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A Tournament of Virtue

Lawrence B. Solum
law@lbs.com

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LAWRENCE B. SOLUM*

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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 excellence—that is, for the possession of the judicial virtues: intelligence, wisdom, incorruptibility, sobriety, and justice. In an in-

* John A. Cribbet Professor of Law, University of Illinois College of Law. I owe thanks to both Loyola Marymount University's Loyola Law School and the University of San Diego School of Law for research support of work incorporated in this Essay and to Mitu Gulati for comments on an early draft.

fluent and provocative series of articles, 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 are excellent. But Choi and Gulati have gotten something crucially wrong: they have mistaken measurability for merit. A tournament of judges would be won by judges who possess arbitrary luck and the vices of originality and mindless productivity; the contest would be lost by those who possess the virtues of justice and wisdom. *The judicial selection process should not be transformed into a game.*

In Part II, “What Is Judicial Excellence?” I tackle the tough problem that Choi and Gulati avoid—the explication of a theory of virtue for judges. In Part III, “Discerning Excellence,” I discuss how we can tell whether candidates for judicial office are bad, by which I mean incompetent, or are truly excellent. Part IV, “The Mismeasurement of Virtue,” engages the idea of quantitative measures of judicial performance as a proxy for excellence. Finally, in Part V, “Conclusion: The Redemption of Spectacular Failure,” I argue that Choi and Gulati’s idea is a 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,² whereas my discussion will range a bit more broadly to include the selection of judges for other courts and tribunals.

II. WHAT IS JUDICIAL EXCELLENCE?

If our enterprise is judicial selection, the immediate question is, Who are the best or most excellent judges? Behind that question lies a more fundamental issue: What is judicial excellence? Stated differently, What makes one judge better than another? Choi and Gulati largely beg this fundamental question—focusing instead on particular metrics of judicial performance. In this Part, 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.

1. 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) [hereinafter Choi & Gulati, *Empirical Ranking*]; Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004) [hereinafter Choi & Gulati, *Tournament*].

2. Choi & Gulati, *Tournament*, *supra* note 1, at 300.

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 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. 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.³

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.⁴ 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 for judging skill, but that is not the standard at which we are aiming. The goal is to demonstrate the availability of a set of objective measures for which we can easily collect data and analyze and that would better identify, at the outset, a merit-worthy pool of Supreme Court candidates.⁵

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 driven by the availability of data. That is, Choi and Gulati begin with the question, What aspects of judicial performance can we easily 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

3. Choi & Gulati, *Empirical Ranking*, *supra* note 1, at 27.

4. *Id.*

5. *Id.* at 29-30.

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 specification of the criteria for judicial excellence 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 that 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 concern 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 the pragmatic standpoints, an answer to the fundamental normative question—What makes for excellence in judging?—is essential.

B. The (Mostly) Uncontested Judicial Virtues (and Vices)

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, quite a bit of 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.⁶ Nonetheless, it may be possible to identify a set of judicial excellences on which there is likely to be widespread agreement.

Whereas Choi and Gulati work backwards, from measurability to virtue, we shall work forwards, starting with the notion of judicial virtue. By “virtue” I mean a dispositional quality of mind or character 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 judges. We begin with an account of those judicial virtues upon which we can mostly agree—which I shall call the “uncontested judicial virtues,” or more accurately, “the mostly uncontested judicial virtues.” “Uncontested” in this context reflects the notion that these virtues are based

6. 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, which makes a simple left-right model of political ideology useful both analytically and empirically.

on noncontroversial assumptions about what counts as good judging and on widely accepted beliefs about human nature and social reality; the qualifier “mostly” reflects the fact that even an account of judicial excellence based on widely shared assumptions will be contested by some.

How can we get at the zone of agreement about judicial excellence? While there is a good deal of argument about which judges are the best, there is actually an astonishing amount of consensus about two related questions, Who are the very worst judges? and What are the worst judicial vices? No one thinks that the best judges are corrupt, drunk, cowardly, foolish, or stupid. This consensus suggests a strategy for articulating a theory of the uncontested judicial virtues. Let us begin with the worst judicial vices and identify the characteristics that are necessary to correct those defects. These characteristics will constitute the uncontested judicial virtues.

1. *Judicial Incorruptibility and Judicial Sobriety*

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.

Almost anyone with common sense is likely to accept the conclusion that judicial corruption is a vice. If we accept judicial corruption is a vice, then what is the corresponding virtue? This question could become complex—because there are a variety of character flaws that might lead to corruption. One such flaw that may be an underlying cause of corruption is greed (or *pleonexia*)—because a desire for more than one’s share (or entitlement) could lead a judge to accept bribes. All humans are at risk of mistaking wealth (which can only be a means) for a final end (something worth pursuing for its own sake). Some judges may resent the fact that they receive compensation that is sometimes only a fraction of that received by their peers in private legal practice—some of whom may be less talented.

We do not need to identify all of the possible vices that could lead to corruption in order to see that *incorruptibility* is an uncontested judicial virtue. There is no real controversy over the proposition that judges should be disposed to resist the temptations that lead to corruption. We call this disposition the “judicial virtue of incorruptibility,” even if it turns out that this virtue encompasses a variety of particular virtues each of which corresponds to a particular human vice that could lead to corruption.

There is another vice that is closely related to corruption but distinct from greed. Judges can become corrupted because their desires are not in order—because they crave pleasure or the status conferred by the possession of fine things. Judges, like the rest of us, can be corrupted by a taste for designer shoes, fast cars, loose companions, or intoxicating substances. More subtly, a judge could be corrupted by a desire for 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.

Let us use some old-fashioned terminology and call the vice of disorderly desire "intemperance." One might argue that intemperance is a purely private vice—that a judge's preference for a third cosmopolitan, the latest from Jimmy Choo or Manolo Blahnik, or the company of good looking youthful companions is her own business and hence irrelevant to the question whether she is an excellent judge. Of course, a proportionate and well-ordered desire for such things is simply not a vice—or at least not an *uncontested* vice. But a disposition to disproportionate desires for such pleasures can lead to more than corruption. Most obviously, a judge who is intoxicated (or high) on the bench is likely to be prone to error. The disordinate pursuit of less-intoxicating pleasures can also impair judicial performance—by focusing a judge's attention and energy away from judicial tasks.

There is a counterargument. It is a common human experience to have a friend, colleague, or acquaintance who is intemperate but nonetheless "gets the job done"—and who even performs brilliantly at times. Who has not encountered the lawyer who is a star by day but a lush in the wee hours or the friend whose life at work still holds together despite a drug problem? So, the argument goes, intemperance is not a *judicial vice*—at least not until it interferes with the performance of judicial duty. Even if the intemperate judicial candidate is a disaster at home, her intemperance should not disqualify her from judicial office if she performs at the office. This counterargument is ultimately unpersuasive. Of course, an intemperate judge can get lucky and "get away with it," either appearing to do well or even actually doing well despite disordered desires. But in such cases "getting away with it" is a matter of luck; an intemperate judge is simply not reliable. A really damaging misstep is always just one cosmopolitan away.

The virtue that corresponds to the vice of intemperance could be called *temperance*, in the classical sense that encompasses the ordering of all the natural desires. But I propose that we use another term to refer to the judicial form of temperance. 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."

2. *Judicial Courage*

Fear is one of the most powerful and familiar of the emotions. The disposition to feel too much fear makes us cowardly; the disposition to insufficient fear makes us rash. Courage represents a mean between cowardice and rashness. Let's call the judicial form of this virtue "judicial courage."

We might usefully subdivide the virtue of courage into two parts—which I shall call "physical courage" and "civic courage." That judges need physical courage in order to be excellent *as judges* is a lamentable fact in many societies. We have recently been reminded of this fact by the tragic experiences of federal district judge Joan Lefkow, who was threatened by one defendant and whose husband and mother were murdered by a party to another case.⁷ A judge who could be intimidated by threats of physical violence could not reliably do justice in our relatively peaceful society—much less under conditions in which violence (or threats of violence) is even more prevalent, as may be the case where narcoterrorism or ethnic conflict is pervasive.

Judicial courage has a second dimension. Judges, like most humans, care about their reputations and social standing. Like the rest of us, judges seek the approval and companionship of their fellows. So, in addition to physical danger, judges may fear consequences of their actions that threaten status and social approval. This fear is dangerous because the law may require judges to make unpopular decisions. A judge who ordered school integration in the South might be shunned socially. In societies where the judicial branch wields significant power in cases involving hot-button issues (abortion, end-of-life disputes, and so forth), there will be occasions where doing what the law requires may be profoundly unpopular. For this reason, judges need the virtue of civic courage—the disposition to put the regard of one's fellows in its proper place and to take it into account in the right way, on the right occasions, and for the right reasons. A judge with this virtue will not be tempted to sacrifice justice on the altar of public opinion. A civically courageous judge understands that the good opinion of others is worth having if it flows from having done justice and that social approval for injustice is an impermissible motive for judicial action.

7. Susan Estrich, *Now Is a Tough Time to Be a Judge*, SUN NEWS (Myrtle Beach), Mar. 25, 2005, available at <http://www.myrtlebeachonline.com/mld/sunnews/news/opinion/11226003.htm> (stating that "everyone was shaken up by what happened to the Lefkow family in Chicago, the cold-blooded murder of a judge's husband and aged mother"); Pam Hartman, *How Anger Turns to 'Social Rage,'* MOBILE REG., Apr. 3, 2005, available at <http://www.al.com/opinion/mobileregister/index.ssf?/base/opinion/1112545146171620.xml> (discussing murders caused by anger at judges).

3. *Judicial Temperament and Impartiality*

Like fear, anger is an emotion both familiar and powerful.⁸ Judges, like the rest of us, may be hot-tempered or cool and collected. And, like the rest of us, judges are likely to find themselves in situations where a hot temper could produce intemperate actions. This is especially true of trial judges, who are given the task of maintaining order in what may become emotionally charged circumstances. Litigants may ignore judicial authority or act with disrespect. Some lawyers may deliberately attempt to provoke the judge in order to elicit legal mistakes or “on the record” behavior that displays animus toward a party, which may serve as the basis for an appeal. In the face of such provocations, a judge with an anger management problem may “fly off the handle.” Intemperate judicial behavior may lead the judge to misapply the law or to distort the applicable legal standards in “the heat of anger.” Moreover, a hotheaded judge may become partial—pulling against the party who is the object of anger and displaying favoritism to that party’s opponent.

Aristotle identified *proates*, or “good temper,” as the corrective virtue for the vice of bad temper. In the judicial context, this virtue is so important that we have a phrase that expresses the virtue as a distinctively judicial form of excellence—“judicial temperament.” This phrase reflects our sense that the virtue of “good temper” is essential for good judging.

Is judicial temperament also required for judges who do not supervise trials? Appellate judges work in a cooler environment—provocative behavior by appellate lawyers is rare, although not unknown. The parties to an appellate proceeding frequently do not appear, and if they do, they sit in the audience without any formal participation in the appellate process itself. Some appellate courts proceed almost entirely on the basis of the briefs, dispensing with oral argument and hence with the opportunity for “live and in person” provocations. Nonetheless, good temper is essential for excellence in appellate judging. Appellate judges hear cases in panels or en banc—which create opportunities for friction among the judges themselves. Hot tempers can destroy collegiality and, with it, the opportunity for compromise and mutual understanding. Moreover, even a brief can elicit anger, and if anger becomes rage, it can have a blinding effect, depriving the judge of the ability to recognize the merits of an argument or a weakness in the judge’s own conception of the legal issues in a case.

8. My view of the virtue of temperance has been improved by recent work by Nancy Sherman. See Nancy Sherman, Aristotle, the Stoics, and Kant on Anger (Mar. 21, 2005) (unpublished manuscript), available at <http://asweb.artsci.uc.edu/philosophy/news/colloqPresentations/Sherman.pdf>.

If excessive anger is a vice, then what about its opposite? Is there a vice of deficiency with respect to anger? The Stoics are famous for answering this question in the negative; we might say that for the Stoics, the disposition to feel anger in any circumstances is a vice.⁹ The contrary view is that proportionate anger serves a valuable function—it alerts us to wrongs and motivates us to respond to them. A simple way of framing the issue is to ask which character from the 1960s television series *Star Trek* would make the best judge—Captain Kirk, Dr. McCoy, or Mr. Spock. Mr. Spock resembles the Stoic sage—he feels no anger and acts only on the basis of logic; we imagine Judge Spock reacting with equanimity to even the most severe courtroom provocations. Dr. McCoy is hot-tempered; we imagine him flying off the handle in response to outrageous behavior by the lawyer for a greedy corporation. Captain Kirk represents a mean between these two extremes; we imagine Judge Kirk as appropriately outraged by bad behavior and injustice but nonetheless remaining “in control,” and responding in an appropriate manner. The virtue of judicial temperament consists in having appropriate anger—anger for the right reasons, on the right occasions, and with a clear understanding of the consequences of its expression.

More concretely, when a party flouts the law or disrespects the participants in a legal proceeding, 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 someone persists in bad conduct, sanctions may be warranted; in such cases, giving an appropriate sanction is the right way to act on the basis of appropriate anger. But judges with the virtue of judicial temperament will not display their anger by ruling against an offending party on issues that are close or by exercising discretion on incidental matters so as to disfavor the anger-provoking party.

One reason that anger is an especially dangerous vice for judges is that anger can produce bias. For this reason, the virtue of judicial temperament is closely related to another judicial virtue, “judicial impartiality.” This virtue is a familiar feature of our conception of good judging. We want judges to be neutral arbitrators. A judge should be open to the law and evidence and not be biased in favor of one side or another. Such impartiality should extend not just to the parties but should also encompass the causes, movements, special interests, and ideologies that may be associated with those parties. When a judge takes the bench or lifts her pen to write an opinion, she

9. See 6 PLUTARCH, MORALIA 89-160 (W.C. Helmbold trans., 1927) (reprinting and translating Plutarch's essay, *On the Control of Anger*); 1 SENECA, MORAL ESSAYS 106-355 (John W. Basore trans., 1928) (reprinting and translating Seneca's essay, *On Anger*).

should put aside her allegiance to left or right, liberal or conservative, religiosity or secularism.

It is a mistake, however, to view impartiality as synonymous with disinterest. The virtue of impartiality is not cold-blooded. This is because the role of judge requires insight and understanding into the human condition. A good judge perceives the law and facts from a human perspective. Some facts are hot—charged with emotional salience. Some legal rules are morally charged—engaging our sense of indignation when juxtaposed with violative behavior. So the impartial judge is not cold-blooded; she is not *indifferent* to the parties that come before her. Rather, the judge with the virtue of judicial impartiality has evenhanded sympathy for all the parties to a dispute. When we say that 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*

Judging is hard work, involving its share of drudgery. Some trials are long and boring. Some opinions require long hours of research and even longer hours of careful drafting. The temptation to shirk this work is accentuated by the fact that judges are not (and should not be) closely supervised. And the lack of supervision is compounded in jurisdictions that grant judges life tenure or long terms in office. It is hard enough to remove a judge for outright corruption; one doubts that any American judge has been removed on the basis of sloth alone. But slothful or lazy judges can do real harm. They are tempted to delegate too much responsibility to judicial clerks, substituting the judgment of the clerk for the judge's own intellectual engagement with the case. Another temptation is to shape one's decision in order to minimize one's own workload. If granting the summary judgment motion takes a case off one's docket, the slothful judge might grant the motion for that reason alone, sacrificing justice on the altar of expediency.

What is the virtue that corresponds to the vice of sloth? We might call it diligence. The diligent judge has the right attitude toward judicial work, finding judicial tasks engaging and rewarding. But more than a good attitude is required. An excellent judge must have an appropriate "energy level"—a product of both physical and mental health. The combination of these traits should translate into a judge who is capable of hard work when hard work is required. Such a judge will put in the required hours and sweat out the difficult tasks. Such a judge will not hesitate to make the right decision, even if that makes more work for the judge. Nowadays, encouraging settlements

may be an appropriate activity for judges, but a diligent judge will aim for just and efficient settlements and not for resolutions that serve the judge's own convenience.

Carefulness is closely related to diligence. No one can sensibly doubt that judicial carelessness is a vice. Careless decisions, careless drafting, careless research—any of these can lead to substantive injustice. Carefulness is especially important in the context of judging, because excellent judging frequently requires meticulous attention to details. The lazy judge may shirk the unpleasant task of mastering the structure of a complex statute or avoid the painstaking task of making sense of a tangled body of precedent. Likewise, it requires diligence and care to draft an opinion in which each and every sentence is worded with careful appreciation of the importance of precision and accuracy. An excellent judge has an eye for detail and a devotion to precision.

5. Judicial Intelligence and Learnedness

Can anyone doubt that stupidity is a judicial vice? All humans need intelligence to function well—but some tasks require more intelligence on more occasions. Judging is the kind of task that almost always requires smartness and sometimes requires extraordinary intelligence. Both law and facts can be complex. Only a judge with intelligence will be able to sort out the complexities of the rule against perpetuities or penetrate the mysteries of a complex statute. But more than intelligence is required. A truly excellent judge must also be learned in the law, because one cannot start from scratch in each and every case and because there is at least some truth to the notion that the law is a seamless web. In terms of the corresponding judicial vices, stupid and ignorant judges will be error-prone, likely to misunderstand and misstate the law, and unlikely to make findings of fact that are correct.

The need for judicial intelligence and learnedness is accentuated rather than diminished in an adversary system. It is true that good lawyering makes a judge's job easier; the lawyers can identify the relevant issues and call the judge's attention to the best arguments on each side of those issues that are in dispute. But in an adversary system, successful advocates will try to make a bad case appear better by deploying sophistry and rhetoric. Intelligent and learned judges can "see through" the obfuscation.

6. Craft and Skill

So far, our investigation has focused on what Aristotle called the moral and intellectual virtues. These are dispositions of character and mind that make for human excellence. Good judging requires

more than good character and intellectual ability. That is because judging includes elements of craft, and therefore a good judge must possess a skill set—the particular learned abilities that are to good judging what good bowing technique is to archery or good draftsmanship is to architecture. A full account of judicial craft is far beyond the scope of this Essay, but one particular aspect of judicial craft and skill demands attention. Excellence in judging (especially good appellate judging) requires particular skill in the use of language. Good judges must be good communicators. This aspect of judicial skill includes at least two parts—oral and written. It is obvious that trial judges need good oral communication skills; they must deliver a variety of oral instructions to the various participants in both trial and pretrial proceedings. Among these, jury instructions are particularly important. Written communication skills are especially important for appellate judges in a common law system, because of the doctrine of *stare decisis*. Because appellate opinions set precedent, a badly written opinion can misstate the law or state the law in a misleading way. A really well-drafted opinion, on the other hand, can clarify the obscure and illuminate the meaning of murky legal texts.

Good communication skills are also important to judges when they mediate between the parties to a dispute. A skilled judge can gain the trust and cooperation of the parties—resorting to the threat of sanctions only in those rare cases where force is truly necessary. In this way, good communication skills can increase the efficiency of judicial proceedings, allowing the judge to focus her attention on those issues and cases where settlement and cooperative processes are unavailing.

C. The (Mostly) Contestable Judicial Virtues

One advantage of a theory of judicial excellence is that it reveals a large zone of agreement. For all practical purposes, we can agree that judges should be incorruptible, courageous, good-tempered, diligent, skilled, and smart. But these (mostly uncontested) virtues do not tell the whole story about judicial excellence. Even if we agree in our judgments about who the very worst judges are—the corrupt, ill-tempered, cowardly, lazy, incompetent, and stupid ones—there are strong and persistent disagreements about who the best judges are. The partisans of Lord Coke may deride the accomplishments of Lord Mansfield; the admirers of Justice Brennan may be among the critics of Justice Scalia. This Part investigates the source of these disagreements about judicial excellence.

Once again, my strategy is to examine the judicial virtues. In particular, I shall argue that disagreements about judicial excellence are typically rooted in two disagreements about the nature of judicial

virtue. The first disagreement is about the nature of the virtue of justice. The second disagreement concerns the role of equity and practical wisdom. On the one hand, some disagreements about judicial excellence turn out to be disagreements about and within conceptions of the virtue of justice. On the other hand, further controversies about which judges are best hang on differences in the understanding of the role of practical wisdom in judging.

Although there are important disagreements about the virtues of justice and practical wisdom, there are certainly agreements as well. When stated at a high level of generality and abstraction, these virtues will command near universal assent. Almost everyone will agree that an excellent judge must be just (rather than unjust) and wise (rather than foolish). Let's borrow the concept/conception distinction.¹⁰ We might say that there is agreement that the concept of the virtue of justice is required for judicial excellence, but that there is disagreement about which conception of the virtue of justice is best (or correct or most adequate). And likewise with the virtue of practical wisdom—we agree on the concept, but disagree about which conception of equity is the best one.

1. *Competing Conceptions of the Virtue of Justice*

What does the virtue of justice require? To answer this question, let us examine two different conceptions of the virtue of justice: *justice as fairness* and *justice as lawfulness*. (For short, I will use the phrases “the fairness conception” and “the lawfulness conception” to refer to these ideas.) I shall argue that conceptualizing the virtue of justice as fairness necessitates intractable disagreements about which judges are excellent, and that the competing conception, which emphasizes the idea that excellent judges are lawful, opens the door to agreement in judgments about who is just.

(a) *Justice as Fairness*

One influential conception of the virtue of justice is premised on the idea that the just and the lawful are separate and distinct. Of course, the view is not that all laws are unjust or that no just norms are law. Rather, the idea is that there is no necessary connection between legality and justice.¹¹ If this were so, then the most plausible conception of the virtue of justice might be articulated as follows:

10. See RONALD DWORKIN, *LAW'S EMPIRE* 73-76 (1986); JOHN RAWLS, *A THEORY OF JUSTICE* 4-5 (rev. ed. 1999); W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC'Y* 167 (1956).

11. This conception of the virtue of justice bears an affinity to the separation thesis—a central tenet of legal positivism. Cf. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994)

The Virtue of Justice as Fairness: A judge, J, has the virtue of justice as fairness, V(j-f), if and only if J is disposed to act in accord with the best conception of fairness, F, in situations, S, where fairness provides salient reasons for action.

One might think that a judge who possessed *V(j-f)* would ignore the law altogether, but this is not the case. If this thought were correct, it would provide the basis for a devastating objection to the fairness conception—because it would require each judge to substitute her private judgments about what fairness requires for the duly enacted constitutions, statutes, and rules. Although I shall not provide the argument here, it seems plain that this would be a recipe for chaos.¹²

But a defender of the fairness conception need not admit that a judge who acted on the basis of fairness would disregard the law entirely. *Why not?* Because the existence of legal norms will frequently give rise to considerations of fairness that will transform the moral landscape, creating salient reasons of fairness that motivate a judge who has *V(j-f)* to act in accord with the law. An example may help to clarify and illustrate this point. Suppose there is a dispute between Ben and Alice over Greenacre—a vacant and unimproved parcel of land. The law gives Ben title to Greenacre, which he has purchased, but Alice has begun to use Greenacre by planting a garden. In the absence of the institution of property law, it might be the case that Ben would have no claim on Greenacre—how would he acquire such a claim without some use or improvement of the land? But given the existence of property law, Ben would have a claim of fairness, because he has paid for Greenacre and has reasonably relied on the legal institution of property. If this is so, then the law has created a claim of fairness that otherwise would not exist, and a judge with *V(j-f)* would decide in favor of Ben—assuming, of course, that there were no other circumstances that created an overriding reason of fairness to decide in favor of Alice.

Nonetheless, the fairness conception faces a formidable objection because of the role that private judgment plays for judges with *V(j-f)*. To articulate this objection, we need to highlight the distinction between two questions about fairness—which I shall call “first order” and “second order” questions of fairness. A first-order question of fairness is simply the question, Which action is fair given the circumstances? A second-order question of fairness concerns whose judg-

(discussing legal positivism and the separation thesis, but not in the context of the virtue of justice).

12. Of course, there may be some theorists who believe that judges do and should act on the basis of their sense of fairness rather than the law. Moreover, those who adhere to the radical or strong indeterminacy thesis contend that the law never constrains the choices of judges. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

ment about first-order questions will be taken as authoritative. Thus, the question—Given the fact of disagreement about the correct answer to a first-order question of fairness, whose judgment should be taken as authoritative?—is a second-order question of fairness. One possible answer to a second-order question of fairness is that one ought to rely on one's own *private* judgment about what action is fair. A quite different answer is that one should rely on some source of *public* judgment. For example, one might rely on duly enacted and public laws.

The fairness conception implicitly requires judges to exercise private judgment about first-order questions of fairness. In exercising that judgment, the judge may conclude that expectations generated by reasonable reliance on the law provide reasons of fairness—as in the case of Ben, Alice, and Greenacre—but this is a conclusion of private judgment. One judge might conclude that Ben's reliance on property law was reasonable and hence that fairness required a decision for Ben. A different judge might conclude that no one could reasonably rely on property law in cases in which they were allowing valuable land to lie fallow when others could make productive use of the land—and therefore decide for Alice. Yet a third judge might conclude that because of pervasive economic inequalities, the whole institution of property is unjust and award the land to a third party, Carla, who was in greater need than either Ben or Alice. Because each judge makes a private judgment about the all-things-considered fairness of following the law in each case, these judgments can (and we expect will) differ with the moral, religious, and ideological views of the particular judge.

The objection to the fairness conception of the virtue of justice is that disagreements in private judgments about fairness would undermine the very great values that we associate with the rule of law. Because the fairness conception requires each judge to exercise her own private judgment about what fairness requires—all things considered—and because such judgments will frequently differ, the outcome of disputes adjudicated by judges with $V(j-f)$ will be systematically unpredictable. If this were the case, then the law would be unable to perform the function of coordinating behavior, creating stable expectations, and constraining arbitrary or self-interested actions by officials. How bad this would be is a matter of dispute. A Hobbesian answer to this question is that it would be *very bad indeed*—in the absence of a coordinating authority, life would be “solitary, poore, nasty, brutish, and short.”¹³ A Lockean answer is that reliance on

13. THOMAS HOBBS, *LEVIATHAN* 76 (Edwin Curley ed., Hackett Publ'g 1994) (1651).

private judgment leads to “inconveniences,”¹⁴ but even an optimistic realist would surely concede that the inconvenience of a society that cannot secure the rule of law would be serious.

We are now in a position to apply what we have learned about the fairness conception to judicial selection. If the fairness conception were correct, then the excellent judges would be those who have the right beliefs about fairness and who are disposed to act on those beliefs. If we agreed on the content of the right beliefs about fairness, this would not be a problem, but we do not agree. So the fairness conception leads to disagreement about who has the virtue of justice. We can provide a crude translation of this point into the language of political ideologies of the left and right. For the left, only left-wing judges are just; because only left-wing judges have what the left considers true beliefs about what fairness requires. And, of course, for the right, the left-wing judges are unjust precisely because they have what the right considers false beliefs about fairness. Even the uncontested virtues—such as incorruptibility or courage—become problematic once the fairness conception has been accepted. For the left, an intelligent, diligent, and courageous right-wing judge may be worse than one who lacks a keen intellect, is somewhat lazy, and is susceptible to the pressures of public opinion. And for the right, these same concerns exist with respect to left-wing judges.

Another weakness of the fairness conception is that anyone who holds it is naturally tempted to apply a double standard of judicial excellence. The double standard works like this:

For judges with whom I agree, the fairness conception supplies the content of the virtue of justice. Right-thinking judges are excellent when they act on the basis of their convictions about what is fair. But when it comes to judges with whom I disagree, a different standard applies. Wrong-thinking judges are excellent when they stick to the rules. For them, the lawfulness conception provides the standard for the virtue of justice.

You may say that position is ludicrous; no one could hold such a blatantly inconsistent set of positions about the meaning of justice. In reply, I suggest that you pay careful attention to the political rhetoric that attends debates about judicial roles and judicial selection.

(b) Justice as Lawfulness

If the fairness conception of the virtue of justice is unsatisfactory, is there an alternative? In the *Nicomachean Ethics*, Aristotle suggests an alternative understanding of justice as lawfulness, but to

14. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 276 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

understand Aristotle's view, we need to take a look at the Greek word *nomos*, which is usually translated as "law." For the ancient Greeks, *nomos* had a broader meaning than does "law" in contemporary English. Richard Kraut, the distinguished Aristotle scholar, explained the difference as follows:

[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.¹⁵

We can restate this last point by using our distinction between types of judgments (first- and second-order, private and public). If judges rely on their own first-order private judgments of fairness as the basis for the resolution of disputes, then it follows inexorably that their judgments will be decrees (*psēphismata*) and not decisions on the basis of a second-order public judgment—in other words, not on the basis of a *nomos*. A judge who decides on the basis of her own private judgments about which outcome is fair—all things considered—is making decisions that are tyrannical in Aristotle's sense.

How can this be?, you may ask. Are not decisions that are motivated by fairness the very opposite of tyranny? But framing the question in this way obscures rather than illuminates the point. Of course, if there were universal agreement (or even a strong consensus) of first-order private judgments about fairness, then decisions on the basis of such judgments would be *nomoi* and not *psēphismata*. But our first-order private judgments about the all-things-considered requirements of fairness do not agree. So in any given case, a decision that the judge believes is required by fairness will be seen by others quite differently. At best, the decision will be viewed as a good-faith error of private judgment about fairness. More likely, those who disagree will describe the decision as a product of ideology,

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

personal preference, or bias. At worst, the decision will be perceived as the product of arbitrary will or self-interest. In no event will a decision based on a controversial first-order private judgment of fairness be viewed as the outcome of a *nomos*—a publicly available legal norm.

We are now in a better position to appreciate why rule by decree (*psēphismata*) is typical of tyranny. Decision on the basis of first-order private judgments about fairness is the rule of individuals and not of law. From Aristotle's point of view, a regime that rules by decree does not provide the stability and certainty that is required for human communities to flourish.¹⁶ Kraut elaborates on this point:

We can now begin to 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 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.¹⁷

And with that point in place, we can now formulate the lawfulness conception of the virtue of justice:

The Virtue of Justice as Lawfulness: A judge, J, has the virtue of justice as lawfulness, V(j-l), if and only if J is disposed to act in accord with the nomoi (positive laws and stable customs and norms), N, in situations, S, where the nomoi provide salient reasons for action.

On the lawfulness conception, the virtue of justice does not require action in conformity with one's first-order private judgments of fairness. Justice as lawfulness is based on a second-order judgment that judges (or, more generally, citizens) should rely on public judgments. The content of the public judgments are the *nomoi*—the positive laws and shared norms of a given community. Someone with the virtue of justice is disposed to act on the basis of the *nomoi*. In other words, the lawfulness conception holds that the excellent judge is a *nomimos*, someone who grasps the importance of lawfulness and is disposed to act on the basis of the laws and norms of her community.

We are now in a position to compare the fairness conception and the lawfulness conception. Which of these offers a more satisfactory conception of the virtue of justice? On the surface, it might appear that the fairness conception is more satisfactory—after all, who can

16. *Id.* at 106.

17. *Id.*

deny that we ought to do what fairness requires, all things considered? Although there is much more to be said in a full account of these matters, the argument advanced here provides good reasons to doubt that the fairness conception can offer a satisfactory account of the virtue of justice. A view of justice must take into account the distinctions between first- and second-order judgments and between public and private judgments. Once these distinctions are introduced, the need for second-order agreement on a public standard of judgment becomes clear. The lawfulness conception of the virtue of justice answers this need; the fairness conception does not.

2. *Competing Conceptions of Equity and Practical Wisdom*

But the virtue of justice may not be exhausted by the lawfulness conception. Even if we concede that in ordinary cases justice requires adherence to the law, the question remains whether there are extraordinary cases—cases in which excellent judges would depart from the law (or, to put it differently, decide that the law does not really apply). Even if first-order private judgment cannot do the work of filling in the content of a general conception of the virtue of justice, that does not necessarily imply that the judge's sense of fairness has no role to play.

One reason we might doubt the adequacy of the lawfulness conception as the whole story about the virtue of justice flows from the fact that the positive law is cast in the form of abstract and general rules; such rules may lead to results that are unfair in those particular cases that do not fit the pattern contemplated by the formulation of the rule. If lawfulness were the whole story about the virtue of justice, then an excellent judge would apply the rule “come hell and high water,” even if the rule led to consequences that were absurd or manifestly unjust. But this implication of the lawfulness conception seems odd and unsatisfactory. Another way of conceptualizing this concern is to distinguish between two styles of rule application, which I shall call “mechanical” and “sensitive.”

Does the excellent judge apply the rules in a rigid and mechanical way? Or does a virtuous judge correct the rigidity of the lawfulness conception with equity? The classic discussion of these questions is provided by Aristotle in Book V, Chapter 10, of the *Nicomachean Ethics*:

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 none the less 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 behaviour is essentially of this kind.¹⁸

This is the *locus classicus* for Aristotle's view of *epieikeia*, which is usually translated as "equity" but can also be translated as "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 society that institutionalized system of norms that is its legal system.¹⁹

But there is a problem with supplementing the lawfulness conception of the virtue of justice with the notion of equity. Understanding the problem begins with the fact that the virtue of equity seems to require the exercise of first-order private judgments of fairness. Once such judgments are admitted to have trumping force—to have the power to override the second-order judgment to rely on the public judgments embodied in the law—the question becomes how the role of private judgment can be constrained. Without constraint, private judgment threatens to swallow public judgment, and then we are on a slippery slope that threatens to transform the lawfulness conception into the fairness conception.

The trick is to constrain equity while preserving its corrective role. To put the point metaphorically, we need an account of equity that enables us to navigate the slope while providing sufficient traction to avoid slipping or sliding. An Aristotelian account of the virtue of equity gives us three points of traction. The first point of traction is provided by the distinction between the equitable correction of law's generality and the substitution of first-order private judgments for the *nomoi*. Equity is not doing what the judge believes is fair when that belief conflicts with the law; rather, equity is doing what the spirit of the law requires when the expression of the rule fails to capture its point or purpose in a particular factual context. The second point of traction is provided by the virtue of justice itself. A judge who is *nomimos* simply is not tempted to use equity to avoid the constraining force of the law. A *nomimos* has internalized the normative force of the law; such a judge wants to do as the law requires.

18. ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* (J.A.K. Thomson trans., rev. ed., Penguin Books 1976).

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

The third point of traction is provided by Aristotle's understanding of the intellectual virtue of practical wisdom, or *phronesis*—think of the quality that we describe as “good judgment” or “common sense.”²⁰ A judge with the virtue of practical wisdom, a *phronimos*, has the ability to perceive the salient features of particular situations. In the context of judging, we can use Llewellyn's phrase, “situation sense,”²¹ or by way of analogy to the phrase “moral vision,”²² we can say that a sense of justice requires “legal vision,” the ability to size up a case and discern which aspects are legally important. The *phronimos* can do equity because she grasps the point of legal rules and discerns the legally and morally salient features of particular fact situations.

This account of equity can be contrasted with two rival accounts. On the one hand, we can imagine a conception of judging as pure equity—the idea that the judge would simply do the right thing in each particular fact situation. This conception of equity is simply a version of the fairness conception of the virtue of justice. On the other hand, we can imagine a conception of judging that limits equity to the vanishing point—perhaps to those cases where the application of the rule is truly absurd. Neither of these two alternatives offers a fully satisfactory account of the virtue of equity. The first alternative sacrifices the great goods created by the rule of law. The second alternative pays too high of a price for those goods and requires more rigidity than is necessary. A constrained practice of equity done by judges who are both *nomimos* and *phronimos* combines the values of the rule of law with the flexibility to bend the rules to fit the facts when that is required by the purposes of the rules themselves.

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 possesses the judicial virtues is another. In this Part, I argue that the discernment of virtue has three components—screening for judicial vice, detection of wisdom, and recognition of lawfulness.

20. ARISTOTLE, *supra* note 18.

21. KARL N. LLEWELLYN, THE COMMON LAW TRADITION 59-61, 121-57, 206-08 (1960).

22. See NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE (1989).

A. *Screening for Judicial Vice*

The first step in discerning excellence is the simplest. The initial screen for judicial excellence eliminates candidates who are incontrovertibly 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 or intellect.

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

B. *Detecting the Phronimos*

Mere absence of the worst 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 interactions with friends and colleagues whom we recognize as having good practical judgment; we ask them for advice and emulate their choices.²³ 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 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

23. See LINDA TRINKAUS ZAGZEBSKI, *DIVINE MOTIVATION THEORY* (2004).

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 judge's 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. Civic or charitable 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 Nomimos*

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 lawlessness is truly difficult to conceal. By way of contrast, a judge who is *nomimos* 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 unnecessary or artificial vagueness or ambiguity. Judges who believe in the rule of law will strive to 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 criteria. 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.

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 Benjamin 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 Justice Cardozo’s opinions and see how often they were cited by other judges, how often they were discussed in law reviews, and how often they made their way into casebooks. Justice 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.²⁴

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 racing, the output of the contestants is ultimately the time it takes each racer to finish, which 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 scale that permits objective comparisons to be made.

24. Choi & Gulati, *Empirical Ranking*, *supra* note 1, at 30 (footnote omitted).

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—for example, 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?

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.”²⁵ 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.²⁶

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 citation 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 the development of their claim about the market for judicial opinions:

25. Choi & Gulati, *Tournament*, *supra* note 1, at 306.

26. *Id.* at 306 n.21 (citation omitted).

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).²⁷

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.²⁸

"No cost" is ambiguous. Choi and Gulati are right if they simply mean that judges do not personally pay a monetary price for access to law libraries and electronic legal databases. 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 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 so many hours in the day, so many days in the week, and so many 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.²⁹

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 opinions are binding on Judge *A*, but let us set those complications aside.

If, however, Judge *A*'s decision whether to cite Judge *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

27. *Id.* at 306.

28. *Id.*

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

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 (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. When it comes to citations, we would expect judges to “satisfice” and not “optimize.” The opinions that are cited are likely to be the opinions the 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 the 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 returned by the research process, there is an increased probability that the 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 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).³⁰

But Choi and Gulati’s claim—that all judges will cite the best opinions—is clearly false once we look at citation through the lens of

30. Choi & Gulati, *Tournament*, *supra* note 1, at 307 (emphasis added).

networking theory. In the language of network economics,³¹ we can call this a process of “preferential attachment.”³² 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.³³ 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 citations. 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* and after Judges *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 to Judge *C*'s opinion in future opinions. 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 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 will 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

31. I am greatly indebted to Tom Smith for his conversations with me on this point. See Thomas A. Smith, *The Web of Law* (Jan. 3, 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=642863>.

32. Boris Galitsky & Mark Levene, *On the Economy of Web Links: Simulating the Exchange Process*, FIRST MONDAY (Jan. 5, 2004), at http://www.firstmonday.org/issues/issue9_1/galitsky/index.html (discussing preferential attachment in the context of hyperlinks on the World Wide Web).

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

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. This is not to say that originality is never appropriate, but a truly virtuous judge will only be original when the law itself requires originality.

Indeed, I have argued that the opposite is true under normal conditions. The excellent judge is a *nomimos*, 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 vehicles for changing the law, transforming the rules laid down into the rules that they 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.³⁴

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

34. Choi & Gulati, *Tournament*, *supra* note 1, at 309-10 (footnote omitted).

judges writing their own opinions as opposed to delegating that task to clerks.³⁵ If total number of pages is not a good 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 who is 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 litigants 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

35. Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?*, 32 FLA. ST. U. L. REV. 1077 (2005).

as a tournament and devise strategies to maximize their chance of success. How might such a judge game the tournament of judges?³⁶ 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.³⁷
- Productivity, including the number of majority and dissenting opinions written and the number of cases in which the judge participated.³⁸
- Judicial independence, or 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).³⁹

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.”⁴⁰ 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 the 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

36. This portion of the Essay draws on a post from *Legal Theory Blog*. See Lawrence B. Solum, *A Tournament for Judges. Mad? Brilliant? Clever?*, LEGAL THEORY BLOG (Apr. 17, 2003), http://lsolum.blogspot.com/archives/2003_04_01_lsolum_archive.html#200162580.

37. Choi & Gulati, *Tournament*, *supra* note 1, at 305-09.

38. *Id.* at 309-10.

39. *Id.* at 310.

40. *Id.* at 305.

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 judges 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 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 a lot 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—especially new law on a topic that arises frequently—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.⁴¹ 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. The most obvious way is to 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 decid-

41. *Id.* at 310.

ing the case in a way you believe is wrong—and by 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, 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 merit-based criteria for judicial selection other than the tournament results.⁴² 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 is 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 oppor-

42. 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.”).

tunity to score points by getting it *long*, that is, 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, which is 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 weak 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*

Choi and Gulati claim transparency as an advantage for the tournament of judges,⁴³ but the opposite may 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 controlled 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.

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.

43. *Id.*

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. 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 could not 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.⁴⁴

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 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

44. *Id.* at 312.

Gulati's tournament of judges invites us to ask two questions: What constitutes judicial excellence? and How can we select judges who possess them? Those questions are worth answering.