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A Tournament of Virtue

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Solum:



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A Tournament of Virtue

Lawrence B. Solum

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A TOURNAMENT OF VIRTUE^{*}

LAWRENCE B. SOLUM^{**}

I. INTRODUCTION: THE MEASURE OF MERIT

How ought we to select judges? One possibility is that each of us should campaign for the selection of judges who will transform our own values and interests into law. An alternative is to select judges for their possession of the judicial virtues—intelligence, wisdom, courage, and justice. Stephen Choi and Mitu Gulati reject both these options and argue instead for a tournament of judges—the selection of judges on the basis of measurable, objective criteria, which they claim point toward merit and away from patronage and politics.¹ Choi and Gulati have gotten something exactly right: judges should be selected on the basis of merit—we want judges who excellent. But Choi and Gulati have gotten something crucial terribly wrong: the selection of judges on the basis of measurable performance criteria would lead us away from true excellence. A tournament of judges would be won by judges who possess arbitrary luck and the vices of originality and mindless productivity; a tournament of virtue would be lost by those who possess the virtues of justice and wisdom. *The judicial selection process should not be transformed into a game.*

I begin in Part II, “What is Judicial Excellence?,” by tackling the tough problem that Choi and Gulati avoid—the explication of a theory of virtue for judges. In Part III, “Discerning Excellence,” I discuss the question as to how we can tell whether candidates for judicial office are bad, which incompetent, and which are truly excellent. Part IV, “The Mismeasurement of Virtue,” engages the idea of quantitative measures of judicial performance as a proxy for excellence. Finally, Part V, “Conclusion: The

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¹ See Stephen Choi and Mitu Gulati, Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance, <http://ssrn.com/abstract=473281> (visited May 4, 2004) [*hereinafter* Choi & Gulati, *Empirical Ranking*]; Stephen J. Choi & Mitu Gulati, A Tournament of Judges, 92 CAL. L. REV. 299 (2004) [*hereinafter* Choi & Gulati, *Tournament*]; *see also* Stephen Choi and Mitu Gulati, A Tournament of Judges, at <http://ssrn.com/abstract=473281> (visited May 4, 2004).

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Redemption of Spectacular Failure.” I argue that Choi and Gulati’s idea is that rare and valuable thing—an idea that is both completely wrong and wonderfully illuminating. One more thing: Choi and Gulati focus exclusively on the selection of Justices for the United States Supreme Court, whereas my discussion will range a bit more broadly to include the selection of judges for other courts.

II. WHAT IS JUDICIAL EXCELLENCE?

Choi and Gulati largely beg the fundamental question—what is judicial excellence. In this section, I will say a bit about why they beg the question and then attempt to remedy this defect in their work by sketching a theory of judicial excellence.

A. The Problem of Disagreement about Judicial Excellence

It may well be the case that there is wide agreement that we should select excellent judges, but disagreement about just what counts as judicial virtue. The problem of disagreement about judicial excellence is one of the key starting points for Choi and Gulati’s defense of empirical measurement of judicial excellence. So their strategy is to focus on a few criteria about which we can agree and which lend themselves to quantification. As they put the point:

While different visions of merit may exist, some are more widely held than others. Few would quarrel with the claim that a judge who displays productivity, intelligence, and integrity is better than one who does not.²

And Choi and Gulati readily admit that by making this move, their proposal would not provide a ranking of judges on the basis of merit, skill, or excellence. Their ambition is more modest—to do better than the status quo by providing some objective measure of judicial excellence:

Our simple measures do not provide a perfect metric of judging skill. But that is not the standard at which we are shooting. The goal is to demonstrate the availability of a set of objective measures, on which data is easy to collect and analyze, that would do better than the current system to identify at the outset a merit-worthy pool of Supreme Court candidates.³

So far, so good. We have two assumptions. First, there is disagreement about the criteria for judicial excellence, and so we ought to seek judges who possess those aspects of excellence about which there is agreement. Second, of those criteria on which there is widespread agreement, only some lend themselves to quantification, and so a “tournament of judges” should focus on the criteria for judicial excellence that are measurable.

From a normative perspective, what seems quite odd about Choi and Gulati’s development of these ideas is that their analysis seems motivated by the availability of data. That is, Choi and Gulati ask what aspects of judicial performance can we easily

² Choi & Gulati, *Empirical Ranking*, *supra* note 1, at 5.

³ *Id.* at 7.

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measure. Only after the measurability question is answered do they then ask what qualities of good judging are the readily available metrics likely to measure. Of course, as a way of getting started, this method has much to commend itself. If one wants to conduct a tournament of judges, one must work with the data that is available. But getting started is one thing, and serious analysis is another. For us to take Choi and Gulati seriously, their analysis needs to be supplemented by another step—the specification of the actual criteria for judicial excellence. *Why is this step necessary?* In order to determine whether a tournament of judges will improve judicial selection or make it worse, we need to know how the easily measurable aspects of judicial excellence relate to those which are difficult to measure. That relationship is crucial, because there is no *a priori* reason for ruling out the possibility that focusing on the measurable might have the unintended consequence of favoring judges with serious defects. If a tournament of judges were more than just pie in the sky and actually began to influence the judicial selection process, there is the further worry that an emphasis on measurable criteria as the determinants of judicial selection might actually make judges and their decisions worse rather than better. From both the theoretical and pragmatic standpoints, an answer to the fundamental normative question—what makes for excellence in judging—is essential.

B. The Thin Judicial Virtues

Choi and Gulati make an important point when they note that there is disagreement about the qualities that make for good judging. In recent years, judicial selection has largely been driven by the preference of political actors for certain outcomes on key issues (abortion, affirmative action, and so forth), and hence ideology has played a major role in judicial selection.⁴ Nonetheless, it may be possible to identify a set of judicial excellences on which there is likely to be widespread agreement.

What is called for is a thin theory of the judicial virtues. “Thin” in this context reflects the notion that these virtues are based on noncontroversial assumptions about what counts as good judging and on widely accepted beliefs about human nature and social reality. Whereas Choi and Gulati work backwards, from measurability to virtue, we shall work forwards, starting with virtue first. By “virtue,” I mean a dispositional quality of mind or will that is constitutive of human excellence, and the “judicial virtues” include both the human virtues that are relevant to judging and any particular virtues that are associated with the social role of judge.

⁴ With respect to ideology, judicial selection is arguably a zero sum game. That is, pro-choice political actors (especially interest groups that focus on the issue) have little to gain from the appointment of a pro-life judge who possesses other fine qualities. And vice versa: pro-life political actors have little to gain from the appointment of pro-choice judges, even if they have many other virtues. Of course, abortion is not the only issue, but many such issues cluster together, making a simple left-right model of political ideology both useful both analytically and empirically.

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1. Incorruptibility and Judicial Sobriety

If there is disagreement about what qualities make for the most excellent judges, there is widespread consensus on some of the features that make judges truly awful. One judicial vice on which there is likely to be near universal agreement is “corruption.” Judges who sell their votes undermine the substantive goals of the law, because corrupt decisions are at least as likely to be wrong as they are to be substantively correct. Moreover, corrupt decisions undermine the rule of law values of productivity and uniformity of legal decisions and likewise undermine public respect for the law and public acceptance of the law as legitimate.

If corruption is a vice, then incorruptibility is a virtue. We want judges who will be able to resist the temptations of corruption in its many forms, both subtle and blatant. The virtue of incorruptibility summarizes a variety of particular virtues each of which corresponds to a particular human vice that could lead to corruption.

One such vice is graspingness (or *pleonexia*), the defect of wanting more than one deserves. Judges (like the rest of us) can suffer from the human failing of mistaking wealth (which can only be a means) for a final end (a good that is worth pursuing for its own sake). Once this mistake is made, it is all too easy for humans of great talent and ability to become resentful if their income and wealth is not as great as their peers who are less talented. This vice may take on a special poignancy for judges, who frequently forgo the opportunity for large incomes in order to take the bench. The particular virtue of *incorruptibility* is the corrective for the vice of *pleonexia*.

But not all corruption is motivated by the desire for undeserved wealth as a final end. A judge whose desires are not in order—who lacks the virtue of temperance—might become corrupt in order to support the taste for designer shoes, fast cars, loose companions, or intoxicating substances. Or more prosaically, such a judge might want the finer things of life, for example, a magnificent home, the ability to confer lavish gifts upon one’s children, or the opportunity for luxurious travel. Thus, *temperance*, in the classical sense that encompasses the ordering of all the natural desires, is a virtue for judges. We have a saying that captures the intuitive sense that judges must have their desires in order: we say of a temperate human that she or he is “sober as a judge,” and this suggests that we name this virtue “judicial sobriety” (although “judicial temperance” would also capture the sense of this virtue).

2. Civic Courage

Judges are sometimes faced with physical danger, and so, like all humans, they need the virtue of courage. But judges are more frequently faced with a different sort of threat that induces a different kind of fear. Judges are sometimes required to make decisions that are unpopular—that will trigger the disapprobation and even wrath of their fellow citizens in general or the wealthy and the powerful in particular. Judges, like most humans, care for the opinion of their fellows. One wants to be well liked, and to receive the benefits of human sociability that follow from a good reputation. When justice conflicts with the desires and opinions of one’s fellows, this creates a temptation—to act unjustly in order to preserve good opinion. And this temptation is especially dangerous in the case of judges—who are given the power to make decisions

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(sometimes final and binding decisions) as to the rights and obligations of their fellow citizens.

Such judges need the virtue of civic courage—the disposition to put the regard of one’s fellows in proper place and to take it into account in the right way on the right occasions for the right reasons. A judge with this virtue will not be tempted to sacrifice justice on the altar of public opinion. A courageous judge does not see the good opinion of his fellows as a relevant reason in the context of making a judicial decision.

3. Judicial Temperament and Impartiality

Anger is one of the most powerful of human emotions, and a force for both good and evil. Judges frequently find themselves in situations in which a hot temper could produce intemperate actions. *Why is this so?* In an adversary system, conflict is inevitable. Many litigants and attorneys engage in provocative conduct. In part, this is a result of the fact that many humans have what might be called “an anger management problem.” In addition, some lawyers may deliberately provoke the judge in order to elicit legal mistakes or an “on the record” display of animus that might form the basis of an appeal. Moreover, some lawyers and litigants may not show proper deference to and respect for judicial authority and as a consequence may engage in behavior that is properly regarded as insulting. In the face of such provocations, a hot tempered judge may “fly off the handle.” Intemperate judicial behavior may lead the judge to misapply the law—misinterpreting the applicable legal standards in “the heat of anger.” Moreover, a hot-headed judge may become partial—pulling against the party who is the object of anger and displaying favoritism to that party’s opponent.

The corrective for bad temper is the temperateness, and we traditionally call the judicial form of this virtue “judicial temperament,” reflecting the role of judges as paradigms or exemplars of this virtue. This does not mean that excellent judges do not experience anger—they do and they should. Rather, the virtue consists in having appropriate anger—anger for the right reasons on the right occasions with the right consequences. When a party displays disrespect for the judge or for the rules of procedure and evidence, anger may be appropriate. Such appropriate anger alerts the judge to the existence of a “situation that must be dealt with.” In some circumstances, the judge will properly display such anger, giving a lawyer, party, or witness “a stern warning.” When a lawyer, party, or witness persists in bad conduct, sanctions may be warranted; in such cases, an appropriate sanction is the right way to act on the basis of appropriate anger. But judges with the virtue of a judicial temperament will not display their anger by ruling against an offending party on issues that are close or exercising discretion on incidental matters so as to disfavor the anger-provoking party.

Because anger can produce bias, the virtue of judicial temperament is closely related to another judicial virtue, which we might call “judicial impartiality.” Judges need to be impartial, both with respect to the parties that appear before them and as to the causes, movements, special interests, and ideologies that may be associated with those parties. Sometimes this virtue of impartiality is portrayed as cold. The impartial judge, it might be thought, is like Mr. Spock of the original *Star Trek* series. The cold-blooded Mr. Spock was contrasted to the hot-blooded Dr. McCoy. Of these two, it

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might be thought that Mr. Spock is the appropriate role model for a judge. But that is a mistake.

Judges should neither be cold-blooded nor hot-tempered. This is because the role of judge requires insight and understanding into the human condition. The impartial judge is not *indifferent* to the parties that come before her. Rather, the virtue of impartiality requires even-handed sympathy for all the parties to a dispute. When we say, “Impartiality is not indifference,” we mean that the virtue of impartiality requires both sympathy and empathy without taking sides or favoring the legitimate interests of one side over those of the other.

4. Diligence and Carefulness

In systems where judges are given life tenure and a guarantee against diminished compensation (as in the United States federal system), judges may be tempted by the vice of sloth. Slothful or lazy judges are tempted to take the easy way out. Such a judge might delegate too much to judicial clerks, substituting the judgment of the clerk for the judge’s own intellectual engagement with the case. Or such a judge might be tempted to rule in ways that reduce the judge’s workload—choosing the ruling that requires the lesser rather than the greater effort. The slothful judge might also be tempted to put inappropriate pressures on the parties to a dispute to enter into a settlement agreement.

The dangers of judicial sloth are readily apparent. Judicial clerks can provide helpful research, act as a sounding board, and may even be capable of drafting a judicial opinion with guidance, but since clerks are usually hired directly out of law school, they usually lack both the knowledge of the law and the sound practical judgment that is required for good decision making. Overreliance on clerks is likely to lead to poor decisions. When a judge rules so as to avoid work, then there is a real danger that the easy decision will be the wrong decision, working a substantive injustice to one or more of the parties to the dispute. And substantive injustice can also be the result of inappropriate settlement pressures.

The corrective for the vice of judicial sloth is diligence. Ideally, this virtue is reflected in the attitude of the judge towards judicial work. Excellent judges should enjoy their work; they should find judicial tasks engaging and rewarding. This attitude combined with an appropriate “energy level” results in diligence. The diligent judge will be hard working, putting in the required hours and sweating out the difficult tasks. Such a judge will not over-rely on clerks or assistants and will put in the effort required to insure that her decisions and opinions are the product of her own judgment and not the judgment of subordinates.⁵ Such a judge will not hesitate to make the right

⁵ Judging is not a managerial task. Good judges are not expected to hire good clerks and then manage them efficiently. Such delegation may be appropriate for other officials. Executives and even legislators may well deserve praise for delegation of responsibility to others. But judges are expected to exercise sound practical and legal judgment on the issues they are required to decide. Of course, some tasks may be delegated, and research is the paradigm case of proper delegation. Even here, however, diligence may require that the judge actually read the key sources and form her own independent judgment as to their proper interpretation.

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decision, even if that makes more work for the judge. It may well be appropriate for judges to attempt to facilitate settlement, but a diligent judge will not do this for the wrong reason. Aiming for just settlements is one thing; aiming for convenient settlements is another.

Closely related to diligence is carefulness, the corrective for the vice of judicial carelessness. The slothful judge is tempted to cut corners and avoid the burdens of meticulous attention to details. Thus, a slothful judge will be tempted to avoid the unpleasant task of mastering the structure of a complex statute or plunging into the painstaking task of making sense of tangled body of precedent. Likewise, a slothful judge may avoid the labor-intensive enterprise of drafting an opinion in which each and every sentence is worded with careful appreciation of the importance of precision and accuracy. The careful judge must be meticulous, with an eye for detail and devotion to precision.

5. Judicial Intelligence and Learnedness

Humans need intelligence to flourish. Judges in particular need to be able to comprehend complexity in both the law and the facts. “Stupidity” is surely a judicial vice, because unintelligent judges are likely to make decisions that are incorrect. In an adversary system, judicial intelligence plays a particularly important role, because intelligent advocates will try to make “worse case appear the better,” by deploying sophistry and rhetoric. Excellent judges can “see through” such attempts, and hence, can make findings of fact that true (or best supported by the evidence) and conclusions of law that are correct, even in the face of powerful attempts at obfuscation.

Mere intelligence is not sufficient for intellectual excellence in judging. A virtuous judge must be learned as well as smart. This means that good judges must have a good legal education and must immerse themselves in the law, reading widely and deeply in the fields of law that are relevant to their jurisdiction. Whether “the law is a seamless web,” or not, may be controversial, but it seems likely that wide and deep legal knowledge is likely to result in better comprehension of the law and the avoidance of mistakes about what the law actually requires.

6. Craft and Skill

So far, I have been discussing what Aristotle called the moral and intellectual virtues, dispositions of character and mind that make for human excellence. Good judging also requires craft and skill—the particular learned abilities that are to good judging what good bowing technique is to archery or good draftsmanship is to architecture. A treatise on judicial craft and skill could consume volumes and is certainly outside the scope of this Essay. Nonetheless, one particular aspect of judicial craft and skill deserves special comment.

Good judges (and especially good appellate judges) need to be skilled in the use of language. This aspect of judicial craft can be further subdivided. Oral communication is especially important for trial judges, who must deliver a variety of oral instructions to the various participants in both trial and pre-trial proceedings. Among these, jury instructions are particularly important. Written communication is especially important

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for appellate judges in a common law system, because of the doctrine of *stare decisis*. Appellate opinions set precedent, and a badly written opinion can fail to communicate the intended decision in a manner that will provide clear guidance to parties in future litigation. A really well-written opinion, on the other hand, can do tremendous good—illuminating the law where it was murky and settling questions that were up in the air.

Excellence in communication also plays a role when judges act as mediators or negotiators, aiding the resolution of various disputes and conflicts that arise in the course of the litigation process. An effective judge has the knack of gaining the voluntary cooperation of the parties in the common enterprise of dispute resolution, resorting to force and coercion only when a heavy hand is appropriate to the situation. Undoubtedly, there are many other aspects of judicial craft and skill that would be included in a comprehensive account of judicial excellence.

C. The Thick Judicial Virtues

Up to this point, we have been dealing with the thin judicial virtues—those qualities that make for good judges, but which are uncontroversial. Judicial selection is a task for practical politics. We cannot, *a priori*, rule out the possibility that an adequate account of judicial selection will require that we move beyond the zone of easy agreement and into disputed territory. That is, we must consider the possibility that we need to move beyond a thin theory of judicial virtue and examine the implications of a thick theory.

In this Section, I will lay out the case for two thick judicial virtues. The first of these is justice; the second is practical wisdom. Although these virtues may be the subject of *wide agreement*, they push beyond the boundaries of the uncontroversial. Moreover, the justice and practical wisdom are likely to win assent at a fairly high level of abstraction. When these virtues are applied to particular cases, ambiguities in their abstract formulation are likely to be exposed and hence judgments about their contours are likely to diverge. There may be widespread agreement on the concept of justice or the concept of practical reasons, but particular conceptions of these virtues will provoke disagreement.

1. The Virtue of Justice: The Judge as Nominos

An excellent judge is just; a judge who lacks the virtue of justice has a serious defect. At this level of abstraction, the virtue of justice is likely to be the object of widespread agreement.⁶ But what does the virtue of justice require?

⁶ I want to make room for the possibility that some may get off the boat before the virtue of justice is taken on. It is possible, for example, that some combination of legal formalism and exclusive legal positivism might produce the assertion that judges do not need to the virtue of justice. The exclusive legal positivism might maintain that the justice of a legal outcome is irrelevant to its legality. The legal formalist might argue that the law should not grant judges discretion to do justice in any circumstances. The combination of these two positions might produce an argument that judges need a very narrow virtue of *fidelity to law*, but that a wider virtue of *justice* simply is not required.

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In the language of virtue jurisprudence, we might say that the good judge must have the virtue of fidelity to law and concern for the coherence of law. Let us call this “justice as lawfulness.” In conceptualizing the idea that justice as lawfulness is a virtue, it is helpful to examine Aristotle’s account of the relationship between justice and lawfulness. To begin, we need to say a bit about the Greek word *nomos* which is translated as law. The eminent Aristotle scholar, Richard Kraut explains:

[W]hen [Aristotle] says that a just person, speaking in the broadest sense is *nomimos*, he is attributing to such a person a certain relationship to the laws, norms, and customs generally accepted by some existing community. Justice has to do not merely with the written enactments of a community’s lawmakers, but with the wider set of norms that govern the members of that community. Similarly, the unjust person’s character is expressed not only in his violations of the written code of laws, but more broadly in his transgression of the rules accepted by the society in which he lives.

There is another important way in which Aristotle’s use of the term *nomos* differs from our word ‘law’: he makes a distinction between *nomoi* and what the Greeks of his time called *psēphismata*—conventionally translated as ‘decrees’. A decree is a legal enactment addressed solely to present circumstances, and sets no precedent that applies to similar cases in the future. By contrast a *nomos* is meant to have general scope: it applies not only to cases at hand but to a general category of cases that can be expected to occur in the future.⁷

Rule by decree, Aristotle believed, was typical of tyranny—the rule of individuals and not of law; a regime that rules by decree does not provide the stability and certainty that is required for human communities to flourish.⁸ Kraut continues:

We can now see why Aristotle thinks that justice in its broadest sense can be defined as lawfulness, and why he has such high regard for a lawful person. His definition embodies the assumption that every community requires the high degree of order that that comes from having a stable body of customs and norms, and a coherent legal code that is not altered frivolously and unpredictably. Justice in its broadest sense is the intellectual and emotional skill one needs in order to do one’s part in bringing it about that one’s community possesses this stable system of rules and laws.⁹

The excellent judge is a *nomimos*, someone who grasps the importance of lawfulness and acts on the basis of the laws and norms of her community.

2. The Virtue of Judicial Wisdom: The Judge as Phronimos

But the virtue of justice is not exhausted by the idea of lawfulness. Even if we concede that in ordinary cases, justice requires adherence to the law, there are surely extraordinary cases—cases where we think of justice *not as lawfulness* but instead as

⁷ RICHARD KRAUT, ARISTOTLE 105-06 (2002).

⁸ *Id.* at 106.

⁹ *Id.*

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fairness. One version of this objection simply rejects the idea of justice as lawfulness *tout court*. That is, it might be argued that judges should never follow the law when the law conflicts with the judge's own sense of fairness. Whatever the merits of this argument in the context of a society where there was very little disagreement about what fairness requires, it is a nonstarter in the context of a society—like our own—which is characterized by deep and persistent pluralism about fairness. In such a society, if each judge follows her own notions of fairness, then law will simply not be able to do the job of coordinating behavior and avoiding conflict. Judges will disagree about the content of the law; hence that content will be uncertain and unpredictable.

But the objection to the claim that justice is exhausted by lawfulness can be expressed more modestly. One version of this objection might focus on the idea that the law is cast in abstract and general rules which may lead to results that are unfair in particular cases. A virtuous judge—the objector might argue—needs to have a keen sense of fairness, so as to be able to do justice in the cases where simply following the rules laid down would lead to absurd and unintended consequences.

But of course, this version of the objection to justice as lawfulness was anticipated by Aristotle. In V.10 of the *Nicomachean Ethics*, Aristotle wrote:

What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is nonetheless right; because the error lies not in the law nor in the legislator but in the nature of the case; for the raw material of human behavior is essentially of this kind.¹⁰

This is the core of Aristotle's view of *epieikeia*, usually translated as equity or fair-mindedness. As Roger Shiner puts it: "Equity is the virtue shown by one particular kind of agent—a judge—when making practical judgments in the face of the limitations of one particular kind of practical rule—those hardened customs and written laws that constitute for some societies the institutionalized system of norms that is its legal system."¹¹

For our limited purposes, the important question is: "Must a judge adhere to the *correct* political ideology in order to do equity?" A negative answer to this question is, at the very least, plausible. Aristotle's point is not that equity is opposed to lawfulness. Rather, doing equity is being true to the spirit of the law, even when we depart from the letter of the law. That is, equity can only be done by a *phronimos* who is also *nominos*. Doing equity requires both a sense of a fairness and a grasp of the *nomos*, the laws, norms, and customs generally accepted by the community.

¹⁰ ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 1137^b9-1137^b24 (J.A.K. Thomson trans., Hugh Tredennick rev., 1976) (pagination is to the Bekker edition).

¹¹ See Roger Shiner, *Aristotle's Theory of Equity*, 27 *LOY. L.A. L.REV.* 1245, 1260-61 (1994).

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III. DISCERNING EXCELLENCE

Excellent judges possess the judicial virtues. They are incorruptible and sober, courageous, good tempered, impartial, diligent, careful, smart, learned, skilled, just, and wise. But how can we tell which candidates for high judicial office possess these virtues? Knowing “what judicial virtue *is*” is one thing; knowing who possess the judicial virtues is another. In this section, I argue that the discernment of virtue has three components—screening for judicial vice, detection of wisdom, and recognition of lawfulness.

A. Screening for Judicial Vice

The first step in discerning excellence is the simplest. The first screen for judicial excellence eliminates candidates who are vicious—corrupt, ill-tempered, cowardly, unintelligent, or foolish. Screening for these vices is already a large part of the judicial selection process. Background investigations, conducted at the federal level by the FBI, seek to ferret out the moral vices. The solicitation of comments by peers (lawyers and judges) is designed to elicit evidence of more subtle defects in character of intellect.

If we want to effectively screen for vice, we want to selected judges (and especially Supreme Court Justices) from candidates who have a track record that is likely to expose the vices if they exist. This suggests that Supreme Court Justices ought to be selected from those who have long experience in public life. Serious moral and intellectual defects may not be apparent at age 30, but they are likely to have been exposed after two decades in public life. Luck may allow a cowardly or corrupt human to flourish without incident for some span of years, but time will tell and vice will out.

B. Detecting the Phronimos

The absence of the worse vices is not enough. A good judge must possess the virtue of practical wisdom or *phronesis*. Screening for vice is relatively easy; detecting the *phronimos* is likely to be both more difficult and more controversial. Before going any further, however, we ought to be careful not to exaggerate the problem. Practical wisdom is not an esoteric or mystic quality. Folk psychology recognizes “practical wisdom,” which is frequently called “common sense.” Our intellectual and literary traditions are full of references to the wise—from King Solomon to Gandalf. Our ordinary lives involve experience of friends and colleagues, whom we recognize as having good practical judgment; we ask them for advice and emulate their choices.¹² Practical wisdom is harder to *theorize* than it is to *recognize*.

The fact that we are able to recognize practical wisdom offers the key to the problem of discerning the *phronimos*. Persons of practical wisdom, *phronimoi*, are recognizable by those who know them and interact with them. This fact has consequences for judicial selection. The process of selecting judges should rely heavily

¹² See LINDA ZABZEBSKI, DIVINE MOTIVATION THEORY (2004).

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on the recommendations of those who are in a position to know whether the candidate possesses practical wisdom.

But this creates a special problem for the selection of Supreme Court Justices. The ultimate selector is the President, but the pool of candidates is comprised mostly of judges. Given the separation of powers and the code of judicial ethics, judges may become cloistered—isolated from everyone but their friends and family, judicial colleagues, and law clerks. Opinions give evidence of craft and the intellectual virtues, but provide an imperfect window on the practical wisdom. For this reason, it is especially important that judges—at least those who would be willing to serve on the Supreme Court—engage in practical activities that expose them to public life. Civil activities and service on judicial commissions are two obvious opportunities for judicial immersion in a public life of practical activity. Supreme Court Justices should be selected from among those who have demonstrated their possession of practical wisdom, both from the bench and in wider public life.

C. Recognizing the Nominos

If judicial opinions are an imperfect window on the virtue of practical wisdom, they are well suited for the task of recognizing which judges are lawful and which are results oriented. Although disregard for the rule of law can be masked by clever opinion writing, a persistent pattern of lawfulness is truly difficult to conceal. By way of contrast, a judge who is *nominos* will strive to stay within the letter and spirit of existing law. Judges who believe in the rule of law attempt to give statutory or constitutional language its full due, eschewing interpretations that create vagueness or ambiguity. Judges who believe in the rule of law will strive to give follow precedent rather than evade it.

Of course, it might be possible for an ambitious lower court judge to feign the virtue of justice as lawfulness. But given the relatively small chance that any one judge has of appointment to the United States Supreme Court, it seems rather unlikely that many judges would choose to act as formalists when they are instrumentalists at heart. Judges with the vice of results orientation are likely to wear it on their sleeve rather than conceal it underneath their robes.

In sum, we have good reason to believe that we can screen for vice, discern the possession of practical wisdom, and recognize true dedication to the rule of law. The fact that we have the capacity to recognize judicial virtue, however, does not entail that we can quantify it. A tournament of virtue, on the other hand, promises something that might appear to be a very great good. If we can quantify indicia of judicial excellence reliably, then judicial selection might proceed on the basis of objective, publicly available criterion. The hard question is whether the variables that can be quantified are good proxies for true judicial virtues.

IV. THE MISMEASUREMENT OF VIRTUE

Can we quantify judicial virtue? I will argue that the most reasonable answer to this question is “no.” Before I do, however, we should examine the case for quantification, as stated by Choi and Gulati.

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A. The Case for Quantification

Choi and Gulati make the case for measurement by introducing the distinction between absolute and relative measurement of judicial excellence:

Some will see the search for a set of objective measures as pointless because they think that there is no way to measure or quantify what it means to be a good, let alone great, judge. This is likely true as an absolute matter. Nonetheless, with a set of candidates with track records as lower court judges, it may still be possible to make meaningful relative evaluations. So, just as it is impossible to articulate what special factor makes Lance Armstrong the best cyclist in the world, it is impossible to reduce Justice Cardozo's greatness as a judge to numbers. But one can look at how many times Armstrong has won the Tour de France and compare his numbers to those of his peers. Similarly, one can look at Cardozo's opinions and see how much they were cited by other judges, how often they were discussed in the law reviews, and how often they made their way into the casebooks. Cardozo's numbers can then be compared to those of his peers. As with Armstrong, this type of relative analysis does not give us a measure of his greatness or tell us what made him great. But it gives us a sense, even if imperfect, of how he performed relative to his peers.¹³

In other words, they argue that we can develop an ordinal scale for judicial excellence, even if we cannot develop a cardinal scale. Before we go any further, however, we ought to observe that the analogy that Choi and Gulati make between bicycle racing and judging is a rather tenuous one. In the case of bicycle racing, there is an objective and quantifiable measure of performance. The first to finish is the winner; participants in the race are ranked (both cardinally and ordinally) by time. In the case of judging, there is no measure of performance that corresponds to the time it takes to finish a race. In racing, the outputs of the contestants is ultimately the time it takes each racer to finish and these outputs can easily be compared across racers. In judging, there are many outputs, rulings, opinions, jury instructions, and so forth. These outputs cannot easily be compared across cases and judges. There is no single scale, equivalent to time, that permits objective comparisons to be made.

B. Measuring the Wrong Qualities

Choi and Gulati's error extends beyond the obviously fallacious nature of their analogy to racing. The measures they propose—e.g., citation rates and productivity—not only fail to capture the essence of judicial excellence, they may, at least in some circumstances, measure judicial vice. Choi and Gulati assume that judges who write lots of opinions that are cited a lot are better judges than those who write fewer opinions and get fewer citations. But are these assumptions correct?

¹³ Choi & Gulati, *Empirical Ranking*, *supra* note 1, at ___.

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1. Citation and the Rule of Law

Choi and Gulati seem to assume that citation rate correlates with judicial excellence. Their argument for this conclusion is actually somewhat obscure. It begins with the idea that there is a “market” for judicial opinions: “We can look at the frequency with which a judge's opinion is used by a variety of consumers (including, for example, citation counts). Because circuit court judges write lots of opinions, the market test allows us to rank them in terms of the quality of those opinions.”¹⁴ In the accompanying footnote, they explain:

The view of judicial opinions as a market product available for consumption by judges, attorneys, and casebook writers has historical roots. In the early days of the Supreme Court, judicial opinions were typically recorded and distributed by private reporters. Reporters such as Cranch and Wheaton, for example, would record Court decisions, earning a return through private sales of their reports. . . . Indeed, across the Atlantic in England, it was common for multiple reporters to record the same judicial opinion, competing against each other based on the quality of the text they provided.¹⁵

This passage does not, however, establish that the use of judicial opinions mimics a market in the respects that would be relevant to the notion that citations counts measure judicial excellence. The fact that reporters of opinions compete with each other on the basis of the accuracy of their reports does not entail that the authors of opinions compete with each on the basis of the quality of their decisions. Because this claim would be absurd, we can assume that Choi and Gulati did not intend to suggest it, and that the footnote is merely reporting an interesting fact and is not intended to establish the conclusion that there is a market for the excellence of opinions.

Choi and Gulati continue with their development of their claim about the market for judicial opinions:

Markets do not always work well, however, and when they do not, they tend to be biased and inefficient. The problems that plague markets include asymmetric information, unsophisticated customers, and an inadequate number of producers (leading to oligopoly pricing).¹⁶

So far, so good. Choi and Gulati's next claim, however, is problematic:

Unlike many other markets, however, the market for judicial opinions is relatively free of such imperfections. For one, judicial opinions may be obtained at no cost by judges and, in many areas of the law, are abundant.¹⁷

“No cost” is ambiguous. Choi and Gulati are right if they simply mean that Judges do not pay a monetary prices for access to law libraries and electronic legal databases out of their own pocket. But this does not mean that the production of citations to other judges' opinions is cost free. Citing is an expensive business, but the price is paid in

¹⁴ *Id.* at 306.

¹⁵ *Id.* at 306 n. 21 (citations omitted).

¹⁶ *Id.* at 306.

¹⁷ *Id.* at 306.

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terms of time. Finding opinions takes time. Reading them takes time. Citing them properly takes time. Choi and Gulati obviously know this; they are legal scholars and personally pay a price for the citations they produce.

The price that judges pay in terms of time is an opportunity cost. Whether judges research, read, and cite on their own or have their clerks do this work, the time devoted to this activity is not available for other activities. Moreover, the time resource is finite. A judge's own time is finite; there are only some many hours in the day, days in the week, weeks in the year. Clerk time is also finite; judges are limited in the number of clerks they can employ. Typically, this limit is quite rigid, and even if a judge wanted to hire additional clerks, the judge would not be permitted to do so.¹⁸

The fact that citations are costly has important implications for answering the question whether citation rates measure the quality of judicial opinions. If citations were free, then one might suppose that the only variable that would influence the decision of Judge A to cite an opinion by Judge B would be the quality of Judge B's opinion. Of course, there are other variables, such as whether Judge B's opinion are binding on Judge A, but let us set those complications aside.

If, however, Judge A's decision whether or not to cite Judge's B's opinion is costly, then quality will not be the only variable. Another important variable will be the costs of searching for Judge B's opinion. If Judge B's opinion turns up early in Judge A's search for authority, then it will be more likely to be cited. As we all know, there are many basic propositions of law for which many possible opinions could be cited. In each federal circuit, for example, there are opinions on basic procedural matters (e.g. standards of appellate review, standards for summary judgment, and so forth) where hundreds or thousands of prior opinions will state the proposition of law.

A rational judge will not read all of these opinions and cite the opinion that does the best job of stating the law. Rather, the rational judge will read enough authority to be reasonably sure of the correct statement of the rule. The opinions that are cited are likely to be the opinions that judge encounters first, and as a practical matter, this means that they are likely to be the opinions that result from traditional research methods. For example, a Westlaw search will produce a list of opinions in reverse chronological order. Each opinion that deals with the issue will cite other authority, and these recently cited authorities are highly likely to be cited in the newly written opinion. Importantly, judges are highly likely to cite authority that is already widely cited. If a particular authority is cited in the cases turned up by the research process, there is an increased probability that judge will cite that authority. And the more judges that cite the authority, the greater the likelihood that it will garner further citations.

Choi and Gulati continue their exposition, explicitly connecting citation rate with quality:

Indeed, the particular nature of the products (that they are free) means not only that competition is likely to occur effectively, but that we should be able to see clear and outright winners of the tournament. *All judges will cite the best opinions.* And to the extent certain "superstar" judges tend to write the best opinions, other judges will repeatedly look to these judges for guidance in the

¹⁸ Some judges do have discretionary power to hire "externs," or law students who perform some of the tasks that clerks do.

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future. After all, given that the opinions all cost the same amount of money (zero), why not only use the best ones (even if the next best is only slightly worse)? This phenomenon of superstar judges does highlight one possible market defect: to the extent that most judges do not receive a large return from writing good opinions, many will not have an incentive to do so. All things considered, though, we predict that the reporting of objective ratings will raise the likelihood that more judges will exert effort to become a superstar judge (given the high payoff from winning the tournament).¹⁹

But Choi and Gulati's claim—all judges will cite the best opinions—is clearly false once we look at citation through the lens of networking theory. In the language of network economics,²⁰ we can call this a process of “preferential attachment.”²¹ Opinions that are well situated in the network of citations will be cited many times; opinions that are more obscurely situated in the network will be cited rarely or not at all. The result is the so-called “rich get richer” phenomenon.²² Opinions that are initially cited for a proposition will be cited over and over for that same proposition.

In other words, the citation rate of a given opinion (and hence of the author judge) will depend in large part on the position of the opinion in the ecology of the network of authority. The first opinion to state a given proposition will be likely to generate many opinions. Subsequent opinions will be more likely to be cited if they are the most recent opinion stating the proposition; the time that a given opinion remains at the top of the stack (the first position in the recency queue) will depend on the average frequency with which the proposition is stated at the time the opinion is issued. If the opinion of Judge C stating proposition X is at the top of the stack at a time when Judges D, E, and F are all working on opinions that also will state proposition X, then it is likely that Judge C's opinion will be cited three times. But if Judge D states the proposition after Judge C but after Judge E and F have already finished researching their opinions, then Judge D's opinion may never be cited at all. Moreover, once Judge C's opinion has been cited by Judges D, E, and F, then it becomes highly likely that these judges will repeat their citations in future opinions. Moreover, the repetition of the citation in their opinions increases the likelihood that other judges will cite Judge C's opinion for the proposition. Occupying a very favorable node (or position in the ecology of the citations network) can result in an extraordinary number of citations; occupation of an unfavorable node can result in no citations at all. The important thing

¹⁹ *Id.* at 307 (emphasis added).

²⁰ I am greatly indebted to conversations with Tom Smith on this point. In particular, I would not have seen this point without Smith's discussion of his important unpublished work on network economics and citation frequencies. All of the credit for this insight properly belongs to Smith and I respectfully request that any citation to this portion of the article include an explicit reference to the origin of the ideas in Smith's work.

²¹ Boris Galitsky & David Levene, *On the Economy of Web Links: Simulating the Exchange Process*, http://www.firstmonday.org/issues/issue9_1/galitsky/index.html (visited on September 6, 2004) (discussing preferential attachment in the context of hyperlinks on the World Wide Web).

²² *See id.* (discussing rich-get-richer phenomenon in terms of hyperlinks).

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is that these differences can occur even though the proposition stated is exactly the same. For this reason, citation rates do not necessarily track quality.

But this understates the problem with citation rates as a proxy for judicial excellence. Given the ecology of citation networks, it seems quite likely that frequency of citation is likely to be a function of originality. The first case to state a proposition is, all else being equal, highly likely to become an important node in the citation network. Whereas judges must choose between many opinions when choosing authority for an oft-repeated proposition of law, they only have one choice when selecting authority for a novel proposition of law instantiated in only a single prior opinion. But it is hardly clear that novelty makes for good law or that originality is a judicial virtue.

Indeed, I have argued that the opposite is true under normal conditions. The excellent judge is a *nominos*, who follows the law rather than makes it. Good judges are clever in using the resources within existing law to solve the legal problems that come before them. The very best judges are experts at avoiding originality. And the very worst judges may be the most original. Very bad judges may use the cases that come before them as the vehicles for changing the law, transforming the rules laid down into the rules that the judges prefer. This kind of results-oriented or legislative judging may produce many original propositions of law and hence a high citation rate, but this is a measure of judicial vice and not judicial virtue.

This is not to say that a high citation rate is necessarily an indicator of judicial vice. There are hard cases, in which some important issue of law comes before a court for the first time. Some judges may have high citation rates because the luck of the draw has handed them a disproportionate share of cases with truly new legal questions. But even if this is so, it does not follow that these are the best judges. Luck is not virtue.

2. Productivity and Carefulness

What about productivity? Choi and Gulati suggest that a tournament of judges should include a productivity measure:

The selection of a Supreme Court justice, therefore, should involve a prediction about the effort that a circuit judge is going to exert if elevated. Objective factors could focus on the effort that she exerted while she was a circuit judge. We could look at how many opinions (versus short form dispositions) the judge published, how many concurring and dissenting opinions she wrote, how many opinions she wrote in which she took on primary responsibilities (as opposed to delegating to clerks), and the overall number of cases which she played a role in deciding during a given period of time.²³

But are the judges who write the most or longest opinions the best judges? Choi and Gulati have argued that short opinions are actually an indicator of judicial excellence, because shortness is a proxy for judges writing their own opinions as opposed to delegating that task to clerks.²⁴ If total number of pages is a not a good

²³ Choi & Gulati, *supra* note 2, at 309-10.

²⁴ Stephen Choi & G. Mitu Gulati, *Which Judges Write Their Opinions*, at ____.

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proxy for diligence, then what about the number of opinions written? It is certainly possible that the number of opinions written per time period is a proxy for judicial excellence, but this is not necessarily the case. The number of opinions written is surely a function of the number of opinions assigned. Assigning judges may attempt to equalize workloads; this might result in a judge given a difficult writing assignment being assigned fewer opinions. Or assigning judges might seek to equalize the number of writing assignments. The question whether there is a relationship between number of opinions written and judicial excellence seems to depend on a variety of empirical questions and *not* to be well suited for armchair speculation.

3. Fame versus Excellence

There is a more general problem with Choi and Gulati's approach to measuring judicial excellence. The judges who are cited most and who write the most opinions may well be the judges who want to be famous, or at least "almost famous." Fame and glory (or external recognition) are powerful motivators, but it is not clear that a desire for fame is a virtue for judges. Indeed, the claim that excellent judges seek fame and glory seems somewhat counterintuitive.

There is nothing wrong with a desire for external recognition; humans as social creatures may naturally desire recognition by their fellows. But an excessive desire for fame is likely to be inconsistent with judicial virtue. The virtue of justice—the central component of judicial excellence—requires that judges aim at giving judges what they are due, that to which they are entitled by the rules laid down. To the extent that judges decide cases on the basis of a desire for the fame and glory that come with winning a tournament of judges, they risk departing from the actions required by the virtue of justice; to put it more bluntly, a tournament of judges may create incentives to do injustice in order to win. Justice may require a prosaic opinion that says nothing likely to garner oodles of citations. Winning the tournament of judges may encourage a more dramatic opinion that makes new law in order to garner attention.

C. Gaming the Tournament of Judges

If there were a tournament of judges that influenced the selection of Supreme Court Justices, we may confidently predict that some judges would play to win. That is, they would view the tournament as a tournament and devise strategies to maximize their chance of success. How might such a judge game the tournament of judges?²⁵ To simplify, let's assume the tournament is scored by a formula which includes the following three measures:

- Citations by lower courts, academics, and the Supreme Court.²⁶

²⁵ This section of the paper draws on a post from *Legal Theory Blog*. See Lawrence B. Solum, *A Tournament for Judges. Mad? Brilliant? Clever?*, *Legal Theory Blog*, April 17, 2005, http://lsolum.blogspot.com/archives/2003_04_01_lsolum_archive.html#200162580 (visited September 7, 2004).

²⁶ See Choi & Gulati, *supra* note 1, at 305-09.

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- Productivity, including the number of majority and dissenting opinions written and the number of cases in which the judge participated.²⁷
- Judicial independence, the frequency with which the judge is in opposition to another judge selected by the same President (or a President from the same political party).²⁸

Let's also assume that the judicial selection tournament will be viewed by both participants and third parties as a game, with payoffs determined by the selection of Supreme Court Justices. Judges who are selected would receive a large positive payoff, but other players (Presidents, Senators, Judges, Academics, and Law Clerks) would also receive payoffs--if judges whose ideology they shared became Supreme Court Justices. This assumption, that judges would play to win, is shared by Choi and Gulati: "Our proposal also recognizes that judges, like the rest of us, respond to incentives."²⁹ So how would the judges respond to the incentives? How might the game be played?

1. Gaming the Productivity Measure

Choi and Gulati propose that we measure the number of opinions and dissents as well as the number of cases in which judges participate. How could this measure be gamed? Tournament leaders will wish to maximize the number of opinions and dissents. If not assigned an opinion, a judge will have a strong incentive to dissent. If two politically aligned judges sit on the same panel and one of the two is a tournament leader while the other is not, there will be a strong incentive to hand the opinion to the leader. Circuits determine their own procedures for case assignments. A Circuit with a tournament leader who is politically aligned with the Chief Judge and the majority of judges on the Circuit will have a strong incentive to provide more opinion writing opportunities to the leader. This will advantage judges in friendly circuits and disadvantage judges in unfriendly circuits. In the long run, however, there are only so many ways to game productivity. Presumably equilibrium will be reached among the judges who are tournament leaders—with each scoring in approximately the same range on this measure.

2. Gaming the Citation Frequency Measure

The opportunities for gaming this measure are obvious. Academics will now have an incentive to cite their favorites to influence tournament results. Likewise with both lower court and Supreme Court justices. A set of second-order tactics will be likely to emerge. The composition of law school faculties can be influenced by state legislatures and by the wealthy alumni of private universities. The lower federal court benches are selected by the President and the Senate. Moreover, judges themselves can change their opinion writing so as to maximize the opportunities for both citing other judges (allies in the tournament) and for being cited. Opinions will become longer and long

²⁷ See *id.*, at 309-310.

²⁸ See *id.*, at 310.

²⁹ Choi & Gulati, *supra* note 1, at 305.

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string-cites will become the rule. Basic and uncontroversial issues will be discussed in depth. When faced with a choice between writing an opinion on an issue where there is no law—because the issue arises infrequently—and an issue on which there is lots of law—because the issue comes up all the time—the rational tournament participant will avoid the former and seek the latter.

Perhaps the most successful tactic for gaming the citation frequency measure is also the most problematic. Judges will have an incentive to change the law, because an opinion that makes new law is much more likely to be cited than an opinion that merely restates existing law.

3. Gaming the Judicial Independence Measure

Choi and Gulati propose that we measure independence by voting records. Judges would score points for voting against a judge appointed by a President of the same party as appointed that judge. There are several ways to game this measure. Most obviously, dissent when a same party judge is in the majority and the decision would otherwise be unanimous. And by the way, the judge trying to win the tournament will also write a long citable dissent that rehearses all of the basic law surrounding the case and cites all the judge's allies in the tournament. Of course, there will be cases in which the players cannot decide contrary to party affiliation without changing the outcome. But if you are a tournament leader and the case is not on a hot-button issue about which you care deeply, it may well be in your interest to score some independence points by deciding the case in a way you believe is wrong—writing a long opinion, of course!

4. Gaming Clerk Selection

Getting really good clerks is going to be very important in the tournament of judges. If you want to be a tournament leader, you will need to write a lot of very long opinions and dissents. Moreover, you need high quality opinions, because they are more likely to be cited by other judges. So you want the best clerks. Supreme Court Justices can influence who gets the best clerks by informally signaling that some judges are “feeder judges.” Clerks will want those clerkships, because they will lead to prestigious Supreme Court clerkships, which in turn will lead to prestigious academic positions, creating the opportunity to influence both citations and future clerks. The advantage added by the very best clerks is likely to be substantial, and may well be decisive, given that citation frequency is the one measure among the three where an equilibrium ceiling is unlikely to be established by the players. With great clerks and a stable of externs and some high quality politicking, it might be possible for a judge to garner many thousands of citations.

D. The Costs of a Gamed Tournament

In their original article, Choi and Gulati suggested that the tournament of judges could be accompanied by a ban on discussion of any other merits-based criteria for

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judicial selection other than the tournament results.³⁰ When it comes time to select Supreme Court Justices, the tournament results will be the only information that Presidents and Senators may use to justify their decision—other than political ideology. Assume that the tournament does, in fact, determine who is appointed to the Supreme Court. What price would we pay?

1. Damage to the Rule of Law.

One thing that is very difficult to measure objectively is whether a judge has decided in accord with the law—rather than on the basis of either ideology or to gain an advantage in the tournament. The virtue of justice not rewarded in the tournament. No points are assigned for getting the law right. Moreover, *too high a regard for justice is likely to be punished*. Judges who vote based on the merits will lose opportunities to write opinions and dissents. Judges who agonize about getting it right will be diverting precious time from the opportunity to score points by getting it *long*, i.e. producing lots of long and citable opinions. And judges who get it right are unlikely to produce opinions with lots of novel propositions of law—and hence lots of citations.

2. The Exclusion of Soft Variables

Practical wisdom or *phronesis* is a key component of judicial excellence, but the tournament of judges does not award points to judges who have common sense, the ability to size up a situation and penetrate to the issues that are truly important. Indeed, the judges who possess this virtue are likely to be rather poor performers in the tournament of judges. They are likely to perceive that scoring points at the expense of doing justice is a rather poor excuse for judging. They are likely to lag behind their more canny and competitive colleagues.

3. Decreased Transparency

Gulati and Choi claim transparency as an advantage for the tournament of judges, but in all likelihood the opposite is likely to be the result of their proposal. The tournament is likely to create an illusion of objectivity. Behind the scenes, however, there would be manipulation of opinion counts, citation counts, and independent decision counts. This will especially be true if one party were to control the Presidency, the Senate, the Supreme Court, and a majority of Court of Appeals slots at the beginning of the tournament. That party would have enormous strategic advantages in gaming the tournament, but the political nature of the selection process would effectively be masked by the apparently neutral and objective basis that the tournament results would provide for the selection of Supreme Court Justices.

³⁰ See *id.* at 313 (“To address the problem of political transparency, an extreme form of the tournament would be one that bars the president and the Senate from putting forth merit-related rationales outside our list of objective factors.”).

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4. A Crisis

The end result of Choi and Gulati's proposal would be so awful that one cannot imagine the story ending except in some kind of crisis. You may not like the current Supreme Court, but imagine a court populated by judges who had won Choi and Gulati's tournament. These judges would be without the virtues of integrity, wisdom, or justice. They would have been selected for the ability to manipulate the tournament results. In order to do this, the winning judges would be those who are willing to elevate self interest over the interests of the public and the parties who appear before them. And these clever but vicious judges would be entrusted with the ultimate constitutional authority.

V. CONCLUSION: THE REDEMPTION OF SPECTACULAR FAILURE

If viewed as a serious proposal for reform of the judicial selection process, Choi and Gulati have a spectacularly bad idea—a real stinker, as they say. This can be true even if the retroactive application of Choi and Gulati's selection criteria identifies excellent judges. The reason for this is obvious. No one had an incentive to game Choi and Gulati's hypothetical tournament. The participants couldn't predict that the tournament would exist, and even if they knew that two law professors were conducting a hypothetical tournament, they would have very little incentive to play to win. All of this would change if the tournament of judges were actually implemented. Choi and Gulati recognize the imperfections of their measures of excellence and offer the following defense:

We will never succeed in generating a perfect objective measure of judicial quality. The point, however, is not whether objective criteria perform better than a perfect system of judicial selection. Rather, the question is whether objective criteria work better than the selection process we have today. Given how politicized the selection of Supreme Court justices currently is, the use of any objective factors will lead to a marked improvement.³¹

But this argument fails on two counts. First, it is not necessarily the case that the use of objective factors would lead to a "marked improvement" in a gamed tournament. Such a tournament would select for those who are motivated by a desire to win the tournament and not by those who want to do justice. Choi and Gulati assume that the tournament will reduce the role of political ideology, but in a gamed tournament, that assumption is doubtful. Second, the reform of the judicial selection process—like most reform processes—is likely to involve path dependency and opportunity costs. If political capital were invested in a tournament of judges and we start down the road of judicial selection based on objective measurement of outputs, then it may become more difficult to focus on true judicial excellence. If the tournament of judges favors one ideological faction over another, the winning faction will have every incentive to preserve the tournament. The opportunity cost of a real-world tournament of judges

³¹ *Id.* at 312.

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could well be loss of the chance for the implementation of real merit-based judicial selection.

Sometimes, however, bad ideas spark good debates. We can view Choi and Gulati's tournament of judges as a thought experiment rather than a proposal for reform. As a thought experiment, the tournament of judges is a marvel, precisely because it invites rigorous analysis of the judicial selection process. In the end, Choi and Gulati's tournament of judges invite us to ask two questions: "What constitutes judicial excellence?" and "How can we select judges who possess them?" Those questions are worth answering.