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BE CAREFUL WHAT YOU WISH FOR: THE PROBLEMS WITH USING EMPIRICAL RANKINGS TO SELECT SUPREME COURT JUSTICES

WILLIAM P. MARSHALL*

In *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance*,¹ Professors Stephen Choi and G. Mitu Gulati present an imaginative and well-timed challenge to the current judicial nominations culture, which insists in maintaining that nominees are selected for their excellence when they are actually chosen for their ideology. The ambition of the project is straightforward: develop a system for evaluating judges based on excellence from which judicial nominations to the Supreme Court can be measured. Then, with such a system in place, a president who chooses a nominee who fared poorly in the survey—an ostensibly less-qualified candidate—will be forced to provide nonmerit-based justification for that choice. Similarly, senators can be challenged to explain their reasons if they oppose a candidate who performs well under the study or if they support a candidate who does badly.² By this device, Professors Choi and Gulati hope to limit the role of ideology in favor of merit in judicial selection, or at least make its presence more transparent.³

The methodology Choi and Gulati employ to develop their rankings is well-considered and sophisticated. Attempting, as much as possible, to eliminate criteria that might reflect ideological bias, the authors examine

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

2. *See id.* at 27–28.

3. *Id.* at 40 n.30.

factors that are readily quantifiable rather than dependent on subjective judgment. Thus, they look at a judge's productivity measured by opinion output; opinion quality measured by favorable citation; and judicial independence measured by the number of dissenting and concurring opinions combined with opinions written in opposition to a judge of the same political party.⁴ Recognizing that circuit-based norms or intercircuit differences may inappropriately influence the raw data, the authors account for such factors by making statistical adjustments to their figures throughout the ranking process.

I agree that the judicial appointments process is in dire need of improvement⁵ and that candor thus far has been notably absent.⁶ I am also one of the last legal idealists who believe that presidents should seek excellence more than ideological compatibility in their judicial nominations.⁷ That said, however, I have serious concerns about Choi and Gulati's project. To begin with, I have some reservations about the utility of the indicia of productivity, quality, and independence that they employ. Although I share the authors' view that a judge's writings should be of central importance in assessing ability, I am not convinced that the approach used by the authors will lead to the results they seek. More significantly, however, I fear that a purportedly objective ranking of judicial candidates will only make it easier for a president to pack the Supreme Court with ideologues and will hamper congressional efforts to fight such ideological appointments because the ranking system is more likely to provide additional cover for ideological appointments than to remove that which already exists. Finally, I am concerned that if a rankings system becomes too successful a method for judicial selection, its overall effect would be to impose only one type of nominee in the nominations process.

4. *Id.* at Part III. Choi and Gulati explain that they use productivity, opinion quality, and independence as the appropriate measures for judicial rankings for three reasons. They suggest 1) that these indicia are relatively apolitical and objective, 2) that they focus on the strength of a judge's writings, which in their view is the key aspect of a judge's performance, and 3) that these measures are not as susceptible to the "bad type" of game playing which, in their view, dominates the current system. *Id.* at 34.

5. See generally STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994) (discussing some of the current problems in the appointments process).

6. But see Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 (arguing that the Senate should review the ideology of judicial nominees during the confirmation process).

7. See William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. (forthcoming 2004).

In Part I of this Comment, I discuss some of the problems that I have with the specifics of the ranking system that Choi and Gulati employ to evaluate judicial performance. My purpose here is not to raise every technical objection one might have to their methodology.⁸ Choi and Gulati already recognize that their system may need tweaking,⁹ and I am sure they will continue to make adjustments as their thinking evolves. My intention in Part I, rather, is to highlight some elements of the authors' system that may be counterproductive to their goals or that might otherwise lead to unintended and unfortunate results.

Part II presents a harder critique. It begins with a nod to the authors' suggestion that a credible ratings system could become a factor in the Supreme Court nomination and confirmation processes. It questions, however, whether the insertion of such a ranking system would be a beneficial development. Part II.A contends that, at best, an ostensibly objective ranking system would most likely become a tool for politicians to accomplish ideological goals rather than, as the authors contend, a device to uncover hidden ideological agendas. Part II.B, in turn, argues that, if taken seriously, the ratings system may actually reduce the caliber of judicial nominees by imposing a model of judicial excellence for appointees that may not reflect the qualities needed at the Supreme Court level. Part III then offers a brief conclusion.

8. For example, the authors could be criticized for not including law review articles, teaching, or lecturing in their measure of productivity. They defend this exclusion, in part, on grounds that these activities, in their view, may well be correlated with the number of published opinions. Choi & Gulati, *supra* note 1, at 42–43. One would think, however, that the time a judge spends on extra-judicial activities could interfere with, and therefore limit, his or her number of published opinions. Alternatively, the authors support excluding extrajudicial activities from their productivity assessment on grounds that providing credit would diminish the judges' incentives to spend time on opinion writing. *Id.* While this may be true, it is not at all obvious that the contributions to the law that a judge makes through opinion writing will always exceed the contributions made through other legal writings. Several prominent appellate court judges and Supreme Court Justices have written significant scholarly work while on the bench. See, e.g., O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (originally delivered in 1897 while serving on the Massachusetts Supreme Court); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) (written while chief judge of the United States Court of Appeals for the Seventh Circuit); WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* (1987) (written while Chief Justice of the Court); JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1891) (written while serving as an Associate Justice on the Court).

9. See Choi & Gulati, *supra* note 1, at 35.

I. THE LIMITS OF PRODUCTIVITY, OPINION QUALITY, AND JUDICIAL INDEPENDENCE AS MEASURES OF JUDICIAL MERIT

Any evaluative system that purports to measure a quality as elusive as judicial merit can be second guessed, and Choi and Gulati are the first to acknowledge that their particular approach may be less than perfect.¹⁰ Indeed, I suspect that like other measures of this kind, the only persons likely to be delighted with the effort are those that finish at the top of the survey. For this reason, I will not spend much time quibbling with the specifics of the authors' system. Some broader concerns with their ranking system, however, are worth identifying because they may present obstacles to the achievement of a satisfactory ranking system that will not easily be overcome. These are the incentives for gaming created by some aspects of their approach, the difficulties in eliminating hidden ideological bias in assessing opinion quality, and the problems in constructing an independence measure that reflects the type of independence desirable in a judicial nominee. Each of these objections will be discussed in turn.

A. GAMING THE SYSTEM

Choi and Gulati claim their system is not susceptible to counterproductive gaming.¹¹ I am not persuaded. Their productivity criterion is a classic example of the type of measure that encourages system gaming.¹² A judge need only write more opinions to improve his or her ranking. It is dubious, at best, however, to think that publishing opinions for the sake of publishing opinions will add anything meaningful to the nation's body of law.¹³ Some judges, for example, issue unpublished opinions in certain cases on the grounds that if an opinion adds nothing to existing law, there is little use in preserving it as authority.¹⁴ Because Choi and Gulati do not count unpublished opinions in their productivity measure, however, their system encourages judges to publish opinions that the judges themselves see as having little or no jurisprudential benefit.¹⁵

10. *See id.* at 29.

11. *Id.* at 34.

12. The authors' productivity measure is not the only aspect of their methodology that encourages gaming. The citations measure encourages judges to cite their friends and political allies. *See infra* notes 29–33 and accompanying text. The independence measure invites judges to write more separate opinions. *See infra* notes 16–18 and accompanying text.

13. This observation, of course, also applies to academic writing.

14. *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 191–93 (1999).

15. A judge, of course, may choose to expend considerably more effort preparing an opinion for publication that might otherwise have been left unpublished and, if so, the resulting opinion may have

The Choi and Gulati system is also problematic in that it encourages judges to write more concurring and dissenting opinions. Indeed, under their system, judges who write separate opinions receive a double credit. The opinion not only adds to their productivity measure but also to their independence quotient.¹⁶ The value of separate opinions, however, is also debatable. A short concurrence here or a cursory dissent there does not necessarily add any insight to the legal issues involved.¹⁷ Choi and Gulati might respond that any separate opinion is beneficial in that it facilitates a more comprehensive assessment of a judge's ideology. But I am not so sure. After all, concurrences and dissents are often short and without substantive content.¹⁸ Some dissents, moreover, may be nothing more than a reference to a judge's previous dissents in similar cases.¹⁹ And, a judge can still receive the benefits of a higher productivity or independence measure without expressly ascribing to a particular judicial philosophy by simply choosing to write separate opinions on trivial points in relatively mundane cases.

The only inevitable result one would expect, then, from a ranking system that utilizes a quantity measure is that there would be an exponential increase in the pages and volumes of the Federal Reporter.²⁰ After all, if the authors' approach achieves any level of acceptance, all judges are likely to buy into the system because no judge, Supreme Court candidate or not, is likely to want to see his or her name at the bottom of a judicial merits ranking.²¹ Let the race to the publishing desk begin.

more jurisprudential significance. Whether a judge intent on improving productivity rankings would actually devote much more time to such opinions, however, is only speculative. Indeed, it is notable that many judges still issue unpublished opinions, although in some circuits unpublished opinions have precedential authority. See Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 423, 431-32 (2002) (noting the trend in the federal courts to treat unpublished opinions as having precedential authority).

16. Choi & Gulati, *supra* note 1, at 62.

17. Indeed, too many separate opinions may actually perform a disservice to precedential clarity because they lead to the absence of clear majorities.

18. For example, one might state simply, "I concur in the result." See, e.g., *Modern Equip. Co. v. Cont'l W. Ins. Co.*, 355 F.3d 1125, 1131 (8th Cir. 2004) (Bright, J., concurring).

19. See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 11, 13 (2d Cir. 1980) (Mansfield, J., dissenting) (citing to his earlier dissent in the same case).

20. Not to mention a commensurate cost increase imposed on practicing lawyers who will have to wade through an ever-increasing body of opinions.

21. The fact that a rating system will encourage all judges, and not just potential Supreme Court nominees, to game the system is explicitly recognized by Choi and Gulati in another related article. See Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 313-15 (2004). Choi and Gulati argue, however, that the effect of promoting competition among judges would be to increase the quality of judicial output. *Id.* See also Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983); Frederick Schauer, *Incentives, Reputation, and the Inglorious*

B. QUALITY, TRANSPARENCY, AND THE PITFALLS OF INHERENT BIAS

As the authors concede, their system does not measure important aspects of judicial merit such as integrity and character. In that respect, their study differs from the appraisal of judicial nominees developed and applied by the American Bar Association (“ABA”).²² The authors contend, however, that their system is preferable to ABA rankings in that, unlike the ABA system that is “shrouded in secrecy,” their process is transparent.²³ This transparency is beneficial, the authors allege, because it allows outside observers to survey the system for any perceived bias and adjust the rankings accordingly.²⁴

Certainly, the authors’ system is more transparent than the ABA’s. Moreover, unlike the ABA, their rankings are not developed pursuant to the professional judgment of a group of elite experts who themselves can be accused of coming to the table with ideological bias.²⁵ Instead, Choi and Gulati rely on hard statistics. Furthermore, unlike the ABA ratings, their system evaluates judges before their names are set forth as Supreme Court nominees. Their results, therefore, cannot be criticized as subject to the political pressure that might attend an evaluative process undertaken after a name has been identified.

Nevertheless, their system is neither as transparent nor as free from inherent bias as they would like. Consider their use of citation frequency as a measure of opinion quality.²⁶ I will grant the authors their premise that citation count has a relationship to opinion quality.²⁷ As the authors argue,

Determinants of Judicial Behavior, 68 U. CIN. L. REV. 615, 630 (2000) (discussing the possible role of reputation enhancement in influencing judicial behavior). *But see* Russell Smyth, *Do Judges Behave As Homo Economicus and, If So, Can We Measure Their Performance? An Antipodean Perspective on a Tournament of Judges*, 32 FL. ST. U. L. REV. (forthcoming 2004) (manuscript at 5, on file with author) (noting that “[f]or most ‘run of the mill’ judges of lower courts . . . whose opinions are rarely discussed in law lectures or extracted in casebooks, respect of the academic community is unlikely to be a major motivating factor”).

22. For a description of the ABA judicial appraisal system, see Blake Tartt, *The Participation of the Organized Bar in Judicial Selection: What Is Proper, and What Is Improper*, 43 S. TEX. L. REV. 125 (2001).

23. Choi & Gulati, *supra* note 1, at 36.

24. *Id.*

25. See Laura E. Little, *The ABA’s Role in Prescreening Federal Judicial Candidates: Are We Ready to Give up on the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 37–39 (2001).

26. Choi & Gulati, *supra* note 1, at 48–49.

27. See generally William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998) (arguing that citation count correlates to opinion influence). The equation of citation count to opinion quality or influence, however, is contestable and (as Choi and Gulati and Landes, Lessig, and Solimine recognize) has been subject to a number of cogent criticisms. See Choi & Gulati, *supra* note 1, at 48

“customer use provides a market test of the quality of a judge’s opinions.”²⁸ Citation count, however, is hardly free from ideological influence.

Ideologically liberal judges, for example, are likely to cite the opinions of other ideological liberals because, quite simply, they are more likely to be persuaded by the reasoning of those with whom they share the same philosophical outlook.²⁹ To use the authors’ own analogy, a judge is more likely to market an opinion successfully when its “customers” are predisposed to agree with its author’s viewpoint.³⁰ The more liberals there are on the bench,³¹ accordingly, the better liberals are likely to fare under the citation count criteria.³²

The authors may respond that even if this is so, the process is still transparent.³³ A senator who opposes a nominee who has fared well on the

n.38; Landes et al., *supra*, at 271–76. Among the most prominent critiques of the use of citation as a measure of quality are that such studies may reflect “brand names” among judges, thus rewarding reputation over quality; that judges who happen to be assigned to opinions in areas that later prove fertile ground for new litigation are effectively rewarded for luck; and that if one opinion is only marginally better than another, it will be cited far more times, thus making very small differences in quality look more important than they are. Choi and Gulati attempt to compensate for any skewing effects in citation count caused by such factors through their use of log transformations.

28. Choi & Gulati, *supra* note 1, at 48.

29. This is in addition to any gaming of the system that could be based on one judge’s, or a group of judges’, efforts to intentionally advance the ranking of a favored colleague by citing him or her as much as possible. For a description of a similar gaming strategy in the academic context, see J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT. L. REV. 843, 856–59 (1996).

30. This is not to suggest that a judge will only cite ideological or political allies. A judge, for example, may intentionally cite someone with whom he or she normally disagrees in order to give a greater sense of legitimacy to an opinion.

31. There may be a tipping point. If there are too many like-minded judges, the positive effects of ideologically-friendly citations may be diluted as opinion writers might not be able to cite all their fellow travelers in each opinion.

32. This is a different criticism than the point addressed by the authors that their system will favor judges from the political party that dominates the federal judiciary. See Choi & Gulati, *supra* note 1, at 57 n.45. I agree that their system may also have that effect. See Smyth, *supra* note 21, at 18. Assuming that Democrats may be more likely to cite Democrats and Republicans more likely to cite Republicans, the more judges there are of one party on the bench, the more the judges from that party are likely to be cited. The authors dismiss this criticism on the grounds that, for Supreme Court selection purposes, the president and Senate are likely to look only at in-party rankings and so this bias will effectively not matter. That is, a president would not be expected to nominate a judge from an opposing political party and, therefore, will not be criticized for choosing not to do so. Yet even if the authors are correct in this assessment, one still has to question whether their dismissal comes too quickly. After all, in a merit-based system, why should the president not choose from among the top performers regardless of party affiliation?

33. The authors might also attempt to adjust the system by developing a formulation that discounts ideologically motivated citations. For example, they have proven adept in factoring out other concerns such as chief judge status or number of opinions that might distort the citation count.

citation count criterion could break down the study and demonstrate that the nominee's citations come from a relatively narrow group of ideologically driven judges. But consider the obstacles facing the senator making such a claim. The senator would have to demonstrate that the president was acting to further an ideological agenda, that the candidate was ideologically driven, and that there was, in effect, a cabal of political ideologues embedded in the federal judiciary. This is a lot of baggage for any senator to take on and, even if true, the claims would be unlikely to gain political resonance when pitted against a study that purports to have the mantle of objectivity. In short, transparency in theory may not translate into transparency in practice.³⁴

C. INDEPENDENCE AND THE INTRACTABILITY OF IDEOLOGY

Choi and Gulati assess independence by looking primarily at two factors—the dissenting and concurring opinions authored by the judge and the cases in which the judge opposed the position of a member of his or her own political party.³⁵ In this way, the authors hope to assess both the judge's independence generally and the judge's autonomy from political sponsors specifically.³⁶ The authors are correct to identify independence as an important judicial quality. Their choice of method for assessing independence, however, is subject to question.

Consider a three judge panel composed of two Republicans and one Democrat in which the Democrat and one of the Republicans join together while the other Republican dissents. Under the authors' system, the dissenting Republican gets the most credit for the decision by virtue of having written a separate opinion and for opposing a member of the same political party. The other Republican, meanwhile, gets some, albeit lesser,

Discounting for ideology, however, would require some sort of measure for the authors to identify ideology—hardly an easily quantifiable task.

34. Indeed, because the purported objectivity of the citation measure is so hard to unpack, the result may actually be counterproductive to transparency goals.

35. The authors contend that measuring how a judge votes in relation to other appointees from the same political party reflects a measure of independence from political sponsors. Equating a fellow judge with his or her political sponsors, however, is not always accurate. Justices Brennan, Warren, White, and Blackmun, to cite some recent examples from Supreme Court history, were obviously not representatives of their sponsoring party's ideologies. President Dwight Eisenhower, in particular, is known to have been rankled by the liberal decisions of Warren and Brennan, both of whom he appointed. Asked whether "he had made any mistakes as president," Eisenhower famously responded "[y]es, two . . . and they are both sitting on the Supreme Court." PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 403 (1999).

36. Choi & Gulati, *supra* note 1, at 61–62.

credit for opposing a member of the same political party; the Democrat gets no credit at all.

The problem with this, of course, is that we have no idea if the score under this formula reflects actual independence. After all, it may be that the Republican siding with the Democrat is acting more independently. The dissenting judge may be merely toeing the party line. Or, it may be that the Democrat is acting independently and taking a position contrary to the dominant views of that party. Any true assessment of independence would have to look at the substance and the political dynamic underlying the specific case.

The authors, of course, might respond that even if their independence measure is not accurate in all circumstances, it still provides an effective overall appraisal. More likely than not, in circumstances such as the one described in my previous hypothetical, the dissenting Republican is likely to be the independent thinker.³⁷ Again, I am not so sure. Is it a greater measure of independence to side with a member of an opposing political party or to write separately? The difficulty in measuring independence, in short, is in defining what judges should be independent from, and it is here that the authors' approach is subject to the most serious criticism.

The authors define independence in terms of a judge's relationship with his or her judicial colleagues. This focus on independence from other judges, however, is questionable. First, as the authors themselves recognize, too much independence from one's colleagues can reflect a lack of other qualities one might want in a Supreme Court Justice, such as leadership and collegiality.³⁸ Moreover, measuring independence by the number of separate opinions also rewards tactics that disrupt judicial efficiency. Decisions with dissents take more time to process and impose collegiality costs. The authors' system, by placing a premium on separate opinions, provides significant incentive for increased division.

Second, the authors' emphasis on independence from one's colleagues rewards a judge who is outside the ideological mainstream because such a judge will not only disagree with party opponents but also with members of

37. Alternatively, Choi and Gulati could contend that the hypothetical is simply atypical. In the normal case of a panel composed of three members of the same political party, the lone dissenter can readily be scored the most independent. But is that necessarily so? It could be that the two judges in the majority are the political mavericks.

38. See Choi & Gulati, *supra* note 1, at 62; Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV 1639, 1641 (2003) (noting that "quantitative studies are inherently suspect, because they fail to account for the effects of collegiality on judicial decision-making").

the same party. The problem of course is that rewarding such a judge with a high independence rating directly undercuts the authors' efforts to separate ideology from merit because it directly equates ideology with merit.³⁹ For the same reason, the independence measure also interferes with the authors' efforts to unmask presidential efforts to disguise ideological appointments as merit selections. If a nonmainstream ideologue does well enough in the ratings, which the independence measure helps to ensure, the president need not defend the selection as anything other than a merit-based choice.⁴⁰

Third, and perhaps most importantly, a judge's independence from his or her colleagues may be a factor entirely beside the point in assessing the type of independence one would desire from a federal judge. The independence that should be most valued in a judge, one would think, would be the judge's willingness to depart from the positions of the same political party. It is to the political party, after all, and not to colleagues to whom the judge owes political allegiance. More broadly, the primary value of judicial independence is that it provides a check on political action that is removed from the pressures of political expediency.⁴¹ It is not in the value of having judges file separate opinions. Indeed, one of the most important qualities a judge may possess is an ability to understand when one should subordinate personal views in order to protect the institutional authority of the judiciary.⁴²

I recognize, of course, that the authors use the relationship of a judge to colleagues of the same political affiliation as a gauge of the judge's independence from political sponsors.⁴³ I must also concede that I cannot offer an alternative measure of independence short of breaking down each judge's opinion in relation to the political position of his or her party at the time each case is decided—something that in a large array of cases may be impossible to do with any accuracy. But this only shows that a true objective measure of independence may be impossible to attain. As it

39. To be sure, the independence measure will not always directly equate with ideology. A judge whose ideology is within the judicial mainstream will not receive a similar boost from the independence measure as would a nonmainstream colleague.

40. See also *infra* notes 52–58 and accompanying text.

41. See Suzanna Sherry, *Independent Judges and Independent Justice*, 61 LAW & CONTEMP. PROBS. 15 (1998) (providing a historical overview of judges using their independence contrary to popular sentiment and legislative will).

42. See, e.g., Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 30–87 (1979) (detailing the efforts put forth and concessions made by several members of the Warren Court in order to achieve unanimity in several desegregation cases, in the belief that a united front was necessary to preserve the institutional credibility of the Court in making such controversial landmark decisions).

43. See Choi & Gulati, *supra* note 1, at 60.

stands now, however, the authors' approach rewards dogmatism and obstreperousness more than the type of independence we most value in our jurists.

II. BE CAREFUL WHAT YOU WISH FOR

The possibility that an evaluative measure of the type offered by Choi and Gulati could gain credibility is real.⁴⁴ The authors are correct that presidents delight in describing their nominees as highly qualified, and for that reason alone they would likely cite a system that provided empirical support for their assertion. Additionally, our society is fascinated with rankings and quantitative measures⁴⁵ and I would suspect that the media would pick up on a system that purportedly inserted an objective measure into a normally nonquantifiable process. This is not to say that the acceptance of the authors' rankings would happen overnight, but I suspect that once one administration publicly relied on a rankings system in support of a Supreme Court nominee, subsequent administrations might feel political pressure to follow suit.⁴⁶ No president wants to be seen as nominating candidates adjudged as inferior under any ratings system, and I would suspect that once a ranking system gained legitimacy, its effects would be hard to avoid.⁴⁷

44. The ABA ranking system, for example, enjoyed significant influence on the judicial nominations process during the eras when its review was seen as less ideological than it is now. See Little, *supra* note 25, at 39–43. Currently, to use a different example, the purported objectivity of the *U.S. News & World Report's* annual law school rankings has had a tremendous impact on legal education. See *infra* note 47.

45. See David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419, 421 (2003) (speculating about the possibility that “the mentality of seeking to identify the ‘Top Ten’ or to proclaim ‘We’re Number One’ is an idiosyncrasy of . . . American pop culture”).

46. See, e.g., NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 118–23 (1998) (noting that after President Eisenhower stated “we must never appoint a man who doesn’t have the recognition of the American Bar Association,” later administrations, even those hostile to the organization, “could not afford to ignore the ABA”). Even members of the Bush administration, which has eliminated the special role played by the ABA in the confirmations process, have not been above using high ratings of some of their nominees for political advantage. See Jonathan Rigel, *ABA Approves More Bush Nominees: Judge Candidates Michael McConnell and Miguel Estrada, Both Targets of Liberal Groups, Rated “Well Qualified,”* LEGAL TIMES, July 16, 2001, at 8.

47. The influence of the *U.S. News & World Report's* annual law school rankings is an example of this phenomenon. Although many experts have criticized the rankings' methodology, their success has made the rankings a major factor in the law school admissions process. See Thomas, *supra* note 45, at 420–21 (criticizing the rankings as misleading, but conceding that “[n]othing has had a more profound impact on legal education in the past generation than the phenomenal prominence of law school rankings, especially the rankings published by *U.S. News & World Report*”).

The question is whether this development would be salutary, and in that respect one has to be skeptical. First, the authors' system is more likely to aid, rather than inhibit, a president's ability to advance an ideological agenda through Supreme Court nominations. Second, the overall effect of choosing Supreme Court Justices through an empirical ranking of judicial performance may not be to further the cause of excellence. It may be only to impose a formulaic definition of excellence on an activity that may not, in the end, be quantifiable. Both of these objections will be discussed in turn.

A. JUDICIAL RANKINGS AND AIDING AND ABETTING THE IDEOLOGICALLY MOTIVATED PRESIDENT

While the authors are correct that under the current system, presidents tend to hide their ideological agendas by describing their Supreme Court nominees as excellent rather than as ideologically favored, the current system does not entail, as the authors suggest, the complete sacrifice of judicial excellence for judicial ideology.⁴⁸ Merit matters—even under the current system. Even the most ideological president needs to appoint skilled judges. A president will not succeed in furthering a judicial agenda by nominating Supreme Court appointments who lack the vision to see the long-term effect of their decisions. For example, a decision imposing major limitations on federal power under the Commerce Clause might vindicate a president's desire to devolve power to the states, but it might also frustrate that president's desire to enact anti-abortion or strong anti-takings laws at the federal level. Similarly, from the other side, a decision too rigidly enforcing antidiscrimination norms could limit the president's ability to promote federal affirmative action.

Additionally, in order to earn Supreme Court majorities, a president must appoint Justices that have the prominence and ability to command the respect of their colleagues. Judges who are viewed by colleagues as nothing more than ideological hacks will not be able to persuade other members of the Court to follow their positions. Indeed, if they are unable to craft positions acceptable to colleagues, they may end up alienating, rather than persuading, fellow Justices.⁴⁹ The incentives, then, already exist for a

48. See Choi & Gulati, *supra* note 1, at 28–30.

49. See, e.g., PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT 130–32 (1995). Justice Frank Murphy, for example, was convinced that during the 1943 term, some Justices cast votes to avoid joining their enemies. *Id.* at 130–31. It also appears that sour relations between Justice William O. Douglas and Chief Justice Earl Warren (exacerbated by a tiff over Warren's insistence that a stenographer who had taken leave without notice resign) led the latter first to refuse to

president to appoint high caliber nominees—or at least to appoint candidates who are not at the bottom of the quality ladder. For this reason, the authors' system may be more redundant in the current nominations milieu than the authors would have us believe because their ranking system, as they admit, is more appropriate for weeding out low-quality candidates than differentiating among those at the top.⁵⁰

Second and most importantly, however, I am concerned that their ranking system would actually worsen an ideologically driven process rather than improve it. Their ranking system would tend to favor someone whom an ideological president would most desire to nominate—a highly skillful jurist committed to pursuing an ideological agenda. A skilled judge, for example, is likely to perform well on the productivity and opinion quality measure because those measures, to some extent, reflect ability.⁵¹ And, he or she is particularly likely to score well under the independence measure because, if he or she is rigidly ideological, he or she is likely to write separately from more mainstream colleagues (including those of the same political party).⁵²

The authors may likely respond that, because their system is transparent, a president's efforts to hide ideological preferences behind their study can be exposed. That is, the senators opposing the nomination can show how ideological factors such as citations from fellow ideological travelers or a high independence count based on a rigid ideological stance were responsible for the candidate's high rankings. The objecting party can refigure the data, as the authors invite them to do,⁵³ in a manner that lessens the impact of ideological influences. But, as discussed previously, such an argument is unlikely to have much political resonance,⁵⁴ and any attempt to

join Douglas's opinion in the landmark privacy case *Griswold v. Connecticut*, and then to convince Justice Arthur Goldberg to defect from Douglas's majority to write a separate concurrence, which Warren then joined. *Id.* at 131–32. This move allowed “a majority to support Douglas without Warren having to join him directly,” thus demonstrating simultaneously the potential harm that can be caused by personal acrimony among the Justices and the benefit of Warren's ability to navigate the inner-politics of the Court. *Id.*

50. See Choi & Gulati, *supra* note 1, at 74–75.

51. Moreover, as we have seen, the use of the citation count may actually be particularly counterproductive to transparency goals because the potential ideological bias in such a count is difficult to unpack. See *supra* text accompanying notes 29–32.

52. Indeed, what is particularly ironic about this is that the further the candidate is outside the legal mainstream the higher his or her independence score is likely to be. Thus, the independence scores of the nominees of a president intent on transforming constitutional law are likely to be higher than the scores of the candidates of a president desiring to retain the status quo. The authors' system, in short, aids presidents who want to change the law.

53. Choi & Gulati, *supra* note 1, at 61.

54. See *supra* notes 33–34 and accompanying text.

refigure the analysis is likely to be perceived only as a partisan attempt to distort the result of the “official” study. The salient fact for political purposes is the headline, for example, that the candidate scored among the best five judges in the country according to a study that all initially agreed was nonpartisan and objective. Anyone claiming, after a candidate who has fared well under the study has been nominated, that the ranking is somehow misleading or distorted is likely to be discounted as merely expressing sour grapes. As the authors themselves note, “[t]he ease of transmission and understandability” of the rankings may result in the public giving too great weight to objective findings.⁵⁵

One might argue that a president may still be forced to explain why the basis of a nomination is not ideological unless the nominee has placed first in the study. Such circumstances may still require an explanation of why the most qualified candidate was not chosen. The problem with this, however, is that it places weight on a slight gradation in rankings that even the authors do not contend is significant. As I understand the authors’ methodology, their goal is to distinguish more broadly between better- and lesser-performing judges, rather than to provide a precise ranking of each individual.⁵⁶ Thus, the president in the above hypothetical could easily respond without much political exposure that one of the top five judges in the country was chosen, and no further explanation is necessary.⁵⁷ The fact is that, unless all of the president’s ideological choices do not place well, the study will only enhance the ability of the president to effectuate an ideological agenda.⁵⁸ Presidents, after all, should never be underestimated in their ability to use data to their own advantage.

B. COOKIE CUTTER JUDGES?

The final difficulty with the authors’ study is that it may become too successful. Precisely because the resonance of objective rankings is so hard to overcome, I am concerned that if their method were to take hold, it would end up prescribing the model for most, if not all, future nominations. To begin with, the model could inhibit a president from choosing a candidate outside the federal appellate bench because it defines excellence

55. Choi & Gulati, *supra* note 1, at 39 n.29.

56. *See id.* at 81–82.

57. Alternatively, the president’s decision could be explained as being based on numerous non-ideological factors such as age, geography, military service, or particular area of expertise.

58. The ranking system in fact may provide the president with protection from the squabbings of ideological allies, as reliance on the rankings may explain (privately) why one ideological candidate was chosen over another.

in terms of federal appellate performance. This means a president who chooses, for example, a sitting governor or senator for a Supreme Court nomination may face the exact same reaction as a president who chooses a nominee far down in the rankings. If the president has chosen from outside the category of those considered best qualified, it must be for political reasons. Yet, as the examples of Earl Warren,⁵⁹ Hugo Black,⁶⁰ and numerous others attest, excellence at the Supreme Court level does not depend on a successful judicial experience at the federal appellate level.⁶¹ The authors are, of course, correct in that most recent Supreme Court Justices have come from the federal appellate court ranks. But a ranking system that only looks at federal appellate court judges may only entrench this practice because the only “objective” ranking applies to candidates solely with this background.

This leads to a further point. Are the qualities it takes to be an excellent federal appellate judge the same as those required to be a good Supreme Court Justice? As Choi and Gulati themselves recognize in a related work, “[t]he best soldiers are not always the best leaders.”⁶² For example, the federal appellate judge is obligated to decide cases strictly within the constraints of precedent; the Supreme Court Justice, on the other hand, has more room to develop the law. These two skills are not fungible. One might be particularly skilled in mastering current law and in fashioning opinions that relay the existing rules with clarity and precision and still not have the vision and creativity to create the rules themselves. Similarly, to use an example relied on by Choi and Gulati, productivity may be considerably less important than leadership at the Supreme Court level.⁶³ The key to success at the Supreme Court level may not be an ability to write as many opinions (separate and majority) as possible, but one to forge majorities that create lasting precedents on critical constitutional issues.⁶⁴ And certainly independence at the Supreme Court level in

59. Earl Warren was the governor of California before being appointed to the Supreme Court. See IRONS, *supra* note 35, at 393–94.

60. Hugo Black was a U.S. Senator before proceeding to the Supreme Court. *Id.* at 326.

61. Indeed, according to one popular survey purporting to rank the “great” Supreme Court Justices, only eight of the twenty greatest Justices had any prior judicial experience. William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 419 (1996).

62. Choi & Gulati, *supra* note 21, at 310. The authors also maintain, in what may be an unrelated observation, that “[t]he best law students are not necessarily the best legal academics.” *Id.*

63. As Justice Felix Frankfurter once observed, “precious wines are not drunk out of beer mugs, and significant, original, and enduring judicial work is not measured by the pound.” Ross, *supra* note 61, at 442.

64. See generally Sherman Finesilver, *Leadership on the United States Supreme Court*, in GREAT JUSTICES OF THE SUPREME COURT (Pederson & Prunizee ed. 1993) (listing the ability to forge consensus and the lasting impact of principles espoused as traits of great Justices).

particular must be measured in terms of independence from outside political forces—the check on the other branches, after all, is what Supreme Court review is all about.⁶⁵

Excellence at the Supreme Court level, in short, may be more attributable to the intangible than to the quantifiable,⁶⁶ and placing too much emphasis on quantifiable measures alone may, thus, inhibit the selection of those with the qualities most needed for a successful Supreme Court tenure. Thus, it may be that when all the intangibles are taken into account, the president who claims to believe that a Supreme Court nominee is the best qualified in the country may be hiding an ideological agenda that can be uncovered, if it turns out that the candidate does not fare well under an objective measure. Or, the president may be telling the truth.

III. CONCLUSION

A president faced with an opportunity to nominate a Supreme Court Justice has a number of options: attempt to secure political capital with a valued constituency by appointing a person from a particular geographic region or of a particular ethnicity;⁶⁷ repay a political debt by nominating someone to whom he or she feels particularly obligated;⁶⁸ put forward the name of a relatively uncontroversial candidate in order to save political capital for other ventures;⁶⁹ strive to protect a legislative agenda by naming

65. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57–58 (1982); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (discussing the role of judicial review in checking against breakdowns in the political process).

66. The authors could, of course, try to assess intangibles such as integrity, temperament, courage or leadership by surveying the bench and bar familiar with the judicial candidate's work. The *U.S. News & World Report's* ranking of law schools, for example, places a great deal of emphasis on the school's reputation assessment among other law schools and the bench and bar, and a similar reputation survey could be added to a judicial performance appraisal. I suspect, however, that the authors may understandably want to avoid reliance on such data because it reflects only the collected subjective opinions of those surveyed. As such, reliance on such data would both interfere with the goals of transparency that the authors set for the project and would also increase the likelihood that their results could be affected by ideological bias.

67. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 75 (2000).

68. Many commentators and historians, for example, have suggested that President Eisenhower's selection of Earl Warren may have been in reward for the latter's effective handling of the former's California delegation at the 1952 Republican convention, thus cementing Eisenhower's bid for the party's nomination. See, e.g., Philip B. Kurland, *Earl Warren: Master of the Revels*, 96 HARV. L. REV. 331, 334 (1982) (book review).

69. See, e.g., Mark Silverstein & William Haltom, *You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J.L. & POL. 459, 459–61 (1996) (noting that President Bill Clinton chose to select respected and uncontroversial appellate court judges for the Supreme Court in order to avoid contentious confirmations processes).

a person likely to uphold the constitutionality of its programs and interpret the legislation in a manner most consistent with its design;⁷⁰ appeal to the activists in his or her party by nominating a person committed to pursuing a particular ideological agenda;⁷¹ or choose to recommend a candidate believed to be the best qualified to hold the position.

As a historical matter, which of these reasons best explains a particular nomination decision has probably been as much a function of the political exigencies of the day as it has been a product of the nominating president's personal inclinations.⁷² Whatever the politics of the moment, however, one thing has remained constant. No matter what the actual reasons, presidents have tended to characterize their nomination decisions as being based on their judgment of who is the best qualified candidate, rather than on the other, more unseemly rationales.⁷³

It is against this background that Choi and Gulati have endeavored on an important project: the development of an objective, apolitical ranking system by which the relative merits of judicial candidates can be measured. Such an approach, the authors believe, could facilitate a more transparent Supreme Court nominations process and potentially lead to the appointment of better qualified candidates. While their aspirations may be laudable, Choi and Gulati nevertheless fail to achieve their goal because, in the end, their goal may simply be unachievable. No set of quantifiable measures of judicial excellence can be free from ideological influence or political manipulation. No set of quantifiable measures can predict who will be an outstanding Supreme Court Justice.

70. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 158–61 (2002) (describing Franklin Roosevelt's successful effort to appoint Justices who would uphold his New Deal legislation).

71. See Steven G. Calabresi, *Advice to the Next Conservative President of the United States*, 24 HARV. J.L. & PUB. POL'Y 369, 377 (2001) (arguing that a conservative president should nominate only judges believed to be likely to toe the conservative line).

72. In today's current political climate, for example, ideology has clearly become the motivating force in judicial appointments strategy as both Court and country are closely divided and the resolution of so many important issues rests on Supreme Court decisions. See, e.g., *id.* at 375–78.

73. See GERHARDT, *supra* note 67, at 130 (noting that presidential claims of merit are so common as to have become "relatively meaningless" to observers). Presidents, of course, may not always be supported in these contentions, even by members of their own parties. In one infamous incident, cited by Choi and Gulati, Senator Roman Hruska, seeking to support Richard Nixon's nomination of Harold Carswell to the Court, proclaimed, "Even if he is mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they? We can't have all Brandises, Cardozos and Frankfurters, and stuff like that there." JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 16 (1995), *quoted in* Choi & Gulati, *supra* note 1, at 29 n.9.

