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EMPIRICAL MEASURES OF JUDICIAL PERFORMANCE: THOUGHTS ON CHOI AND GULATI'S TOURNAMENT OF JUDGES

BRANNON P. DENNING*

Stephen Choi and Mitu Gulati have constructed a fascinating thought experiment[1] to restore rationality to a process that was once referred to as the confirmation "mess"[2] but that is now described as "war."[3] They have, moreover, put their tournament into operation and composed a list of court of appeals "winners" from whom future Supreme Court nominees might be chosen and for whom the President could make credible claims of selection based on merit.[4]

As someone who has written about the pathologies of the confirmation process[5] and has suggested reforms that are not particularly

* Associate Professor of Law, Cumberland School of Law at Samford University. I thank Mitu Gulati for sharing his and Stephen Choi's excellent work with me and for suggesting me for this Symposium. Thanks also to Jim Rossi for the kind invitation to contribute, and to Bill Ross for reading and commenting on early drafts.

1. Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004).

2. STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994).

3. *See* Michael J. Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 REGENT U. L. REV. 15 (2002-2003); Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003); Michael J. Gerhardt, *Supreme Court Selection as War*, 50 DRAKE L. REV. 393 (2002); *see also* David C. Vladeck, *Keeping Score: The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U. L. REV. 1415, 1415 (2005) (calling the process a "quagmire").

4. Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004).

5. *See, e.g.*, Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent,"* 53 ADMIN. L. REV. 1 (2001) [hereinafter Denning, *Reforming the New Confirmation Process*]; Brannon P. Denning, *The "Blue*

viable politically,[6] I can sympathize with Choi and Gulati's sense that "the present Supreme Court selection system is so abysmal that even choice by lottery might be more productive"[7] as well as their desire to find a solution, even one unlikely to be adopted in the form they propose.[8] However, the tournament they propose is based on a number of unelaborated assumptions about the state of the Supreme Court appointment process that bear closer scrutiny.[9] Despite my skepticism about some of their assumptions, however, I think that a form of tournament could be extremely useful to all stakeholders in the confirmation process—the President, the Senate, interest groups, and the public.

Part I of this Essay examines the assumptions driving Choi and Gulati's proposed tournament of judges. I conclude that those assumptions may not be correct, or at least that they require some elaboration to support the strong claims that Choi and Gulati make. My criticisms are intended not to dismiss the proposal, but rather to encourage Choi and Gulati to refine it. They have already shown that a tournament can be run fairly easily,[10] and that it can produce some surprising results.[11] Explaining and defending their assumptions may increase the possibility that their proposal is taken up by participants in the process. In Part II, I argue that if we abandon an extreme form of the tournament, that is, "one that bars the president and the Senate from putting forth merit-related rationales outside [a] list of objective factors,"[12] a tournament may be extremely useful to many of the interested parties in the selection and confirmation

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Slip": Enforcing the Norms of the Judicial Confirmation Process, 10 WM. & MARY BILL RTS. J. 75 (2001) [hereinafter Denning, *Blue Slip*]; Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218 (2002).

6. *See, e.g.*, Denning, *Reforming the New Confirmation Process*, *supra* note 5, at 31-41 (proposing reforms to the confirmation process, including amending Senate filibuster rules, curbing power of committee chairs, curbing the use of the "hold," and constructing a meaningful "advice" mechanism for Senators); Denning, *Blue Slip*, *supra* note 5, at 97-101 (proposing reforms to the "blue slip" procedure in the Senate Judiciary Committee, including making it a formal part of the Committee's rules).

7. Choi & Gulati, *supra* note 1, at 301.

8. *Id.* at 322 ("How likely is it that a proposal like ours would get implemented? In the form we suggest, there is no chance.").

9. Please note that the brevity of the original essay is a point in its favor, and the authors were quite explicit about wanting to open a debate. Choi and Gulati noted:

> Our essay serves only as a starting point. We hope the potential benefits of exposing the politics involved in the selection of Supreme Court justices to greater scrutiny as well as introducing greater competition among appellate court judges will lead to an ongoing debate about how to reform our judicial system.

Id.

10. *See* Choi & Gulati, *supra* note 4.

11. *Id.* at 80-81 (describing the surprisingly high performance of ranking judges reputed to be on Bush's short list for Supreme Court nominations).

12. Choi & Gulati, *supra* note 1, at 313.

process. I doubt, though, that it could be as transformative as Choi and Gulati sometimes suggest. A brief conclusion follows in Part III.

I. EXAMINING THE ASSUMPTIONS IN *A TOURNAMENT OF JUDGES?*

A close reading of Choi and Gulati's initial essay reveals five assumptions driving their proposal: (1) politics should play a very small role in the selection of Supreme Court nominees; (2) the present level of politicization in the Supreme Court appointments process is aberrant and produces bad selections; (3) claims of "merit" by Presidents for their Court nominees obscure the politicization of the process and mislead the public; (4) a tournament will bring transparency to the process, exposing and diminishing the degree of politicization; and (5) nominees' opponents and proponents can agree ex ante on objective criteria for the tournament.[13] I argue in this Part that each of these assumptions either is questionable as a descriptive matter or requires a stronger normative defense than Choi and Gulati offer.

A. Assumption No. 1: Politics Should Play a Very Small Role in the Selection of Supreme Court Nominees

Choi and Gulati repeatedly contrast "intellectual ability," or "merit," with "politics" and regard the two as virtually mutually exclusive selection criteria.[14] One aim of their tournament is to reduce the role that politics plays in nominations to the Supreme Court.[15] From this starting point, three additional questions arise, which are not answered by Choi and Gulati. The first is definitional: what precisely do they mean by "politics"? Second, why exactly should we seek to eliminate politics, however defined, from the process? Third, if, as they concede, total elimination of politics from the process is unlikely, how much politics is optimal or acceptable?

Portions of their essay suggest that Choi and Gulati equate "politics" with "ideology" in the sense that selections are now made according to how candidates are expected to vote on a set of discrete issues.[16] "The current selection criteria for the Supreme Court," they

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13. *See generally id.*

14. *See id.* at 301, 302, 304, 305, 310-11, 312-13, 315, 316, 317, 320.

15. *See, e.g.*, *id.* at 303 (arguing that selecting "future Supreme Court justices on the basis of . . . objective criteria would make clear (and thereby reduce) the role that politics plays in both the initial process of selecting a candidate and the often highly political Senate confirmation proceedings").

16. *See, e.g.*, *id.* at 302 ("Our best guess is that politicians define 'merit' in terms of ideology, and argue accordingly. We suggest that a market-based system would be an improvement."). In a subsequent essay, they clarify this a bit by contrasting "merit," which "refers to more widely held views of what makes a good judge," with "ideology," which "refer[s] to narrowly held views." Choi & Gulati, *supra* note 4, at 27. As Choi and Gulati acknowledge, it is still difficult to define ideology. *Id.* at 27 n.6. Moreover, the substitution of

write, "appear to be a set of *political* litmus tests on matters such as abortion, the death penalty, and affirmative action."[17] But then why not use "ideology"? After all, describing the selection process as "political" could mean other things—including (1) nominations calculated to appeal to certain interest groups or to members of the Senate and (2) nominations to repay presidential debts to political allies—or it could describe campaigning by or on behalf of prospective nominees. Indeed, elsewhere Choi and Gulati seem to condemn these manifestations of politics too.[18]

Lest I be seen as nitpicking, I think that a precise definition of the "politics" that Choi and Gulati condemn is necessary because of the normative question lurking in the background: Why should the confirmation process be insulated from politics? They seem to identify two problems with an overtly political selection process. First, there is the harm to judicial independence—political actors will seek to pack the Court with ideological proxies who will do their nominator's bidding.[19] Second, there is, they argue, harm in courts being seen not as impartial adjudicators but as employing a neutral façade to justify results predetermined by the deciding Justice's ideological commitments.[20]

But there is another way of understanding "political" judicial selection. The two main players—the President and the Senate—are popularly elected and therefore presumably responsive to their constituents. When a President nominates someone to the U.S. Supreme Court or when the Senate is asked to confirm that nominee, each is really deciding whether to confer on a nominee unreviewable discretion to be exercised for as long as that person chooses to remain on the Court. The small number of cases that the Supreme Court now takes often places it squarely in the middle of highly contested cultural conflicts—abortion, affirmative action, sexual privacy—and it resolves them outside the legislative process. At this level the legal materials are the least determinant, and resolution of the legal questions often requires the Court to weigh conflicting constitutional values. If de Tocqueville was correct that most political questions in

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ideology for politics still leaves open the question of the appropriate denominator: How much (if any) focus on ideology should the system tolerate?

17. Choi & Gulati, *supra* note 1, at 305 (emphasis added).

18. *Id.* at 312 ("Underlying most appointments, we suspect, are political agendas and the repayment of political favors."). For similar observations to those made above, see Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 325, 327 (2005).

19. Choi & Gulati, *supra* note 1, at 300 ("An effective constitutional democracy requires an independent judiciary."); *id.* at 310-11 (discussing the importance of judicial "independence," defined as deciding cases "impartially," that is, "independent of political ideology," and arguing that "[e]vidence suggests that judges fall short of this mark").

20. *Id.* at 317 ("[A] tournament system should help reduce the appearance of political bias that exists today. Evidence reveals that who you get as a judge, in terms of political affiliation, can often affect the outcome of the case.").

America become legal ones, then the Court is as much a political institution as the Presidency or Congress.[21] Is it so wrong, then, for the President or Senate to seek some assurances—for instance, that the nominee thinks like the President or that a nominee is not outside the mainstream and might tip the balance on a closely divided Court—before judicial nominees are elevated to the bench and placed outside the ordinary electoral accountability? If this is the politics that Choi and Gulati want to eliminate from the selection process, they need to provide a more compelling normative justification.

Choi and Gulati seem to recognize that eliminating all politics, however defined, from the selection process is not possible. Presidents, to a greater or lesser extent, have sought out nominees with whom they felt they shared certain values.[22] The Senate has often invoked "political"—even ideological—concerns when rejecting certain High Court nominees.[23] And yet the Supreme Court has not only survived, it remains one of the most revered organs of our government, even after *Bush v. Gore*.[24]

Choi and Gulati admit that their proposal "will not eliminate political considerations;"[25] they even write that they are "not necessar-

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21. It is important to remember that the subject of Choi and Gulati's essay is selection for the *Supreme Court*, despite their article's use of the word "judge" throughout. This is not to say that appeals court judges do not have similar discretion, but I would argue that they are at least not at liberty to overrule or disregard binding Supreme Court precedent, though they may have considerable discretion implementing Court decisions that are vague or ambiguous. For example, two recent decisions from the Eleventh Circuit Court of Appeals upholding Florida's statutory prohibition on homosexual adoption and Alabama's prohibition on the sale of sex toys, both decided after *Lawrence v. Texas*, 539 U.S. 558 (2003), show how much discretion lower courts have when implementing Supreme Court decisions. *See* Williams v. Attorney Gen., 378 F.3d 1232 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1335 (2005); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 869 (2005). The same phenomenon can be seen in many lower courts' treatments of the Court's recent Commerce Clause decisions. *See, e.g.*, Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez*, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369.

22. *See generally* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (new and rev. ed. 1999); DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999).

23. ABRAHAM, *supra* note 22, at 28-34 (discussing Senate rejection of nominees); CARTER, *supra* note 2, at 62-65 (discussing opposition to Thurgood Marshall's nomination); MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS 10-32 (1994) (discussing opposition to Abe Fortas's elevation to Chief Justice).

24. *See, e.g.*, James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 541 (2003) (arguing that a "reservoir of good will" built up by the Court enabled it to weather criticism over its resolution of the 2000 presidential election); *see also* Bush v. Gore, 531 U.S. 98 (2000).

25. Choi & Gulati, *supra* note 1, at 312.

ily against the inclusion of politics per se in the judicial nomination process"[26] but merely want trade-offs (which they assume to exist) between politics and merit to be transparent.[27] But these concessions raise a denominator problem: How much politics is too much, or what is the optimal amount the process should tolerate?

B. Assumption No. 2: The Present Level of Politicization in the Supreme Court Appointments Process is Aberrant

Whatever the optimal amount that politics should play in the process, Choi and Gulati argue that politics is too prevalent in Supreme Court selection.[28] They further suggest that current levels of politicization are aberrant and that a less politicized selection process would produce Justices who are better qualified than those now chosen.[29]

The lack of an acceptable-level-of-politics baseline makes the claim that the current process is "overwhelmed by politics"[30] difficult to assess. In his historical survey of Supreme Court selection and nomination, Henry Abraham wrote of Presidents' consistent concerns with a "candidate's *real* politics"—regardless of nominal party affiliation.[31]

> The chief executive's crucial predictive judgment concerns itself with the nominee's likely future voting pattern on the bench, based on his or her past stance and commitment on matters of public policy insofar as they are reliably discernible. All presidents have tried, thus, to pack the bench to a greater or lesser extent.[32]

Even George Washington, in an age before the official emergence of parties, "not only had a septet of criteria for Court candidacy, but he adhered to them predictably and religiously," wrote Abraham.[33] David Yalof's recent study of presidential Supreme Court selection shows every President from Truman through Clinton making politi-

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26. *Id.* at 305.

27. *Id.* at 303-04, 305, 312-13, 316, 318, 321 (referring to transparency).

28. *Id.* at 304 (describing the current selection system as "a biased and nontransparent process overwhelmed by politics").

29. *Id.* at 301 (calling the "present Supreme Court selection system . . . abysmal" and blaming "politics" for its sorry state); *id.* at 304 (defending tournament proposal by "point[ing] out how badly the present selection system works without [objective] measures").

30. *Id.* at 304.

31. ABRAHAM, *supra* note 22, at 49.

32. *Id.*

33. *Id.* at 53. They were:

> (1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participation in the political life of state or nation; (4) prior judicial experience on lower tribunals; (5) either a "favorable reputation with his fellows" or personal ties with Washington himself; (6) geographical suitability; (7) love of our country.

Id.

cal choices, either by instructing subordinates to find nominees whose "real politics" match the President's (Eisenhower, to an extent; Nixon; and Reagan) or by nominating personal friends whom the President trusts (Truman, Kennedy, and Johnson).[34] If later Presidents, like Nixon and Reagan, have become more concerned with positions that candidates are likely to take with regard to specific issues which come before the Court (like abortion), to the point of constructing disqualifying "litmus tests,"[35] perhaps that is a rational response to the increased role the Court has played in resolving contentious social issues.

And yet, Abraham noted, "although a number of rather weak nominations have slipped past the Senate," Presidents "have avoided nominating patently unqualified individuals to the high tribunal."[36] Of course that does not mean that Presidents could not have made even "better" selections,[37] but it is impossible to know how much better those not chosen would have performed on the Court or to know how many "better" candidates were available to the President. That weak candidates[38] are sometimes selected and confirmed does not go very far in establishing the truth of Choi and Gulati's charge that politics has overwhelmed the selection process and that inferior selections are made as a result.

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34. YALOF, *supra* note 22.

35. *See* Choi & Gulati, *supra* note 1, at 305 ("The current selection criteria for the Supreme Court appear to be a set of political litmus tests on matters such as abortion, the death penalty, and affirmative action."). Democratic Presidents, too, can have litmus tests. In April 2004, Democratic presidential nominee John Kerry publicly announced that he would appoint only pro-choice judges to the Supreme Court. *See* Mike Glover, *Kerry Underscores Stance on Abortion*, CINCINNATI POST, Apr. 23, 2004, at A7. Subsequently, however, he softened that stance somewhat, suggesting that he might consider a pro-life judge, as long as *Roe v. Wade* is not threatened. *See* Jim Vandehei, *Kerry Forced to Address Abortion*, PITTSBURGH POST-GAZETTE, June 6, 2004, at A11 (noting concern among supporters at Kerry's remarks).

36. ABRAHAM, *supra* note 22, at 33.

37. Learned Hand and Henry J. Friendly are the usual choices for great judges who never made it to the Supreme Court. *See, e.g.*, *id.* ("What a pity that a man of Hand's intellect and pen never became a member of the Supreme Court—he would have graced it from every point of view."); *id.* at 214-15 (noting Lyndon B. Johnson's refusal to nominate the "legal giant[]" Henry Friendly to the Supreme Court). Yalof's study indicates that Presidents bypassed candidates with arguably better paper credentials for various reasons. *See, e.g.*, YALOF, *supra* note 22, at 67 (noting that Eisenhower "excluded a large number of qualified candidates from consideration either because they were too young, held jobs in private practice, served on trial courts, or worked for the administration"); *id.* at 79 (identifying former Attorney General Robert Kennedy as "the main conduit for [President Kennedy] in the selection process" and noting that his "strenuous objections" to Paul Freund "buried Freund's candidacy even while it enjoyed the support of at least four other high-level advisors").

38. Abraham's study notes that the Senate has not balked at rejecting nominees thought to be unqualified. Harold Carswell was the last such nominee, despite Senator Roman Hruska's plea for the establishment of a "mediocre" seat on the Court. ABRAHAM, *supra* note 22, at 11 (describing Hruska's "pathetic fumbling attempt to convert [Carswell's] mediocrity into an asset").

C. Assumption No. 3: Claims of "Merit" by Presidents for Their Court Nominees Obscure the Politicization of the Process and Mislead the Public

The prevalence of politics and the deleterious effects it has on the selection process, Choi and Gulati claim, are "disguised by claims about a particular candidate's 'merit.'"[39] A tournament conducted by reference to ex ante criteria, they contend, will expose the gap between claims of merit made on behalf of nominees by their proponents and those who won the tournament. "It becomes hard to argue that candidate *X* is the 'best' candidate on purely merit grounds," they write, "when preexisting objective criteria presumptively support candidate *Y*."[40] If candidate *X* is chosen, then the burden of explanation should fall on the President. "The public should know when a judge has been chosen because of ideology, and not because she measures up when objectively compared with contemporaries."[41]

The argument for transparency itself entails a few questionable, or at least unverified, assumptions. First, assuming that "the public" is the audience for the information furnished by the tournament,[42] the authors must presume a role for the public in selecting Supreme Court nominees. Officially, of course, the public plays no direct role in selecting or confirming Supreme Court Justices.[43] Indirectly, however, Presidents who consistently make shoddy nominations, or Senators who confirm those nominations (or refuse to confirm worthy ones), could be held accountable by the voters.[44] Moreover, political scientists have found that when deciding whether to support or oppose controversial Court nominees, Senators will endeavor to gauge

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39. Choi & Gulati, *supra* note 1, at 301.

40. *Id.* at 304 (emphasis added).

41. *Id.* at 305. "Where political motivations drive the selection of an alternative candidate, our proposed system . . . would make it more likely that such motivations would be exposed to the public." *Id.* at 304; *see also id.* at 305 ("[W]here politics does impact the selection of judges, such motivations should be made transparent to the public.").

42. The authors are somewhat unclear on this point. While they frequently refer to the benefits accruing to the public from a transparent process, *see, e.g.*, *id.* at 303, 305, 312, 313, they also refer to transparency encouraging dialogue between the President and the Senate, *id.* at 313, and even providing a means for journalists to evaluate candidates, *id.* at 322.

43. *See* U.S. CONST. art. II, § 2, cl. 2 (prescribing presidential nomination and Senate confirmation).

44. Indeed, this accountability was offered by Alexander Hamilton in *The Federalist* as a check on the potential for cronyism by nominating Presidents and partisan obstructionism by Senators. *See* THE FEDERALIST NO. 77, at 428-30 (Alexander Hamilton) (Clinton Rossiter ed., 1961). For evidence that votes against nominees made by popular Presidents can come back to haunt Senators, see Jeffrey A. Segal, Albert D. Cover & Charles M. Cameron, *The Role of Ideology in Senate Confirmation of Supreme Court Justices*, 77 KY. L.J. 485 (1988-89).

public support for the President, the nominee, or both.[45] Perhaps Choi and Gulati believe that for the public to form opinions on nominees in order to exercise that indirect influence, the public needs the comparative information that their tournament provides.

But perhaps they simply overestimate the degree to which voters and Senators credit presidential claims of merit. Political scientists James Gimpel and Lewis Ringel have noted that while public supporters of a particular nominee tend to tout the nominee's objective qualifications—character, achievements, abilities, and the like—opponents tend to frame arguments against the nominee in terms of the nominee's perceived ideology or expected positions on key issues.[46] In another paper, Gimpel argued that one of the strongest "cues" for those holding opinions about nominees to the Supreme Court is the nominating President.[47] "Public evaluations of the president's choice for the Court," they conclude, "are shaped by judgments of presidential performance. . . . The president serves as a cognitive link between the citizen and the Court in the judicial selection process."[48] This link, in turn, can serve as a cue to Senators as to whether they can safely oppose a presidential nominee.[49] And when Senators are free to vote their preference, according to Segal, Cover, and Cameron, they tend to want to vote against nominees from whom they perceive themselves as ideologically distant and vice versa.[50]

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45. *See, e.g.*, Kathleen Frankovic & Joyce Gelb, *Public Opinion and the Thomas Nomination*, 25 PS: POL. SCI. & POL. 481, 483 (1992); L. Martin Overby et al., *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 AM. POL. SCI. REV. 997 (1992). Frankovic and Gelb wrote:

> By two to one, Americans thought Clarence Thomas should be confirmed before the hearings [on Anita Hill's sexual harassment allegations]. After they were over, they still favored confirmation.
>
> . . . .
>
> Many of the Senators decided to vote to confirm in the last hours before the vote. Multiple public opinion polls, done by media organizations, were available to Senators. Many surely used those polls to help make up their minds, or to justify minds they had already made up. The Senate was confused about who was telling the truth. Given the sensitivity of male Senators to a sexually charged confrontation, they sought to validate their position by recourse to the public's judgment.

Frankovic & Gelb, *supra*, at 483.

46. James G. Gimpel & Lewis S. Ringel, *Understanding Court Nominee Evaluation and Approval: Mass Opinion in the Bork and Thomas Cases*, 17 POL. BEHAV. 135, 139-40 (1995).

47. James G. Gimpel & Robin M. Wolpert, *Opinion-Holding and Public Attitudes Toward Controversial Supreme Court Nominees*, 49 POL. RES. Q. 163 (1996).

48. *Id.* at 173.

49. *Id.* at 174 ("It is therefore not surprising that senators feel free to give Supreme Court nominees a harder time when the appointing president is suffering at the polls.").

50. Segal, Cover & Cameron, *supra* note 44, at 485; *see also* Lee Epstein et al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. 1145, 1168-72 (2005).

In other words, if the political scientists are correct, Supreme Court nominees—all things being equal—will be confirmed if more Senators find the nominee closer to them ideologically than find the nominee ideologically distant. On the other hand, a President's popularity may cause some Senators to cast votes counter to their ideological preference, lest they suffer the wrath of voters at a later date. The public, meanwhile, will tend to judge a nominee based on its approval or disapproval of the President.[51] Supporters will tend to focus on general characteristics—many of which speak to a nominee's merit—while opponents will tend to focus on specific issues and on ideology generally.[52]

Perhaps more interesting is evidence of the willingness of members of the public, when polled, to express their opposition to particular nominees in ideological terms—for example, "issue-specific concerns such as abortion and affirmative action"—as compared to evidence that members of the public who support particular nominees are more likely to state general reasons for their approval—for example, "the nominee's personal traits and experience."[53] This suggests a certain sophistication on the part of engaged members of the public, who are aware that claims of merit for a particular nominee will be made in the larger context of a nominee's ideological acceptability to the President. Certainly such an understanding exists among Senators, who often point out, when opposing a particular candidate, that they do not expect that the President (especially if the President is a member of another party) would nominate the same person they would.

None of these accounts, however, suggests that Presidents' mere claims about a nominee's merit are very persuasive, other than by virtue of the fact that the claims are being made by a popular President. Given the intense interest group activity that now surrounds Supreme Court nominations, members of the public for whom Supreme Court nominations are salient (and this still probably constitutes a very small percentage of "the public") will be subjected to a barrage of information—both positive and negative—about a nominee other than a President's statements in support. It does not seem plausible that these members of the public would be taken in or misled by presidential claims of merit.

Senators called upon to vote on the nomination will be subject to even more pressure and will have even more information to influence their vote. Even assuming that some members of the public might accept an administration's claims of merit, Senators who wish to see

51. *See* Gimpel & Wolpert, *supra* note 47, at 171-73.
52. *See* Gimpel & Ringel, *supra* note 46, at 139-40.
53. *See, e.g.*, *id.* at 139-41.

a particular nominee defeated can use the information at their disposal, as well as the national forum their office provides, to publicize negative aspects of a nominee's record or question a nominee's qualifications.[54] Senator Ted Kennedy did this effective after the Bork nomination by making a speech on the floor of the Senate vehemently denouncing "Robert Bork's America."[55]

One final thought: If members of the public at large are formulating opinions on Supreme Court nominees that are rooted in ideology and if, as the evidence suggests, undecided members of the Senate take heed of public opinion when deciding whether to support a nominee, perhaps the "politics" in the selection process that Choi and Gulati decry[56] comes as much from the bottom up as from the top down. That is, if members of the public understand there to be an ideological component to judging and to judicial selection and people know that courts (especially the Supreme Court) have a role in resolving issues important to them, then perhaps Presidents and Senators will be forced to take account of public expectations as never before. Thus, we see Democratic presidential candidates vowing to appoint only judges solicitous of *Roe v. Wade*[57] and Republican Presidents pledging not to appoint "activist" judges.

D. Assumption No. 4: Tournament Would Introduce Needed Transparency to Selection Process and Assumption No. 5: Possibility of Ex Ante Agreement on Objective Criteria

Assuming that there *is* a level of confusion on the part of the public regarding Supreme Court selection that needs to be dispelled, would a tournament help? Choi and Gulati argue that a tournament would shed light on what they see as "a biased and nontransparent process."[58] But the success of a tournament in opening the selection process to scrutiny depends on the ability of potential antagonists in the process to agree, ex ante, on the "objective" criteria to which Choi and Gulati make repeated reference.[59] If the selection process is already the subject of unhealthy politicization, as Choi and Gulati charge, one wonders what hope there is of getting Presidents, Senators, interest groups, journalists, academics, and members of the

54. Segal, Cover, and Cameron offer evidence that Senators may oppose the nominee of even a popular President if they can raise questions about qualifications. *See* Segal, Cover & Cameron, *supra* note 44, at 485.

55. 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Kennedy).

56. *See* Choi & Gulati, *supra* note 1, at 301.

57. *See supra* note 35 and accompanying text.

58. Choi & Gulati, *supra* note 1, at 304. For references to "transparency," see *supra* note 27.

59. *Id. passim*.

public to agree on what objective criteria ought to be used and how they should be applied to potential nominees.

A possible response is that the transparency inherent in a tournament, as Choi and Gulati suggest, permits criticism of the criteria, the criteria's application, or both. However, to improve on an existing tournament, one need only use different criteria or apply the existing criteria differently. As improvements result in the formulation of alternate tournaments, such tournaments would themselves be transparent and open to criticism, which could lead to the fashioning of more tournaments, and so on. There could then conceivably be a Tournament among tournaments, with consumers of the information making choices among them. In that way, we might eventually reach a consensus regarding the set of objective criteria by which judges are to be measured.

But in the short run, this "let a thousand flowers bloom" approach would seriously reduce the possibility of dispelling confusion surrounding the selection process. Those lacking independent means for discriminating among the competing tournaments might simply resort to rough proxies. For example, liberal Presidents and Senators might use tournaments run by organizations such as the American Constitution Society or People for the American Way, while conservatives might turn to the Federalist Society, the CATO Institute, or the Heritage Foundation. Even if there was an overlap in the "objective" criteria employed by these different organizations, I strongly suspect that there would be little overlap among the lists of presumptive candidates generated by interest groups or organizations from opposite ends of the political spectrum.

II. HOW TOURNAMENTS CAN AID SUPREME COURT SELECTION

While a tournament is unlikely to reduce the role of politics in Supreme Court selection significantly or have a dramatic impact on the behavior of the parties in the confirmation process, it may nevertheless be useful to help correct some of the process's pathologies. Presidents may find it helpful to conduct a credible search that at least *appears* to reduce the level of "politics." The Senate may use tournaments to construct a meaningful "advice" function that provides incentives for the President to consult with Senate members prior to selecting a nominee.[60] Interest groups can use the tournament to compete with the decidedly opaque American Bar Association (ABA) evaluation process. Finally, a tournament, if used by interest groups and the media, could provide a useful way of evaluating

60. *See* U.S. CONST. art. II, § 2, cl. 2 (establishing the Senate's role in Supreme Court appointments).

Supreme Court nominees without resorting to crude labels like "liberal" and "conservative" or "activist" and "strict constructionist."

A. Improving the President's Selection Process

Despite the considerable discretion Presidents have in selecting nominees, they are inevitably constrained by political realities.[61] As David Yalof has demonstrated, this fact (as well as differences in personality) has caused Presidents' approaches to Supreme Court selection to vary.[62] Insensitivity to those realities can create problems not only for the nominee but also for the President, who can find that his "personal prestige and ability to influence other public matters suffer when the selection of a Supreme Court nominee fails to adequately account for the hostile forces at work in the immediate political context."[63] If recent struggles over lower court judges are a guide, the political landscape facing the current President and his nominee(s) will be a difficult one indeed.[64] President Bush would do well to recognize and accept the political environment in which his Administration must operate; here, perhaps, the tournament might identify a nominee who would have a better chance at confirmation than one chosen through some other selection process. "Successful confirmation politics," Yalof sensibly concluded, "often depends on whether the president has made astute selection decisions during [the] earlier stages of the appointment process."[65]

Yalof offered three models of presidential selection: (1) open selection, where decisions are made after vacancy; (2) single-candidate focused arrangements, where the President has someone in mind for the next vacancy; and (3) criteria-driven frameworks for selection, where "the president and his advisors set forth specific criteria to be met by prospective nominees."[66] Half of the modern nominees discussed in his book were selected by the third process.[67] Yalof concluded that this approach had the best potential for permitting

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61. *See* YALOF, *supra* note 22, at 4.
62. *See id.* at 4-5.
63. *Id.* at 4.
64. Yalof's book includes a helpful discussion, listing ten "critical developments in American politics [that] substantially altered the character of the modern selection process for justices": (1) the growth and bureaucratization of the Justice Department; (2) the growth and bureaucratization of the White House; (3) the growth in size and influence of federal courts; (4) the divided party government; (5) the increasingly public nature of the confirmation process; (6) the rise in power of the organized bar; (7) the increased participation by interest groups; (8) the increased media attention; (9) the advances in legal research technology "for researching the backgrounds of prospective Supreme Court candidates"; and (10) the more visible role of the Supreme Court in American political life. *Id.* at 12-19.
65. *Id.* at 168.
66. *Id.* at 6-7.
67. *Id.* at 177.

Presidents to further the interests of their administration, though criteria-driven searches often require delegation to subordinates who might become involved in turf wars with each other.[68] While Yalof was loath to offer "generalizations about relevant do's and don't's in Supreme Court recruitment,"[69] he seemed to offer qualified approval of the criteria-driven process, as long as one "eminently qualified presidential advisor" with political and legal savvy was in charge and the criteria chosen were not "overly restrictive," which would preserve flexibility and prevent "the quality of selection outcomes [from being forced] down to its lowest common denominator."[70]

Based on Yalof's study and his tentative conclusions, Choi and Gulati's tournament could be of considerable help to an administration's pursuit of a successful nomination and confirmation. Committing resources to identify potential nominees *before* a vacancy occurs permits Presidents to consider different strategies in the absence of an immediate need to make a nomination. Moreover, it permits a President to signal to other players that the selection of Court personnel is important to the administration. Running a tournament based on ex ante criteria could enable the administration to make credible claims of a merit-based approach, even if it is unlikely that the administration's opponents will agree with the criteria that are used.[71] The appearance of merit-based selection (even when conducted within ideological constraints) might suffice to shift the burden to opponents of the nominee to justify their opposition in terms of other criteria they would be obliged to disclose, as Choi and Gulati suggest, thus giving a President (all things being equal) a strategic advantage at the outset of the nomination.

The President may also be able to use a criteria-based tournament to offer key Senators a role in the selection process. Asking Senators to give names is always tricky: failure to choose a Senator's preferred nominee can create an enemy (even within one's own party), and given the present confirmation climate, Presidents need all the friends they can get in the Senate. Alienating Senators is as impolitic as it is unnecessary. But imagine a President inviting Senators to offer criteria by which future selections ought to be made. Co-opting Senators by offering them the opportunity to construct the tournament both signals that the President respects the Senate's "advice" role and helps spread responsibility. Candidates who emerge from a tournament that Senators had a role in constructing might have an

68. *Id.* at 172-80.
69. *Id.* at 186.
70. *Id.* at 187.
71. *See supra* Part I.D.

easier time than those emerging from a process that did not involve the Senate at all.

However, unless a future President tries to employ a tournament, we will have no way to test the possibilities presented above. As commentators have made clear, a good part of a President's success in nominating a Supreme Court Justice has less to do with the nominee and more to do with the perceived power of the nominating President.[72] Moreover, a President may find his efforts to introduce objective criteria stymied by bureaucratic infighting among his own advisors,[73] by his own political commitments, or by the political context of the time. Perhaps Senators would not want to collaborate with the President, realizing that such collaboration may constrain their own actions in the future with regard to a particular nominee. Finally, any role for a tournament would depend at least in part on the level of a President's interest in the Supreme Court and its personnel; history shows that this cannot be taken for granted.[74]

B. Creating a Senate "Advice" Mechanism

Charles Black once concluded ruefully that any sort of formal Senate advice mechanism no longer exists.[75] But there is no reason to think that it is too late in the day to create one; Choi and Gulati's tournament may offer a way to do so. Senators may lobby the White House to have their favored criteria included in an administration-run tournament, which an administration may favor over the submission of specific names. Alternatively, Senators may wish to construct their own tournament and publicize the names of the winners to pressure the White House to take account of their wishes.

Perhaps Senators could even offer an administration a deal: allow us to participate in some way, and we will guarantee "fast-track"

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72. *See* ABRAHAM, *supra* note 22, at 28 (listing "opposition to the nominating president" as one of eight historical reasons for rejection of Supreme Court nominees); *see also* JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 128-40 (1995) (discussing the "wide range of resources for screening potential nominees and generating support for them" available to modern Presidents); Segal, Cover & Cameron, *supra* note 44, at 506 (noting the likelihood of a nominee's defeat "when . . . the political environment is hostile to the president").

73. *See, e.g.*, YALOF, *supra* note 22, at 134-35 ("Reagan's hands-off management style ultimately encouraged a disproportionate amount of conflict among advisors within his administration, each clamoring for influence over the final selection outcome.").

74. *See, e.g.*, MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2000) (discussing lack of interest in judicial nominees on the part of the Clinton Administration); YALOF, *supra* note 22, at 40 (noting Truman's "limited interest in most of the Court's docket").

75. Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 659 (1970) ("*Procedurally*, the stage of 'advice' has been short-circuited."). I have argued that the "blue slip" that home-state Senators must submit to permit a judicial nomination to go forward can be seen as an effort to encourage Presidents to consult Senators prior to a nomination. Denning, *Blue Slip*, *supra* note 5, at 91-97.

consideration of nominees, including expedited hearings and a quick vote, as Glenn Reynolds once suggested.[76] Under Reynolds's proposal, the Senate would proffer a list of candidates to the President.

> This list would constitute the "advice" portion of the Senate's constitutional role. The President could then do one of two things—she could select a nominee from the list, who would be presumed competent based on the Senate's earlier screening and would be given approval according to some sort of accelerated procedure . . . , or she could select someone not on the list, in which case the confirmation process would take place as usual.[77]

Reynolds's brief proposal did not include a discussion of the criteria the Senate should use to compile the initial list, but the procedure he outlined neatly accommodates Choi and Gulati's tournament. If Senators could convince the media, interest groups, and the public that their selection process was fair and nonpartisan by citing their use of "neutral" criteria, then Choi and Gulati's prediction that the burden would shift to the President to explain his choice if it was not on the Senate's list could prove accurate.

It would be ideal if, in either event, Senators from both parties—perhaps those on the Senate Judiciary Committee—worked together to fashion criteria, or to run the tournament, or both. Wishful thinking? Perhaps, but such collective responsibility may give Senators of all parties reprieve from interest groups that pressure them to support or oppose particular nominees. Senators themselves have, of late, expressed frustration with the present process,[78] and if the recent wrangling over courts of appeals judges are any indication, the next Supreme Court vacancy will produce an unprecedented bloodletting. Because Senators and the President realize this, perhaps now is an ideal time to propose an alternative to the mutually assured destruction of the current process.[79]

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76. Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577, 1579-81 (1992).

77. *Id.* at 1580 (footnote omitted).

78. For a sampling of complaints, see John Coryn, *Restoring Our Broken Confirmation Process*, 8 TEX. REV. L. & POL. 1 (2003); John Coryn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2003); Orrin G. Hatch, *At Last a Look at the Facts: The Truth About the Judicial Selection Process: Each Is Entitled to His Own Opinion, But Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 486-92 (2003); *see also* Michael J. Gerhardt, *Judicial Selection as . . . Talk Radio*, 39 U. RICH. L. REV. 909 (2005) (quoting from Senators' complaints).

79. We should probably take these expressions of frustration with a grain of salt. As Reynolds reminded us,

> [I]t may be that the process as it now exists suits a lot of people more than they want to admit. Presidents and presidential candidates are able to promise to appoint ideologues of one stripe or another to the Court—and, if they can slip the ideologues past the Senate, to fulfill their promises. Senators are able to posture and curry favor with interest groups . . . . And those interest groups themselves are given a potent tool for currying publicity and raising

C. Ending the ABA's Monopoly on Candidate Vetting

In the 1940s, the ABA began evaluating nominees to the federal bench. Presidents and Senators helped the ABA attain a role in the selection and confirmation of judges that was unique among interest groups. Acting on long-standing complaints by conservatives that the ABA was biased against conservative judges, the Bush Administration and Senate Republicans ended the ABA's official role in vetting judicial nominees. The Administration's action was criticized, and if Democrats retake the Senate (as they did briefly in 2001), the ABA may be restored to its prominent position.[80] For those administrations unhappy with the ABA, because of suspicions about its agenda, dislike of the committee's penchant for secrecy, or its elite makeup, Choi and Gulati's tournament offers an alternative that does not leave an administration open to charges—like those leveled at the current Bush Administration—of letting ideology drive selection to the exclusion of other considerations.

The ABA committee in charge of judicial selection is made up of fifteen lawyers[81] who rate nominees according to "professional qualifications—integrity, professional competence and judicial temperament."[82] As Choi and Gulati note, the ABA's vetting process in no way approaches a tournament because they evaluate only candidates who are nominated, the standards used are not objective or easily quantifiable, and the process (including the makeup of the committee) is not transparent.[83] Though the evidence of political bias is mixed, the ABA has certainly been perceived as biased against judges nominated by Republican Presidents,[84] a perception no doubt

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> funds. . . . If we do not depart from the present system, we will know that all the complaints about the process, from both the executive and the legislative branches, amount to so many crocodile tears.

Reynolds, *supra* note 76, at 1582.

80. *See generally* Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37 (2001); William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 35-61 (1990) (discussing the role of the ABA and the litigation over its role in judicial selection).

81. The ABA president appoints the committee, which consists of "two members from the Ninth Circuit, one member from each of the other twelve federal judicial circuits and one member-at-large." AM. BAR ASS'N, THE ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 2 (1999), *available at* http://www.abanet.org/poladv/scfedjud.pdf.

82. *Id.* at 4.

83. Choi & Gulati, *supra* note 4, at 35-36.

84. *Compare* James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J.L. & POL. 1 (2001), *with* Michael J. Saks & Neil Vidmar, *A Flawed Search for Bias in the American Bar Association's Ratings of Prospective Judicial Nominees: A Critique of the Lindgren Study*, 17 J.L. & POL. 219 (2001). *See also* James Lindgren, *Saks and Vidmar: A Litigation Approach to Social Science*, 17 J.L. & POL. 255 (2001); John R. Lott, Jr., *The American Bar Association, Judicial Ratings, and Political Bias*, 17 J.L. & POL. 41 (2001).

reinforced by the ABA's public stands on controversial legal and social issues.[85]

Critics have charged that there is no good reason to privilege the ABA over other interest groups. Choi and Gulati's proposal now furnishes other groups—whatever their interest in the selection process—with a tool for publicizing their own evaluations of judicial nominees, or for suggesting nominees who "win" their tournament. At the very least, perhaps the introduction of some competition into the nominee evaluation game would put pressure on the ABA to open up its process and refine the notoriously vague criteria that its evaluation committee uses. If such alternative evaluations were done conscientiously and developed a reputation for fairness and transparency, administrations could choose to forego the ABA evaluations, yet they would be insulated from the charge that they were trying to shield their candidates from scrutiny or were pursuing a narrow ideological agenda. Even if having competing evaluations is confusing because of the proliferation of information, as I suggest above, the net result would be more information that members of the public could either sort through themselves or, as is now the case, rely on specialists and the media to digest and report.

D. Creating a New Vocabulary for Debating Nominations

The last point—that to the extent the public has an opinion at all on judicial nominees, it is one inevitably shaped by information filtered through interest groups and media outlets—is another problem for which Choi and Gulati's tournament proposal offers a potential solution. When candidates are discussed, they are inevitably pigeonholed as liberal or conservative, as activists or practitioners of judicial restraint, or as pro-business or pro-civil rights. Where such labels are affixed to sitting judges (as Choi and Gulati point out, the next Supreme Court nominee will likely be a sitting judge),[86] they tell almost nothing about the judge's record, experience, or expertise and can, in fact, be extremely misleading.

A particularly disturbing trend among newspaper editorial boards is the tendency to condemn a judge because she "ruled against" a particular group (civil rights litigants, businesses, the state in criminal matters, and so on) a certain percent of the time.[87] Such statistics

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85. *See, e.g.*, News Release, American Bar Association, ABA Urges Congress to Reject Constitutional Amendment Restricting Ability of States to Define Civil Marriage (Mar. 23, 2004), *available at* http://www.abanet.org/media/releases/news032304.html.

86. *See* Choi & Gulati, *supra* note 1, at 303 ("The norm today appears to be that a candidate for the Supreme Court must first sit on a federal circuit court of appeals before she may be considered for a seat on the Court.").

87. For some examples, see Brannon P. Denning, *Judge Noonan's* J'Accuse . . . !, 34 CUMB. L. REV. 477, 500 n.174 (2003-2004) (book review).

tell little about either a judge's abilities or her ideological disposition. They ignore entirely the underlying merits of the cases filed. Moreover, with lower court judges, a particular type of claim may be foreclosed by precedent. Problems are compounded when one tries to assign responsibility for the decision of multimember panels.

Using the number of times a judge is overruled or reversed is similarly unhelpful. A judge with a heavy caseload might be expected to have a higher number of reversals, which if converted to a percentage might be quite small. Appeals court judges are vulnerable to the whims of the U.S. Supreme Court. An appeals court could make a good-faith effort to apply Court precedent, only to have the Court adopt an equally plausible interpretation of its own precedent or repudiate its prior decisions and proceed in an entirely new direction.[88]

Senate confirmation hearings do little to improve upon the media characterizations. My colleague Bill Ross has demonstrated that the often jejune questions posed to nominees by members of the Senate Judiciary Committee—Senators presumably having a high level of interest and expertise in legal matters—show Senators wedded to the same reductionist dichotomies as the popular media. These questions in turn invite equally banal responses from the nominees themselves, who can perhaps be forgiven their reticence given the nature of the process.[89]

Choi and Gulati ask, "[W]hat if journalists today were to begin looking at the citation counts or publication rates of the Republican candidates for the court . . . ?"[90] They predict that "[t]he tournament will have begun," because comparisons would be made between nominees and other judges, criticisms would be made about the criteria used, and new metrics would be put forward.[91] Even if the result would be competing tournaments, with *The New York Times* running one and *The Wall Street Journal* running another, they, like competing public opinion polls, would have to disclose their criteria and would be open to criticism.

Such efforts would, one hopes, shape the debate so that the next Supreme Court nominee would not be asked about her favorite Jus-

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88. For similar concerns, see Vladeck, *supra* note 3, at 1434 ("I am also skeptical that reversal rates would tell us much about the quality of court of appeals judges . . . .").

89. *See, e.g.*, William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119 (2001) [hereinafter Ross, *Questioning of Lower Federal Court Nominees*]; William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109 (1987); William G. Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB. L. REV. 993, 1004-14 (1994).

90. Choi & Gulati, *supra* note 1, at 322.

91. *Id.*

tice, or what Supreme Court decisions she disagreed with most,[92] but perhaps, instead, about judicial independence, approaches to application of precedent, and prior decisions. The tournaments, moreover, might generate information that could be used to educate Senators, who are often satisfied with bland and uninformative assurances about fidelity to precedent, affinity for Justice John Marshall Harlan, abhorrence of *Lochner*[93] (or *Korematsu*[94] or *Dred Scott*[95]), and vigorous renunciations of judicial activism in any form. Similarly, solid information about a nominee that tournaments might provide could inoculate the nominee against charges of being "out of the mainstream" if the nominee is shown "objectively" to stack up well against her colleagues on the bench. Either outcome would be a welcome improvement over the present system.[96]

Finally, it is worth noting that Senators have not yet decided whether it is publicly acceptable to oppose an otherwise-qualified Justice solely on the basis of ideology (save for nominees deemed to be "extremists"). It is generally accepted, however, that opposition based on ethical lapses or questions about a nominee's integrity is perfectly acceptable. The process thus creates an incentive for Senators who might otherwise oppose a nominee based on her ideology to play ethical gotcha games with nominees to justify a "no" vote. Similarly, since "extremists" are fair game as well, as I alluded to above, nominees sometimes find their records twisted to support an outcome made on other grounds. To the extent the tournament caught on, it might help expand the range of acceptable reasons to oppose a President's nominees beyond impugning a nominee's integrity or assassinating her character.[97]

III. CONCLUSION

It is probably impossible to remove politics from the Supreme Court selection process. Even if it were possible, I am not sure it would be desirable, given the tremendous power Supreme Court Justices potentially wield. That said, I do not accept that we are stuck

92. *Cf.* Ross, *Questioning of Lower Federal Court Nominees*, *supra* note 89, at 153-58.

93. Lochner v. New York, 198 U.S. 45 (1905).

94. Korematsu v. United States, 323 U.S. 214 (1944).

95. Dred Scott v. Sandford, 60 U.S. 393 (1856).

96. *See also* Gerhardt, *supra* note 18, at 366 (noting that the media's move from "reporting 'hard' news or facts and figures to reporting 'soft' news or speculation and commentary," due in part to the emergence of the twenty-four hour news cycle, has "put enormous pressure on newspapers and television reporters to emphasize scandal" with the result being that "[t]he media . . . prefers to stick to simple labels of 'liberal' and 'conservative'").

97. *Cf.* ROBERT A. KATZMANN, COURTS AND CONGRESS 39 (1997) ("It may be that open and serious discussion of the nominee's values, approach to the law and to decisionmaking, and declared policy preferences may have the salutary effect of reducing the temptation to do battle in highly personal terms.").

with the pathogenic confirmation process to which we have become accustomed over the last twenty years. Politics and ideology have been employed as bases for opposition to Supreme Court nominees for nearly as long as the Court has existed. Yet only recently, it seems, has "war" become an appropriate metaphor for the process. Therefore, I applaud Choi and Gulati for rejecting the fatalism that has crept into discussions about the confirmation process and offering an alternative to it.

While not the depoliticized, objective, merit-machine academics might wish for, I believe that their tournament, or something like it, might be used to improve our present process. It offers the possibility for cooperation on Supreme Court appointments between the President and the Senate without either seeming to lose face or cede power. It offers a framework in which the Senate could revive a meaningful advice function. (If it served as even the beginning of a conversation between a presidential administration and Senators of both parties or simply spurred a bipartisan discussion among Senators about confirmation criteria, as it has among the participants in this Symposium, surely it was worth proposing.) Tournaments may create competition to produce the best measure for candidates, and may even spur long-time players, like the ABA, to refine their criteria in order to retain influence. Finally, it may help reframe the terms on which debates over nominees are conducted.

In the end, nothing may come of Choi and Gulati's proposal. Perhaps, as Glenn Reynolds suggested, the present system suits the parties just fine, despite their public protestations.[98] But if we are still debating the confirmation wars ten years from now, academics should remind Presidents, Senators, interest groups, and members of the media that it was not for lack of alternatives that the process did not improve.

98. *See supra* note 79 and accompanying text.