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Foreseeing Greatness? Measurable
Performance Criteria and the Selection of
Supreme Court Justices

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Abstract

This article contributes to an ongoing debate about the feasibility and desirability of measuring the “merit” of appellate judges—and their consequent Supreme Court potential—by using objective performance variables. Relying on the provocative and controversial “tournament criteria” proposed by Professors Stephen Choi and Mitu Gulati in two recent articles, Brudney assesses the “Supreme Court potential” of Warren Burger and Harry Blackmun based on their appellate court records. He finds that Burger’s appellate performance appears more promising under the Choi and Gulati criteria, but then demonstrates how little guidance these quantitative assessments actually provide when reviewing the two men’s careers on the Supreme Court. The article goes on to discuss more generally certain reservations about the performance measurement approach—focusing on the importance of including political and ideological factors from a separation of powers standpoint, and on the further importance of non-quantitative factors such as collegiality and career diversity (i.e. having candidates other than appellate judges).

Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices

James J. Brudney*

In two recent, provocative articles, Professors Stephen Choi and Mitu Gulati contend that a tournament based on objective considerations of judicial merit should govern our approach to the nomination and confirmation of Supreme Court justices.¹ Professors Choi and Gulati developed their three quantitative tournament criteria—seeking to measure productivity, independence, and quality among sitting appellate judges²—for prospective application. It seems reasonable that these same criteria could be used to compare two contemporaneous Supreme Court nominees from a somewhat earlier era, in order to consider whether one emerges as more “worthy.” Such a comparison is likely to be especially instructive if both nominees then ended up serving on the Supreme Court, thus allowing for observations regarding their actual performance, not simply their tournament-related potential.

Two such justices conveniently exist: Warren Burger and Harry Blackmun. As federal appellate judges, Burger and Blackmun served for comparable lengths of time during the same

* Newton D. Baker-Baker & Hostetler Chair In Law; Law Clerk to Justice Blackmun, October Term 1980. I received helpful comments and suggestions on an earlier draft from Victor Brudney, Ellen Deason, and Alan Michaels. I am grateful for the excellent research assistance provided by Rebecca Fitzthum and Sara Sampson and for valuable technical and statistical support received from Cory Smidt. I thank Amy Beaudreault for her fine assistance in the preparation of this manuscript.

¹ See Stephen Choi & Mitu Gulati, *A Tournament of Judges?* 92 CAL. L. REV. 299 (2004) [hereinafter *Choi & Gulati I*; Stephen Choi & Mitu Gulati, *Who Would Win a Tournament of Judges?* ___ S. CAL. L. REV. ___ (2005) (draft on file with author) [hereinafter *Choi & Gulati II*].

² See *Choi & Gulati I*, *supra* note 1, at 305-10; *Choi & Gulati II*, *supra* note 1, at 12-40.

historical period.³ They were nominated for the Supreme Court by the same President, who had made clear that he wanted new members of the Court to reflect a certain judicial philosophy.⁴ As Supreme Court justices, however, Burger and Blackmun came to differ sharply in their doctrinal and ideological orientation. Commentators also have diverged in evaluating their respective careers on the Court.

In this article, I compare the “objective merit” outputs of Warren Burger and Harry Blackmun as appellate judges, in order to consider some of the challenges involved when assessing the merit-related potential of Supreme Court nominees. Part I discusses the appellate court records of Judges Burger and Blackmun, borrowing from the three Choi & Gulati quantitative criteria. Judge Burger’s performance appears more promising in the area of productivity and on one measure of independence, while the two judges seem comparably strong with respect to the quality factor. Part I then suggests how little guidance these quantitative assessments provide when reviewing the two men’s careers on the Supreme Court. For Justice Burger, a record of independence in appellate court opinion writing seems in retrospect to have foreshadowed an aloof and at times fractious attitude toward his colleagues while serving as Chief Justice. Justice Blackmun’s tenure was characterized by his evolving perspectives as a member of the Court—in terms of the social vision he embraced and the effect that vision had on his judicial philosophy. Blackmun’s evolution, which is often invoked by persons who consider him a distinguished justice, could scarcely have been anticipated based on a quantitative review of his appellate court performance.

³ Judge Burger served on the D.C. Circuit for over 13 years, from April 1956 to June 1969. Judge Blackmun served on the Eighth Circuit for nearly 11 years, from November 1959 to May 1970. See Part I *infra* for further discussion.

⁴ See, e.g., Robert B. Semple Jr., *A Critic of Court: Nominee Has Long Taken a Strong Stand for ‘Law and Order,’* N.Y. TIMES, May 22, 1969 at L36 (discussing Burger nomination in relation to President Nixon’s interest in strict constructionist justices); David E. Rosenbaum, *Nixon Said to Cut High Court List to Three Judges*, N.Y. TIMES, April 12, 1970, at A1 (discussing possible Blackmun nomination in same context).

Part II addresses in more general terms certain reservations about the performance measurement approach proposed by Choi and Gulati. Efforts to assess potential judicial merit are surely necessary pre-requisites to appointment, but they ought not to preclude consideration of political and ideological factors. The Constitution contemplates that a candidate's partisan or ideological background may be part of the selection process, and the political branches' reliance on this background reflects an understanding that the Supreme Court's judgments embody important choices on matters of public policy as well as on the rule of law. In addition, when attempting to evaluate judicial merit, we should recognize the relevance and importance of non-quantitative factors, including collegiality and career diversity. The Choi & Gulati approach inevitably overlooks or undervalues such qualitative elements.

I. COMPARING POTENTIAL AND REFLECTING ON PERFORMANCE

Professors Choi and Gulati have identified a set of objective measures they would like to see employed when comparing appellate judges for potential elevation to the Supreme Court. These measures focus on three categories: productivity in generating impressive numbers of published opinions, quality of written opinions as reflected in frequency of citations outside one's own circuit, and independence from the views of one's colleagues and political sponsors, manifested through patterns of dissents and concurrences authored.⁵ While recognizing that assignment of proper weights within and between these categories presents some challenges,

⁵ See *Choi & Gulati II*, *supra* note 1, at 13-14, 19-20, 32-34 (discussing the three measures).

Choi and Gulati maintain that the three measures should at minimum form a valuable basis for evaluating claims of merit made by presidents on behalf of their Supreme Court nominees.⁶

Rather than critique the details of the Choi & Gulati approach, I borrow from their three categories to develop a comparison that better suits my focus on two judges during an earlier time period.⁷ I make some minor adjustments or refinements in the three measurement categories,⁸ while attempting to be faithful to the spirit of the Choi & Gulati enterprise.

A. The Output-Based Potential of Judges Burger and Blackmun

Warren Burger and Harry Blackmun had remarkably similar backgrounds before ascending to the Supreme Court. Each was raised in modest financial circumstances in St. Paul, Minnesota, where they were childhood friends.⁹ Each came from a moderately conservative Protestant, Republican family tradition.¹⁰ Each was chosen by President Eisenhower to join the federal appellate bench.¹¹ After more than a decade of appellate court tenure, each was nominated by President Nixon and then confirmed to serve on the Supreme Court.¹²

⁶ See *Choi & Gulati I*, *supra* note 1, at 310-11; *Choi & Gulati II*, *supra* note 1, at 3.

⁷ In general, I have examined the record of Judges Burger and Blackmun over a greater number of years than the three year time frame relied on by Choi and Gulati, and have focused only on the circuits in which Burger and Blackmun served during that longer period. Given time and space constraints, I cover far fewer judges than do Choi and Gulati, and my treatment of their three factors is less elaborate.

⁸ For instance, Choi and Gulati focus on published rather than unpublished opinions when assessing productivity. See *Choi & Gulati II*, *supra* note 1, at 13-14. That distinction is of some consequence in an era when federal appellate courts publish only 20% of their dispositions on the merits. See generally Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75-76 (2001). It is not relevant, however, to appellate judging during the 1950s and 1960s, when all written opinions were published in the Federal Reporter. See Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 MICH. J. L. REFORM 119, 121-25 (1994) (describing appellate court publication norms prior to 1973).

⁹ See Linda Greenhouse, *Warren E. Burger Is Dead at 87: Was Chief Justice for 17 Years*, N.Y. TIMES, June 26, 1996 at A1 (describing Burger's childhood circumstances); Stephen L. Wasby, *Justice Harry A. Blackmun in the Burger Court*, 11 HAMLINE L. REV. 183, 184 (1988) (describing Blackmun's childhood circumstances).

¹⁰ See Greenhouse, *supra* note 9, (describing Burger's pre-judicial experiences on behalf of Junior Chamber of Commerce and Republican governor of Minnesota); Pamela S. Karlan, *Bringing Compassion into the Province of*

When considered under the Choi & Gulati criteria, Burger appears to have somewhat more potential than Blackmun based on their performances as appellate court judges. The fact that Blackmun is generally regarded as a more distinguished Supreme Court justice may not have been foreseeable at all. Yet, to the extent that hindsight offers some perspective regarding the reasons for their divergence, the three quantitative measures proposed by Choi and Gulati are of little help; in one instance they may well be counterproductive. If anything, it would seem that available qualitative evidence might have served as a more useful signpost of what was to come.

1. *Productivity in Opinion Writing*

The first Choi & Gulati category is productivity based on published opinions. I compared the number of published majority opinions¹³ authored by Judges Burger and Blackmun to the number of majorities published by every other active status judge serving on their respective circuits for some or all of the same time periods. Thus, Burger served for 12 full

Judging: Justice Blackmun and the Outsiders, 71 N. D. L. REV. 173, 173 (1995) (referring to Blackmun's background as a "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs").

¹¹ See *W.E. Burger Sworn as Judge*, N.Y. TIMES, April 14, 1956, at A10 (reporting Burger appointment); *Lawyer Named for U.S. Court*, N.Y. TIMES, Aug. 19, 1959 at A33 (reporting Blackmun nomination).

¹² See *Senate Confirms Burger by 74-3*, N.Y. TIMES, June 10, 1969 at A1; Warren Weaver Jr., *Blackmun Approved*, 94-0: *Nixon Hails Vote by Senate*, N.Y. TIMES, May 13, 1970 at A1.

¹³ Choi and Gulati report on both total number of published majority opinions and total number of published opinions overall (*i.e.* including concurrences and dissents). See *Choi & Gulati II*, *supra* note 1, at Table 2 (p.15). I address only majority opinions here; discussion of dissents and concurrences is confined to the "independence" factor, in part to avoid overvaluing these separate opinions as integral parts of two categories. Published majority opinions were identified through a Lexis search for the circuit court on which each judge served, during each calendar year in which the judge was on active status for all 12 months. Cross-checks with Westlaw revealed that Lexis was more accurate in identifying opinion authors during this period. In developing lists of citation-receiving opinions for use in Table II, many judges' majority opinion numbers were cross-checked with Westlaw and, for Judge Blackmun, with the appendix to his Supreme Court confirmation hearing record, *see* note 69 *infra*.

Including published concurrences and dissents as part of a productivity measure raises an additional problem in today's circumstances; publication of separate opinions may well be determined derivatively based on whether the majority opinion is deemed worthy of publication. See generally Merritt & Brudney, *supra* note 8, at 107 (noting that appellate courts determined not to publish almost 15% of decisions that included a dissenting opinion, and nearly 6% of decisions that contained a concurring opinion, for dataset of cases decided between 1986 and 1993). Choi and Gulati may not have accounted for this problem. See *Choi & Gulati II*, *supra* note 1, at 14 (assuming that judges who author unpublished majority opinions "affirmatively do not want [them] used by others as precedents.").

calendar years (1957-68) as an active status judge on the D.C. Circuit; I compared his productivity to that of all other active status judges who served on the D.C. Circuit between 1957 and 1968.¹⁴ Similarly, I compared Blackmun's productivity as an active status judge during his ten full calendar years (1960-69) to the productivity of all other active status judges who served on the Eighth Circuit between 1960 and 1969. Comparisons within each circuit are based on a standardized productivity score calculated for each individual judge.¹⁵

Although Judges Burger and Blackmun published majority opinions at similar rates, Burger's relative standing on productivity among his D.C. Circuit colleagues is considerably higher than Blackmun's in the Eighth Circuit. Judge Burger authored 254 published majorities from 1957 to 1968, or 21.17 per year. His standardized productivity score of .63 ranked him second overall among the 14 judges serving during this period, and first in comparison with judges who were on active status for the same number of years.¹⁶

¹⁴ I confined the comparisons to judges who served for full calendar years in an effort to standardize units of measurement. For instance, Judge Burger served for parts of two other years (1956 and 1969) and published opinions during those years, but it seemed appropriate to eliminate the impact of production during unequal numbers of months, and also to minimize effects associated with the initiation period or with the consequences of an unplanned promotion-related departure. My comparisons were with active status judges to avoid reliance on senior status or visiting judges sitting by designation, whose opinion assignments may have been less uniform. See James. J. Brudney & Corey Ditslear, *Designated Diffidence: District Court Judges on the Courts of Appeals*, 35 L. & SOC'Y REV. 565, 581-84 (2001) (describing modest opinion-writing role of designated district judges over seven year period).

¹⁵ Standardized productivity scores were computed by taking each judge's number of majority opinions and subtracting the circuit's mean for that year; the result was then divided by the standard deviation. See DAVID S. MOORE, *STATISTICS: CONCEPTS AND CONTROVERSIES* 252-53 (5th ed. 2001) (discussing standard scores). A score of zero would indicate that the judge's opinion-writing frequency was at the mean level. Table I presents the average productivity score for each judge, based on the number of full-time active years he served during our period of measurement (see n. 14 *supra*). Figures for individual years are on file with the author. Cory Smidt provided valuable assistance in calculating the standardized productivity scores. Professors Choi and Gulati use a somewhat different approach to capturing variations within a circuit; they adjust for intercircuit differences based on the mean number of opinions published for judges of each circuit. See Choi & Gulati II, *supra* note 1, at 17-18. The Choi & Gulati approach was less practicable here, given my focus on only two circuits for a period well in excess of three years. See note 7, *supra*.

¹⁶ See Table I *infra*. Judge Leventhal, the only judge with a higher score, served only three years during this 12-year period. Notably, in six of the 12 years, Burger produced majority opinions at a number more than one standard deviation above the circuit mean.

Judge Blackmun produced 210 majority opinions from 1960 to 1969, or 21 per year. However, Blackmun's performance was merely average in relation to his circuit court peers. Blackmun's standardized productivity score of .01 ranked him sixth out of the 12 judges serving during this period, and last among the judges who served for the same number of years that he did.¹⁷

Appellate courts published all majority opinions authored during the period in which Judges Burger and Blackmun served, and the differences in productivity among judges within each circuit appear to be less dramatic than those identified by Choi and Gulati.¹⁸ This narrower range presumably reflects in part the tendency to distribute opinion assignments on a relatively equitable basis among three-member panels. When four out of every five circuit court panel decisions are *unpublished*—as is true today—there is likely to be far more variation in individual judges' rates of publication within their own circuit. Of course, a major reason for this variation may well be the opinion assignment practices of a panel's most senior or "ranking" member. By retaining the few publication-worthy cases for themselves, these panel members can influence productivity figures in ways that Choi and Gulati may need to anticipate.¹⁹ In addition, the Choi

¹⁷ See Table I *infra*. Unlike Judge Burger, Blackmun's productivity was never more than one standard deviation above the circuit mean during his 10-year period.

¹⁸ See Choi & Gulati II, *supra* note 1, at Table B (noting that in Seventh Circuit from 1998-2000, Judge Posner published 254 majority opinions and Judge Manion published 102). Using the 10 Seventh Circuit judges in Choi and Gulati's tournament as a baseline (*see id.* at Table B), Posner's output exceeded the circuit mean of 168 published majorities by 51% while Judge Manion's total of 102 published majorities was 39% below the circuit mean. For our comparable 1964-66 period, the top judge in the D.C. Circuit exceeded his circuit mean by 23% while the bottom judge was 25% below the mean; in the Eighth Circuit, the top judge exceeded that circuit's mean by 16% while the bottom judge fell 7% below the mean. Copies of all calculations on file with author.

¹⁹ Given the traditional practice that the senior active-status member of each panel controls opinion assignments, it seems worth exploring whether judges who most often have the assignment power tend to produce unusually high numbers of published opinions within a circuit. See generally J. Robert Brown Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1040 n. 14 (2000) (describing standard practice of senior judge on panel assigning opinions); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1665 (2003) (same). Judges who control opinion assignments can also begin drafting majorities even before oral argument, knowing that they will reserve one or more particular opinions for themselves.

& Gulati focus on only three years of opinion-writing probably exaggerates productivity differences among judges when compared with the 10 and 12 year periods examined here.²⁰

Nonetheless, even in an earlier era of universal publication, and measuring for productivity over a longer period of time, some judges were distinctly more productive than others within their own circuit. In this regard, Judge Burger was unusually prolific in generating majority opinions when compared to others on the D.C. Circuit. By contrast, Judge Blackmun was not unproductive but his performance on the Eighth Circuit qualifies him as no better than average.

2. *Quality of Opinion Writing*

Choi and Gulati recommend citation counts as a proxy for the quality of the appellate judicial product.²¹ They contend that judges whose opinions help explain the law more clearly or effectively, or who develop a reputation for quality analysis outside their own circuit, will receive more citations.²² Borrowing from their approach, I compiled the citations received for majority opinions published by Judges Burger and Blackmun during a four year period when they were both serving on the appellate bench, from 1963 to 1966. I also compiled citations for the four other D.C. Circuit judges who were on active status during all four of those years, and

²⁰ Productivity is more likely to be volatile within a three year period; average production tends to flatten out over a longer time frame. For example, Judge Burger's productivity varied over his D.C. Circuit career—it was as high as 26.7 majorities per year from 1960-62 and as low as 14 per year from 1964-66. It is not unreasonable to infer that Judge Leventhal's three year productivity average of 29.0, *see* Table I, might exceed his performance when measured over a more extended period.

²¹ *See Choi & Gulati I, supra* note 1, at 306-07; *Choi & Gulati II, supra* note 1, at 20 & Table 5.

²² *See id.* at 19-20. Opinion assignment practices may affect citation counts just as they do publication rates. *See* note 19, *supra* and accompanying text. Judges who tend to control the assignment of majorities can influence reputations by channeling certain hot doctrinal subjects, or cutting-edge legal questions, to particular colleagues—or by retaining those opinions for themselves. Choi and Gulati have not controlled for “pre-tournament inherent differences” that they view as related to merit. *See id.* at 20 (discussing possible citation advantage for judges who are better liked, on more respected circuits, or have more seniority). It would be useful to consider whether the power to control opinion assignments should be deemed merit-related in this context.

the three other Eighth Circuit judges who served throughout the same four year period.²³ For each of these judges, I gathered the total number of citations in any state or federal court outside of their own federal circuit, including citations by the Supreme Court.²⁴ In addition, I compared the top 20 citation-receiving opinions of each judge; this tracks the Choi & Gulati approach of evaluating a judge's quality based on her "best opinions" as well as her average performance when considering the full volume of production.²⁵

As presented in Table II, Judges Burger and Blackmun are remarkably similar in terms of their volume of outside citations. For the 1963-66 period, Judge Burger's average number of citations per opinion based on all published majority opinions modestly exceeded Blackmun's, 6.08 to 5.66. Conversely, with regard to citations per majority opinion for the 20 most frequently cited opinions, Blackmun's average was slightly above Burger's 16.5 to 16.0.

Further, both Burger and Blackmun stand out from other members of their respective circuits in terms of the recognition garnered for their majority opinions. Judge Blackmun's top-20 average of 16.5 far outpaces his Eighth Circuit colleagues; it is more than twice that of Judges Matthes and Van Oosterhout, and nearly double that of Judge Vogel.²⁶ Judge Burger is

²³ Although time constraints made it impracticable to compile lists of outside-circuit citations for all individual judges, the judicial colleagues selected provide a suitable intra-circuit framework for discussion.

²⁴ Sara Sampson, research librarian at The Ohio State Moritz College of Law, compiled the citation counts, using "custom restrictions" within Lexis Shepard's Service to provide individual cases. The "outside circuit" citations include cases cited by the Supreme Court, but do not include federal cases within a judge's own circuit—*i.e.* no district court cases from D.C. are included for Judge Burger or his four colleagues and none from districts within the Eighth Circuit for Judge Blackmun or his three colleagues. Citations were to all outside opinions through May 31, 1969. This parallels the Choi & Gulati approach of tracking 1998-2000 opinions cited through May 31, 2003 (*see Choi & Gulati II, supra* note 1, at 21), although I have included four years of majority opinions instead of only three. The date of May 31, 1969 is also convenient because Judge Burger was nominated to the Supreme Court in late May; any cites after May 31, 1969 may reflect in part the perception of Burger, and eventually Blackmun, as Supreme Court justices.

²⁵ *See Choi & Gulati II, supra* note 1, at 25.

²⁶ *See Table II infra.* Blackmun's overall citation average also far exceeds the averages for his three colleagues who served as active judges throughout this same four year period.

comparably impressive in the company of his D.C. Circuit colleagues. Burger's top-20 average of 16.0 is three times that of Judge Danaher, and his top-20 and overall averages are well above the citation counts for his three other colleagues.²⁷ Moreover, in distancing himself from Judges Bazelon and Skelly Wright, Burger's performance on citation counts ranks him comfortably ahead of two nationally renowned appellate judges of the era.

An additional issue is whether any difference existed between the two circuits in terms of their outside recognition. Based on our admittedly selective sample, it appears that D.C. Circuit judges are cited more often by courts outside their own circuit.²⁸ There are a number of reasons why the D.C. Circuit might have enjoyed such an advantage in this time period. From a subject matter standpoint, that court has long been the primary venue for judicial review of agency action, handling an unusually large volume of administrative law cases.²⁹ During the 1960s, the circuit court also had jurisdiction to review general criminal matters under the D.C. Code.³⁰ Perhaps judges from other circuits were more likely to look to the D.C. Circuit as a source of doctrinal insight in the administrative law and criminal law areas, something less obviously

²⁷ See Table II *infra*.

²⁸ Omitting Judge Blackmun, the Eighth Circuit average for citation-receiving opinions among judges on active status for these four years is 3.08 citations per opinion considering all majorities and 8.53 per opinion considering top-20 majorities. Excepting Judge Burger, the D.C. Circuit average for active status judges is 3.54 citations per opinion considering all majorities and 9.41 per opinion considering top-20 majorities. Also revealing is the fact that three of the four D.C. Circuit judges (besides Burger) approached or exceeded 10 citations per opinion for their top 20 opinions, whereas only one of three Eighth Circuit judges (other than Blackmun) even approached that level.

²⁹ Numerous federal statutes confer automatic jurisdiction in the D.C. Circuit for review of agency action. See, e.g., 15 U.S.C. § 57a(e) (review of Federal Trade Commission regulations); 15 U.S.C. § 77(i) (review of Securities Exchange Commission orders); 29 U.S.C. § 160(e), (f) (review of decisions by National Labor Relations Board).

³⁰ See District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, 84 Stat. 475 § 111 (expanding local D.C. courts and removing local criminal jurisdiction from D.C. Circuit). See generally John W. Kern III, *The District of Columbia Court Reorganization Act of 1970: A Dose of the Conventional Wisdom and a Dash of Innovation*, 20 AM. U. L. REV. 237, 240-42 (1970).

available from the Eighth Circuit.³¹ It also is possible that judges elsewhere in the country simply perceived the D.C. Circuit as “higher status” in general terms, and looked more often to its majority opinions for guidance.³² Still, under the Choi & Gulati model, service on a more respected circuit counts as a positive factor; it is the circuit’s reputation for high quality work, and the individual judge’s ability supporting such a reputation, that warrant preferential consideration in the tournament.³³ Judge Burger’s top performance on such a prestigious court may therefore be worthy of extra respect.

Finally, one intriguing aspect of Judge Blackmun’s record on citations is that five of his top 20 citation-receiving opinions involve the tax field.³⁴ Blackmun practiced tax law for many years before joining the federal bench,³⁵ and the widespread recognition for his tax law decisions presumably reflects the value of that pre-judicial experience. Blackmun’s Supreme Court career

³¹ Of Judge Burger’s top-20 citation-receiving opinions in the 1963-66 period, seven were administrative law decisions and 13 were criminal law opinions.

³² See generally CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 1-2 (1999) (discussing origins of D.C. Circuit’s pre-1970s reputation as a “mini Supreme Court”); Neil A. Lewis, *Democrats and Republicans Trade Accusations at Confirmation Hearing*, N.Y. TIMES, Oct. 23, 2003 at A23 (observing that “the District of Columbia Circuit...is widely viewed as second in importance only to the Supreme Court”).

³³ See *Choi & Gulati II*, *supra* note 1, at 20. Choi and Gulati also consider the possibility that high citation rates may reflect the controversial or outrageous nature of an opinion rather than the quality of its analysis. *Id.* at 25. They recommend examining negative citations to the top-20 citation-receiving opinions as a safeguard. See *id.* at 26 and Table 6. There are virtually no such negative citations by courts for the Burger and Blackmun majorities published during our four year period. Using Lexis Shepard’s Service (searching for questioned, criticized, overruled (wholly or in part), or disapproved) resulted in identification of three negative cites for Burger majorities, only one of which was outside the circuit, and three negative cites for Blackmun majorities, two from outside the circuit.

³⁴ See *General Banchares v. C.I.R.*, 326 F. 2d. 712 (8th Cir. 1964), *Hamm v. C.I.R.*, 325 F. 2d. 934 (8th Cir. 1963); *Estate of Peyton v. C.I.R.*, 323 F. 2d. 438 (8th Cir. 1963), *Banks v. C.I.R.*, 322 F. 2d 530 (8th Cir. 1963); *Bouschor v. U.S.*, 316 F. 2d 451 (8th Cir. 1963).

³⁵ See Robert A. Green, *Justice Blackmun’s Federal Tax Jurisprudence*, 26 HASTINGS CONST. L. Q. 109, 112 (1998) (reporting that Blackmun specialized in taxation during 16 years of private practice).

also featured him as a highly respected voice on federal tax law issues;³⁶ in this content-specific respect, his appellate court performance may have signaled Supreme Court potential.

3. Independence in Opinion Writing

Choi and Gulati maintain that a judge's willingness to disagree publicly with her colleagues on the appellate bench, especially colleagues who are presumptively like-minded, is a valuable predictor of judicial independence.³⁷ They identify two distinct components of judicial independence that deserve assessment. As a measure of special intellectual effort expended, and simple willingness to differ from one's colleagues, they value the number of separate opinions (dissents and concurrences) that a judge authors.³⁸ As an indicator of ideological autonomy, they place additional emphasis on these dissents and concurrences if the judge's "separation" was from panel members of her own political party.³⁹

Table III indicates that Judge Burger wrote 130 dissents and concurrences, far more than the 18 authored by Judge Blackmun during their comparable periods on the appellate bench. The large differential must be understood in the context of their distinct circuit cultures. During this period, the D.C. Circuit was a contentious place; judges wrote dissenting or concurring opinions much more frequently than was true for their colleagues on the Eighth Circuit.⁴⁰ It may therefore

³⁶ See *id.* at 110 (discussing Blackmun's extraordinary reputation in this area among tax lawyers and academics).

³⁷ See *Choi & Gulati I*, *supra* note 1, at 310; *Choi & Gulati II*, *supra* note 1, at 32-34.

³⁸ See *Choi & Gulati II*, *supra* note 1, at 33.

³⁹ See *id.* at 34. Choi and Gulati also consider dissents written against the judge in order to assess in a more refined way the extent to which each judge opposed a judge of the same political party. See *id.* at 34-35. Their evaluations of independence based on dissents and concurrences are more extensive than what I am able to present here, although I do discuss dissents from Burger and Blackmun majorities at n. 46, *infra* and accompanying text.

⁴⁰ See Table III *infra* (data indicating that D.C. Circuit judges on average wrote dissents nearly seven times as often as Eighth Circuit judges (6.32 per "judge year" versus 0.93), and they authored concurrences nearly eight times as often (3.19 per "judge year" versus 0.42). The contentiousness among D.C. Circuit judges becomes even clearer when considering the fact that the Eighth Circuit judges actually produced slightly more majority opinions on average than their D.C. Circuit counterparts. See *id.* (data indicating that Eighth Circuit judges produced 20.5

be appropriate in one sense to view Burger and Blackmun as displaying comparable independence within their respective circuit court spheres. Each judge authored more dissents and concurrences than the average for his circuit as a whole; Burger ranked fourth among 14 D.C. Circuit judges in separate opinions written per year of service, while Blackmun placed fifth among 12 Eighth Circuit judges on this scale.⁴¹ Still, the six-fold difference between Burger and Blackmun in annual number of separate opinions reflects a considerably greater investment of intellectual effort on Burger's part. Circuit norms may help account for the size of this gap, but the differential itself is tangible and robust.

As Choi and Gulati recognize, circuits may vary considerably among each other or over time in terms of their partisan composition, making it difficult to assess an individual judge's autonomy from circuit court colleagues who are appointed by a President of the same political party.⁴² Measuring partisan autonomy was also a challenge in this setting; I did not attempt to

majorities per "judge year" compared to 18.1 majorities per "judge year" for D.C. Circuit judges). For a more detailed treatment of the unusually high levels of conflict on the D.C. Circuit during this period, see Charles M. Lamb, *A Microlevel Analysis of Appeals Court Conflict: Warren Burger and his Colleagues on the D.C. Circuit*, in *JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS* 179-96 (Sheldon Goldman & Charles M. Lamb eds. 1986) (analyzing effects of party and religion in explaining patterns of conflict between Burger and his colleagues).

⁴¹ Over his 12 years as an active status judge, Burger averaged 10.83 separate opinions per year, compared to the D.C. Circuit average of 9.51 separate opinions per "judge year." During his 10 years of active status duty, Blackmun averaged 1.8 separate opinions a year, as opposed to the Eighth Circuit average of 1.34. Burger's comparative record is perhaps more impressive because he wrote more majorities than did Blackmun, relative to circuit norms, and thus had somewhat fewer opportunities to write separately. See Table I *supra* and accompanying discussion.

Although a standardized score was used for majority opinions (see Table I), such a measure is not as applicable for dissents and concurrences. When implementing a standardized score, one assumes the observed outcomes are generated by a normal distribution. In the Eighth Circuit however, judges often did not write a separate opinion for the entire year. A substantial part of the estimated distribution would therefore exist below zero, and the censoring of observations at zero would result in bias in the observed mean and standard deviation. A standardized score would not have this problem for the D.C. Circuit based on annual outputs of separate opinions, but the utility of this score would be limited inasmuch as circuit comparisons cannot be made. Accordingly, a simple average score was used in Table III. See generally MOORE, *supra* note 15 at 248 -55 (discussing relationship between standard scores and normal distributions).

⁴² See Choi & Gulati II, *supra* note 1, at 310 n. 29.

gather comprehensive data on panel compositions by party for every judge on the D.C. and Eighth Circuits. While the record on political autonomy is thus less than complete, the evidence I did assemble on Judges Burger and Blackmun illustrates some of the difficulties involved in the Choi & Gulati approach to measuring such autonomy.

During Judge Burger's years on the D.C. Circuit, most of his colleagues were Democratic appointees; among his seven to eight fellow active status judges, there were never more than two appointed by Republican Presidents.⁴³ It is therefore not terribly surprising that 68 of his 70 dissents were from majority opinions written by Democratic appointees; for only 11 of these 70 dissents was there even a "panel majority" of Republicans, meaning a second Republican besides Burger himself.⁴⁴

Judge Blackmun belonged to a politically more balanced court of appeals. In his 10 full years on the Eighth Circuit, Blackmun served mostly with Republican appointees during his early years and mostly with Democratic appointees in his later period.⁴⁵ The less partisan context of Blackmun's 11 dissents reflects this relatively balanced circuit court composition; four dissents were from all-Republican majorities, two from all-Democratic majorities, and the other five from "mixed" majorities of one Republican and one Democratic appointee. The fact that the Eighth Circuit had a less partisan "edge" may also help explain why there were notably fewer

⁴³ Of the 89 active status "judge years" served by Burger's colleagues (*see* Table III), 69 (78%) were by Democratic appointees and only 20 (22%) by Republican appointees. Panel composition was even more heavily Democratic given that five of the six D.C. Circuit judges who served on senior status were Democratic appointees. Thus, the odds of having an all-Republican or even majority Republican panel were extraordinarily low.

⁴⁴ In 59 of 70 decisions, Burger dissented from a majority joined by either two Democrat-appointed panel members or (in nine en banc cases) a majority comprised overwhelmingly of Democrat-appointed judges. In 10 other decisions the majority triggering his dissent consisted of one Democrat and one Republican appointee. The one dissent that Burger authored from an all-Republican majority was in *Price Broadcasters Inc. v. FCC*, 295 F. 2d 166 (1961).

⁴⁵ Of the 57 active status "judge years" served by Blackmun's colleagues (*see* Table III), 28 (49.1%) were by Republican appointees and 29 (50.9%) by Democratic appointees.

dissents or concurrences published in response to Blackmun majorities than was the case for majorities authored by Burger.⁴⁶

A closer look at some details regarding the 11 Blackmun dissents suggests ways in which the partisan classification scheme becomes problematic. One Republican appointee from whose majority opinions Blackmun dissented on four occasions was appointed to the federal trial bench by President Roosevelt and elevated to the appellate court by President Eisenhower after 13 years as a Democratic appointee.⁴⁷ There is some question as to whether this judge's partisan label should differ from that of a "pure" Republican appointee. Moreover, in at least two of his four dissents from all-Republican majority decisions, Blackmun's opinion disagrees with the "liberal" position adopted by his Republican colleagues.⁴⁸ When Choi and Gulati place special value on a judge's autonomy in being willing to risk the displeasure of like-minded colleagues, they would seem to have in mind the judge's departure from a shared partisan-related ideology,

⁴⁶ Judge Blackmun's 210 majorities drew a total of five dissents and five concurrences from his active status Eighth Circuit colleagues. By contrast, Judge Burger's 254 majorities elicited 31 concurrences and 58 dissents by judges on the D.C. Circuit. Four of the five dissents to Blackmun came from Democratic appointees; 54 of the 58 dissents to Burger were written by Democratic appointees. Data compilations indicating the number of dissents and concurrences by individual judges to Burger majorities and Blackmun majorities are on file with the author.

⁴⁷ Judge Vogel is the judge referred to in text. He authored three majorities from which Blackmun dissented and was listed as lead judge on a per curiam majority that elicited a Blackmun dissent. Two of these four majorities were "pure" Republican and the other two were mixed majorities of a Republican and a Democrat.

⁴⁸ See *Kroger Co. v. Doane*, 280 F. 2d 1, 6-7 (8th Cir. 1960) (dissenting from decision that affirmed jury verdict favoring plaintiff in diversity action for negligence; Blackmun contended it was reversible error not to submit defendant's jury instruction on contributory negligence); *Bookwalter v. Phelps*, 325 F. 2d 186, 189-91 (8th Cir. 1963) (dissenting from decision affirming district court judgment in estate tax case that widow's allowance qualified for marital deduction; Blackmun would have re-construed applicable state law to take deduction away from surviving spouse). The two other cases in which Blackmun dissented from majorities joined by two Republican appointees are more difficult to categorize on a liberal-conservative spectrum. See *Crome & Co. v. The Vendo Co.* 299 F. 2d 852 (8th Cir. 1962) (affirming district court judgment of patent infringement; Blackmun viewed evidence of inventiveness as inadequate to warrant patent protection); *United States v. Wiley's Cove Ranch*, 295 F. 2d 436 (8th Cir. 1961) (affirming district court decision that payments for livestock feed under Emergency Feed Program were properly certified by a county committee of Farmers' Home Administration; Blackmun would have allowed for more searching review by Department of Agriculture of circumstances surrounding county committee's certification).

not its reinforcement. Accordingly, Blackmun's record of dissents as evidencing political autonomy is at best ambiguous.

Turning to a less quantitative perspective, Judge Burger's propensity to express himself through dissenting opinions was viewed by the political branches as a sign of positive Supreme Court potential. At his confirmation hearing, Senators approvingly referred to and quoted from five separate Burger dissents that had addressed controversies involving matters of criminal procedure, mental health law, and school desegregation.⁴⁹ Taking their cue from President Nixon's stated intention to appoint "strict constructionists" to the Supreme Court,⁵⁰ several Senators praised Burger for dissents that suggested to them a willingness to help rein in Warren Court activism in areas of criminal law and separation of powers.⁵¹

Given the strongly Democratic complexion of the appellate court on which Burger served, the fact that his disagreements were almost always with Democratic appointees, while virtually inevitable, may well not satisfy the Choi & Gulati autonomy measure for judges taking

⁴⁹ See *Nomination of Warren E. Burger: Hearing Before the Committee on the Judiciary, United State Senate* 91st Cong. (1969) [hereinafter *Burger Hearing*] at 5-6 (statement of Sen. McClellan referring with approval to Burger dissents in *Killough v. United States*, 315 F. 2d 241 (D.C. Cir. 1962) (en banc) and *Frazier v. United States*, 419 F. 2d 1161 (D.C. Cir. 1962); *id.* at 7 (statement of Sen. Ervin, referring with approval to Burger dissent in *Frazier supra*); *id.* at 15-16 (statement of Sen. H. Byrd, referring with approval to Burger dissents in *Frazier, supra*, *Kent v. United States*, 401 F. 2d 408 (D.C. Cir. 1968), *Scott v. Macy*, 402 F. 2d 644 (D.C. Cir. 1967), and *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1968) (en banc)). By contrast, the Senators questioning Burger referred to only one of his majority opinions. See *id.* at 7 (statement of Sen. Ervin, referring with approval to Burger majority in *Powell v. McCormack*, 395 F. 2d 577 (D.C. Cir. 1969), *reversed* 395 U.S. 486 (1969)).

⁵⁰ See sources cited in note 4 *supra*; *Burger Hearing, supra* note 49, at 3 (statement of Sen. H. Byrd, referring to Burger's judicial record as consistent with the President's philosophical expectations for Supreme Court appointees).

⁵¹ See *Burger Hearing, supra* note 49, at 3 (statement of Sen. McClellan); *id.* at 7 (Sen. Ervin); *id.* at 15-16 (Sen. H. Byrd). See also 115 CONG. REC. 15176 (1965) (remarks of Sen. Dirksen, praising Judge Burger's "courage and conviction" as evidenced in his "many concurring and dissenting opinions"); *id.* at 15179 (remarks of Sen. Holland, identifying with Judge Burger's philosophy as "firmly worded and firmly expressed" in his dissenting opinions). Whether these dissents were written in part to campaign for a future seat on the Supreme Court is a question beyond the scope of this article, although the Choi & Gulati approach might well encourage such strategic judicial behavior. See generally, Julius Duscha, *Chief Justice Burger Asks 'If it Doesn't Make Good Sense, How Can it Make Good Law?'* N.Y. TIMES MAGAZINE, Oct. 5, 1969 at 30 (reporting that in 1967, a mutual friend of Richard Nixon and Warren Burger told Burger of Nixon's favorable reaction to a Burger speech criticizing two Warren Court decisions that had expanded the rights of criminal defendants).

an unbiased approach to individual cases.⁵² Still, the frequency and clangor of these disagreements does suggest that Burger had the courage of his convictions in a largely hostile doctrinal environment, as well as a determination to exert extra effort to voice those convictions—traits that register as positives on the Choi & Gulati scale.⁵³

This abbreviated comparison between two appellate judges is hardly meant to be definitive. I have not evaluated Judges Burger or Blackmun in the more detailed context of how appellate judges from all circuits conducted themselves individually during the same time period. Overall, though, Judge Burger emerges as a candidate of somewhat greater potential under the Choi & Gulati approach. Burger's productivity in publishing majority opinions exceeded Blackmun's. His majority opinions were cited by other circuits at the same rate as Blackmun's. It is true that Blackmun's citation numbers are high for his Circuit, but Burger's favorable average compared to his nationally respected circuit court peers stands out even more. Further, Burger's persistent authorship of dissents and concurrences would more clearly establish his capacity for independence under the Choi & Gulati framework.

B. The Supreme Court Performance of Justices Burger and Blackmun

In considering the Supreme Court career of these two long-serving justices, I focus on one aspect of each man's record, an aspect that suggests how difficult it is to predict future Supreme Court behavior based on the Choi & Gulati appellate court performance criteria.⁵⁴ For

⁵² See *Choi & Gulati I*, *supra* note 1, at 310 & n. 29 (focusing on dissents from politically like-minded judges as indicating lack of bias).

⁵³ See *Choi & Gulati I*, *supra* 1, at 33 (extolling extra effort and willingness to displease colleagues).

⁵⁴ I do not compare the two justices' Supreme Court records based on the Choi & Gulati performance factors. While it would be possible to do so, such comparisons inevitably would raise additional questions. Thus, for instance, Burger published more majority opinions than Blackmun during the 16 Terms they served together, 244 to 219. See Table I (A) at back of issue one (annual Supreme Court review issue) of the *Harvard Law Review*, vols. 85 through 100. One could debate whether increases in individual productivity are more of a virtue on appellate courts that frequently confront caseload backlogs than on a Supreme Court that necessarily clears its calendar every year. Even

Burger, the independence factor turns out to be normatively troubling. Judge Burger's appellate court record of authoring numerous dissents and concurrences appears in retrospect to have signaled an aloofness from colleagues and a lack of consensus-building capability amply demonstrated in his tenure as Chief Justice. For Blackmun, the fact that he changed substantially in doctrinal and ideological terms while a member of the Supreme Court is closely linked to the recognition he has received as a justice. Blackmun's evolution, however, seems wholly unrelated to his measurable outputs as a member of the Eighth Circuit.

1. Justice Burger and Separate Opinions

I have noted Judge Burger's propensity for publishing dissents and concurrences while serving on the D.C. Circuit; in addition to exceeding the "independent" expression of almost all his circuit colleagues, his record of dissents attracted the approving attention of the executive and legislative branches. With hindsight, however, Judge Burger's inclination to write separate opinions seems more reflective of a standoffish and at times insensitive judicial style than of the unbiased deliberative approach anticipated under the Choi & Gulati framework. From a doctrinal standpoint, Burger remained reasonably consistent in his wary stance toward the rights of criminal defendants,⁵⁵ but his record is more fitful or uneven in certain other areas of the law.⁵⁶ More broadly, the Burger Court has been criticized for a legacy of "rootless activism" and

assuming, however, that the modest differential between the two justices (15.3 versus 13.7 per Term) constitutes a "productivity advantage" for Burger, the advantage may well be due to reasons unrelated to merit, such as Burger's control over opinion assignments and the increasingly strained professional and personal relations between the two men.

⁵⁵ See generally Timothy P. O'Neill, *Criminal Law: The Good, the Bad, and the Burger Court: Victim's Rights and a New Model of Criminal Review*, 75 J. CRIM. L. & CRIMINOLOGY 363, 379 (1987); Staci Rosche, *How Conservative is the Rehnquist Court? Three Issues, One Answer*, 65 FORDHAM L. REV. 2685, 2717-18 (1997).

⁵⁶ See Phillip Craig Zane, *An Interpretation of the Jurisprudence of Chief Justice Warren Burger*, 1995 UTAH L. REV. 975, 1003 (1995). See generally Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1437-42 (1987).

the absence of an identifiable agenda or set of values.⁵⁷ It may be unfair to expect that any Chief Justice could have imposed a coherent philosophy or direction on the Court during such a divisive period of intellectual and political ferment in the larger society.⁵⁸ Nonetheless, Burger's "independent" judicial approach and style were not conducive to promoting collegiality or building consensus.

By viewing a greater volume of separate appellate court opinions as a fundamentally positive indicator, Choi and Gulati expect that a judge's willingness to express her views independently will enhance the objectivity of judicial decisionmaking.⁵⁹ Although this judicial willingness may reflect a neutral sensibility and intellectual fortitude that can improve the quality of the deliberative enterprise, a judicial appetite for independent expression may additionally or alternatively promote disharmony and lack of cohesion on an appellate court. The prospects for divisiveness may increase if the judge's insistence on the importance of separate expression is carried over to his new role as Chief Justice on the Supreme Court—where the controversies are closer, the stakes are higher, and judges participate continuously with the same colleagues in the dynamic of shared decisionmaking.

Burger himself seems not to have anticipated the magnitude of his transition to the Supreme Court. He told the Senate Judiciary Committee that "I would conceive my judicial duties to be ...basically the same as they have been as a member of the U.S. Court of Appeals—deciding cases."⁶⁰ Consistent with that vision, Burger as Chief Justice continued to voice his

⁵⁷ See *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 217 (Vincent Blasi ed. 1983); Gene R. Nichol, *Book Review: An Activism of Ambivalence*, 98 HARV. L. REV. 315, 318 (1984); Alschuler, *supra* note 56, at 1437.

⁵⁸ See, e.g., Nichol, *supra* note 57, at 323-24; Alschuler, *supra* note 56, at 1454.

⁵⁹ See *Choi & Gulati II*, *supra* note 1, at 32-33.

⁶⁰ See *Burger Hearing*, *supra* note 49, at 5.

independence from his judicial colleagues. He wrote far more dissents as a percentage of his majorities than any Chief Justice in the modern era, and similarly authored substantially more concurrences per majority than other Chief Justices over the past 80 years.⁶¹ This appetite for writing separately contributed to Burger's reputation as a less than successful leader of the Court; it is of a piece with descriptions of imperious or tactless approaches toward his colleagues that impeded the crafting of consensus on a range of complex and hotly contested issues.⁶²

At the appellate court level, judges are often critical of any pronounced tendency to write separate opinions. They fear the erosion of institutional integrity that may result from a regular insistence on voicing one's own doctrinal positions when compromise or acquiescence would yield unanimity.⁶³ They also worry that a judicial inclination to write separately may reflect a somewhat arrogant unwillingness to deliberate and genuinely consider alternative views, an unwillingness that in turn leads to poorer work products.⁶⁴ On the other hand, judges who regularly publish separate opinions are not all regarded with disfavor. There are justices whose

⁶¹ See Zane, *supra* note 56, at 976-78, 1006-07 (reporting on number of opinions authored by Chief Justices since 1921 Term). As a result of his persistent inclination to issue large numbers of dissents and concurrences, Burger authored more separate opinions—dissents plus concurrences—than majorities in his 17 years as Chief Justice, a record not remotely approached by the six other Chief Justices. See *id.* at 1006-07. Zane's data include opinions written accompanying orders of the Court, such as those denying certiorari or relating to Supreme Court applications. See *id.* at 1006 n. 213. With respect to opinions filed in cases briefed and argued before the Court, Justice Burger's concurrences and dissents together are nearly half (47%) his total output. See Table I (A) at back of issue one (the annual Supreme Court review issue) of the Harvard Law Review, volumes 84 through 100.

⁶² See, e.g., Mathew Brelis, *Court Improvements, Not Ideology, Called Main Legacy*, BOST. GLOBE at 1 (June 26, 1995) (reporting on perceptions of Burger's "pompous, almost regal attitude" that made it hard for him to build consensus); Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1630 (1994) (discussing Burger's clumsy collegial style).

⁶³ See *What Makes a Good Appellate Judge? Four Views*, 22 JUDGES' JOURNAL, 16 (1983) (views of Judge Aldisert); *id.* at 17 (views of Judge Erickson). See generally Scott C. Idleman, *A Prudential Theory of Judicial Candor* 73 TEX. L. REV. 1307, 1388 (1995).

⁶⁴ See Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 384-85 (1984) (discussing adverse effects on quality of opinions when judges do not adequately respect the viewpoints of fellow panel members).

record of authoring separate opinions is praised as a mark of commitment to unbiased principles⁶⁵ or to a consistent vision of the law.⁶⁶

Whether an appellate judge's insistence on independent expression signifies a future justice unusually free of ideological predispositions or uncommonly insensitive to the needs of a collegial institution is a question worth asking. With hindsight, one can point to reservations expressed at the time of Justice Burger's nomination, indicating that his independent-mindedness might well adversely affect his ability to lead the Court.⁶⁷ The nature of those doubts suggest that at bottom, the relationship between separate opinion writing and laudable or lamentable qualities of judging is a contingent one. Insights into that relationship are more likely to be found by examining the judge's individual biography, his personality and temperament, and the perception of his intellectual integrity among his peers than by measuring his past performance on an objective scale of production.

2. Justice Blackmun and Evolution on the High Court

While Blackmun's appellate court record scores less well than Burger's under the Choi & Gulati approach, the two men were viewed similarly in the course of the Supreme Court

⁶⁵ See Edward McGlynn Gaffney Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 601-04 (1994) (discussing the first Justice Harlan's distinguished record of dissents in civil rights cases); Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS U. L. REV. 781, 792-802 (2000) (discussing canonization of dissenters Holmes, Brandeis, and the first Harlan).

⁶⁶ See, e.g., Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1232-34, 1241 (2002) (discussing Justice Black's critical role in leading Court's movement over two decades to incorporate Bill of Rights into Fourteenth Amendment); Patricia R. Stemberge, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B. U. L. REV. 907, 914-17 (2000) (discussing impact of Justice Black's absolutist approach to First Amendment).

⁶⁷ See, e.g., Sidney E. Zion, *Nixon's Nominee for the Post of Chief Justice*, N.Y. TIMES, May 22, 1969 at 36 (reporting the "well known" view in legal community that "[Burger's] professional differences with a majority of his [D.C. Circuit] colleagues have often been so harsh as to create a mutual disrespect," and that some of his colleagues regarded him as "unsuited by talent and temperament to lead the High Court"); Duscha, *supra* note 51, at 30, 148 (reporting criticism from Burger's ex-law partner (who had since become a state Supreme Court justice) that Burger's stubbornness and tenacious adherence to his convictions helped make him an excellent lawyer but have been liabilities for him as an appellate judge).

appointments process.⁶⁸ During his confirmation hearing, Blackmun was characterized by Senators from across the political spectrum as a judge whose written opinions reflected a philosophy of judicial restraint and a clear respect for precedent.⁶⁹ There are modest indications in Blackmun's Eighth Circuit opinions and Senate testimony that he might behave on the Supreme Court in a manner less constrained than his reputation suggested,⁷⁰ but the general view at the time was that Blackmun would make few waves on the Court and would generally follow the lead of his long-time friend Warren Burger.⁷¹

Of course, Justice Blackmun's Supreme Court career departed dramatically from these expectations. Looking beyond his signature contributions in the areas of abortion and commercial speech,⁷² Justice Blackmun began by voting with Chief Justice Burger in nearly nine of 10 decisions, but by the time Burger retired in 1986, the two were aligned only about one-half

⁶⁸ See Lee Epstein et. al., *The Role of Qualifications in the Confirmation of Nominees to the U.S. Supreme Court*, 32 FLA. ST. U. L. REV. ___, __ (2005) (reporting that Burger and Blackmun had identical "perceived ideology" scores during appointments process, and their "perceived qualifications" were very similar, with Blackmun's score marginally higher).

⁶⁹ See *Harry A. Blackmun: Hearing Before the Committee on the Judiciary United States Senate*, 91st Cong. (1970) at 2 [hereinafter *Blackmun Hearing*] (remarks of Sen. Mondale); *id.* at 34 (remarks of Sen. Ervin), *id.* at 55 (remarks of Sen. H. Byrd. See also *id.* at 3 (editorial in Rochester (Minn.) Post-Bulletin describing Blackmun as a "strict constructionist" of the Constitution [and] a man of moderate, commonsense views").

⁷⁰ See, e.g., *Jackson v. Bishop*, 404 F. 2d 571 (8th Cir. 1968) (holding that certain conditions in Tennessee prisons violated constitutional rights); *Jones v. Alfred H. Mayer*, 379 F. 2d 33 (8th Cir. 1967), *rev'd* 392 U.S. 409 (1969) (expressing reservations about precedent that dictated appellate court's decision in civil rights setting; precedent subsequently abandoned by Supreme Court). See also *Blackmun Hearing*, *supra* note 69, at 37 (expressing belief that his appellate court record "show[s] in the treatment of little people, what I hope is a sensitivity to their problems"); *id.* at 44 (stating that man is a social being and law is in part social, that precedent is where one starts but times do change...).

⁷¹ See *id.* at 10 (report of ABA Standing Committee on Federal Judiciary, noting comments from one set of law review editors that Blackmun might be too subservient to precedent); Rosenbaum, *supra* note 4, at A38 (reporting in N.Y. Times that "the striking feature about Mr. Blackmun, according to lawyers who have studied his decisions, is his similarity to Mr. Burger as a judge").

⁷² See generally *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bates v. Arizona*, 433 U.S. 350 (1977).

the time.⁷³ Conversely, Justice Blackmun voted with Justices Brennan and Marshall in about 50% of all decisions during his first several years on the Court; by 1986, he was voting with each of them more than 80% of the time.⁷⁴

This shift toward more liberal voting patterns—which continued over his full 24-term tenure—reflects Blackmun’s changing views on a range of regularly contested issues.⁷⁵ During his years on the Court, Blackmun became more willing to construe the Constitution broadly in order to protect individual civil liberties.⁷⁶ He exhibited greater sympathy for persons living in conditions of economic hardship, and emphasized the consequent importance of assuring access to legal channels for those less well off.⁷⁷ Blackmun notably modified his doctrinal positions

⁷³ Data on voting patterns were compiled based on Table I (A) (Voting Alignments) at the back of issue one (the annual Supreme Court review issue) of the Harvard Law Review, volumes 85 through 100. The decline in level of agreement between Burger and Blackmun was steady rather than sudden; it fell from 89.9% in the 1970 Term to 69.6% in 1978 and 50% in the 1985 Term.

⁷⁴ See note 73, *supra* (relying on the same Table I (A) figures in 16 successive Harvard Law Reviews). Again, the increased association in voting behavior was gradual more than sudden. Blackmun’s alignment with Brennan went from 48.7% in the 1970 Term to 58.8% in 1978 and 80.3% in the 1985 Term. His alignment with Marshall increased from 51.7% in 1970 to 60.9% in 1978 and 82.1% in 1985.

⁷⁵ The shift did not include the rights of criminal defendants under the Fourth Amendment; there, Blackmun basically remained the “law and order” appointee that President Nixon had wanted. See Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 AKRON L. REV. 125, 142-45, 150-51 (1995) (discussing how Blackmun supported law enforcement officers’ search efforts in a number of discrete areas).

⁷⁶ Compare *Cohen v. California* 403 U.S. 15, 27-28 (1971) (dissenting opinion, critical of wearing a jacket that bore words ‘fuck the draft’ as an “absurd and immature antic” that was “mainly conduct and little speech”) with *Bowers v. Hardwick*, 478 U.S. 186, 208, 214 (1986) (dissenting opinion, contending that Court’s decision to allow prosecution for consensual homosexual activity in one’s own home betrayed privacy values deeply rooted in our constitutional traditions).

⁷⁷ Compare *Wyman v. James* 400 U.S. 309, 321-22 (1971) (majority opinion, rejecting as impertinent a welfare recipient’s assertion of Fourth Amendment claim against welfare monitoring program) and *United States v. Kras*, 409 U.S. 434, 449 (1973) (majority opinion, rejecting indigent’s request to waive bankruptcy filing fee of 50 dollars, and emphasizing that recommended installment payments would be “less than the price of a movie and little more than the cost of a pack or two of cigarettes”) with *Beal v. Doe* 432 U.S. 438, 462-63 (1977) (dissenting opinion, criticizing decision to uphold a congressional ban on use of Medicaid funds for nontherapeutic abortions as “condescend[ding]” and “punitive” toward indigent and financially helpless women) and *Lassiter v. Department of Social Services*, 452 U.S. 18, 46-47 (1981) (dissenting opinion, critical of decision denying right to counsel for indigent woman facing proceeding to terminate her parental rights).

with respect to the Court's role in policing the lines between state and federal sovereignty,⁷⁸ in deferring to the state to safeguard the interests of children,⁷⁹ and in overseeing the implementation of capital punishment.⁸⁰

There has been no shortage of informed speculation regarding why Justice Blackmun's performance differed so sharply from what was predicted for him. In terms of an evolution in judicial philosophy, scholars and commentators have referred to Blackmun's heightened sensitivity to the plight of "outsiders" in our society, especially their need for and entitlement to safeguards within the legal culture.⁸¹ These observers have identified a concomitant erosion of Blackmun's faith in government, particularly his belief in government's ability and willingness to fulfill various protective functions for individuals and groups who are vulnerable or at risk.⁸² Blackmun's philosophy did not simply emerge full-blown once he joined the Court, but the fact that it was rooted to some extent in various pre-Supreme Court experiences⁸³ hardly explains what brought it to fruition.

⁷⁸ Compare *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (concurring opinion) with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

⁷⁹ Compare *McKeiver v. Pennsylvania* 403, U.S. 528, 547, 550 (1971) (upholding performance of juvenile courts against constitutional challenge) with *De Shaney v. Winnebago County Department of Social Services* 489 U.S. 189, 212-13 (1989) (dissenting opinion) (lamenting mistreatment of juvenile neglected by social service system).

⁸⁰ Compare *Furman v. Georgia* 408 U.S. 238, 408-10 (1972) (dissenting, in agreement with view that capital punishment as applied was not unconstitutional) with *Herrera v. Collins*, 506 U.S. 390, 430-32 (1994) (dissenting, urging abandonment of death penalty as unconstitutionally arbitrary).

⁸¹ See, e.g., Karlan, *supra* note 10, at 18; Harold Hongju Koh, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 20 (1994); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 725-31 (1983); Wasby *supra* note 9, at 198.

⁸² See, e.g., *Changing Social Vision*, *supra* note 81, at 722-25; Wasby *supra* note 9, at 198.

⁸³ See n.70 *supra*. See also *Blackmun Hearing*, *supra* note 69 at 38 -39 (displaying sensitivity to alienation of youth in modern society, referring to what he had learned from his own experience with his daughters). *Changing Social Vision*, *supra* note 81, at 723 (discussing Blackmun's reliance on medical knowledge and historical context, gleaned in large part from experience as counsel to the Mayo Clinic, to deepen his understanding of the abortion issue while drafting *Roe v. Wade*).

One factor that seems to have contributed in important respects to the development of Justice Blackmun's jurisprudence is simply his exposure to the crucible of Supreme Court service. Blackmun seemed continuously affected by the "awesome realization"⁸⁴ of the Supreme Court's final power to affect the lives of individuals and the relationships among institutions of government. That realization could have reinforced a faith in tradition or a deference to precedent that frequently accompanies appellate court service. Instead, it seemed to liberate Blackmun, making him more open to the Court's role in addressing unforeseen problems and proposing new solutions.⁸⁵

In addition to his keen attention to the magnitude and novelty of the Court's agenda, Blackmun may have been affected at a more personal level by a deterioration in his relationship with the Chief Justice. Looking back after a dozen years on the Court, Blackmun expressed frustration at the early public image of him as functioning under Burger's control or influence.⁸⁶ Further, Burger's pattern of assigning majority opinions, apparently giving Blackmun an unusually small number of majorities in close or important cases and more than his share of the less glamorous Indian and tax decisions, may have played a role in the growing alienation between the two justices.⁸⁷

⁸⁴ *Blackmun Hearings*, *supra* note 69, at 43.

⁸⁵ See *Changing Social Vision*, *supra* note 81, at 734-36. Philippa Strum, *Change and Continuity on the Supreme Court: Conversations with Justice Harry Blackmun*, 34 U. RICH. L. REV. 285, 300 (2000). Cf. Blackmun Hearing, *supra* note 69, at 43 (responding to question about binding aspects of Court precedent by stating that "even Justices of the Supreme Court are humans and I suppose attitudes change as we go along ...[a]s times have changed, Justices have changed. People take a second look").

⁸⁶ See John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES §6 (magazine), Feb. 20, 1983 at 20, 23. See generally Linda Greenhouse, *Friends for Decades, But Years on Court Left Them Strangers*, N.Y. TIMES, Mar. 5, 2004 at A1.

⁸⁷ See Wasby, *supra* note 9, at 185, 196-97 (discussing 1986 political science study showing that Blackmun ranked next to bottom in number of important cases he had been assigned, and noting Burger's penchant for giving Blackmun an unusually high number of unanimous or wide margin cases to write).

In assessing Blackmun's development as a justice, Professor Pamela Karlan referred to his intense awareness of the "profoundly lonely business of judging,"⁸⁸ suggesting that for a sensitive person like Blackmun, this loneliness may have "deepen[ed] the reservoirs of empathy."⁸⁹ Observers also have pointed to Blackmun's openness to change as a sign of maturity and a commitment to continued reflection;⁹⁰ to his deep concern for fairness in judicial decisions, especially as it affected the proverbial "little guy";⁹¹ and to his receptivity to modes of understanding complex human events that transcended legal knowledge or analysis.⁹²

Certain judicial attitudes associated with Justice Blackmun's career are not without their detractors. A penchant for self-doubt and openness to change are viewed at times as hallmarks of timidity if not inconsistency.⁹³ Blackmun's emotionally descriptive attentiveness to the plight of society's outsiders has been dismissed as overly sentimental and lacking rigor.⁹⁴ Despite such critiques, Blackmun is held in high regard by a range of legal and political pundits, based on his

⁸⁸ Karlan, *supra* note 10, at 185 (quoting from Blackmun's own statements). See Jenkins, *supra* note 86, at 61 (quoting Blackmun's reference to Supreme Court service as "distinctly lonely").

⁸⁹ Karlan, *supra* note 10, at 185.

⁹⁰ See Judge Richard S. Arnold, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 6, 9 (1994).

⁹¹ See Erwin N. Griswold, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 11, 12 (1994).

⁹² See Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 12, 16-18 (1994) (discussing Blackmun's regular engagement with scientific and social scientific data and his sensitivity to the relevance of literature).

⁹³ See Jenkins, *supra* note 86, at 57 (discussing criticisms of Blackmun's focus on resolving discrete disputes while failing to propound consistent theories of law); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557-59, 564 (1985) (Powell J. dissenting) (critical of Blackmun's pivotal role in "precipitate overruling of multiple precedents" as undermining respect for Court's authority). See generally Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 804 (2003); Idleman, *supra* note 63, at 1392-93. The tendency to evolve while a member of the Court may also be criticized as frustrating the legitimate role played by the politically accountable branches in selecting an ideologically suitable candidate. For discussion of interaction between law and politics in the selection of justices and in Supreme Court decisionmaking, see Part II A. *infra*.

⁹⁴ See Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, NEW REPUBLIC, May 2, 1994 at 13; Radhika Rao, *The Author of Roe*, 26 HASTINGS CONST. L. Q. 21, 38 (1998).

capacity for growth while on the Court, his ability to blend careful craftsmanship with a strong sense of compassion, and his abiding awareness of how the law affects the circumstances and conditions of ordinary people.⁹⁵

From a historical standpoint, it is probably too early for a thorough evaluation of Justice Blackmun's contributions. Some key qualities that make him a distinguished justice to his supporters—empathy for the litigants before him, an abiding interest in fairness, and a receptivity to extralegal modes of analysis—are doubtless viewed as shortcomings by his critics. Whether one is an acolyte or a dissenter, however, the qualities that have tended to focus debate about Blackmun's "merit" as a justice are hardly reflected in his appellate court citation count or his pattern of dissents as a member of the Eighth Circuit. The Choi & Gulati approach is simply not relevant to this debate.

Justice Blackmun's metamorphosis while a member of the Court may be more the exception than the rule.⁹⁶ Still, the surprising nature of his arc on the Supreme Court is far from

⁹⁵ See Griswold, *supra* note 91, at 11-12 (describing Blackmun as "one of the truly great justices of our time"); Paul R. Baier, *Mr. Justice Blackmun: Reflections from the Cours Mirabeau*, 59 LA. L. REV. 647, 655 (1999) (reporting President Clinton's description of Blackmun as an ideal Justice); Janet Reno, *Statement on the Death of Harry A. Blackmun* (March 4, 1999) (referring to Blackmun's compassion, integrity, and commitment to rule of law, and calling him "a great Justice") (copy on file with author).

Many of those observations were offered in the context of Justice Blackmun's retirement from the Court or his death, moments when one would expect a laudatory tone. Yet, there is a distinct contrast between what has been said about Blackmun and Burger on such occasions. Tributes to Justice Burger are notably less effusive; they tend to focus less on his defining doctrinal contributions or his judicial philosophy, and more on his contributions to the administration of justice or his general respect for our history and traditions. See, e.g., Carl Tobias, *Warren Burger and the Administration of Justice*, 41 VILL. L. REV. 505, 505-10 (1996) (focusing on contributions to more efficient court management); Kenneth W. Starr, *A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 971 (1987) (discussing Burger's respect for our history and traditions); John Edward Sexton, *A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 979, 984 (1987) (discussing Burger's role speaking out on problems of judicial system).

⁹⁶ See TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 113 (1999) (contending, based on a consensus among scholars, that presidents have enjoyed a 75% success rate in predicting the future ideological course pursued by their Supreme Court appointees); *id.* at 119-21 (arguing that for most justices who depart from ideological expectations, the departure may be attributed to a lack of relevant interest or attentiveness by the appointing president, and that Blackmun's evolution while a member of the Court was unusual even among the 25% classified as surprises). But cf. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S.

unique. Although some justices have turned out more liberal or attentive to questions of redistribution than their pre-Court record would have lead one to expect, there are others whose careers on the Court were distinctly more conservative or protective of the status quo than was anticipated at the time of their appointment.⁹⁷

Yet, insofar as predicting the future performance of Supreme Court candidates can be a hazardous business, reliance on quantitative indicia of appellate court outputs is unlikely to clarify the crystal ball. This is due in part to the very different nature of the dockets confronted by appellate judges and Supreme Court justices. The Supreme Court's discretionary caseload is determined by how shifting coalitions of interested colleagues react to emerging developments in constitutional advocacy and legislative policy, developments that over the long term are largely unforeseeable. For example, Justice Blackmun's role in shaping the Court's positions on abortion or commercial speech—and the impact that role had on his overall performance as a justice⁹⁸—could hardly have been anticipated based on his Eighth Circuit record addressing a mandatory caseload largely characterized by more mundane matters of statutory interpretation.

In addition, the impact of precedent is diminished, and the importance of collegial interaction increased, on a court of last resort in which nine individuals decide every case en banc. Given the role played by personal dynamics in this unusually intense repeat-player setting, a justice's lifespan on the Court becomes a further major, unpredictable factor. Blackmun's

SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 50-52 (revised ed. 1999) (quoting several eminent Court scholars and former Presidents emphasizing the president's limited ability to predict the performance of his Supreme Court nominees).

⁹⁷ Justices McReynolds and Frankfurter are two notable examples. See generally Paul Finkelman, *You Can't Always Get What You Want...; Presidential Elections and Supreme Court Appointments*, 35 TULSA L. J. 473, 480-81 (2000).

⁹⁸ See Rao, *supra* note 94 at 34 -35, 39-40 (discussing impact of abortion cases on Justice Blackmun's philosophy); William S. Dodge, *Weighing the Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L. Q. 165, 170-93 (discussing Blackmun's role in shaping Court's position on commercial speech).

career would surely look different if he had left the Court after 10 years instead of 24, if the Eisenhower appointee who retired in 1981 had been Brennan rather than Stewart, or if the replacements for Burger, Powell, and Marshall had been appointed by a Democratic president.⁹⁹

In the end, Supreme Court performance depends heavily on factors that are qualitative and personal. These factors include individual character and sensibilities, biographical experiences within and outside the law, the particulars of interaction with a subtly changing set of colleagues, the impact of a fluid and highly controversial docket, and length of tenure on the Court. The heavily subjective focus does not mean that predictions about performance won't continue to be a familiar aspect of the Supreme Court appointments process. As discussed in Part II, however, such predictions should be based on factors other than quantifiable production as an appellate judge. The Choi & Gulati approach would give Burger high marks for a performance criterion that turned out to represent one of his serious shortcomings as a Supreme Court justice. Further, the Choi & Gulati focus on appellate court outputs fails altogether to account for the qualities that principally defined Blackmun's Supreme Court tenure.

II. POLITICS AND NON-QUANTITATIVE FACTORS

A. *The Legitimate and Appropriate Role of Politics*

A driving force behind the Choi & Gulati proposal to measure and rank judicial performance is the authors' belief that "politics is primarily to blame" for our "abysmal" system of selecting Supreme Court justices.¹⁰⁰ Acknowledging that the political branches must continue

⁹⁹ See generally Michael J. Gerhardt, *The Art of Judicial Biography*, 80 CORNELL L. REV. 1595, 1641-45 (1995) (discussing factors that make it virtually impossible to predict judicial greatness).

¹⁰⁰ Choi & Gulati I, *supra* note 1, at 301.

to play a formal role in the nomination and confirmation process, Choi and Gulati maintain that their tournament will at least require politicians to address merit-based considerations in more objective and transparent terms.¹⁰¹ Ultimately, though, the authors seek to supplant the existing politically-based system; they contend that their market-based approach is normatively preferable to the opaqueness and subjectivity that are endemic to the political model.¹⁰²

This effort to minimize if not eliminate the role of partisan and ideological considerations is in my view misguided. Initially, the Constitution in its design anticipates that politics will play an important part in the judicial selection process. One indicator of the extent of presidential and senatorial control is the Constitution's silence regarding any minimum qualifications for the federal judiciary. Although minimum requirements are specified for the offices of President and members of Congress,¹⁰³ the Framers entrusted the executive and legislative branches with complete discretion to determine judicial qualifications through their decisions regarding which individuals would be nominated and confirmed.¹⁰⁴ From a historical standpoint, several factors may help explain the absence of objective criteria or threshold requirements for service on the Supreme Court.¹⁰⁵ Whatever the explanation in original terms, there is an ongoing constitutional

¹⁰¹ See *Choi & Gulati II*, *supra* note 1, at 3.

¹⁰² See *Choi & Gulati I*, *supra* note 1, at 302-04; *Choi & Gulati II*, *supra* note 1, at 3.

¹⁰³ See U.S. CONST. ART II, § 1 (providing that President must be 35 years of age, a natural born citizen, and a 14-year resident of the U.S.); *id.* at ART. 1, §§2 and 3 (providing that House members must be 25 years of age, citizens for seven or more years, and residents of their state, and Senate members must be 30 years of age, citizens for nine or more years, and residents of their state). Article III of the Constitution contains no comparable requirements for federal judges. See ABRAHAM, *supra* note 96, at 35 (noting the surprising absence of any constitutional requirements to become a federal judge).

¹⁰⁴ See U.S. CONST., ART. II, § 2 (providing that President has power to appoint Supreme Court justices "by and with the Advice and Consent of the Senate"). The recruitment and selection of federal judges through the political process contrasts with the civil service approach to judicial selection adopted in some European countries. See generally PERETTI, *supra* note 96, at 85.

¹⁰⁵ See John R. Vile and Mario Perez-Reilly, *The U.S. Constitution and Judicial Qualifications: A Curious Omission*, 74 JUDICATURE 198, 200-02 (1991) (suggesting that constitutional silence may be due to the absence of

contemplation that the partisan preferences and ideological priorities of the politically accountable branches will play a role in the selection process, “serv[ing] as effective majoritarian checks on the Supreme Court’s counter-majoritarian function.”¹⁰⁶

That constitutional contemplation has become increasingly resonant in today’s legal and public policy circumstances. Constitutional and statutory interpretation are now regularly matters of intense political controversy, and both the executive and legislative branches have come to understand the importance of investing in the judicial selection enterprise.¹⁰⁷

It should not be surprising that the President and his agents regard Supreme Court decisionmaking as directly related to the real and perceived success of their policy agenda. During our prolonged period of divided government,¹⁰⁸ as enactment of major legislative reforms has become a special challenge, the White House has paid more attention to court-centered strategies as a means of implementing changes in policy. Those strategies prominently include urging the Supreme Court to enforce certain legal rules expansively while arguing that the Court should act with restraint on other occasions involving related provisions of public law.¹⁰⁹ Indeed, in managing imbedded regulatory schemes that address politically contested subjects like

contemporary standards for legal education or training, making it difficult to specify a uniform “lawyer” qualification; the absence of minimum age or educational requirements for judges serving under state constitutions of the time; and a concern that restrictive qualifications would serve to intensify fears of an aristocratic judiciary).

¹⁰⁶ Michael J. Gerhardt, *Book Review: The Confirmation Mystery*, 83 GEO. L. J. 395, 419 (1994).

¹⁰⁷ Arguments presented in the ensuing several paragraphs were initially developed in an earlier article. See James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L. J. 149, 153-61 (2003).

¹⁰⁸ Between 1968 and 2004, Congress (at least one chamber) and the Presidency were controlled by different parties 75% of the time: The exceptions were 1977-80 plus 1993-94 (all Democratic) and 2001 plus 2003-04 (all Republican). Even in those exceptional times, the Senate has had between 41 and 49 members from the minority party, allowing for the reality or threat of a filibuster, except for the two year period from 1977-78. See CONGRESSIONAL QUARTERLY’S GUIDE TO U.S. ELECTIONS, vol. 2, 1570 (John L. Moore et. al. eds.) (4th ed. 2001).

¹⁰⁹ See generally Jeremy Rabkin, *At the President’s Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63, 85-86 (1993) (discussing White House influence in shaping Justice Department strategy on civil rights litigation before Supreme Court).

civil rights, workplace standards, and consumer health or safety, the executive branch has often altered its litigation approach depending on which political party is shaping the federal government's Supreme Court agenda.¹¹⁰ Accordingly, the President's interest in appointing Supreme Court justices based on political and ideological compatibility should be viewed as part of his effort to "integrat[e] the federal judiciary into the dominant lawmaking coalition."¹¹¹

The Senate likewise has a considerable policy-related stake in the selection of Supreme Court justices. Current majorities, and even filibuster-proof minorities, are strongly interested in confirming justices who will not undermine preferred regulatory enactments or constitutional landmarks.¹¹² More generally, because legislators expect courts in the future to be bound by the laws they enact in the present, they will be concerned not to endorse for a lifetime appointment any justice perceived as unduly hostile to their current legislative agenda.¹¹³ A Congress worried

¹¹⁰ See, e.g., Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ENVTL. L. REP. 10606 (1993) (describing Reagan Administration Justice Department efforts to advocate less expansive approach toward enforcement of occupational health standards by shifting government's position in midst of 1981 Supreme Court litigation); REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL* 61 (1992) (reporting Reagan Administration's 1982 reversal of Solicitor General's position regarding the constitutionality of tax-exempt status for a private college that discriminated on basis of race; Supreme Court subsequently appointed private attorney to argue Government's position from lower courts); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1439-41 (1998) (reporting Clinton Administration's 1993 reversal of prior Justice Department position on retroactivity of 1991 Civil Rights Act). See also Robert Pear, *In a Shift, Bush Moves to Block Medical Suits*, N.Y. TIMES, July 25, 2004 at A1 (reporting on Bush Administration's argument to Third Circuit against private right of action to challenge injuries from FDA-approved medical devices, the opposite position from what Clinton Administration argued before Supreme Court in 1997). See also, Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391 (2000) (discussing Government's ability to pursue its policy program successfully before Supreme Court by selective filing of petitions for certiorari).

¹¹¹ J. Woodford Howard, Jr., *Perspectives on the Selection of Federal Judges*, 77 KY. L. J. 619, 621 (1989).

¹¹² See, e.g., *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 100th Cong. (1987) 467-68 (questioning of nominee by Sen. Metzenbaum with respect to enforcement of Occupational Safety and Health Act); *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Committee on the Judiciary*, 101st Cong. (1990) 64-65 (questioning of nominee by Sen. Thurmond with respect to validity of Congress's efforts to limit number of post-trial appeals by death row inmates); *id.* at 53-55 (questioning of nominee by Sen. Biden with respect to foundation and scope of constitutional right to privacy).

¹¹³ See, e.g., McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L. ECON & ORG. 180, 185-86 (1999) (discussing risk that courts will try to impose their own policy preferences, subtly or profoundly

about the potential for judicial defiance does remain free to monitor Supreme Court performance after the fact, at least with respect to high profile regulatory statutes that legislators want to see vigorously applied.¹¹⁴ In practice, however, it tends to be both arduous and depleting for Congress to invalidate judicial interpretations of a federal statute with which the majority disagrees.¹¹⁵

There are, of course, risks that undue emphasis on political or ideological background during the selection process may undermine the Court's basic decisionmaking function. Senators and Presidents have professed their awareness of this risk when they publicly eschew the use of litmus test screening that asks candidates to make advance commitments on specific issues of constitutional or statutory interpretation.¹¹⁶ At the same time, consideration of

altering a political compromise years after its enactment); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 581 (1992) (suggesting that each enacting Congress wants its laws enforced and sympathetically applied into the future, and that courts can encourage sitting legislators to act carefully and deliberatively by interpreting earlier legislative products in a sensitive fashion).

¹¹⁴ An often-cited example is the 1991 Civil Rights Act which overrode all or parts of numerous Supreme Court decisions. See H.R. Rep. No. 102-40, pt. I at 23-90 (1991) (reviewing action to override or modify results from ten Supreme Court decisions). See generally William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (discussing override statutes from 1967 to 1990). But cf. ROBERT A. KATZMANN, COURTS AND CONGRESS 71-74 (1997) (reporting very low congressional staff awareness of important statutory interpretation decisions by the D.C. Circuit).

¹¹⁵ The difficulties stem both from the lack of time and information needed to monitor statutory interpretation decisions and from the procedural and resource constraints that inhibit legislative success. See generally, JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 41-42, 194 (1984) (discussing limitations on members' access to sophisticated policy information and on the political capital available to each senator or representative); James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?* 93 MICH. L. REV. 1, 21-26 (1994) (discussing finite resources and limited windows of opportunity that restrict Congress's legislative capacity). See also Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61, 63-64, 68 (2001) (reviewing 966 committee reports accompanying every bill reported out of House, Senate, or Conference committee from 1990-1998, and finding enacted bills responded to 65 circuit court cases (clarifying, codifying or overriding), and reports referred to total of 187 specific circuit court cases out of more than 200,000 decisions in that nine year period).

¹¹⁶ See, e.g., *Should Ideology Matter? Judicial Nominations, 2001, Hearing Before the Subcommittee on Administration Oversight and the Courts of the Senate Committee on the Judiciary*, 107th Cong. (2001) at 30 (statement of Sen. Hatch) (contending that "the Senate's responsibility to provide advice and consent [should] not include an ideological litmus test because a nominee's personal opinions are largely irrelevant so long as the nominee can set those opinions aside and follow the law fairly and impartially as a judge"); Nat Hentoff, *To Get A Supreme Court Seat*, WASH. POST, Aug. 14, 1999 at A17 (reporting candidate George W. Bush's statement that he

ideological background for its general predictive value would not appear to jeopardize the principled core of judicial decisionmaking, especially when—as is often the case—the White House and the Senate focus on that background in an effort to temper perceived excesses by the other branch.¹¹⁷ Moreover, when the Senate fails to review candidly a nominee’s ideology or judicial philosophy, it tends instead to pursue alternative strategies that may be disingenuous if not unseemly.¹¹⁸

None of this is meant to suggest that political factors should be the primary qualification for ascending to the Supreme Court. There is an expectation that candidates should be exceptionally accomplished in terms of their professional abilities, temperament, and integrity. The American Bar Association has evaluated Supreme Court candidates on such merit-based

would not require an ideological litmus test for the Supreme Court). *But cf. id.* (reporting candidate Bill Clinton’s 1992 statement to Bill Moyers that he would want his first Supreme Court appointee to be a strong supporter of *Roe v. Wade*, although it “makes me uncomfortable” to be taking such a litmus test position).

¹¹⁷ See Robin Toner & Neil A. Lewis, *Lobbying Starts as Groups Foresee Vacancy on Court*, N.Y. TIMES, June 8, 2003 at A1 (reporting Democratic Senator and liberal interest groups as concerned about possibility that President Bush will nominate extreme right wing ideologue to Supreme Court); David L. Green, *‘Big Fight’ Brewing on Judicial Nominee*, BALTIMORE SUN, Oct. 31, 2003 at 1A (reporting President Bush’s criticism of Senate Judiciary Committee Democrats as “playing politics with American justice” by blocking floor votes on his judicial nominees). See generally Jon O. Newman, *Federal Judicial Selection: A Judge’s View*, 86 JUDICATURE 10, 12 (2002) (discussing role of Senate in steering President’s judicial appointments toward the middle); Stephen B. Burbank, *Politics, Privilege & Power: The Senate’s Role in the Appointment of Federal Judges*, 86 JUDICATURE 24, 26 (2002) (discussing how presidents’ more distinct policy agenda in selecting judicial nominees has triggered increased attention by senators to those nominees).

¹¹⁸ These strategies have often included review of a nominee’s past non-ideological indiscretions, or his asserted ethical misconduct in the private sphere. See, e.g., Adell Crowe, *People Watch*, USA TODAY, Sept. 29, 1987 at A4 (describing how local Washington, D.C. paper obtained list of videos rented by Supreme Court nominee Robert Bork’s wife to investigate whether Bork might have watched X-rated films); Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana ‘Clamor’*, N.Y. TIMES, Nov. 8, 1987 at A1 (describing how reports of Douglas Ginsburg’s marijuana smoking while a Harvard law professor led to his withdrawing as Supreme Court nominee); ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 239, 247-63 (2d ed. 1997) (discussing concerns fueled if not inspired by conservative anti-New Deal media and interest groups to reveal Senator Black’s earlier membership in Ku Klux Klan as means of defeating his Supreme Court appointment).

grounds since the Eisenhower Administration; until recently, both Congress and the Executive Branch have utilized those evaluations.¹¹⁹

In addition, a focus on competence and integrity as essential elements in the appointments process is eminently reasonable from the President's standpoint. As a regular repeat-player in Supreme Court litigation, the Executive Branch should prefer justices who are likely to apply language, precedent, and logical reasoning in largely rigorous fashion when deciding cases. The White House also may see some political value in appointing a "higher quality" justice who is well received by the organized bar and the informed media, and a corresponding political cost in installing mediocre or disreputable individuals on the Court.¹²⁰

There will be an ample number of suitably accomplished individuals available for each open seat on the Supreme Court, even assuming a limited pool of well qualified candidates. In this setting, considerations of "merit"¹²¹ are a necessary and important element of the appointment process but they can not fully define that process. This is because, while the

¹¹⁹ See generally ABRAHAM, *supra* note 96, at 25-28; GEORGE L. WATSON & JOHN A. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 83-85, 108-12 (1995). [check pages] Roberta Cooper Ramo & N. Lee Cooper, *The American Bar Association's Integral Role in the Judicial Selection Process*, 12 ST. JOHN'S J. L. COMM. 93, 106-08 (1996). But see Amy Goldstein, *Bush Curtails ABA Role in Selecting U.S. Judges*, WASH. POST, March 24, 2001 at A1 (reporting second President Bush's decision to discontinue 50-year tradition of executive branch reliance on ABA for advice on potential candidates for federal bench); Terry Carter, *A Conservative Juggernaut*, A.B. A. J., June 1997, at 32 (reporting Senate Judiciary Committee Chairman's decision to end formal ABA role of advising Senate, based on his view the Association was too liberal).

¹²⁰ See generally SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 4 note c (1997) (discussing why it is both good presidential policy and good politics to recruit and nominate highly qualified judges). The unsuccessful effort by certain senators to make a virtue out of mediocrity with respect to a Supreme Court nominee illustrates the outlier nature of such anti-merit sentiments. See ABRAHAM, *supra* note 103, at 11 (recounting comments by Senator Hruska, floor manager for the Carswell nomination, that "[e]ven 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, and a little chance? We can't have all Brandeises, Cardozos, and Frankfurters, and stuff like that there"). But cf. JOHN W. DEAN, THE REHNQUIST CHOICE 125-26, 133-142 187 (2001) (discussing President Nixon's willingness to consider mediocre or even outrageous candidates for the Supreme Court in 1971, at least partly as a form of payback for the Senate's previous rejection of his nominees).

¹²¹ For reasons discussed in Part I *supra*, it is far from clear that the Choi & Gulati measurable performance factors based on appellate court outputs are preferable to the current less quantitative approach as a way of evaluating the professional talents and temperament of prospective Supreme Court candidates.

Supreme Court is expected to act in a principled and intellectually coherent manner when resolving disputes of law, it has long been understood that the Court's legal propositions are replete with judgments and choices that have significant policy consequences.¹²² In appellate controversies involving two well-briefed positions, norms of legal craftsmanship constrain the judges' policymaking discretion. At the same time, these norms can often be met regardless of which side prevails; indeed, a justice who wants to see his policy preferences implemented will presumably make every effort to provide a coherent, well reasoned, and carefully crafted legal opinion.¹²³

Choi and Gulati in their tournament attach little or no value to the inevitable interplay of law and policy in Supreme Court decisionmaking. By contrast, the real world sees considerable value in this interplay, as evidenced by the intense recognition it receives during the appointments process. The President and the Senate regularly seek to shade the future judicial philosophy of the Supreme Court toward their own broadly conceived policy preferences. The fact that their reliance on political and ideological considerations is susceptible to occasional misuse does not impeach the legitimacy of such reliance, provided it is combined with a threshold concern for sufficiently meritorious candidates.¹²⁴ Thus, for both principled and

¹²² See, e.g., CHARLES L. BLACK JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 173-74 (1960) (discussing widespread recognition that constitutional law consists of both "a great deal of sheer legal technicality" and profoundly value-laden judgments regarding public policy; because these questions of law and policy overlap and are inseparable, "legal acumen [is] not a sufficient condition...for dealing competently with questions of constitutional law"); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 374 (1960) (discussing the importance of reading a statute in light of some assumed purpose known to the legislature, and observing that as a statute ages, an appellate court must apply it to circumstances unanticipated at the time of enactment, in effect extrapolating from the initial purpose to make new policy).

¹²³ See generally PERETTI, *supra* note 96, at 82, 159 (arguing that when justices vote in accordance with their political preferences, a well crafted and intellectually rigorous decision is less likely to activate the political sanctions that are occasionally used or threatened against the Court).

¹²⁴ To be sure, invocation of these policy-related considerations does not always produce the expected results, as aptly illustrated by the Burger and Blackmun stories. Despite their pre-Court similarity in political and ideological background, as justices they turned out to differ markedly on a range of policy and value-laden controversies that

practical reasons, the two branches constitutionally charged with recruiting and selecting members of the Court will continue to search for an appropriate composite of law-related expertise and policy-related wisdom.

B. Collegiality and Career Diversity

In focusing on performance criteria that lend themselves to quantitative and comparative measurement, Choi and Gulati omit consideration of other, more “qualitative” factors that make critical contributions to the appellate decisionmaking process. I will touch briefly on two important aspects of individual judicial performance that are not easily analyzed at the empirical level—collegiality and career diversity.

1. Collegiality

Judges and judicial scholars have identified various ways in which collegiality provides shape and direction to group decisionmaking on an appellate court. As a process matter, collegial interaction tends to sharpen and deepen a court’s reasoning. Judges in conference who carefully engage and evaluate the arguments and explanations offered by their colleagues are likely to create a better informed and intellectually more rigorous final product even if no one’s vote is changed during deliberations.¹²⁵ In addition, an individual appellate judge whose

came before the Court. Such surprises, however, will not deter the President and the Senate from efforts to identify individuals who combine an acceptably high level of legal craftsmanship with a suitably worthwhile set of policy preferences. *See generally* PERETTI, *supra* note 96, at 80-86, 130-32.

Choi and Gulati would presumably prefer that the justices’ ideological orientations be randomly distributed based on whoever has been found most meritorious under their three criteria. There are at least two problems with this approach, both alluded to in text. First, it thwarts input from the political branches, input anticipated under our constitutional design. Second, it underestimates the sophistication and ingenuity of these political branches in being able to package or manipulate appellate judges’ “objective” scores in the service of an ideological agenda.

¹²⁵ *See* Deanell Reace Tacha, *The “C” Word: On Collegiality*, 56 OHIO ST. L. J. 585, 587 (1995). *See also* Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 300-01, 307 (1986) (discussing impact of voting memos and regular oral argument in developing intellectual common ground on a panel); James L. Oakes, *Book Review, On Appeal: Courts, Lawyering, and Judging*, 104 YALE L. J. 2369, 2376-77 (1995) (recounting Judge Coffin’s discussion of the importance during collective judicial deliberations of responsive dialogue and constructive reaction to suggestions from other judges).

personal style helps foster a background norm of cordial, courteous relations may well play a more important role on contentious issues for which he has managed to facilitate continuing conversation.¹²⁶

Collegiality affects decisionmaking at a substantive level as well, again operating in at least two distinct ways. By encouraging judges to modify their personal predilections and soften their traditional advocacy-oriented approach, the “filter” of collegiality can enhance prospects for a consensus that “mitigates judges’ ideological preferences.”¹²⁷ In this respect, collegiality functions to constrain the influence of a judge’s personal vision or outlook. At the same time, collegiality can also produce consequences that are more ideologically directional. Judges whose persuasive reasoning skills and doctrinal vision are augmented by an ability to cultivate warm personal relationships with colleagues may be especially successful in forging alliances that over time determine a series of outcomes giving shape to an entire area of law.¹²⁸

Although an integral part of the appellate decisionmaking process, collegiality is not readily measurable in the output-dependent terms relied upon by Choi and Gulati. Judge Harry Edwards has suggested that as a “qualitative variable...involv[ing] mostly private personal interactions,” it may not be measurable at all.¹²⁹ The ongoing private exchanges to which Judge

¹²⁶ See *Gerhardt*, *supra* note 99 at 1613 -14 (discussing John C. Jeffries biography of Justice Lewis F. Powell, and noting Jeffries’ suggestion that Powell’s “ingrained courtesy and ability to listen” may have enhanced his pivotal position in many instances even if he did not seek such a position).

¹²⁷ Edwards, *supra* note 19, at 1689.

¹²⁸ See *Gerhardt*, *supra* note 99 at 1611 -12 (discussing Roger K. Newman’s biography of Justice Hugo Black, and noting Newman’s contention that Black’s friendly demeanor, civility, and personal political skills enabled him to exert far greater influence on the Court than his chief rival, Justice Frankfurter, over a period of more than 20 years); Richard A. Posner, *A Tribute to Justice William J. Brennan Jr.*, 104 HARV. L. REV. 13, 14 (1990) (discussing how Justice Brennan’s personal qualities made him “the supremely collegial justice,” and observing that his consequent skill in constructing coalitions sustained his influence in doctrinal terms even after the Court’s balance of power had shifted away from him).

¹²⁹ Edwards, *supra* note 19, at 1656. See also *id.* (“Regression analysis does not do well in capturing the nuances of human personalities and relationships”).

Edwards refers seem likely to have an especially pervasive if nuanced influence at the Supreme Court, where decision-makers do more than simply come together from geographically dispersed locations on a periodic basis in order to resolve particular cases. The justices effectively live together in professional terms, continuously inhabiting the same intellectual space; they have been described by one veteran Court observer as “locked into intricate webs of interdependence where the impulse to speak in a personal voice must always be balanced against the need to act collectively in order to be effective.”¹³⁰ It is therefore not surprising that the collegiality factor often figures prominently as part of in-depth examinations into the strengths or shortcomings of individual Supreme Court justices.¹³¹

To take just one example, the conference at which all nine justices exchange views following oral argument affords an opportunity for wielding influence.¹³² Justice Thurgood Marshall’s colleagues have remarked on how deeply he affected their thinking during conferences, in ways that would hardly be amenable to formal measurement yet seem quite relevant when considering the “quality” of a Supreme Court justice.¹³³ Moreover, given that

¹³⁰ Linda Greenhouse, *The Court: Same Time Next Year. And Next Year*, N.Y. TIMES, Oct. 6, 2002, § 4, at 3.

¹³¹ See generally *Gerhardt*, *supra* note 99, at 1610-14 (discussing how biographies of Justice Black and Justice Powell analyzed their subject’s collegiality and reached different conclusions).

¹³² See generally ALICE FLEETWOOD BARTEE, *CASES LOST, CASES WON: THE SUPREME COURT AND THE JUDICIAL PROCESS* 45-47 (1984); RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 81 (1980). But cf. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 290-95 (1987) (observing that in Burger Court, Conference discussion did not generally change minds or votes); Stuart Taylor Jr., *Ruing Fixed Opinions*, N.Y. TIMES, Feb. 22, 1988 at A16 (reporting Justice Scalia’s disappointment, after two years on the Court, that Conference involves more a statement of views by nine justices than efforts to persuade others to change minds).

¹³³ See, e.g., William J. Brennan, Jr., *A Tribute to Justice Marshall*, 105 HARV. L. REV. 23, 25-26 (1991) (describing how, in school desegregation cases in which Marshall did not write an opinion, his “strong statements” at conference “drawing on his familiarity with the problems” made his colleagues more determined to reach unanimous decisions); Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992) (describing how Marshall’s personal stories and renditions of his life experiences during conference meetings prodded his colleagues “to respond not only to the persuasiveness of legal argument but to the power of moral truth”); Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221, 1222 (1992) (emphasizing that Marshall’s “gift of story-telling” during Court conferences was “an essential part of his professional greatness,...not some incidental facet or adornment of [his] character and personality”).

collegiality involves complex elements of personal chemistry, it is not clear that one's reputation and accomplishments on an appellate court will be replicated or even approximated with an entirely new group of judicial peers.¹³⁴ In sum, while the Choi & Gulati framework should not be expected to capture all merit-related dimensions of judging, its exclusive focus on quantifiable criteria overlooks a substantial and influential judicial attribute.¹³⁵

2. *Career Diversity*

An important presumption underlying the Choi & Gulati framework is that Supreme Court justices should be selected primarily if not exclusively from the pool of sitting appellate court judges. It is true that in recent decades, federal appellate experience has become almost mandatory for appointment to the Supreme Court: seven of the last eight justices chosen, and 10 of the last 13, were serving on the circuit courts when nominated.¹³⁶ Choi and Gulati are inclined to view this increasingly standard practice as not just practically inevitable but normatively appropriate. While they would allow the pool to be expanded under certain conditions, they maintain that data chronicling appellate judges' performance is likely to be the best predictor of future conduct on the Supreme Court, because no other apprenticeship has job responsibilities that are as closely analogous.¹³⁷

¹³⁴ See Duscha, *supra* note 51, at 140 (describing Judge Burger's quiet methods of persuasion among his D.C. Circuit colleagues and suggesting that Burger had some success in building coalitions on that court).

¹³⁵ Other important judicial attributes, such as integrity and temperament, may also be difficult if not impossible to assess in empirical terms, but that discussion is beyond the scope of this article. See generally Ramo & Cooper, *supra* note 119, at 102-03 (describing qualitative elements that go into evaluating a nominee's integrity and judicial temperament).

¹³⁶ The only exceptions, dating back to 1967, are Justices Powell, Rehnquist, and O'Connor, and Justice O'Connor was a sitting state appellate judge.

¹³⁷ See Choi and Gulati I, *supra* note 1, at 318-20.

One difficulty with this presumption is that in reinforcing the current status quo, it may well sacrifice prospects for improved institutional decisionmaking by depriving the Court of more diverse career perspectives. Justice Cardozo famously referred to the value of having a ‘balance of eccentricities’ to generate more reliable and respected legal standards.¹³⁸ The value of the experiential range of those eccentricities is diminished when almost all justices have appellate court judging as their most recent and by implication most meaningful professional exposure.

There is considerable evidence in the legal and social science literature that career diversity is significantly associated with the voting patterns of appellate judges.¹³⁹ Professors Lee Epstein, Jack Knight, and Andrew Martin recently surveyed 22 studies that had investigated linkages between career experience and judicial outcomes, concluding that nearly 70% had found some sort of relationship.¹⁴⁰ Those findings, combined with the broader literature suggesting that diversity enhances the collective decisionmaking enterprise,¹⁴¹ should make us wary of too readily accepting or encouraging the value of homogeneous formative experiences for Supreme Court service.

¹³⁸ See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 177 (1921) (“The eccentricities of judges balance one another [and] out of the attrition of diverse minds is beaten something which has a consistency and uniformity and average value greater than its component elements”).

¹³⁹ See Lee Epstein, Jack Knight & Andrew Martin, *The Norm of Prior Judicial Experience and its Consequences for Career Diversity on the Supreme Court*, 91 CAL. L. REV. 903, 961 (2003) (listing 22 studies exploring linkages between judges’ prior occupations and their decisionmaking); *Brudney*, *supra* note 107, at 170 (reviewing studies that have demonstrated associations between judicial voting patterns and experience as a law professor, experience as a prosecutor, and experience in elected office).

¹⁴⁰ See Epstein, Knight & Martin, *supra* note 139, at 954-56.

¹⁴¹ See *id.* at 941-53 (discussing importance of diversity as justification for collective decisionmaking in general, for competitive markets, and for common law courts); See generally *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117 (1997); *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994).

A useful illustration is the virtually complete loss of the perspective provided by justices who had formerly held federal or state elected office. Until Chief Justice Warren's retirement in 1969, the Court for nearly 50 years included anywhere from two to five justices who had spent substantial time serving as U.S. Senators or Representatives, state legislators, governors, or (in one instance) President.¹⁴² Of 21 justices appointed between 1921 and 1953, seven had previously been elected to federal office and six to state office.¹⁴³ In stark contrast, of 20 justices appointed since 1953, none had previously held federal elected office and only one (Justice O'Connor) had been elected to serve at the state legislative or executive level.

While there are risks to generalizing about relations between the branches of government, it seems safe to observe that Supreme Court attitudes and approaches toward Congress's lawmaking processes and Congress's final work products were more deferential from the 1940s to at least the mid 1970s than they have become in more recent times.¹⁴⁴ Many complex factors and circumstances have doubtless contributed to these changes at the Court, and there are

¹⁴² From 1945 to 1956, five of the nine Court seats were occupied by individuals who had held federal or state elected offices, including Hugo Black (10 years in U.S. Senate); Stanley Reed (four years in Kentucky legislature); Harold Burton (four years in U.S. Senate); a seat occupied consecutively by Frank Murphy (two years as Michigan Governor) and Sherman Minton (six years in U.S. Senate); and a seat occupied consecutively by Fred Vinson (14 years in U.S. House) and Earl Warren (ten years as California Governor). *See generally* DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT, vol. II, 975-1023 (4th ed. 2004).

¹⁴³ The seven with federal elective office experience included three with Senate experience, one with House experience, two with both Senate and House experiences, and one who had served as President. The six who had state elective office experience included three former governors and three former state legislators (two of whom also went on to serve in the U.S. Senate). *See* SAVAGE, *supra* note 142.

¹⁴⁴ *See, e.g.*, GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, & MARK V. TUSHNET, CONSTITUTIONAL LAW 185-203 (4th ed. 2001) (discussing evolution of a less deferential Commerce Clause doctrine); *id.* at 220-31 (discussing development of less deferential Court perspective on Congress's power to enforce § 5 of Fourteenth Amendment); *id.* at 234-55 (discussing evolution in Court's willingness to imply Tenth Amendment limits on Congress's powers); WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION (3d. ed. 2001) 742-58 (discussing current, less deferential Court perspective on probative value of legislative history or "legislative intent" in understanding statutory meaning).

divergent normative views as to the value of such changes.¹⁴⁵ One might reasonably wonder, though, whether the Court's dramatically decreased personal familiarity with how Congress or legislators generally operate has played a role in the doctrinal shift, as well as whether a Court dominated by former federal appellate judges isn't perhaps affecting the tenor and direction of decisions in other ways.

Choi and Gulati are not unaware of the diversity problem; they have forthrightly offered to accommodate alternative career paths based on development of suitable measurement techniques.¹⁴⁶ Yet, a focus on quantifiable performance criteria is likely to miss the larger and subtler ways in which appellate judges are influenced by the distinctive professional perspectives of their colleagues. One can envision an approach that measures legislators' effectiveness based on their percentage of missed floor votes; the number of bills sponsored, hearings chaired, or live floor speeches delivered; and perhaps even the number of enacted public laws for which they receive total or partial credit. It is questionable whether these or related measurements can adequately capture what makes prior experience in Congress or state legislatures a valuable "qualifier" for Supreme Court service.

¹⁴⁵ Compare, e.g., Robert C. Post & Reva B. Siegal, Essay, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L. J. 441 (2000) (critical of Court's diminished deference) and A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New 'On the Record' Constitutional Review of Federal Statutes*, 80 CORNELL L. REV. 328 (2001) (same) and Ruth Colker & James J. Brudney, *Dissing Congress* 100 MICH. L. REV. 80 (2001) (same) with Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (supportive of Court's diminished deference) and John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) (same) and John Manning, *Textualism as Non-Delegation Doctrine*, 97 COLUM. L. REV. 673 (1997) (same).

¹⁴⁶ See Choi & Gulati I, *supra* note 1, at 319-20.

CONCLUSION

Professors Choi and Gulati are surely correct to insist on the importance of merit or competence in the selection process for Supreme Court justices. They also rightly argue for a less disingenuous approach to merit-based assessment on the part of both Congress and the White House. However, their evaluative focus on the transparency and objectivity of appellate judge track records would not be an improvement on our current, admittedly imperfect, system.

The assumption that prior judicial experience should be a principal determinant of Supreme Court potential has itself been challenged by scholars of the Court.¹⁴⁷ One need not fully embrace such challenges in order to question the predictive value of this experience as measured in purely quantitative terms. Viewed in a comparative setting, the appellate court outputs of Warren Burger and Harry Blackmun are not overly enlightening with regard to the very different agenda and dynamics that confront Supreme Court justices. In addition, by dismissing politics as a major flaw in the selection process, Choi and Gulati ignore the legitimate and appropriately constraining roles played by both political branches. Finally, there are certain more qualitative factors important to the Court's effective performance as a lawmaking institution; while these may be difficult to assess on an individual candidate basis, they should not be overlooked when considering each candidate's potential to achieve greatness or to enhance the success of the Court.

¹⁴⁷ See Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 795 (1957) (concluding, upon review of the justices' careers over 167 years, that "[o]ne is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero"); Gregory A. Caldeira, *In the Mirror of the Justices: Sources of Greatness on the Supreme Court*, 10 POL. BEHAV. 247, 258 (1988) (using multivariate model to conclude, *inter alia*, that contrary to much conventional wisdom, there is no association between judicial experience and eminence as a Supreme Court justice).

Table I: Published Majorities in D.C. Circuit and Eighth Circuit

D.C. Circuit 1957-1968

Judge	Years FT Active	# Majority Ops	Average Produc. Score	Circuit Rank
Edgerton	6	82	-1.11	13
Miller	7	95	-1.17	14
Prettyman	5	99	0.39	4
Bazelon	12	220	-0.09	8
Fahy	12	227	0.26	5
Washington	8	152	0.10	6
Danaher	12	214	-0.07	7
Bastian	8	127	-0.66	10
Burger	12	254	0.63	2
Wright	6	100	-0.24	9
McGowan	5	104	0.51	3
Tamm	3	41	-0.77	11
Leventhal	3	87	1.85	1
Robinson	2	26	-0.96	12

Eighth Circuit 1960-69

Judge	Years FT Active	# Majority Ops	Average Produc. Score	Circuit Rank
Woodrough	1	14	-0.44	9
Johnsen	5	31	-1.56	12
Vogel	8	166	0.18	4
Von Oosterhout	10	255	0.76	1
Matthes	10	220	0.30	3
Blackmun	10	210	0.01	6
Ridge	4	54	-0.52	10
Mehaffy	6	136	-0.28	8
Gibson	6	120	0.07	5
Lay	3	69	-0.18	7
Heaney	3	76	0.38	2
Bright	1	24	-1.06	11

Table II: Citations Outside Own Circuit

D.C. Circuit, Majority Opinions 1963-66

Judge	# Majority Ops	Outside Circuit Cites through 5/31/69— Overall Mean	Outside Circuit Cites through 5/31/69—Top 20 Mean
Bazelon	86	3.71	10.4
Fahy	85	3.33	9.65
Danaher	66	2.03	5.7
Burger	67	6.09	16.0
Wright	65	4.88	11.1

Eighth Circuit Majority Opinions 1963-66

Judge	# Majority Ops	Outside Circuit Cites through 5/31/69— Overall Mean	Outside Circuit Cites through 5/31/69—Top 20 Mean
Vogel	90	3.41	9.85
Van Oosterhout	111	2.90	8.15
Matthes	93	2.98	7.6
Blackmun	95	5.66	16.5



Table III: Dissents/Concurrences in D.C Circuit and Eighth Circuit

D.C. Circuit 1957-68

Judge	Years FT Active	# Mjrty Ops	# Conc. Ops	# Diss. Ops	Separate Ops per FT Year	Circuit Rank
Edgerton	6	82	7	29	6.0	9
Miller	7	95	17	72	12.7	3
Prettyman	5	99	7	17	4.8	12
Bazelon	12	220	58	135	16.1	1
Fahy	12	227	40	89	10.75	5
Washington	8	152	23	30	6.6	8
Danaher	12	214	28	69	8.1	7
Bastian	8	127	5	39	5.5	10
Burger	12	254	60	70	10.8	4
Wright	6	100	42	53	15.8	2
McGowan	5	104	18	8	5.2	11
Tamm	3	41	5	21	8.7	6
Leventhal	3	87	9	5	4.7	13
Robinson	2	26	4	1	2.5	14
Total	101	1828	323	638	9.51 (mean)	

Eighth Circuit 1960-69

Judge	Years FT Active	# Mjrty Ops	# Conc. Ops	# Diss. Ops	Separate Ops per FT Year	Circuit Rank
Woodrough	1	14	0	5	5.0	2
Johnsen	5	31	1	2	0.6	10
Vogel	8	166	1	4	0.62	9
Van Oosterhout	10	255	6	10	1.6	6
Matthes	10	220	4	5	0.9	7
Blackmun	10	210	7	11	1.8	5
Ridge	4	54	0	3	0.75	8
Mehaffy	6	136	0	3	0.5	11
Gibson	6	120	0	3	0.5	11
Lay	3	69	7	10	5.7	1
Heaney	3	76	0	6	2.0	3
Bright	1	24	2	0	2.0	3
Total	67	1375	28	62	1.34 (mean)	