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A Tournament of Judges

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A Tournament of Judges?*

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We suggest a Tournament of Judges where the reward to the winner is elevation to the Supreme Court. Politics (and ideology) surely has a role to play in the selection of justices. However, the present level of partisan bickering has resulted in delays in judicial appointments as well as undermined the public's confidence in the objectivity of justices selected through such a process. More significantly, much of the politicking is not transparent, often obscured with statements on a particular candidate's "merit"—casting a taint on all those who make their way through the judicial nomination process. We argue that the benefits from introducing more (and objective) competition among judges are potentially significant and the likely damage to judicial independence negligible. Among the criteria that could be used are opinion publication rates, citations of opinions by other courts, citations by the Supreme Court, citations by academics, dissent rates, and speed of disposition of cases. Where political motivations drive the selection of an alternative candidate, our proposed system of objective criteria will make it more likely that such motivations are made transparent to the public. Just as important, a judicial tournament for selection to the Supreme Court will serve not only to select effective justices, but also to provide incentives to existing judges to exert effort.

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* We borrow our title from MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991).

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I
BACKGROUND, IMPETUS, AND THE BASIC IDEA

Federal courts in the United States are structured in part to protect federal judges from outside pressures, political or otherwise. These protections, which include life tenure and guaranteed income, give federal judges few incentives to compete for promotions, pay raises, or other perquisites. Absent outside pressures, the theory goes, judges can act independently. An effective constitutional democracy requires an independent judiciary. Hence, any proposal to alter the elements that produce independence must be viewed with skepticism. It is one of these sacred elements, the lack of incentive to seek promotion, which this Essay challenges. We propose a "Tournament of Judges" where the reward to the winner is elevation to the Supreme Court. Subjecting elite federal judges to competition in a tournament may strike some as uncouth and, at the least, improper. We hope to persuade the reader that, crazy as it sounds, the idea is worth considering: the benefits of introducing more competition among judges are potentially significant and the likely damage to judicial independence slight.[1]

The backdrop for this piece is the likelihood that two and perhaps even three Supreme Court justices will retire in the near future. Rumor has it that both Chief Justice Rehnquist and Justice O'Connor are contemplating the move.[2] Justice Stevens is in his eighties and may have similar thoughts. The question of who will be selected to replace them has thus been the subject of debate in many newspapers.[3] And the discussion has been almost entirely political (focusing on litmus tests such as a candidate's likely position on abortion).[4] Occasionally, a nominee's intellectual

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1. As this Essay was in the publication process, we came across a draft of another article that applied tournament theory to the context of judicial promotions. This draft tested tournament theory on data from the German Labor Courts. *See* Martin Schneider, Careers in a Judicial Hierarehy: Tournaments, Fast Starters, and Late Bloomers in the German Labor Court System (Sept. 18, 2003) (paper presented at Annual Conference of the European Association of Law and Economics), *available at* http://www.univ-nancy2.fr/RECHERCHE/EcoDroit/DOWNLOAD/EALE/Schneider.pdf (examining thc career path of 230 judges in the German labor court system and characterizing promotion within the system as a "succession of tournaments").

2. Many had expected at least one of these retirements to be announced at the end of the Supreme Court's most recently completed term. That did not happen. Speculation will now build towards the end of the next term. *See, e.g.*, Editorial, *The Supreme Court's Unexpected Tack*, VIRGINIAN-PILOT, July 10, 2003, at B8; John H. Cushman Jr., *O'Connor Suggests That She Will Stay on U.S. Court*, INT'L HERALD TRIB., July 8, 2003, at 2.

3. *See, e.g.*, Mike France, *High Court Anxiety: Why Business Is Fretting About the Appointments to Come*, BUS. WK., July 7, 2003, at 28; Michael J. Gerhardt, *Here's What Less Experience Gets You*, WASH. POST, Mar. 2, 2003, at B1; Tony Mauro, *Alberto Gonzales Viewed as Top Contender to Fill Future U.S. Supreme Court Vacancy*, TEX. LAWYER, Mar. 3, 2003, at 1; Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, § 6 (Magazine), at 38; Jim Wooten, Editorial, *Pickering Rises Above Mudslinging*, ATLANTA J.-CONST., Mar. 11, 2003, at A13.

4. *See, e.g.*, Robin Toner, *As Abortion Battle Escalates, Both Sides Look to the Supreme Court*, N.Y. TIMES, Mar. 17, 2003, at A19.

ability is mentioned, but this topic has time and time again been placed to the side in favor of a discussion of the nominee's political beliefs.

We believe that the present Supreme Court selection system is so abysmal that even choice by lottery might be more productive. We also believe that politics is primarily to blame.[5] The present level of partisan bickering has not only unduly delayed judicial appointments, it has also undermined the public's confidence in the objectivity of those justices that are ultimately selected.

Because it is disguised by claims about a particular candidate's "merit," however, much of the politicking has escaped the public eye.[6] The

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5. For a brief summary of the politicization of the federal judicial appointments process, see Elliot E. Slotnick, *Prologue: Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 583, 587 (2003). Some commentators subscribe to the notion that judges (and by implication the judicial selection process) should be "above politics." *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS, at x-xi (1994); *cf.* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744-45 (2002) (contending, in the context of elected judges, that "[t]o foster the appearance of an independent and impartial judiciary, we need a system that emphasizes judicial qualifications, opens the process to all who meet the legal requirements, and in most instances, eliminates the need for political campaigning").

On the other hand, it is well recognized that politics in fact does play a large (and constitutional) role in both the nomination and confirmation of federal judges. Chemerinsky notes that:

> Every President in American history, to a greater or lesser extent, has chosen federal judges, in part, based on their ideology. Likewise, since the earliest days of the nation, the United States Senate also has looked to ideology in the confirmation process. This is exactly how it should be. An individual's beliefs influence how he or she will decide cases once on the bench. Therefore, it is appropriate, and indeed essential, for the appointing and confirming authorities to consider ideology.

Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 620 (2003); *See also* Christopher L. Eisgruber, *Democracy and Disagreement: A Comment on Jeremy Waldron's* Law and Disagreement, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 35 (2002-03) (arguing in favor of the political character of the appointments process); Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 397 (1994) (book review) ("If by 'politics,' one means the weighing of each nomination's and confirmation's implications for federalism, the institutional relationships among the branches of the federal government, personal fealty to the nominee, and public accountability, then politics drives the confirmation process by constitutional design."). Even for those who argue that politics has a legitimate role, our proposal is not necessarily an anathema. The use of objective measures of merit will only work to make political motivations more transparent.

6. Chemerinsky sets forth three possible models of selecting judges based on professional qualifications, judging skills, and ideology. *See* Chemerinsky, *supra* note 5, at 621-23. He then goes on to contend that no consistent relationship exists between the choice of which model to use and political viewpoints. *See id.* at 623. Chemerinsky writes:

> I saw this dramatically during the mid-1980s as I participated in debates over whether Chief Justice Rose Bird should be retained on the California Supreme Court and whether Judge Robert Bork should be confirmed for a seat on the United States Supreme Court. In California, in 1986, conservatives argued that Bird, and two other Justices, Joseph Grodin and Cruz Reynoso, should be rejected because of their liberal views and prior votes, especially in death penalty cases. Liberals in California argued that assuring judicial independence required that evaluation be limited to the justices' competence; that the individual's ideology and prior votes should play no role in the retention process. *But the sides were reversed a year later in a battle over the Bork confirmation.* It was the liberals who argued that Bork should be rejected because of his conservative views and prior votes as a court of appeals judge. Conservatives argued that evaluation should be limited to the nominee's competence—that his ideology and prior votes should play no role in the Senate's confirmation decision.

confirmation process has thus become an exercise in question-begging. Politicians claim that a candidate is "qualified" yet rarely tell us what that means.[7] Our best guess is that politicians define "merit" in terms of ideology, and argue accordingly. We suggest that a market-based system would be an improvement.

We are not the only ones to have articulated discomfort with the current system, however. President George W. Bush recently criticized the American Bar Association (ABA), a long-time screener of judicial nominees, for being overly political in its ratings of federal judicial nominees.[8] While President Bush may be correct that the ABA's ratings favor liberal nominees,[9] reducing (or indeed eliminating)[10] the role of screening based

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. . . My point is simply that both sides of the ideological spectrum use each of these models when it serves their purpose.

Id. at 623-24 (emphases supplied).

7. For cites on the proposition that politicians regularly describe their favored candidates as "highly qualified" without providing much in the way of evidence, see, e.g., Helen Dewar, *GOP Presses for Votes on Judges; Senate Republicans Force New Vote on One Nominee, but Democrats Vow to Prevail*, WASH. POST, July 30, 2003, at A4 (observing that the Republicans describe Priscilla Owen as "highly qualified" whereas the Democrats see her as a "pro-business, anti-abortion activist who lets her personal beliefs guide her legal actions"); Editorial, *Imperial Senate*, LAS VEGAS REV.-J., Mar. 2, 2003, at 2E (claiming that "highly qualified judicial nominees" are being forced to "endure an Inquisition-like onslaught from ideologues"). For more specific examples of statements by politicians, see President George W. Bush's Statement on the Senate Filibuster of Judicial Nominees, 39 WEEKLY COMP. PRES. DOC. 1025 (Aug. 1, 2003) (claiming that his "highly qualified nominees" with "stellar records" are being blocked without justification); James Wensits, *Chocola Supports Bush Court Nominee*, S. BEND TRIB., Feb. 14, 2003 (describing Congressman Chris Chocola as asserting that there is "no question that Miguel Estrada is highly qualified to serve on the federal bench," but providing little evidence beyond Estrada's schooling and the basics of where he had been employed (in the Justice Department)); Sen. Orrin Hatch, Letter, *Abortion Stances Based in Religion*, ROLL CALL, Sept. 8, 2003 (claiming that his "highly qualified" candidate was being blocked on religious grounds); Neil A. Lewis, *GOP Senators Try to Change Filibuster Rules*, SAN DIEGO UNION-TRIB., May 10, 2003, at A6 (quoting Senate Republican leader Bill Frist as referring to both Miguel Estrada and Priscilla Owen as "highly qualified and intellectually superior" without explaining the basis for Frist's characterization).

Senators also pursue their own political agenda, often in response to the president's judicial nominee selection. *See* Neil A. Lewis, *First Punch in the Revived Bench-Tipping Brawl*, N.Y. TIMES, Mar. 17, 2002, at 35 (reporting that Senator Charles Schumer said "on Thursday that his principal reason for opposing Judge Pickering was to signal to the White House that it could not hope to send up legions of conservative judicial nominees and expect the Democrats to accept them willingly. 'This is about maintaining balance on our courts,' Mr. Schumer said.").

8. *See* Robert S. Greenberger, *ABA Loses Major Role in Judge Screening*, WALL ST. J., Mar. 23, 2001, at B8. In 1997, Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, had already removed the ABA from any formal role in the confirmation process for federal judges. *See, e.g.*, Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 270-71 (1999).

9. *See* James Lindgren, *Examining the American Bar Association's Ratings of Nominees to the U.S. Courts of Appeals for Political Bias, 1989-2000*, 17 J.L. & POL. 1 (2001) (finding evidence of a liberal bias in the ABA judicial ratings).

10. *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, 37-44 (2001) (describing the Bush Administration's elimination of the ABA's screening role).

on objective criteria is not the solution. Without the ABA or some alternative screening mechanism, the system will become even more politicized. The goal should be to create a better screening mechanism, not to abandon efforts to systematize the process all together. This Essay suggests such a mechanism.[11]

The norm today appears to be that a candidate for the Supreme Court must first sit on a federal circuit court of appeals before she may be considered for a seat on the Court.[12] We take this norm as the starting point for our tournament. That such a norm appears to exist currently is convenient for our idea of a rank-order tournament because the circuit judges can be ranked on the basis of their performances under roughly identical conditions. Among the criteria used would be opinion publication rates, citations of opinions by other courts, citations by the Supreme Court, citations by academics, dissent rates, and speed of disposition of cases. Some of these criteria are readily measurable today. Other data would have to be collected.[13] The point is that a host of relatively objective measures exist by which to rank judges.[14]

The selection of future Supreme Court justices on the basis of such objective criteria would make clear (and thereby reduce) the role that politics plays in both the initial process of selecting a candidate and the often highly political Senate confirmation proceedings.[15] And, even if objective criteria are used only to identify an initial candidate, those seeking to push an opposing candidate for political reasons would have difficulty endorsing

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11. We advance a normative claim. The question of whether such a tournament is consistent with the constitutional power of the president to nominate a justice to the Court and the Senate's constitutional right to "advice and consent" is not addressed here. That said, we see nothing unconstitutional about the president voluntarily looking to a set of objective measures to back up his claim regarding a candidate's merit. Nor can we see anything problematic with the Senate looking to such measures as part of the fulfillment of its role. If there is sufficient public pressure that claims of merit be backed up by objective measures, that will induce the move to at least considering such measures.

12. For a discussion and critique of this norm, see Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903 (2003). *See also* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES 170 (1999) (stating that "federal circuit court judges have become the 'darlings' of the selection process in modern times").

13. Data collection itself can often have indirect policy consequences. Systematic trends that otherwise would not come to light are readily observable once modern statistical methods are applied to cross-sectional and time-series data.

14. For an attempt at using objective criteria to rate the relative performance of Supreme Court justices, see Lee Epstein et al., *Rating the Justices: Lessons From Another Court* (draft presented at the annual meetings of the MWPSA, 1992) (on file with authors). Epstein et al. focus particularly on quantifying the influence of particular justices rather than on more subjective notions of greatness. *See id.*

15. For an account of how politics within the Senate affected the confirmation process for judicial nominees during the 1990s, see Kline, *supra* note 8. Recently, we have seen Senate Democrats filibuster Miguel Estrada's nomination to the D.C. Circuit. *See* Helen Dewar, *Polarized Politics, Confirmation Chaos: Retribution Appears Evident in Nominations Since the Late 1980s*, WASH. POST, May 11, 2003, at A5; Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sept. 5, 2003, at A1.

her without revealing their true motivation. It becomes hard to argue that candidate X is the "best" candidate on purely merit grounds when preexisting objective criteria presumptively support candidate Y. Where political motivations drive the selection of an alternative candidate, our proposed system of objective criteria would make it more likely that such motivations would be exposed to the public.

An initial objection to our plan might be that the mere existence of easily obtainable numerical measures does not necessarily mean that these measures will effectively predict who will make a skilled justice. Our response is to point out how badly the present selection system works without such measures. No matter how weak our objective bright-line predictors are, we contend that our system would outperform the current one.[16] Bright-line factors may not predict judicial quality as well as the most searching and unbiased analysis. But objective factors will do better than what we have now: a biased and nontransparent process overwhelmed by politics.

We also believe that a judicial tournament would provide appellate judges with the otherwise absent external incentive to exert greater effort than they currently do. If high effort as a circuit judge (for example, publishing more opinions or hearing oral argument in more cases) is a criterion for promotion, rewarding effort with a higher ranking would induce circuit judges to work harder at their jobs. In other words, the criteria focus not only on predicting the future skill of a justice, but also on rewarding judges who work hard.

In this Essay, we will suggest several criteria that can serve as a starting point for our proposed system and evaluate their ability to surpass the current selection process. Next, we will discuss the benefits of the tournament in giving judges added inducement to perform at high effort levels. After addressing some potential objections to our proposal, we conclude that despite some wrinkles, the use of objective criteria would be a vast improvement over the current appointments process and would increase the quality of judging on the circuit courts.[17]

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16. A partial test of our hypothesis might be to look at past circuit judges and ask which among them would have been elevated to the Supreme Court under our proposal. We suspect that among those who would have made it to the Court would be Learned Hand, Henry Friendly, and Richard Posner. Such a test would be partial and imperfect, however, because it is difficult to compare the hypothetical performances of a group that might have made it to the Court with the real performances of those who did make it.

17. On the economics of rank-order tournaments of the type we propose, see, for example, Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841 (1981). The theory can help explain the high salaries of Chief Executive Officers (CEOs). CEO compensation is seen as the tournament prize for which corporate vice-presidents compete. *See* Brian G.M. Main et al., *Top Executive Pay: Tournament or Teamwork?*, 11 J. LAB. ECON. 606 (1993). Under tournament theory, a CEO's compensation does not necessarily reflect her current productivity (although it could), but operates to induce others to compete for the top spot. *See* Sherwin Rosen, *Prizes and Incentives in Elimination Tournaments*, 76 AM. ECON. REV. 701 (1986).

II
FORMULATING OBJECTIVE TOURNAMENT CRITERIA

The current selection criteria for the Supreme Court appear to be a set of political litmus tests on matters such as abortion, the death penalty, and affirmative action.[18] These litmus tests provide some indication of how political hot-button cases will be decided, but not much else. Because hot-button cases make up but a small fraction of the Court's docket, these promotion criteria focus only on a small portion of what is required of a justice. While we are not necessarily against the inclusion of politics per se in the judicial nomination process, this modern-day focus fails to consider the full nature of the judicial function. Moreover, where politics does impact the selection of judges, such motivations should be made transparent to the public. The public should know when a judge has been chosen because of ideology, and not because she measures up when objectively compared with contemporaries.

Our proposal also recognizes that judges, like the rest of us, respond to incentives.[19] Incentives should thus be harnessed to improve the overall quality of the federal judiciary. Crafting a fully specified system of objective factors that may be used to rate judges, however, is beyond the scope of this Essay. We suggest only a preliminary set of objective criteria with the hope that others will improve upon them.

a. Quality of the Judicial Product: We focus first on the most easily measurable aspect of the judicial task: opinion writing. Circuit court judges write lots of opinions (roughly between five and ten times the number of majority opinions that Supreme Court justices do).[20] These opinions are then used by other judges to decide subsequent cases. Opinions are thus the judiciallycreated "products" that form the raw materials for the construction of other similar products. For judges and academics, the products

18. Kline observes that a nominee's predisposition toward "judicial activism" served as the litmus test for Republican-controlled Senates during the mid-1990s. *See* Kline, *supra* note 8, at 250. In addition, race and gender can creep into the mix. *See* Mike Allen & Helen Dewar, *Second Judicial Nominee Targeted; Senate Democrats Plan to Filibuster to Stop Selection of Owen*, WASH. POST, Apr. 30, 2003, at A1 (reporting on the search by officials in the current administration for minority candidates who also meet the administration's ideological criteria).

19. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 634 (2000); *cf.* J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG. 259 (1997) (providing evidence that the Japanese legal system rewards more productive judges).

20. For data on the judges' publication numbers for the circuit courts, see Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, L. & CONTEMP. PROBS., Summer 1998, at 157, 210-11. Information on the Supreme Court's opinions can be found in the *Harvard Law Review*'s annual Supreme Court issue published in November.

are free. For lawyers, they generally must be purchased from the West Publishing Company or from Lexis or Westlaw.

Whether a judge's opinion is used as a product is determined by market forces. Judges use opinions written by other judges as the tools required to write their own opinions. Presumably, the best opinions will be cited more often than others. They may even be cited by the Supreme Court. Some will be the subject of academic analysis, some will be included in casebooks (although the quality argument is more attenuated here—casebook authors being fond of not only the better opinions, but also the ones that are more controversial and lend themselves to debate). The point is that there is a market test available for assessing the quality of 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.[21]

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).

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. There are also a large number of producers (over 160 circuit judges[22]), and they all have identical resources (the same income, the same number of law clerks, the same perks). Finally, the customers, often the judges themselves, are sophisticated about the products from which they are choosing. We expect therefore that in this market the opinions used the most are

21. 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. *See* John V. Orth, The Secret Sources of Judicial Power (2003) (unpublished manuscript, on file with authors). 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. *See* JOHN WILLIAMS WALLACE, THE REPORTERS (3d ed. 1855); *see also* Email from John V. Orth, William Rand Kenan Jr. Professor of Law, University of North Carolina School of Law, to Stephen Choi, Professor of Law, School of Law, University of California, Berkeley (Boalt Hall) (Apr. 3, 2003) (on file with authors).

22. If one includes senior judges, the numbers become even higher. Senior judges, especially if they take on a reduced workload, do not tend to have the same resources as their colleagues on active status. Information on the circuit courts is available at http://www.uscourts.gov/courtsofappeals.html (last visited Oct. 22, 2003). Specifics on the case loads for the circuit courts by year are located at http://www.uscourts.gov/fcmstat/index.html (last visited Oct. 22, 2003). In 2002, there were 167 active federal circuit court judges and ninety senior judges. *See id.* Biographical data on both active and senior circuit court judges is available at http://www.fjc.gov/newweb/jnetweb.nsf/hisj (last visited Oct. 22, 2003).

likely to be the ones that judges find the most useful for their own production of opinions.

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).[23]

More refined methods of measuring citation counts are also possible. Those compiling citation rankings could assign a judge a positive score for favorable citations and a negative score for unfavorable citations (thereby curbing the incentive to take extreme positions in their opinions). Supreme Court and en banc reversals could also be counted against the judge.

Focusing on Supreme Court reversals, however, may unfairly penalize judges with different political views from those on the Court. To control for this possibility, the tournament could take into consideration both the political affiliation of the court of appeals judge and that of the reversing majority. For example, imagine that a judge is reversed by a Court that is controlled by justices appointed by a president of the same political party as the president who appointed the judge herself. One way to develop the system would be to penalize that judge more harshly for the reversal than a judge appointed by an opposing party's president.

Variables outside of a particular judge's control may also affect the number of times she is cited. Judges with a longer tenure on the bench are likely to have a longer citation list. As controls, rankings could focus on the number of citations per year or per opinion. For example, the tournament could tabulate the total citations to all the published opinions authored by each circuit court judge over a common time period (say, for example, from 1998 to 2000). Looking at the opinions authored over one

23. Even those judges far from superstar status may compete to improve their ranking relative to judges close to them in the objective ranking system. For a discussion of the benefits of competition for mid- and low-level judges, see *infra* Part III. The first description of the impact "superstars" have on markets is often traced back to the legendary economist Alfred Marshall. *See, e.g.*, Moshe Adler, *Stardom and Talent*, 75 AM. ECON. REV. 208 (1985); Glenn M. MacDonald, *The Economics of Rising Stars*, 78 AM. ECON. REV. 155 (1988); Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981).

common time period puts judges on a more even playing field. Some judges, of course, will still obtain more citations than others. But such differences will be more due to internal differences among judges (such as skill in analyzing legal arguments and writing opinions) rather than exogeneous factors (such as more years on the bench).[24] Similarly, judges in one circuit may hear different cases than judges in other circuits, with some tackling more difficult cases and larger numbers of cases than others. An adjustment could be made by measuring the difficulty of the overall caseload for each circuit and either discounting or crediting performances accordingly.[25] To control for the possibility that judges from circuits with a heavier caseload may receive more citations from other judges within their own circuit (compared with judges in lower caseload circuits), the tournament could focus exclusively on citations arising from outside a particular judge's circuit.

A more complicated issue arises if one views an opinion as a team product. Circuit court decisions are generally rendered in groups of three. The question is how to allocate credit (or blame) for the final product. One judge writes the opinion, but the theory is that she writes the opinion in consultation with the other two judges. Our tournament gives only the writing judge credit for an opinion. Citation counts therefore represent but a noisy indicator of judicial quality. Indeed, in certain circumstances, the credit for a superb (or not-so-superb) opinion should be allocated among the three.

The "team product" problem may ultimately prove unsolvable. It would be difficult for an outside evaluator to know much more than the fact that the writing judge did significantly more work on the opinion than the other two. That said, giving all the credit to the writing judge is a reasonable approximation, since in a large number of three-judge panels those

24. An argument exists, nonetheless, that judges in certain circuits may receive a mix of cases more conducive to receiving high citation counts. As well, judges more aligned in ideology with the chief judge of a circuit may obtain assignments to write opinions more likely to generate larger numbers of citations. While we are not sure whether such factors are large in magnitude, a tournament could control for intercircuit differences in citations (focusing solely on how much better a judge is relative to her peers on the same circuit) as well as the subject matter of the cases (e.g., adjusting for the tendency of some types of cases to obtain more cites than others). Evidence also exists that the chief judge may have only limited influence. *See, e.g.*, Forrest Maltzman & Paul J. Wahlbeck, *May it Please the Chief? Opinion Assignments in the Rehnquist Court*, 40 AM. J. POL. SCI. 421 (1996) (finding that, for the Rehnquist Court, opinion assignments were more a function of organizational needs rather than ideology).

25. In his book on the federal courts, Judge Posner rates the caseloads of the different circuits in terms of their levels of difficulty. He roughly approximates the difficulty level of each category of case (for example, one might think that social security cases are among the most difficult and criminal law cases among the easiest) and attaches a corresponding weight to each category. He then evaluates each circuit's caseload by determining what fraction of a court's entire docket is made up of cases from the different categories. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 75, 230 (1996).

judges most inclined to write high citation opinions tend to outperform their colleagues.

A critic might then ask whether the tournament presents the danger of discouraging collaboration. Will the two nonwriting judges refuse to work with or worse, attempt to undermine the writing judge in an effort to boost their own relative rankings? The question is a fair one since, in theory, the relative nature of the tournament ranking produces incentives not only to perform well, but also to undermine the performance of others.[26] But working with particular colleagues is not a one-time event for judges. They are likely to interact repeatedly with these colleagues over many decades and the probability of promotion is probably too small for it to be worthwhile for any one judge to undermine her colleagues. Moreover, judges who act to undermine a colleague in one case may expect to find themselves undermined by the same colleague in later opinions. Hence, if there are gains to be had from cooperation (better decisions and better opinions), judges will cooperate rather than compete. In sum, we expect the competition to be healthy.

b. Caseload Performance: In addition to measuring the quality of a judge's opinions, we might also try to measure the effort with which a judge approaches her job. We might do so by observing how a circuit judge handles her caseload.

We measure effort because each Supreme Court justice is responsible for a significant workload. In order to tackle the workload, the justice has a number of options. She can choose to delegate some or all of the drafting to her law clerks, she can choose not to dissent in many cases (even when she disagrees), and she can choose to vote to grant certiorari in as few cases as possible.

It is arguably in the public interest for the justice to exert maximal effort. This would mean that she would use her clerks minimally, dissent as often as would be warranted, and vote to grant certiorari in as many cases as is possible. 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[27]), and the

26. *See* Kong-Pin Chen, *Sabotage in Promotion Tournaments*, 19 J.L. ECON. & ORG. 119 (2002) (contending that participants in tournaments based on relative performance may sabotage others in the tournament and suggesting several institutional designs to reduce such perverse incentives).

27. While measuring whether a judge or her clerks actually wrote most of a particular opinion is difficult, recent research suggests that the task is not impossible. *See* Paul J. Wahlbeek et al., *Ghostwriters on the Court? A Stylistic Analysis of U.S. Supreme Court Opinion Drafts*, 30 AM. POL.

overall number of cases which she played a role in deciding during a given period of time.

c. Independence: Another part of the judicial mission is to decide cases impartially. One measure of impartiality is the willingness of a judge to decide cases independent of political ideology. Evidence suggests that judges fall short of this mark.[28] This willingness is measurable. For each circuit court judge, for example, 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) serves as one measure of the willingness of a judge to take an independent approach.[29] Judges who are systematically more willing to disagree with politically like-minded judges are, we speculate, more unbiased in their approach to individual cases.

Other objective measures of merit may also be observed. For purposes of this Essay, we use our identified criteria only as a starting point. Focusing on the number of times a judge is cited, her performance in disposing of cases, and whether she resolves disputes independently, does not produce a perfect test for promotion. The best soldiers are not always the best leaders. The best law students are not necessarily the best legal academics. Likewise, judges with low citation counts as circuit court judges could well move on to write high quality opinions as Supreme Court justices. A judge who shirks while at a lower court may find matters on the Supreme Court so interesting that she exerts high effort. Bright-line rules are necessarily both over- and under-inclusive in their reach.

Given the inherent imprecision of objective factors, some may argue that weighing each factor appropriately is the only way to generate an accurate rank order among judges. Determining the proper weights, however,

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RES. 166 (2002) (using techniques borrowed from computational linguistics to measure the relative levels of influence that clerks had in the drafting of opinions for Justice Thurgood Marshall and Justice Lewis Powell).

28. For example, in an empirical study of cases related to environmental law, Richard Revesz demonstrated that judicial decisions in the D.C. Circuit are significantly correlated with the political party of the president who nominated particular judges. *See* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

29. Likewise, we would credit judges in the majority and dissent who oppose judges of the same or similar political persuasion. In any given case (with a dissent) involving judges with the same political affiliation, both the majority and dissenting judges will count as acting independently in that particular case. Over a series of cases, nonetheless, the truly independent judges would systematically (whether in a majority or dissenting opinion) take part in greater numbers of cases where they oppose judges of the same political persuasion. Of course, a Republican judge sitting on a circuit comprised of primarily Democratic judges may find herself dissenting against a large number of Democrats simply because of the composition of the circuit (aside from any political motivation). To take the extreme case, where all the other judges are Democrats, the lone Republican judge will never dissent against another Republican (since there are none). Senior judges from other circuits as well as district court judges sitting by designation may change the mix of judges. Nonetheless, as one possible control, those running a tournament may wish to adjust for the political composition of a particular circuit in determining independence.

is not easy. Should more credit be given to opinions cited in other opinions or opinions cited in casebooks? Should measures of independence receive greater weight than measures of effort? We are not certain of the answers. Moreover, one person's conception of the proper weights across different criteria may differ from the views of another person.

Nonetheless, we believe that judges who score high on any one of our objective criteria are likely to score high on the majority of the other criteria. A judge who has an impact through her opinion-writing in the judicial community is likely also to have an impact among casebook authors. Likewise, judges who work harder on their opinions are correspondingly less likely to adhere blindly to one particular political viewpoint or another.

Opponents may contend that the objective factors on which we focus may still fail to promote the most effective form of competition. Competition based primarily on citation count, for example, may lead judges to focus too much attention on formulating and drafting opinions. This may exacerbate already crowded court dockets. Even more troublesome, judges seeking citations may search out novel viewpoints, no matter how outrageous and untenable.[30] Under such a system, a judge who simply cites precedents and disposes of a case with a few brief sentences is unlikely to generate many citations. Judges may also only cite their friends (or similar-minded colleagues) who will agree to reciprocate in order to enhance their joint chances of advancing to the Court.[31] Switching the focus to noncitation-related objective factors would not necessarily obviate such problems. The tournament could instead focus on the speed with which judges handle their cases. Such a criterion, however, may lead to overly rapid case disposition at the sacrifice of doing justice in any particular case. After all, one quick method of deciding a large number of cases would be to dismiss them all. And those judges interested in generating a large number of written opinions may simply engage in mass cut-and-paste efforts.

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30. We question whether more outrageous views will in fact garner more judicial citations. While outrageousness may result in more citations for academic work, it is not clear that it holds for judicial opinions. Indeed, judges may value conservatism and therefore shy away from innovative opinions. Judicial conservatism may thus keep the citation rates for innovative opinions disproportionately low.

31. The tournament aspect itself may even solve this problem. If judges cite their friends instead of the best opinions on the subject, they will write lower quality opinions and hurt their own chances of getting cited.

On a related note, judges may attempt to use string citations, citing a high quality opinion followed by citations to all their friends and like-minded judges. Such a strategy, however, may lead to hard-to-follow opinions, decreasing the likelihood that the opinion will get cited in the future. To counteract this practice, sophisticated counting techniques could be used to record only the first citation in a string cite. For examples of citation studies that use different techniques to measure relative influence and prestige levels of judges, see William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998); David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371 (1999).

Solutions to these problems are nonetheless possible. Focusing on multiple criteria is one.[32] Rating judges not only on the number of opinions they produce but also on the citation count per opinion (or per given time period) in addition to the number of cases which they dispose of in any particular time period forces ambitious judges to seek balance. Judges seeking to boost the number of opinions they write at the expense of the quality of such opinions, for example, may find that their citation count per opinion will drop. Likewise, judges who focus too much effort on writing long, detailed opinions may find that their overall number of cases handled drops. Once the more egregious abuses are reduced (if not eliminated) through a balanced set of objective criteria, we believe that encouraging judges to increase their objective rankings would be good for the justice system as a whole. Focusing on objective criteria may give judges an incentive to increase their levels of effort and output.

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.

Under the current system, little effort has been made by recent presidents and relevant senators to measure the opinion-writing skills or work dedication of circuit appointments. Underlying most appointments, we suspect, are political agendas and the repayment of political favors.[33] If, however, our proposal is accepted by the public such that a president is seen to be a failure if his selections to the circuit court do badly in the competition, then presidents and senators will begin to seek only those circuit court candidates who will do well in the tournament of judges. This will not eliminate political considerations. The politicians will still want candidates whose political views they prefer. But the politicians will also have to put forth the best competitors among those they agree with and explain why.

By focusing first on objective criteria, our proposal forces into the open more subjective criteria used in the selection of a judge. Let politics

32. While we see a benefit in focusing on a range of balanced objective criteria, some may argue that too many objective indicia may lead to an unwarranted illusion of accuracy. Nonetheless, we believe that because a high correlation is likely to exist among the various objective factors, the best judges will tend to come out at the top of an objective ranking. An objective ranking in this sense may develop a deserved reputation of accuracy. And even if some do place overly great weight on these objective factors, the benefits of untangling politics from discussions of merit and pushing politics out into the open more than justifies the illusion.

33. *See* Kline, *supra* note 8.

play a role but only in a transparent manner.[34] Where, for example, an explicit reliance on objective criteria is not used to select a judge for elevation to the high court, the president should bear some burden in explaining why (based on affirmative action, politics, or some other rationale) an alternative judge is being selected. Likewise, the senators in the confirmation process should bear the burden of discussing why they believe various nonmerit factors should weigh (if at all) into the selection process. Assuming that the tournament throws up a number of high scorers, though, there remains a danger that politicians will use "merit" arguments to mask their true motivations for pushing one or another of the high scorers. Politicians may attempt to mask political motivations through more subjective-based merit arguments, contending that our objective factors do not capture the full range of merit.

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. Any objections (or moves to introduce an alternative candidate) must therefore explicitly rely on nonmerit factors, thus preventing the possibility of pretextual rationales designed to disguise more politically motivated appointments.[35] While this approach is necessarily under- and over-inclusive with respect to merit, the gains in terms of transparency may make the move toward objective factors worthwhile. Moreover, with transparency, the public can more easily observe the explicit tradeoffs between ideology and judicial quality.[36]

III
THE EFFECT OF THE TOURNAMENT ON CIRCUIT COURT JUDGE BEHAVIOR

The possibility exists that judges may simply ignore competition. After all, with life tenure why care about competition? Moreover, if the only fruit of competition is a seat on the Supreme Court, most judges may consider the likelihood too remote for it to be worthwhile to compete. Two responses come to mind. First, judges may in fact care about goals other than elevation to the Court. Judges in particular may care about their reputational standing among other judges. Simply providing a detailed and objective "standing" of judges relative to one another should generate peer

34. *See* sources cited *supra* note 5.

35. Similarly, we recommend that any tradeoffs between "merit" and political factors must be couched only in terms of the objectively defined measures of merit.

36. A cynic might respond that the appointments process to the Supreme Court is now overtly political and no one pays any attention to merit in any case. If this is the case, though, a tournament is even more necessary. With an objective ranking of merit, we may at least reintroduce the possibility that merit will be a factor in the selection of Supreme Court justices. This will be an improvement from the current system, conceding that the political atmosphere surrounding nomination and confirmation would remain.

pressure and a degree of competition. Presently, only superstar judges with a large number of citations stand out among the large pool of circuit court judges.[37] A judge in the middle of the spectrum thus may not have much incentive to compete to the extent that her chance of achieving star status is low. Providing a rating system, however, will give even mid-level (and indeed lower-level) judges more obtainable goals. A mid-level judge, for example, may seek to produce a greater number of published opinions to increase her citation count in an effort to move past the next three or four more highly rated judges.

Of course, individual judges sitting on the same circuit may already have a good subjective sense of each other's abilities. A criticism of our proposal therefore is that objective tests are superfluous. Why would a mid-level judge care about how she ranks in an objective ranking if she and her colleagues already know where she stands? The answer: a judge would care to the extent that she cared about how outsiders view her.

One group of outsiders the judges might care about is the set of potential law clerks. Indeed, this is the one market in which the judges compete openly already. As things stand now, however, law students have little information by which to rank judges in deciding for whom to clerk. (There is something of a status hierarchy based on the prestige levels of different circuits and some individual judges' reputations as "feeders" to the Supreme Court, but that is it.) We suspect, however, that if individual-judge rankings are made available, law students will pay attention to them, especially if those rankings translate into different post-clerkship job prospects.[38] And if the law clerks begin to use the rankings, that will cause at least some judges to care about them.

Second, the fact that appointment to the Supreme Court is unlikely does not answer whether the possibility of appointment may or may not motivate judges. If the magnitude of the benefit of a position on the Court is high enough, even a low likelihood will induce judges to compete.[39] Elevation to the Court is prestigious, to say the least. For most judges and lawyers, it is the pinnacle of achievement. We suspect that many judges are

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37. *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 108-09 (2002).

38. We know that students perceive (accurately, we believe) that law firms care a great deal about the rankings of the schools they attend. *See* David B. Wilkins & G. Mitu Gulati, *What Law Students Think They Know About Elite Law Firms: Preliminary Results of a Survey of Third Year Law Students*, 69 U. CIN. L. REV. 1213, 1224 (2001). If judges (and, as a result, clerkships) also get ranked publicly, we suspect that law firms will attach weight to these rankings as well. Who knows? Perhaps even Supreme Court justices would pay attention to lower court judge performance rankings in selecting their law clerks.

39. The prize of becoming a corporate CEO despite the low probability of achieving it, for example, may motivate large numbers of corporate managers to perform at a high level. For sources discussing the tournament of CEOs, see *supra* note 17.

willing to work extremely hard, despite the small probability of success that they will be elevated.[40]

Under the current system, other than to curry political favor through opinions designed to attract the approval of the current administration, it is unclear what a circuit judge could do to attract the necessary attention required to be considered for promotion. Indeed, to the extent the Senate is controlled by a different political party than the presidency, judges with as little a track record as possible may become favored (to reduce the chance of a confirmation fight).[41]

Thus, under our system, judges who thought they had no chance for appointment due to political factors may strive to excel in ways they have not before. Their response, however, would not be uniform. Some may not care about elevation at all. Our proposal will nonetheless create more competition than exists under the present system.[42]

To the extent that the possibility of promotion to the Supreme Court can provide the 160-plus active circuit judges with the incentive to work harder, that itself would yield significant social dividends. The circuit courts decide upwards of 27,000 cases a year on the merits, in comparison to the seventy-five or so decided by the Court.[43] If the introduction of a tournament for promotion to the Court is able to increase effort levels even a small amount on every case the circuit courts hear, the overall effects will be dramatic.

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40. Even if elevation to the Supreme Court is too remote to provide a real incentive for a judge to improve her performance, it may be possible to use our objective rankings to provide other rewards for judges, although we would like to make clear that we are not proposing taking matters this far. In addition to the psychic benefits of moving higher up on a well-publicized rank order, one could give judges who move higher on the order more perks in the form of a greater number of clerks, more say in which cases they hear and what opinions they write, and possibly even larger offices. For those willing to provide even greater inducement, we imagine that the salaries of individual circuit court judges could be made to depend on their objective rank orders among judges. For example, the top 10% of judges on the rank order could be given a salary bonus at the end of each year.

41. *See, e.g.*, David Lauter, *He May Be Harder to Reject: Bork's Opponents Greet Replacement Suspiciously*, L.A. TIMES, Oct. 30, 1987, at 14 (reporting the concern of many Democratic senators that the nomination of Judge Douglas H. Ginsburg to the Supreme Court would be difficult to block because he lacked a "paper trail" of lower court opinions); Sheryl Gay Stolberg, *Battle Over Judgeship Tests Congressman's Loyalties to People and Party*, N.Y. TIMES, Mar. 15, 2003, at A14 (noting that Miguel Estrada, President George W. Bush's nominee for a vacancy on the D.C. Circuit, had "published little that would hint at his judicial philosophy").

42. A consequence of encouraging judges to publish more is that the circuit judges who "win" this element of the tournament will have a long paper trail. This will enable the public to identify and then express approval or disapproval of their political views. Those who do seek to make political arguments (and their opposition) will thus have more material with which to work when supporting (or opposing) a nominee to the high court. This will hopefully lead to better informed decisions.

43. For data on the case workload of the circuit courts, see http://www.uscourts.gov/cgi-bin/cmsa2002.pl (last visited Oct. 24, 2003) (reporting that 27,758 appeals were decided on the merits in the federal circuit courts in 2002). As discussed *supra* note 20, information on the Supreme Court's opinions can be found in the *Harvard Law Review*'s annual Supreme Court issue published in November.

IV
POSSIBLE OBJECTIONS

There are a number of possible objections to our proposal. Among those are: (a) the ABA and other groups already rate prospective candidates; (b) judges are uniquely self-selected to be relatively impervious to competitive pressures; (c) an undue focus on numbers may hinder attempts to ameliorate historical inequities in the representation of women and racial minorities on the bench; (d) the already problematic norm of only choosing justices from the pool of those with prior judicial experience may become entrenched; and (e) despite our proposal, politics may still enter into the process.

a. ABA and Other Rankings: A number of groups, including the ABA, already evaluate and rank candidates for the Supreme Court. In theory, many of these rankings are apolitical. The ABA evaluates candidates by assessing their temperament, integrity, and professional competence.[44] Thus, a critic might ask whether our proposal adds anything new. Our response is that the rankings that the ABA and other groups use are different from a tournament system. They do not focus on the current judicial performance of all potential nominees. Instead, they evaluate only a handful of potential candidates and then put them in broad categories such as well-qualified, qualified, and not qualified.[45] The analysis of the candidates is also largely qualitative and subjective, and, as discussed, allows for significant political bias (precisely because of its subjective nature). Additionally, under the ABA's system, all of the candidates could end up with a rating of "well qualified." Such a system is anything but a tournament.

What we propose is an ongoing competition between all of the circuit judges, a competition where each would be regularly ranked against all the rest. The reward for winning is a presumptive elevation to the Court when a seat opens up. We have no quarrel per se with having a subjective and qualitative component in the evaluation of potential Supreme Court justices (with detailed analyses of particular opinions and interviews with litigants). The problem is that such analyses often end up being politically driven. We believe that a significant element of the tournament should involve quantitative (and therefore easily measured) components such as publication and citation rates, forcing those driven by political motivations to make such motives transparent.

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44. For a description of the ABA evaluation process, see Lindgren, *supra* note 9.

45. *See id.* (describing the ABA's rating system for judicial nominees). For more information on the ABA's rating system, see HENRY JULIAN ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 23-28 (rev. ed. 1999); GEORGE WATSON & JOHN A. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 83-85, 108-112 (1995).

b. Judges Prefer Not to Compete: Competition may generate a backlash from the bench. Judges, viewing themselves as professional elites, may feel that they do not need external competitive inducements to do their jobs well. The prospect of competition may even be received with contempt by judges striving to exist "above the fray." Some judges may resent the fact that they suffered large opportunity costs (such as giving up lucrative private sector jobs) to take jobs that no longer free them from the competition they sought to escape. Judges may thus represent a self-selected group of people to whom competitive inducements reduce the value of becoming a judge in the first place. Competition may ultimately make the job of judging undesirable to otherwise qualified legal professionals.

We suspect, however, that this will not be the case. The benefits of being a federal judge are considerable and include not only life tenure, but also power and professional prestige. The costs in added competition would be larger under our system than before, but still relatively small. Indeed, we believe that our tournament will be less intensely competitive than the private sector.[46] Plus, if judges are unusually other-regarding and noncompetitive, then these rankings will not affect them anyway. There is no penalty for not competing. And if they do not compete, at the least, we will have generated useful information about relative judicial performances.

More importantly, even if a large number of judges choose to avoid competition, a tournament system should help reduce the appearance of political bias that exists today. Evidence reveals that who you get as a judge, in terms of political affiliation, can often affect the outcome of the case.[47] That evidence, when put together with the observation that

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46. Even for partners at law firms, there tends to be intense competition. *See* David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. STUDY LEGAL ETHICS 15 (1999) (discussing the continued competitive pressures that partners at elite law firms face).

47. There is a significant literature in political science and, as of late, in law, which uses the judge as the model of a complex actor who does more than simply apply the law to a set of facts. Instead, judges are seen as acting strategically and having biases. For examples of scholarship along these lines, see Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (studying the effects of judicial attitudes on civil rights cases); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (studying effect of judicial attitudes on outcomes in racial discrimination suits); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998) (finding ideological decision making on en banc panels); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 110 (2001) (finding that political affiliation helped predict votes in unpublished dispositions of labor-management disputes); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001) (providing evidence that the political affiliation and ideological preferences of judges affect judicial outcomes). Some judges, such as Harry Edwards of the D.C. Circuit, have taken umbrage at the claims of judicial bias. *See* Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported*

politicians appear to look at political ideology in choosing nominees, suggests that judges may be competing already.[48] Adopting objective criteria can help reduce present levels of competition along political lines because it moves the competition toward nonpolitical criteria (or at the very least flushes political competition out into the open). We hope that the result will be the selection, at a greater rate, of objective and unbiased judges.

c. Promotions For Women and Minorities Will Be Hurt: A related criticism of our proposal might be that focusing exclusively on objective criteria may disproportionately harm the interests of women and minorities. To the extent that the numbers of women and minority judges are small and such judges are relatively inexperienced, criteria based on standing among peer judges (such as citation counts) may create an exclusionary barrier. We are not hostile to the notion of providing some degree of preference for the selection of women and minority judges. Indeed, even pure political motivation (such as selecting a judge because she is anti-abortion) should potentially play a role in the selection of judges. We believe, nonetheless, that like politically motivated appointments, any move to favor a judge for gender or racial reasons should be made transparent. Our system of solely objective merit factors forces those who wish to support a woman or minority judge to make explicit this motivation.

d. The Problematic Norm of Requiring Prior Judicial Experience: Our proposal takes, as its starting point, the norm of picking justices with prior circuit court experience. There are, however, at least a couple of problems with such a norm. First, it restricts the pool of possible candidates. Giants like Brandeis and Cardozo would not have made it onto the Court had such a norm been rigidly adhered to during their times. Second, it creates homogeneity in terms of prior experience.[49] Research by political scientists tells us that prior experience is an important determinant of

Claims of Judicial Bias), 80 WASH. U. L.Q. 723 (2002); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

48. For a ranking of potential nominees in terms of their ideological fidelity, see Kenneth L. Manning et al., *George W. Bush's Potential Supreme Court Nominees: What Impact Might They Have?*, 85 JUDICATURE 278 (2002). Manning et al. compare votes of six potential Bush nominees (drawn primarily from the federal circuit courts) in the areas of criminal justice, civil rights and liberties, and economic and labor regulation. *See id.* at 280. They then code each vote based on whether the vote is "liberal" or "conservative." For example, a vote for the defendant in a criminal justice case is coded as "liberal" while a vote for the state or prosecution is coded as "conservative." *See id.* The percentage of conservative votes averaged over the three subject matter areas is then deemed a judge's ideology score. *See id.* at 282. Manning et al. report that all of the potential Bush nominees are conservative in their voting patterns in cases (and that Judge Harvie Wilkinson is the most conservative of the potential nominees under their methodology). *See id.* at 282-84.

49. Chief Justice Rehnquist is among those who have commented on the problematic nature of this norm. *See* William H. Rehnquist, *2001 Year-End Report on the Federal Judiciary*, 34 THE THIRD BRANCH 1, 3 (Jan. 2002), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html (pointing out the diverse backgrounds of justices such as Louis Brandeis, John Harlan, and Byron White).

judicial decisions.[50] In other words, homogeneity in prior experience is likely to produce homogeneity in decisions. One answer to these objections is that the norm is not one of our choosing. The norm already exists. Our proposal simply takes the current norm as given. But that is too easy and does not answer the harder critique which is that the success of a tournament proposal would entrench the already problematic norm. Further, we agree that the problems mentioned are serious ones. We propose a modification to the tournament that can help correct for the problematic effects of the norm. First though, it helps to see why the norm is beneficial and why it should remain our starting point.

The value of a norm of prior circuit court experience is that it creates an apprenticeship period. The apprenticeship period serves to produce data on how the candidates performed in a job that is close in nature to the job they are seeking. To the extent that we are attempting to predict the future performance of the justice, having the data that enables the best such prediction is vital. These types of apprenticeship periods are crucial in promotion tournaments used by law firms, investment banks, and academic institutions. The analogy to those settings, however, helps us see how the norm can be bypassed in appropriate settings. For example, the norm in most law firms of choosing partners from the associate ranks is not generally a rigid one. In exceptional circumstances, firms are willing to hire laterals. Since information on these laterals is fuzzier or harder to interpret (and therefore future performance harder to predict), the bar for them is generally set higher.[51] Plus, the hiring of laterals takes away from the incentives that the tournament provides to its internal participants. By analogy, even assuming that data as a circuit court judge is the best predictor of future performance as a justice, we may have circumstances where a candidate demonstrates such extraordinary performance on some other job (such as a district court judge, legislator, state supreme court justice, lawyer, or legal academic) that one can predict that the person will make a better justice than any of the other candidates with circuit court experience.

We have no problem with modifying the tournament in such a manner. The key, however, is to come up with a set of objective measures to evaluate these candidates with alternate career paths. This would be easy, for example, with state supreme court justices because one could use measures similar to the ones proposed for the circuit court judges. For others, such as legal academics or lawyers, evaluation would be more difficult, but not impossible. Finally, assuming that the apprenticeship period is

50. *See* Epstein et al., *supra* note 12, at 908.

51. For a discussion of how the bar for lateral hiring in law firms is set higher than that for regular associates, see David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1644 n.205 (1998).

defined as some appropriately short time period (say, three years), then candidates for whom predictive information is not available can be given short stints on the circuit court before they are evaluated for promotion. If the apprenticeship period is kept short enough, perhaps the problem of homogeneity will diminish. The key here, however, will be to ensure that the apprenticeship opportunities (that is, the circuit court judgeships) are provided to a diverse set of candidates.

e. Politics Redux: Suppose we are in fact successful in making political motivations more transparent in the Supreme Court appointment process. Where politicians become hesitant to pursue political goals through Supreme Court nominations, they may instead choose to do so through nominations to the courts of appeals. Our proposal therefore may succeed only in shifting the forum for the current political battles one rung down on the judicial ladder.[52]

Our only answer to this concern is to point out that the circuit court appointments process is already highly politicized. Indeed, to us it is unclear how much more of a part politics could play in the process.[53] Moreover, to the extent the presidency switches between the major political parties at least on occasion, the pool of circuit court judges will still contain some range of viewpoints. It is therefore unlikely that packing the circuit courts with politically-minded judges (more so than already occurs today) will necessarily undermine our attempts to reduce the role politics now plays in the Supreme Court nomination process.

Whatever other objections exist, the one that we do not see room for is the argument that the tournament would hurt judicial independence. If anything, the pressures that appellate judges may currently feel to attract political sponsors by making decisions that please those sponsors would be eliminated. Indeed, if there is an objection to our system at all, it is that judges will be made too independent under it. The tournament will thus

52. In theory, the tournament could be extended down to district court judges (with district court judges competing for slots on the circuit courts). Unlike the circuit courts and the Supreme Court, however, where the primary tasks are roughly the same (deciding cases and writing opinions), district court judges have a third task of considerable importance: trial management. The significant difference in tasks produces two problematic effects. On the one hand, if we rank district court judges according to something like citations to opinions, that will produce an incentive for them to focus on opinion writing at the expense of trial management, a serious problem if an important part of their tasks is to run trials. On the flip side, if we are able to structure a measure of district court performance that adequately considers trial management (and discounts opinion writing), that produces the danger of promoting the better trial managers to a task (a circuit court judgeship) that requires no trial management but a lot of opinion writing.

53. Recent examples of the politicized nature of circuit court appointments include the nominations and confirmation proceedings of Judge Charles W. Pickering to the Fifth Circuit and Miguel Estrada to the D.C. Circuit. *See* Morton Kondracke, *Filibuster May Haunt the Dems*, CINCINNATI POST, Mar. 10, 2003, at A8; Wooten, *supra* note 3.

have eliminated one of the few popular checks on an otherwise independent judiciary. Whether this would be desirable is a topic for another paper.

V
CONCLUSION

Judges do not operate in a vacuum. They are motivated by a variety of concerns, some of which may impel them to act counter to the public interest. A desire to reduce workload may drive some to choose cases that may be quickly disposed of.[54] Other judges may seek higher office and purposefully tailor their opinions to catch the eye of politically minded members of the executive branch. Recognition of the various motivations affecting judges leads us to ask the question: why not attempt to adjust the extant incentives facing judges to further the interests of both an independent judiciary as well as overall social welfare?

We suggest that such an effect can be created by using objective measures of merit to rate federal appellate court judges. In a tournament system, judges will compete against each other to achieve the highest score in the hopes of either winning promotion or enhancing their reputation vis-à-vis their colleagues. Our system thus also offers mid-level judges a professional incentive to improve their productivity.

Our central proposal, however, is to tie competition explicitly to the United States Supreme Court appointment process. Using objective criteria to rate judges for appointment to the Supreme Court will make the role of politics more publicly visible. The degree to which politics plays a role in the selection process today is now only partially visible.[55] Where uniformly accepted objective criteria identify a specific candidate, those seeking to promote an alternative candidate for political reasons would be forced to present their political arguments more openly. Tradeoffs between ideology

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54. *See* Bainbridge & Gulati, *supra* note 37, at 104-05; *see also* Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002) (deseribing how judges use heuristics to lighten their workload).

55. Supreme Court nominees are not introdueed as idealogues but rather as well-qualified candidates with strong judicial credentials. *See, e.g.*, Epstein et al., *supra* note 12, at 918-19 (making the point that "[v]irtually every recent president has, at the time of nomination, placed emphasis on his candidate's judicial position and related qualifieations" and quoting from President Clinton's introduction of Ruth Bader Ginsburg as an example). Perhaps the most remarked upon instance of this type of claim of merit was that made by President George H.W. Bush regarding Justice Thomas. *See* Derrick Bell, *Choice of Thomas Insults Blacks*, NEWSDAY, July 10, 1991, at 85 (asserting that it was "typically disingenuous" of President Bush to call him the most qualified candidate when "there are at least a half-dozen other black judges whose accomplishments, both on the bench and before becoming federal judges, put those of Thomas to shame"). Nevertheless, the current President Bush appears to concur fully with his father's assessment and has described Justice Thomas as one of his models for a judicial appointee to the Court. *See* Richard K. Neumann, Jr., *Conflicts of Interest in* Bush v. Gore*: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 405 (2003) (describing President George W. Bush's defense of the claim of merit that his father had made regarding Justice Thomas).

and judicial merit would then become explicit. To help further transparency, one could restrict the president and the Senate from putting forward a merit-related rationale outside of our objective factors (thus allowing objections *only* along political or other-motivated rationales).

We have approached this topic from a normative perspective. As a positive matter, we admit that implementing the tournament would be no easy task. Picking and weighing the precise combination of objective criteria poses daunting problems. Moreover, to avoid constitutional problems, reformers may wish to implement objective criteria to a more limited extent than advocated in this Essay (with a corresponding reduced benefit).[56] Our Essay serves only as a starting point. We hope the potential benefits of exposing the politics involved in the selection of Supreme Court justices to greater scrutiny as well as introducing greater competition among appellate court judges will lead to an ongoing debate about how to reform our judicial system.

How likely is it that a proposal like ours would get implemented? In the form we suggest, there is no chance. We cannot imagine politicians supporting a proposal that would take power away from them. But what if journalists today were to begin looking at the citation counts or publication rates of the Republican candidates for the court (it wouldn't take much effort to do a simple Westlaw count)? That would be step one. Once they did that, our guess is that others would look to see how those first sets of citation counts compare to those of the other circuit judges. And academics would criticize the simple methods of counting and would attempt to do better and more sophisticated counts using more objective criteria. And if a candidate with low numbers were being touted by the president as the "most qualified," those low numbers would have to be justified. The tournament will have begun.

56. One more limited reform would be simply to keep track of objective measures of quality for all circuit judges (making such a list public) and use this list as a starting point only in informing the selection of Supreme Court justices. This type of ranking could be used at the very least to put pressure on the president and senators to explain why they nominated a candidate who ranks low in the ranking (if this is the case).