorithm.⁶¹ Gorsuch was predicted to be more conservative than Scalia, at the same level as Judges Kethledge, Sykes, and Ryan, and less conservative than Justices Lee and Eid.⁶²

In another study, the researchers analyzed the set of Tenth Circuit opinions that were reviewed by the Supreme Court and coded the voting decisions of Gorsuch, Scalia, and the sitting Justices in each of those cases.⁶³ Measured in that way, the analysis predicted that Gorsuch would be significantly more conservative than Scalia, or even Justice Thomas.⁶⁴

Both studies based on ideology—rather than process—predicted a Justice Gorsuch that would be more conservative than Justice Scalia. Kidd et al., by

55. *See id.* at 11.

56. *Id.*

57. Justice Lee was a positive outlier, scoring above 2.0 in both indices, *see id.*, but there is no evidence that he was ever seriously considered for the position.

58. *See generally* Lee Epstein et al., *President-Elect Trump and His Possible Justices* (Dec. 15, 2016) (unpublished manuscript), <http://epstein.wustl.edu/research/PossibleTrumpJustices.pdf>.

59. *Id.* at 1; *see* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 *POL. ANALYSIS* 134 (2002).

60. *See* Martin & Quinn, *supra* note 59, at 134–35, 139.

61. Epstein et al., *supra* note 58, at 2.

62. *See id.* at 8.

63. Ryan C. Black & Ryan J. Owens, *Estimating the Policy Preferences of Judge Neil M. Gorsuch 1* (Feb. 10, 2017) (unpublished manuscript), <https://ssrn.com/abstract=2915233>.

64. *Id.* at 2–3.

contrast, predicted merely that Gorsuch was *relatively* more likely to resemble Scalia than most of the other potential nominees. Recall, however, that almost no one in the pool exhibited strong resemblance to Scalia, so there was little reason, based on process, to expect Justice Gorsuch to be a radical conservative. After Gorsuch's first term on the Court, researchers estimated his Martin-Quinn score to be 1.344—conservative to be sure, but less than Scalia's last score (1.577) and significantly less conservative than Justice Thomas.⁶⁵ One term is hardly sufficient to make long-term judgments about Gorsuch, but at least in this case, ideology-based predictions seem to have fared poorly.

B. *Scalia-ness redux*

By the time Justice Kennedy announced his retirement, additional names had been added to the Trump short list of potential nominees. Most notably, Judge Brett Kavanaugh made his appearance. To be certain, many had argued that he deserved to be considered as a replacement for Scalia,⁶⁶ but his later inclusion was a cause for celebration in some quarters and concern in others, even among conservatives who viewed Kavanaugh as insufficiently committed to conservative principles.⁶⁷

Uncertainty regarding what a Justice Kavanaugh would look like motivated a number of empirical analyses. This increased consideration of empirical metrics is a positive development, yet most emphasized ideology rather than process, which continues to yield a relative lack of precision. In one study, Kavanaugh's voting record on the D.C. Circuit was compared to that of his colleagues, with researchers coding his opinions in criminal, environmental, labor, and employment discrimination law and finding Kavanaugh to be the most conservative judge tested.⁶⁸ Interestingly, however, the researchers also found Chief Justice Roberts's record on the D.C. Circuit to be on the conservative extreme,⁶⁹ a characterization that many conservatives would likely find puzzling.

In another empirical study, described as a “deep, data-driven survey” of Kavanaugh's judicial writings, Kavanaugh was found to be “radically conservative.”⁷⁰ Specifically, he was found to dissent more “along partisan lines

65. See Oliver Roeder, *Just How Conservative Was Neil Gorsuch's First Term?*, FIVETHIRTYEIGHT (July 25, 2017), <https://fivethirtyeight.com/features/just-how-conservative-was-neil-gorsuchs-first-term/>.

66. See, e.g., John G. Malcolm, *The Trump List of Possible Justices Is Great, but Two Names Are Missing*, NAT'L REV. (Nov. 21, 2016), <https://www.nationalreview.com/corner/supreme-court-nominees-paul-clement-brett-kavanaugh-donald-trump-new-york-times/>.

67. Ed Kilgore, *Kavanaugh Remains SCOTUS Front-Runner Despite Right-Wing Backlash*, N.Y. MAG. (July 5, 2018), <http://nymag.com/intelligencer/2018/07/kavanaughs-supreme-court-bid-gets-conservative-push-back.html?gtm=bottom>m=bottom>.

68. See, e.g., Cope & Fischman, *supra* note 2.

69. *Id.*

70. Ash & Chen, *supra* note 2.

than his peers,” to “justif[y] his decisions with conservative doctrines,” to “invok[e] the original articles of the Constitution,” to “us[e] the language of economics and free markets,” and to do all of this more during campaign season.⁷¹ A separate analysis concluded that, given the politics of the President who appointed Kavanaugh—George W. Bush—Kavanaugh would be more conservative than Justices Alito and Gorsuch, and only marginally less conservative than Justice Thomas.⁷² These ideology-driven metrics continue to dominate the debate, although there is some movement to improve and refine the ways in which we measure ideology, such as using the political leanings of clerks,⁷³ political contributions by judges,⁷⁴ the language used by judges in their opinions,⁷⁵ or evaluations of judges by lawyers in their courtrooms.⁷⁶

Unfortunately, there is only limited work being done on process-driven metrics, but hopefully this Essay can encourage greater work in this area. One such study was a revisiting of the earlier Scalia-ness research by Kidd and Walters.⁷⁷ Some of the weaknesses of the earlier research were not addressed—the inability to apply the chosen metrics to all of the short-listers, as the most obvious. But the Scalia-ness index was modified in a number of ways. Two of the original three measures—textualism and willingness to write separately—were maintained, but the measure for originalism was refined and improved.⁷⁸ Three additional factors were also added to the analysis, each intended to measure other characteristics that defined Scalia. These additional factors were: (1) a ghostwriting analysis; (2) number of years as a law professor; and (3) percentage of life lived outside the D.C. area.⁷⁹ In order to facilitate public understanding of the results, the authors included an analysis of the lower court records of Chief Justice Roberts and Justices Alito, Sotomayor, and Gorsuch,⁸⁰ and transformed the results into IQ and income scores.⁸¹

1. *Originalism*

To measure how willing each potential nominee was to engage the language of originalism, a search was conducted of all opinions written by the

71. *Id.*

72. *See* Roeder & Thomson-DeVeaux, *supra* note 2.

73. *See* Adam Bonica et al., *Measuring Judicial Ideology Using Law Clerk Hiring*, 19 AM. L. & ECON. REV. 129, 130 (2017).

74. *See, e.g.*, Adam Bonica & Maya Sen, *A Common-Space Scaling of the American Judiciary and Legal Profession*, 25 POL. ANALYSIS 114, 115 (2017).

75. *See* Ash & Chen, *supra* note 2.

76. *See* Roeder & Thomson-DeVeaux, *supra* note 2.

77. *See generally* Kidd & Walters, *supra* note 19.

78. *See id.* at 6–7.

79. *Id.* at 10–12.

80. *Id.* at 5.

81. *Id.* at 20.

judge. The search terms were expanded and refined to capture references to the founding of the nation and the Framers.⁸² In order to capture the judge's commitment to originalism, opinions where there was only a passing reference to originalism were excluded, leaving only those opinions where originalism was actively defended or promoted.⁸³

Each judge received a score for how frequently the language of originalism was utilized, measured as a percentage of total opinions by the judge.⁸⁴ Each originalist opinion was also measured by word count to give credit to those judges willing to engage in in-depth originalist analysis.⁸⁵ The two originalist measures—frequency and depth—were then combined into a single measure for originalism.⁸⁶

2. *Textualism*

The textualism metric was largely maintained as presented in the first iteration of the Scalia-ness index. The one modification was to include potential nominees' citations to Scalia's separate opinions in addition to citations to his nonjudicial writings.⁸⁷ Kidd and Walters note the emergence of new metrics for measuring textualism, such as that conducted by Adam Feldman.⁸⁸ Dr. Feldman searches for certain textualist terms, such as *plain meaning*, *plain text*, *plain language*, and *ordinary meaning*.⁸⁹ This analysis concludes that Justices Sotomayor and Scalia were equally textualist;⁹⁰ given the potentially broad definition of the term, Feldman's method may be appropriate for some analyses, but would not appear to be useful for measuring Scalian textualism.

3. *Writing separately*

The metric for writing separately was also slightly modified. A raw percentage was calculated, as had been done in their earlier work, but Kidd and Walters also calculated an adjusted score based on the expected number of

82. See *id.* at 6 n.14. After narrowing opinions to just those written by the judge, the following search string was used: "(1) ORIGINAL! /S MEAN! (2) ORIGINAL! /S UNDERST!. (3) ORIGINAL! /S INTEN! (4) FRAMERS (5) FRAMED (6) FOUNDERS (7) FOUNDING." *Id.* Each case thus selected was also visually inspected to verify its correct inclusion.

83. *Id.* at 6 n.16.

84. *Id.* at 6.

85. *Id.*

86. *Id.*

87. *Id.* at 7.

88. See Adam Feldman, *A New Era in SCOTUS Textualism*, EMPIRICAL SCOTUS (Jan. 3, 2018), <https://empiriscotus.com/2018/01/03/scotus-textualism/>.

89. *Id.*

90. *Id.*

separate opinions for each judge.⁹¹ Doing so accounts for the fact that a judge might appear to write more separate opinions merely because her proposed majority opinions were unconvincing. Similarly, a judge might appear to write fewer separate opinions because proposed concurrences or dissents were convincing enough that they became majority opinions. Assuming that most courts share the burden of opinion writing as equally as possible, it is possible to determine an approximate number of majority opinions that each judge will write. If a judge wrote more (or fewer) opinions in a given year than the expected number, the extra (or fewer) opinions were added to (or subtracted from) the number of separate opinions written that year.⁹²

There are potential weaknesses in the adjusted score, such as the possibility that a particular judge might not be assigned an equal portion of opinions—as when a judge is regularly assigned cases that end in per curiam opinions—or when a judge is regularly in the minority of a divided court.⁹³ The authors were not confident in their ability to fully account for those possibilities, so they scored each short-lister by assigning the average of the raw and adjusted scores.⁹⁴

4. *Ghostwriting*

Justice Scalia was known for writing his own opinions.⁹⁵ By all accounts, his clerks worked hard and produced a great deal of work product, but Scalia was known for rewriting opinions, which is why his opinions exhibited a consistent style over the years.⁹⁶ A method developed by Professors Rosenthal and Yoon allows a judge to be scored according to the variability of her writing style in her opinions over time.⁹⁷ A judge who writes her own opinions would have a lower variability, while a judge who relies heavily on clerks would exhibit a much higher variability.⁹⁸ Each short-lister was evaluated using the Rosenthal–Yoon method to determine the level of direct, personal input they had on their opinions.⁹⁹

91. Kidd & Walters, *supra* note 19, at 9.

92. For greater detail, see *id.* at 9–10 nn.25–27.

93. *Id.* at 10 n.28.

94. *Id.* at 9–11.

95. See EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 271 (2005).

96. See Jeffrey S. Rosenthal & Albert H. Yoon, *Judicial Ghostwriting: Authorship on the Supreme Court*, 96 CORNELL L. REV. 1307, 1319 tbl.2 (2011).

97. *Id.* at 1311–12.

98. *Id.*

99. Kidd & Walters, *supra* note 19, at 10–11.

5. *Years as a law professor*

Each potential nominee was also measured by how many years they spent as a law professor.¹⁰⁰ Given the fact that most law professors attend elite law schools,¹⁰¹ this could be seen as a measure of elitism, a characteristic that Scalia could be said to exhibit.¹⁰² Then again, elitism is hardly a characteristic unique to Scalia, given the elite pedigrees of every member of the Supreme Court in recent memory.¹⁰³ Instead, Kidd and Walters offer the measure as a proxy for an “opportunity to think theoretically about the law—a luxury practitioners lack.”¹⁰⁴ There is, to be certain, a difference in the way law professors and practitioners are required to think about the law. The former is rewarded for thinking theoretically, the latter only for practical results. Whether one agrees with the foundational first principles that motivated Scalia’s jurisprudence, it is hard to argue against their influence on Scalia.

One potential drawback of this metric is that many of the short-listers—Judge William Pryor, most notably—have served as adjunct or part-time professors of law at institutions near their chambers. Kidd and Walters exclude this time, largely for standardization, in that “each law school handles adjunct and part-time instruction differently.”¹⁰⁵ Doing so could potentially lower the accuracy of the metric, disadvantaging those that engage in serious instruction of the law, particularly if they also engage in substantive legal scholarship. It is certainly possible to fashion a measure to include part-time or adjunct instruction, but the lack of standardization might then limit the accuracy of the results in other ways.

6. *Percentage of life outside D.C.*

One argument against Scalia being an elitist is that he spent the majority of his life and career outside of the center of national power, Washington,

100. *Id.* at 11.

101. Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 594 (2003).

102. See, e.g., Debra Cassens Weiss, *Justice Scalia Tells Law Student Why She Probably Won’t Be His Law Clerk*, A.B.A. J. (May 12, 2009), http://www.abajournal.com/news/article/justice_scalia_tells_law_student_why_she_wont_be_his_law_clerk/. But see Richard L. Hasen, *Antonin Scalia’s Disruption of the Supreme Court’s Ways Is Here to Stay*, WASH. POST (Feb. 13, 2018), https://www.washingtonpost.com/news/post-everything/wp/2018/02/13/antonin-scalias-disruption-of-the-supreme-courts-ways-is-here-to-stay/?utm_term=.234e3ace2b97.

103. See Jonathan Singer, *The Right’s Elitism on Judges*, HUFFINGTON POST (Jun. 17, 2009), https://www.huffingtonpost.com/jonathan-singer/the-rights-elitism-on-jud_b_204388.html (“[E]ver since Scalia was approved by the Senate in 1986, every single successful nominee to the Supreme Court has had Scalia’s profile as a former federal appellate judge, and five of ten overall nominees (including three nominees either rejected by the Senate or withdrawn by the President) were, like Scalia, sitting on the D.C. Circuit Court of Appeals when nominated.”).

104. Kidd & Walters, *supra* note 19, at 11.

105. *Id.* at 11 n.35.

D.C. The calls of “drain the swamp”¹⁰⁶ indicate that, for many people—almost certainly to include Scalia’s defenders—there is something special and not-quite-positive about the Washington, D.C. metro area. Each potential nominee was scored on the percentage of their life that she had lived outside of that enclave of political power.¹⁰⁷

7. *Putting it all together*

A simple redux of the earlier Scalia-ness index would not have been redundant given the improvements in all three of the original metrics, but the additional metrics also provided a broader spectrum of colors with which to paint a picture of each potential nominee. The question then becomes how to put the pieces together. The particular choice of Kidd and Walters was to construct both a simple index—using only originalism and textualism¹⁰⁸—and a complex index that used all six metrics.¹⁰⁹

Given that textualism is a broader term covering a wider range of jurisprudential methods,¹¹⁰ the authors chose to weight their new originalism metric twice as heavily as textualism in the simple index.¹¹¹ For the complex index, the choice was made to maintain a primary focus on originalism, given a 50% weight, with textualism retaining a similarly prominent role at 25%.¹¹² This also maintained the two-to-one ratio of importance between the simple and complex index. The remaining variables were given lesser weightings, as they were less defining as to Scalia’s jurisprudential identity. Writing separately and ghostwriting were weighted at 7.5% each, and years as a law professor and time spent outside D.C. were given 5% weight apiece.¹¹³

As with the first iteration of the Scalia-ness index, measuring individuals on more than one dimension requires some method of standardization. Z-scores were again calculated for each metric, allowing for better relative comparisons within the sample.¹¹⁴ By including sitting Supreme Court Justices (based on their records as lower court judges), including those on the right and the left, the sample had a broader distribution, which should increase the

106. See Ted Widmer, *Draining the Swamp*, NEW YORKER (Jan. 19, 2017), <https://www.newyorker.com/news/news-desk/draining-the-swamp>.

107. Kidd & Walters, *supra* note 19, at 11–12.

108. See *id.* at 12–13.

109. *Id.* at 13.

110. See Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (“We’re all textualists now.”).

111. See Kidd & Walters, *supra* note 19, at 13.

112. *Id.*

113. *Id.*

114. See *id.* at 22.

validity of the results. After weighting the z-scores, a final aggregate score was obtained for each potential nominee.

In an attempt to facilitate better understanding of the results by a non-technical audience, Kidd and Walters translated the aggregate score into two measures more familiar to lay audiences—IQ and income.¹¹⁵ IQ translations were constructed using the Stanford–Binet version,¹¹⁶ and incomes using 2017 annual U.S. income data.¹¹⁷

8. *How did Kavanaugh do?*

On the simple index, Kavanaugh scored a 0.76, slightly below Gorsuch's 0.79, indicating that the two of them were relatively similar on measures of originalism and textualism as lower court judges.¹¹⁸ If Scalia-ness were IQ, Kavanaugh would have been an intelligent 112, equal with Judge Hardiman but falling below Gorsuch's 113, Judge Don Willett's 114, Judge Pryor's 119, and Justice Lee's 144.¹¹⁹ If Scalia-ness were income, Kavanaugh would have been solidly middle class with \$70,264, below Gorsuch's \$72,354, Willett's \$75,006, Pryor's \$100,001, and Lee's \$680,122.¹²⁰ Kavanaugh would have been smarter and wealthier—in Scalia-ness—than Alito (96 IQ and \$29,542) and Roberts and Sotomayor (both 90 IQ and \$20,060).¹²¹ Given Justice Lee's status as an outlier, Kavanaugh looked adequate-to-good, if not impressive. If Lee is dropped from consideration, however, Kavanaugh looks to be in good company.

On the complex index, Kavanaugh's position changed only slightly, with Judge Hardiman overtaking him in the rankings.¹²² His Scalia-ness IQ drops slightly to 108, and his Scalia-ness income drops to \$58,016.¹²³ Inclusion of the additional variables changed the overall distribution in ways that are worth mentioning, with Chief Justice Roberts falling below Justice Sotomayor in both Scalia-ness IQ (91 for Roberts and 92 for Sotomayor) and income (\$21,380 for Roberts to \$24,000 for Sotomayor).¹²⁴ Justice Lee was also less of an outlier, with his overall index score falling from 2.74 to 2.28.¹²⁵ The reason

115. *Id.*

116. See Rodrigo de la Jara, *IQ Percentile and Rarity Chart*, IQ COMPARISON SITE, <https://www.iqcomparisonsite.com/iqtable.aspx> (last visited Jan. 11, 2019).

117. See PK, *Income Percentile Calculator for 2017 US Data*, DQYDJ (Dec. 25, 2017), <https://dqydj.com/income-percentile-calculator/>.

118. See Kidd & Walters, *supra* note 19, at 23.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 25.

123. *Id.*

124. *Id.*

125. *Id.*

for these changes was that most of the short-listers exhibited virtually no evidence of originalism or textualism but were far more diverse in the ways they shared the other characteristics of Scalia-ness.

As an originalist, Kavanaugh scored well on the percentage of opinions that used the language of originalism, falling just below 4% and just behind Willett and Gorsuch, who were between 4% and 5%.¹²⁶ The next highest was Hardiman, who scored under 2%.¹²⁷ On word count, however, Kavanaugh scored a 496, above Gorsuch (375) and Willett (327) but below Alito (655), Sykes (804), Pryor (823) and far below Hardiman (1,386) and Lee (2,464).¹²⁸

As a textualist, Kavanaugh was in the top group with a score of 2.57%, falling below Pryor (7.19%), Lee (5.03%), Hardiman (2.75%), and Willett (2.59%), but above Gorsuch (1.72%) and Alito (0.30%).¹²⁹ On the willingness to write separately, Kavanaugh was the leader, with a score of over 20% and an average word count of 3,163.¹³⁰ Only Lee was close on percentage score, with just below 20%, and Lee and Hardiman were close on word count with 3,158 and 3,061, respectively.¹³¹ Of particular interest was the strength of Justice Sotomayor on this measure, with a percentage score over 10% and an average word count of 2,664.¹³² While few observers would equate Justices Sotomayor and Scalia, this shows that they were similar in at least one regard.

On ghostwriting, Kavanaugh scored almost precisely in the middle of the pack, exhibiting more variance—and thus indicating a greater reliance on clerks—than Scalia and Gorsuch, but less variance than Roberts, Alito, and Sotomayor during their lower-court days, but also less than Lee, Pryor, Willett, and Hardiman, the other front-runners for top Scalia-ness marks.¹³³ On the last two variables, Kavanaugh suffers in his similarities to Scalia. Having never worked as a full-time law professor he scored a zero, and he also scored lowest of all potential nominees for percentage of his life lived outside the D.C. area.¹³⁴ In one way, this is unfair to Kavanaugh as someone who grew up in the D.C. area, but if “the swamp” is as bad as many Americans seem to believe, then Kavanaugh’s choices to remain within the sphere of “Potomac fever” may signal a divergence from what made Scalia the jurist he became.

126. *Id.* at 15. Lee was an outlier, at almost 8%. *Id.*

127. *Id.*

128. *Id.* at 36.

129. *Id.* at 16.

130. *Id.* at 18, 36.

131. *Id.*

132. *Id.*

133. *Id.* at 19.

134. *Id.* at 21.

C. What's next?

The search for judicial nomination metrics is a recent development. For most of our history, metrics of this type were out of reach, but improvements in computing power have increased the range of possibilities. For those who believe that judicial decisions are nothing more than expressions of political ideology, there are a few passable metrics. For those who believe that judicial decisions are—or at least should be—governed by process that transcends purely partisan motives, there have been very few attempts. And yet, the incentives for treating judicial decision-making as more than partisan politics would be improved if there were a way of recognizing those judges who exhibited a dedication to that principle. Any other long-term goals for the judiciary will also be easier if metrics for judging progress can be developed.

The measures of Scalia-ness, as mentioned earlier, are designed for a specific purpose: to measure how closely President Trump is adhering to his campaign promise to appoint Justices in the mold of Scalia. These measures are one way of conceptualizing what it means for a judge to be like Scalia, but they are not the only way. Scalia preferred bright-line tests over balancing tests, and a future index could include a metric for that preference. Scalia also exhibited a willingness to jettison precedent, a characteristic that was highly salient during the Kavanaugh confirmation¹³⁵ and which might be measured if the right metric were developed. There could be many other metrics for what it means to be like Scalia; so long as his influence is felt in nominations to the Supreme Court, there will be a need for better metrics of this sort.

Measurement methodologies can also be tweaked and, hopefully, improved. In addition to the changes adopted in revising the Scalia-ness index, for example, the metric for originalism could benefit from an improved understanding of what language is used by known originalists doing originalism. More nuanced use of search terms might be another area for future improvement. In a broader sense, though, the point is not what specific improvements *might* be made, but that the search for better metrics will require a willingness to look for improvements.

More important than the ability to perfectly measure whether Kavanaugh or Gorsuch—or any short-lister for that matter—is a jurisprudential copy of Scalia is an understanding that it is not impossible to have confidence in our

135. See Robert Barnes & Michael Kranish, *Kavanaugh Advised Against Calling Roe v. Wade 'Settled Law' While a White House Lawyer*, WASH. POST (Sept. 6, 2018), https://www.washingtonpost.com/politics/courts_law/kavanaugh-advised-against-calling-roe-v-wade-settled-law-while-a-white-house-lawyer/2018/09/06/f30216dc-b1df-11e8-a20b-5f4f84429666_story.html?utm_term=.d735b5497efd; Randy Barnett, *Two Questions for Donald Trump's Supreme Court Nominees*, WALL ST. J. (Nov. 17, 2016), <http://www.wsj.com/articles/two-questions-for-donald-trumps-supreme-court-nominees-1479342425>; William A. Galston, *Under the Radar: The Supreme Court Decision Brett Kavanaugh Is Most Likely to Overrule*, BROOKINGS: FIXGOV (July 10, 2018), <https://www.brookings.edu/blog/fixgov/2018/07/10/under-the-radar-the-supreme-court-decision-brett-kavanaugh-is-most-likely-to-overrule/>.

ability to measure such abstract principles. In the future, we might want to measure how closely potential nominees adhere to the jurisprudence of Justice Kagan, or Justice Breyer, or any other jurist. For example, we might want to know whether they are empathetic.¹³⁶

If we wish to be able to measure those abstract qualities, we will need to develop metrics. The goals being pursued will determine the nature of the metrics, but irrespective of those goals, there are two ways to think about the evolutionary process. One is the macro-evolutionary path, as we create new metrics that have never been tried. The other is the micro-evolutionary path, as we refine existing metrics, improving their accuracy. The first Scalia-ness index is an example of the macro-evolutionary path, and the second Scalia-ness index demonstrates how micro-evolution in this area takes place, with improvements and refinements allowing a more detailed picture of the potential nominees to emerge.

II. COMPOSITE METRICS

As discussed above, there are a number of existing metrics for judicial ideology, occasionally using the ideology of others, including law clerks.¹³⁷ The most well-established are those that measure judicial ideology by the ideology of those involved in the nomination and confirmation process. For example, it is common to measure federal judges by the ideology of their home-state senators or, potentially, the nominating president.¹³⁸ Given the politics that surround judicial nominations, however, this can be problematic, as exemplified by Justice Sotomayor. She was nominated for the district court by President George H.W. Bush, the Second Circuit by President Bill Clinton, and the Supreme Court by President Barack Obama; anyone wanting to know her judicial ideology would have received a different answer depending on which court she was sitting on, although it seems unlikely that her judicial ideology changed much in those years.¹³⁹

More useful is the Martin-Quinn (MQ) score, which measures Supreme Court Justices according to their votes on various cases, particularly those with ideologically charged subject matter.¹⁴⁰ It presupposes the disputed point that the Justices are concerned with outcomes rather than processes, but it is

136. See, e.g., Peter Slevin, *In Filling Supreme Court Vacancy, Obama Looks for a Jurist with Empathy*, WASH. POST (May 13, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203515.html?noredirect=on>.

137. See Bonica et al., *supra* note 73, and accompanying text.

138. See, e.g., Lee Epstein et al., *The Judicial Common Space*, 23 J.L., ECON. & ORG. 303, 306 (2007); Michael W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 624 (2001).

139. Kidd, *supra* note 20, at 2.

140. See Martin & Quinn, *supra* note 59, at 134.

still a useful measure given that commitment to process can lend consistency to outcomes. Unfortunately, MQ scores cannot be reliably calculated for courts where the entire court does not always sit en banc. The reason is that the composition of individual panels has an effect on the outcome of cases.

For lower courts, scholars have begun using Clerk-Based Ideology (CBI) scores.¹⁴¹ These scores presume that judges hire clerks that think like themselves, a presumption that has been verbalized by judges in the past.¹⁴² CBI scores for Supreme Court Justices also exhibit a significant statistical correlation with the Justices' MQ scores,¹⁴³ and similar results obtain for lower court judges.¹⁴⁴ Unfortunately, the CBI study only analyzed data through the year 2004.

A. Clerk-Based Martin-Quinn scores

One way in which our judicial nomination metrics can be improved is through the use of composites, combining metrics where synergies can be identified. One such composite was generated in connection with Kavanaugh's nomination to the Supreme Court. Of limited scope, it aimed to place potential nominees on an ideological spectrum based on their placement of law clerks in Supreme Court clerkships, doing so for three of the four acknowledged finalists for the nomination.¹⁴⁵ Called the Clerk-Based Martin-Quinn (CBMQ) score, it assigns to each lower court clerk that achieves a Supreme Court clerkship the MQ score of the Justice for whom the clerk worked.¹⁴⁶ The lower court judge's CBMQ score is then the average of her clerk's scores.

There are some potential concerns with this measure. First, it is possible that a judge may not follow the general pattern of hiring law clerks that share the same ideological beliefs. Justice Scalia, for example, had historically hired one law clerk that had opposing views.¹⁴⁷ To the extent a judge takes the path trodden by Scalia, the CBMQ score may not accurately reflect the judge's ideology. Another concern regards the differing levels of success that lower court judges have in placing clerks at the Supreme Court. We can have more confi-

141. See generally Bonica et al., *supra* note 73.

142. *Id.* at 130 (collecting quotes).

143. *Id.* at 142.

144. *Id.* at 145.

145. *Id.* at 130. Judge Amy Coney Barrett, one of the finalists, had been seated on the Seventh Circuit for less than a year and, as a result, none of her clerks had a chance to obtain a Supreme Court clerkship. Others on the short list had sent clerks to the Supreme Court, including Pryor, Colloton, Lee, Ryan, and Sykes. Kidd, *supra* note 20, at 1–2 n.2.

146. Kidd, *supra* note 20, at 5–7.

147. See Soo Youn, *Antonin Scalia: Liberal Clerks Reflect on the Man They Knew and Admired*, GUARDIAN (Feb. 15, 2016), <https://www.theguardian.com/law/2016/feb/15/antonin-scalia-supreme-court-justice-liberal-clerks-reflect>.

dence in the CBMQ score of a judge who has placed more Supreme Court clerks, both in absolute terms—because the number of observations is higher—and also on a percentage basis—because the clerks from whom the score is derived comprise a more complete picture of what type of individual the judge hires as a clerk.

Notwithstanding these concerns, the CBMQ measure exhibits reasonable correlation with other measures of ideology. The first, based on data gathered by Adam Feldman at Empirical SCOTUS,¹⁴⁸ scores D.C. Circuit judges based on ratings given to them by attorneys who argue regularly in front of circuit panels. Of those D.C. Circuit judges, fourteen had placed at least five clerks on the Supreme Court.¹⁴⁹ While not perfectly correlated, there was a strong positive correlation ($r = 0.87$) between the judges' Feldman scores and their CBMQ scores.¹⁵⁰ Likewise, of the sitting Justices, three had sent a sufficient number of clerks to the Supreme Court that a CBMQ could be calculated for the year they were elevated. As shown below, their CBMQ scores are a mixed bag.¹⁵¹

Justice	First-Year MQ Score	CBMQ Score	Difference
Ginsburg	-0.202	-0.127	+0.075
Breyer	-0.306	0.572	+0.878
Gorsuch	1.503	1.128	-0.379

Justice Ginsburg and Justice Breyer turned out to be more liberal than their CBMQ scores would have predicted, while Justice Gorsuch was more conservative than would have been predicted by his CBMQ score.

It is possible that ideologies might not play as strong a role in clerkship decisions as previously believed, at least for some judges. Breyer, while sitting on the First Circuit, sent five clerks—nearly half of his total—to work for Justice Sandra Day O'Connor, which certainly skewed his score towards the conservative side.¹⁵² Ginsburg, while on the D.C. Circuit, also sent a large number to O'Connor, as well as one to Rehnquist and one to Scalia.¹⁵³ Even though her CBMQ score was very close to her first-year MQ score, either she did not exclude clerks based on their ideology or the conservative Justices did

148. Adam Feldman, *The Next Nominee to the Supreme Court*, EMPIRICAL SCOTUS (Dec. 7, 2017), <https://empiricalscotus.com/2017/12/07/the-next-nominee/>.

149. Judges Silberman, Sentelle, Williams, Kavanaugh, Randolph, Ginsburg, Griffith, Brown, Garland, Srinivisan, Rogers, Edwards, Tatel, and Wald.

150. See Kidd, *supra* note 20, at 6.

151. See *id.* at 7.

152. *Id.*

153. *Id.*

not.¹⁵⁴ Gorsuch, likewise, sent two clerks to Justice Kagan and one to Justice Sotomayor while on the Tenth Circuit.¹⁵⁵

Another explanation for the disparity is that the case load for Justices' first years on the Supreme Court may not allow them to exhibit their ideology in full measure. It may be that ideology plays less of a role at the cert stage than it does at the merits stage, and first-year MQ scores are at least partially influenced by case selection. That, combined with the limited input a new Justice would have on case selection during the first term, could limit the reliability of the first-year MQ score.

B. How did Kavanaugh score?

Judge Kavanaugh sent a total of thirty-five clerks to the Supreme Court over his time on the D.C. Circuit.¹⁵⁶ Almost a third of those clerks worked for Chief Justice Roberts, but the remainder were scattered across most of the remaining Justices.¹⁵⁷ Only Justices Ginsburg and Souter never employed a prior Kavanaugh clerk.¹⁵⁸ Kavanaugh's CBMQ score was a moderately conservative 0.721.¹⁵⁹ This was less conservative than the other two short-listers who were scored, Judges Kethledge and Thapar, both on the Sixth Circuit, who scored 1.089 and 1.124, respectively.

When compared with the MQ scores of other current and recent-past Justices, Kavanaugh's CBMQ score would have made him more conservative than Roberts, O'Connor, and Kennedy, but less conservative than Chief Justice Rehnquist, Alito, Gorsuch, Scalia, and Thomas.¹⁶⁰ Kethledge and Thapar would have been located in the same range as Kavanaugh,¹⁶¹ though the lower number of observations for each means we cannot have the same confidence in either score—they could be more conservative or more liberal.

When compared with the first-year MQ scores (the score that the CBMQ is most likely to predict) for current or recent-past Justices, Kavanaugh's 0.721 makes him the least conservative Justice to be nominated by a Republican since Justice Stevens.¹⁶²

154. *Id.*

155. *Id.*

156. *Id.* at 9.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 10.

161. *Id.*

162. *Id.* at 11.

Justice	1st Yr. MQ Score or CBMQ Score
Rehnquist	3.634
Thomas	2.756
O'Connor	1.563
Gorsuch	1.503
Scalia	1.424
Alito	1.408
Roberts	1.381
Kennedy	1.196
Thapar	1.124
Kethledge	1.089
Souter	1.001
Kavanaugh	0.721
Stevens	0.089

Given the trend for Republican-nominated Justices to shift to the left once on the Court,¹⁶³ his CBMQ score gives some solace to those worried that his confirmation would signal a dramatic shift to the right on the Court.¹⁶⁴ It would, likewise, not bode well for those on the right who hoped that his replacing Kennedy would usher in a new, conservative era on the Court.¹⁶⁵

CONCLUSION

Ultimately, it's not really about Kavanaugh and Gorsuch, or, at least, it's not *just* about Kavanaugh and Gorsuch. Gorsuch's confirmation was not as emotionally charged as the Kavanaugh hearings, partly because the effect was replacing Scalia with a judge that is perceived to be likely to judge in the same way that Scalia did. There would be no "tectonic shifts,"¹⁶⁶ as it were, with Justice Gorsuch instead of Justice Scalia. The spectacle that the Kavanaugh confirmation hearings became were—for better or for worse—merely a symptom of the increased importance of the judiciary in our political system.

When the judiciary was the least dangerous branch,¹⁶⁷ it may not have

163. See *id.* at 12; see also Oliver Roeder, *Supreme Court Justices Get More Liberal as They Get Older*, FIVETHIRTYEIGHT (Oct. 5, 2015), <https://fivethirtyeight.com/features/supreme-court-justices-get-more-liberal-as-they-get-older/>.

164. See, e.g., Philip Bump, *How Brett Kavanaugh Would Shift the Supreme Court to the Right*, WASH. POST (July 10, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/07/10/how-brett-kavanaugh-would-shift-the-supreme-court-to-the-right/>.

165. See, e.g., Mary Kay Linge, *Kavanaugh Confirmation Shifts Supreme Court to the Right*, N.Y. POST (Oct. 6, 2018), <https://nypost.com/2018/10/06/kavanaugh-confirmation-shifts-supreme-court-to-the-right/>.

166. *Id.*

167. THE FEDERALIST NO. 78 (Alexander Hamilton).

mattered who was wearing the robes and sitting behind the bench, so long as they were wise and had integrity. Now that most of our most important political questions are destined to be decided by judges rather than by legislatures or bureaucrats, those who seek political outcomes must care about the political preferences of judges. Similarly, those who see this trend as harmful and wish for less politics in judicial decisions must care about finding judges who see their job as procedural rather than substantive. But how?

The political nature of the nomination process has created strong incentives for judges to exhibit certain characteristics—integrity, decorum, courtesy, intellect, etc.—but to hide anything that might make them a controversial candidate. Being too lenient on crime or immigration might make a more progressive judge unconfirmable, even if those outcomes are constitutionally or legally required. Similarly, a more conservative judge might ruin her chances at confirmation if she is too strict on crime or immigration, even if the law or the Constitution require that outcome. The more controversial the topic, the greater the incentive to obscure the judge's true legal ideology or jurisprudential methodology.

This leaves us in a precarious position, with judges being increasingly powerful but with decision-makers having far less information about what kind of judge the potential nominees will be once confirmed. Judges have no incentive to disclose, even if asked repeatedly—nicely or otherwise—in Senate confirmation hearings, and it would be impossible to know whether private disclosures were truthful.

The only way we escape this particular conundrum is to generate metrics that will let us know more about potential judicial nominees, particularly those things that they will never voluntarily disclose. Not everyone cares about how much like Scalia our nominees are, nor should they; the metrics should fit the goals. Importantly, not only will the development of metrics give us more and better information about potential nominees, but it will also signal to sitting judges that obfuscation is no longer the preferred path to future confirmations. It will lead to more honest judging, which will benefit both society and the judges who no longer need to expend effort to hide their preferences or methodology.

This result will be more likely if a strong, competitive market for metrics can emerge, with a wide variety of interested parties developing and then refining metrics to measure a variety of judicial characteristics. Limited metrics will only strengthen the influence of those groups who have good metrics, and capture of the judiciary could yield disastrous results for the rule of law. If judges are measured on a broad range of characteristics, we will more closely approach transparency in the judiciary, and no special interests will have undue influence. This Essay offers some insights on where the search for metrics can begin and gives examples of new and refined metrics. The metrics

presented here show only a glimpse of what is possible if the importance of this endeavor is taken seriously.