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Recommended Citation

78 S. CAL. L. REV. 137 (2004)

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JUDGING MERIT

PATRICK S. SHIN*

In their provocative article, Professors Choi and Gulati make various claims advocating the selection of the next Supreme Court Justice on the basis of “merit.” The ingenious statistical tournament (the “Tournament”) they have designed purports to identify a set of judges—“a merit-worthy pool”¹ of candidates, as they put it—who should be given privileged consideration for future vacancies on the Court.² Mindful that what makes a candidate “merit-worthy” is likely to be contentious, the authors claim that the Tournament embeds only “widely held notions of merit”³ and suggest that its real purpose is to assemble a slate of exemplary candidates from which we should expect the eventual nominee to be drawn, assuming a nonideological selection process. The idea is that if the president were to announce the selection of a nominee who did not appear on this slate, we would be justified in surmising, absent further explanation, that the true basis for that selection was political ideology rather than merit.⁴

My aim in this Comment is to examine the claim that the next Supreme Court Justice should be selected on the basis of merit. My primary interest is not in disputing whether the particular judges who are identified as the winners of Choi and Gulati’s Tournament are *really* the most meritorious. It is, rather, to try to understand what kind of work the idea of merit could be doing here at all. For even if we indulge the authors’ assumption that there *is* some widely shared conception of merit under which we could agree that certain candidates are more meritorious than others, there would remain the antecedent question of why we should frame

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1. Stephen Choi & Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 30 (2004).

2. *Id.* at 70.

3. *Id.* at 29.

4. *Id.* at 28–29.

the task of choosing the next Supreme Court Justice as a problem of judging merit in the first place. Thus, my central objective is not to quibble over the set of criteria that could define some widely shared idea of judicial merit but, more fundamentally, to evaluate the normative upshot of merit claims in this context. How, exactly, should we understand the objection to nominating a candidate who is generally regarded as being less meritorious than others? What is the normative significance of the charge that someone was not selected on the basis of merit? How we answer these questions will depend, of course, on what characteristics and qualities constitute judicial merit but, as I will argue, we cannot settle on criteria of merit without some prior grasp of the concept's normative implications. Even before we can decide what merit is and how it might be measured, we need to consider why merit matters.

First, in Part I of this Comment, I try to identify the claims about merit that are tacit in Choi and Gulati's article. In Part II, I analyze the concept of merit as comprising both a "descriptive" and a "normative" component. I argue that disagreements about merit are commonly centered on questions relating to what makes a person meritorious in the descriptive sense, but even if we were to stipulate a descriptive definition of merit, there would remain the further question of whether merit, so conceived, has any normative significance. In Part III, I bracket objections to the descriptive definition of merit implicit in the Tournament in order to explore the normative significance that such a conception might have. In Part IV, I conclude that the Tournament trades on a notion of merit according to which judges who best instantiate the qualities it measures are most deserving of promotion to the Supreme Court, in a specially limited sense of "desert" that I shall elaborate. Whether the Tournament can be taken seriously depends, ultimately, on whether a candidate's being deserving in this special sense has any institutional importance. This is a matter, I suggest, that Choi and Gulati leave unaddressed.

I

On a simplistic reading, Choi and Gulati's main positive conclusion is that the next appointee to the Supreme Court should be Judge Posner—or, if not him, then one of the other judges identified as the top achievers in the Tournament.⁵ The authors, however, disavow this strong thesis.⁶ At several

5. *Id.* at 69–70.

6. *See id.* at 81 (disclaiming the conclusion that Judge Posner or Judge Easterbrook should be the nominee).

points, they say that the real point of their Tournament is not to argue for the nomination of any particular judge or judges, but to provide an objective basis for debunking claims by politicians that the particular individual they favor is the best or most meritorious candidate available.⁷ The authors' emphasis on flushing out political motivations and forcing politicians to explain the actual basis for their nominations⁸ suggests that their true intention in promoting the Tournament is to achieve transparency of motivation in the nomination process, rather than to argue that the Tournament winners are the most meritorious candidates or to advocate that the next nominee actually be chosen on the basis of the criteria embedded in the Tournament.

But in order for the Tournament to be successful in doing what the authors want it to do—namely, exposing political motives masked by claims of merit and imposing a burden of justification on those who would nominate a low scorer—the pool of winners identified by the Tournament must constitute, at least presumptively, the relevant universe of meritorious candidates. Otherwise, the fact of a poor performance in the Tournament would not provide a basis for inferring that a nominee's selection was based on considerations other than merit. Furthermore, publicizing Tournament results would cause politicians seeking to nominate low scorers to see themselves as being under a special burden of justification only on the presumption that there is some valid objection to choosing a nominee on some basis other than merit (let alone the particular criteria measured by the Tournament).

Thus, despite the authors' deflationary characterization of their own central assertions, the plausibility of putting the Tournament to the use that they claim for it depends on two positive conclusions: (1) the high scorers in the Tournament are presumptively the most meritorious candidates for selection as potential Supreme Court Justices; and (2) the selection of Supreme Court Justices should be made on the basis of merit. We can characterize claim (1) as a claim about the definition of merit and who instantiates it and claim (2) as an assertion that *some* notion of merit should provide the operative principle of selection.

7. *Id.* at 27 (“Our goal with the tournament is to force politicians to come clean on their motivations . . . [by] forc[ing] them to explain how they can claim a candidate is the most qualified if she does not do well on our measures.”); *id.* at 35–36 (stating that the point of the Tournament is “to flush out ideological motivations”); *id.* at 70 (arguing that the Tournament will “reveal[] more explicit political explanations for the selection of a particular judge”).

8. *Id.* at 35–36.

It may be tempting to think that claim (1)—the authors' implicit definition of merit—is where any debate over the Tournament's significance should be joined. It may even seem strange to think of (2) as being contestable. Who would want to deny, after all, that the choice of the next Supreme Court Justice should be based on merit, under some reasonable definition? The only open problem, it may seem, is identifying the elements of merit and their best objectively quantifiable correlates. But how, exactly, are we to do this? How are we to decide on the elements of merit in the context of nominating someone to be a Supreme Court Justice? Choi and Gulati largely help themselves to the assumption that there are certain characteristics that are merit-relevant under "widely held" views of the matter.⁹ But this buck-passing move only avoids the underlying question of what reason we have to hold these views in the first place.¹⁰ It may be true that the main conceptual demarcation on which the significance of the Tournament depends—the distinction between considerations of "ideology" and considerations of merit—is not one to which most people would likely have serious objection. Choi and Gulati, for their part, are content to take this distinction as given: they freely admit that they are simply "assuming that merit and ideology are separable."¹¹ But even granting this assumption, why should making a decision on nonmerit-based considerations be objectionable? More broadly, why should we care about merit?

9. *Id.* at 27.

10. Choi and Gulati might argue that as long as performance in the Tournament is tied to notions of merit that are in fact "widely held," the Tournament can be used as a device to expose duplicitous claims of merit, whether or not those widely held notions are ultimately defensible. The argument is that if the conception of merit implicit in the Tournament is truly widely held, then politicians are presumably among those who hold it. It follows, or so the argument might go, that a politician who makes a claim of merit on behalf of a candidate who fares poorly in the Tournament is probably being disingenuous—that is, the politician is characterizing as meritorious an individual who does not satisfy the politician's own definition of merit. One obvious response to this argument is that the politician's claim might be based not on misrepresentation but simply on an alternative interpretation of the definition. The more important point, though, is that assuming the task at hand is choosing the next Supreme Court Justice (rather than evaluating the honesty of politicians), we have reason to care whether politicians are being disingenuous in claiming their candidates are meritorious only if we have reason to care about merit in the first place.

11. *Id.* at 27. On the other hand, Choi and Gulati also remark that "what one person calls ideology may be what another calls merit." *Id.* It is not entirely clear what the force of this statement is meant to be, since if the demarcation between ideology and merit were sufficiently controversial, it might be difficult to say that there was any widely held view about the separation of one from the other. I take it that the authors simply assume that there is, in fact, wide agreement about what counts as a consideration of merit versus one of ideology.

II

The last question may sound like it involves a conceptual confusion. Consider the statement “a nonmeritorious candidate should be selected to fill the position.” On one possible understanding of merit—let us call it the “weak” view—this proposition entails a contradiction. If an individual lacks merit with respect to a position, then according to this view, it necessarily follows that he or she should not be selected to occupy it, because being a nonmeritorious candidate means being a candidate whose selection would not be justified. In other words, on this view, it is just a truistic fact about merit that only those candidates who are meritorious with respect to a position can be justifiably selected to occupy it. Thus, if we care about being justified in our selections of individuals to occupy positions, then we will necessarily care about merit because caring about justifying our selections is what it means to take merit seriously.

This way of putting the matter seems, on the whole, unsatisfactory. But there is something right about it. What seems right about the weak view is that it conceives of the notion of merit as having a “built-in” normative component, such that ascribing merit to individuals with regard to a particular position necessarily implies some sort of laudatory judgment with regard to their suitability for that position. But what seems wrong about the weak view is that it defines the notion of merit-based selection in the general terms of justified decisionmaking, leaving no conceptual space between the notion of a merit-based selection and a selection that is justified, all things considered. On this view, merit just functions as a placeholder for the set of all considerations that could justify an individual’s selection for a position, and the claim that we should select on the basis of merit reduces to the platitudinous notion that we should select in accordance with our judgment as to whom we have most reason to pick, all things considered. This is perhaps not an interpretation that everyone would reject, but it is an account under which merit is a very weak concept that could not do any normative work.

A more plausible account—and certainly, one that is more concordant with the view of merit implicit in the promotion of the Tournament—is one under which merit picks out a specifiable subset of the potentially relevant considerations that could provide reasons for selection. The claim that a particular position should be filled on the basis of merit is a claim that only the considerations within that subset should be regarded as having legitimate justificatory force for purposes of the selection in question. Thus, on this account—call it the “strong” interpretation—a merit-based

selection is not constituted or expressed by a justified decisionmaking process; on the contrary, the notion of merit acts as a constraint on the requisite justification. When we say, therefore, that some individual is the most meritorious candidate, we are saying something narrower than that this individual is the one we have most reason to select, all things considered. To exhort a decisionmaker to choose someone to fill a position on the basis of merit is to commend to him or her a principle of selection that focuses on certain kinds of considerations (for example, job-related proficiencies) to the exclusion of others that might otherwise be potentially relevant (for example, pragmatic or political factors). On the strong interpretation of merit, then, making a selection on the basis of merit involves narrowing the set of considerations that can properly be regarded as reasons for favoring one individual over another.

On the weak interpretation of merit, we cannot sensibly ask why we should care about merit. But on the strong interpretation, it is a question that eventually must be asked. For if making selection decisions on the basis of merit involves narrowing the scope of our legitimate deliberations, it seems only natural to ask why we should constrain our deliberations by adopting such a narrow principle of selection, thereby limiting the range of justificatory considerations that might otherwise be available in our decisionmaking. Why not allow our decision to be determined by weighing all relevant considerations? This is the basic question of the normativity of merit.

It may help in trying to approach this question to think of the concept of merit as having two separate components, one descriptive and the other normative.¹² Thus, a claim that an individual is meritorious with respect to a particular position entails both a descriptive and a normative assertion. The descriptive assertion consists of a set of claims about facts concerning the individual's characteristics or actions.¹³ The precise content of the assertion will depend on the nature of the position in question and may sometimes be a controversial matter. But, to take a simple example, the claim that someone is a meritorious candidate for a job as a tax auditor surely implies the descriptive assertion that, among other things, the individual is familiar with the Internal Revenue Code. Similarly, the claim

12. Cf. Richard H. Fallon, Jr., *To Each According to His Ability, from None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 822 (1980) (observing that in standard definitions, "assertions of merit possess both descriptive and evaluative content").

13. I use the descriptive-normative dichotomy here only for heuristic purposes. I do not mean to deny that the descriptive content of a merit claim may itself involve evaluative or normative assumptions and claims.

that someone would be a meritorious choice for CEO of a large public corporation surely implies, among other things, that he or she has good management skills. In any case, let us refer to the main characteristics that make up the descriptive content of a merit claim with respect to a given position as the “merit base” for that position.¹⁴

The normative aspect of a merit claim regarding an individual with respect to a given position entails some kind of positive or laudatory judgment concerning that individual’s selection for the position, based on his or her possession of the characteristics that constitute the merit base for that position. The opposite assertion—that an individual does not merit being selected—implies that the individual, by lacking the characteristics that make up the relevant merit base, would not be a good choice for that position. As between two individuals, to say that one is a meritorious candidate while another is not, or that the one is more meritorious than the other, implies that there is reason to prefer the selection of the one over the other—that it would be in some sense better to select the former than the latter. Notice that this characterization of the normative component of merit is not the same as the normative force that the concept has under what I called the weak interpretation. On the weak interpretation, an individual’s merit is simply given by the justifiability of his or her selection on the basis of all relevant considerations, such that it would be contradictory to say that a nonmeritorious person should be selected. On the view I am presently offering, there is also a normative implication “built into” the concept of merit, but what is implied by a claim that someone has merit is that the person’s possession of characteristics constituting the relevant merit base gives us legitimate reason to select him or her, or it gives us legitimate reason to prefer his or her selection to that of someone who does not possess those characteristics. On this view, it is not logically contradictory (even if it might be substantively wrong) to say that a nonmeritorious person should be selected.

Many disagreements about claims of merit regarding an individual will turn on disputes involving the descriptive content of those claims. For example, there might be disagreement over whether an individual actually instantiates or better instantiates than someone else the qualities that define the relevant merit base, the descriptive aspect of merit. In the context of

14. I derive this term from Fallon. See Fallon, *supra* note 12, at 822 (discussing the idea that a claim of merit implies that an individual has certain qualities that constitute the “basis” or “bases” for the merit ascription). Fallon’s discussion in turn draws on Joel Feinberg’s analysis of the concept of desert. See JOEL FEINBERG, *Justice and Personal Desert*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 58–61 (1970).

debating the usefulness of the Tournament, examples of this kind of dispute might include challenges to the reliability or statistical significance of the various quantified factors (such as citation counts and dissent rates) that Choi and Gulati employ as indicia for quality of judicial performance.¹⁵ Such complaints might generally take the form of asserting that one or another factor that determines a judge's performance in the Tournament is not actually correlated with any of the merit-relevant characteristics that it purports to measure. This type of objection represents, at bottom, skepticism as to whether the best performers in the Tournament really do possess the characteristics that constitute the merit base for the position of Supreme Court Justice. Resolving this kind of challenge is primarily a matter of attending to whether the Tournament accurately picks out those individuals who satisfy the descriptive component of merit claims.

Other disagreements will involve somewhat deeper disputes about the specification of the characteristics that make up the relevant merit base. Such disagreements still relate to the descriptive component of merit, but they involve not only first-order questions about who possesses certain characteristics, but higher-order questions about what set of characteristics should count as the basis of merit. The Tournament in its present design implicates a conception under which the merit base with respect to Supreme Court Justices is composed of characteristics such as productivity, independence, and quality of written opinions (as proxied by reputational measures such as citation counts, "invocations," and so forth).¹⁶ A critic of the Tournament might claim that it should not be taken seriously because it simply tests for the wrong qualities. The critic might argue, for example, that one or more of the underlying characteristics that the Tournament is supposed to measure (for example, productivity) is just irrelevant to an individual's meritoriousness as a Supreme Court nominee. This type of challenge is, at bottom, an argument about how the relevant merit base—the descriptive component of merit—ought to be specified.

Arguments about the specification of the merit base for a given position (the descriptive content of merit) cannot get very far, however, without attention to the question of the normativity of the proposed (descriptive) conception. It is not as though the question of what makes a person meritorious for a particular position can be answered by measuring him or her against some universal objective standard that holds across all contexts—merit with a capital "M" as it were. Defending a particular

15. Choi & Gulati, *supra* note 1, at Part III.B and Part III.C.

16. *Id.* at Part III.B.

specification of the merit base for a position requires thinking seriously about why it should matter whether the person to be selected for the position satisfies that specific set of desiderata.

Choi and Gulati largely help themselves to the particular descriptive conception of merit on which the Tournament is based. They do this under the rubric of merely following a widely held understanding of the meaning of merit.¹⁷ This would not be particularly problematic if all that the Tournament was meant to accomplish was to provide a report of the judges who, as a matter of fact, meet the criteria that most people would regard as constituting the merit base for the position of Supreme Court Justice. But, as I suggested at the outset, taking the Tournament seriously involves a normative conclusion as well: namely, that the top performers in the Tournament make up the set of candidates from which the next appointee should be drawn, such that the nomination of someone from outside this group can be presumed to have been based on illegitimate ideological reasons. If what we want is an adequate defense of this claim, it is just question begging to say that most people hold a view of merit-based decisionmaking that precludes relying on ideological considerations. We can either assume this conception of merit as our starting point and then try to establish its normative significance, or we can assume the normativity of merit in general and then try to derive its descriptive content; but, again, if what we want is an argument as to why the Tournament should be taken seriously, we cannot assume both a particular conception of merit and its normative significance, so conceived.

III

The conception of merit implicit in the Tournament is one that focuses, not surprisingly, on the activity of judging. Choi and Gulati present the Tournament as a device for ranking currently sitting federal judges¹⁸ on the basis of the objectively quantifiable correlates of attributes that are supposed to reflect “judging skill”¹⁹ or that characterize a “good judge.”²⁰ These attributes are “productivity,” “quality of opinion writing,”

17. *Id.* at 27.

18. Choi and Gulati suggest that, in practice, the pool of potential nominees consists not of all sitting federal judges, but of all federal judges “who are not too old” and who share the president’s party affiliation. *See id.* at 32. Somewhat surprisingly, Choi and Gulati say that they have no quarrel with these preliminary screening criteria, even though they presumably have nothing to do with merit as the authors understand that term. *See id.* at 33.

19. *Id.* at 29.

20. *Id.* at 30.

and “independence from the views of one’s colleagues and political sponsors.”²¹ Thus, the rankings generated by the Tournament rely on a conception of merit under which the descriptive content of a claim that someone is meritorious consists of an assertion that the individual is productive (or, at any rate, hard-working),²² independent, and writes high-quality opinions.

There is surely room to debate whether these particular attributes are necessary or sufficient to qualify an individual as a good judge or as otherwise meritorious in the descriptive sense.²³ But let us assume that the three general attributes emphasized by Choi and Gulati do compose the merit base for judges, specifically Supreme Court Justices, so that we can get a foothold on the question of the normativity of merit. Once we can get some traction on understanding how an answer to that question might go, we will have a better sense of whether the conception of merit implied by the Tournament rankings is a sensible one.

I suggested that it is internal to the concept of merit—it is “built into” the very logic of the term—that it is in some sense *better* that a position be filled by a meritorious individual than by a nonmeritorious or less meritorious one. In other words, it follows from the meaning of merit that it is better to select someone for a position who satisfies the merit base for that position than to select someone who does not (or who does to a lesser extent). But how should we interpret this sense of “better”? What reasons do we have to prefer the selection of a (descriptively) meritorious individual over a nonmeritorious or less meritorious one?

One possible answer is that the relevant sense of “better” is a consequentialist one.²⁴ Thus, assuming that the merit base for a judge includes the attributes of productivity, independence, and skill at crafting opinions, we have reason to prefer the selection of meritorious judges over nonmeritorious ones simply because judges who are productive, independent, and write good opinions will be more likely than judges who

21. *Id.* at 42.

22. It is somewhat unclear whether Choi and Gulati understand productivity itself (measured by the quantity of published opinions, adjusted for intercircuit differences) to be a component of judicial merit, or whether they take productivity to be important only as an indirect indicator of “effort and skill.” *Id.* I lean toward reading them to mean the latter. See *id.* at 43 (speaking of their “desire to measure the willingness to exert high effort”).

23. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 143 (1983) (arguing that determinations of what constitutes “merit” will always involve a choice among the range of human qualities).

24. Cf. David Miller, *Deserving Jobs*, 42 PHIL. Q. 161, 164–65 (1992) (describing such a view and then arguing against it).

do not have these attributes to dispose of cases in ways that will produce the best outcomes for litigants, the general public, and the judicial system as a whole. Productive judges will help clear busy dockets and also (insofar as they are “hard-working”) will be most likely to give due attention to the cases before them. Independent judges will be less likely to be affected by external distorting influences and hence more likely to reach fair and efficient outcomes. And judges who are good at crafting opinions will be more likely to publish decisions that promote a correct understanding of their implications, thereby settling expectations and facilitating the resolution of future disputes.

All of this seems perfectly reasonable. But is this really the kind of reasoning that underlies the normativity of merit? If it is, then it becomes very difficult to distinguish merit-based decisionmaking from general consequentialist reasoning. Furthermore, if the normative significance of merit is reducible to the value we place on the consequences of selecting a candidate with one set of attributes over a candidate with a different set of attributes, then it becomes unclear why we should give privileged status in our deliberations to considerations of merit as such, to the exclusion of all other considerations bearing on the consequences of a particular selection. Indeed, if the reason we have to prefer the selection of a meritorious individual over the selection of a nonmeritorious one is simply that the consequences of selecting a meritorious one are likely to be better, then it would seem to follow that even if (or perhaps, especially if) we are taking merit seriously, we have reason to disregard an individual’s merit whenever it would be consequentialistically advantageous to do so.²⁵ But the whole point of insisting on making a decision on the basis of merit is to isolate the decision from broadly consequentialist considerations (for example, the political goodwill that would be generated by a particular selection, or, in a rather different context, how much money a college applicant’s parents will donate to the school). Explaining the sense in which it is “better” to choose a meritorious person in consequentialist terms seems to me to be tantamount to dissolving the notion of merit as a concept with any independent normative significance.

A different kind of answer to the question of the normativity of merit is that the reason we have to prefer the selection of meritorious individuals over nonmeritorious ones is that the meritorious candidates’ instantiation of the relevant merit base makes them better qualified, better suited for, and

25. This argument vaguely echoes a well known objection to utilitarian theories of rights. See, e.g., David Lyons, *Utility and Rights*, in *THEORIES OF RIGHTS* 110, 117–32 (Jeremy Waldron ed., 1984).

therefore more deserving of the position in question. As Michael Walzer has said, "The principle that underlies the idea of meritocracy in the minds of most of its supporters is simply this: that offices should be filled by the most qualified people because qualification is a special case of desert."²⁶ Merit, on this view, is thus what is sometimes called a "desert-entailing" concept,²⁷ and the normativity of merit is essentially, to paraphrase Walzer, a special case of the normativity of desert.²⁸ Thus, according to the desert-entailing view, the reason that it is better to award a position to a meritorious candidate over a nonmeritorious one is that the meritorious individual deserves it more. And when we say that a person deserves something more than another, we usually mean to imply that the first person has some sort of superior claim to that thing, such that it would be wrong to give it to the other.²⁹

There are several hints that Choi and Gulati do take merit to be a desert-entailing notion. For example, they characterize the question of merit as bearing on the "worthiness" of a potential nominee.³⁰ It seems natural to interpret a statement that someone is "unworthy" of a position to mean that he or she does not deserve it (and not just that selecting him or her would lead to bad consequences). The authors also use the language of "reward" in characterizing appointment to the Supreme Court.³¹ This invites thinking of the Supreme Court appointment process in terms of desert, insofar as prizes and rewards are paradigmatically things that can be said to be deserved.³² Indeed, setting up the process of selecting a meritorious nominee as a tournament, with the nomination being the prize to be claimed by the winner, all but presupposes that merit implies desert.

26. WALZER, *supra* note 23, at 135.

27. I adapt the term from Tim Scanlon, T.M. SCANLON, WHAT WE OWE TO EACH OTHER 274 (1998), who in turn borrows it from Galen Strawson, *see id.* at 400 n.14.

28. *But see* Louis Pojman, *Equality and Desert*, 72 PHILOSOPHY 549, 554–56 (1997) (defining desert as a "species" of merit). Louis Pojman's usage, however, is somewhat technical; Walzer's discussion seems to me to track better our actual usage of the terms, especially in the context of selecting people to fill offices.

29. I am here offering an explanation of what we might mean when we make a desert claim with respect to things like jobs and offices. The sense in which any such desert claim could be justified is a further question. As discussed below, it seems to me that such claims can be justified only in a purely postinstitutional or certain nonmoral sense. *See infra* note 33 and text accompanying notes 35–47.

30. Choi & Gulati, *supra* note 1, at 36 (suggesting that merit criteria be adopted "to evaluate the worthiness of a Supreme Court nominee").

31. *See id.* at 33 ("[W]e propose to predict (and reward) the candidates' performances on three relatively apolitical factors."); *id.* at 42 (arguing that the Tournament "helps determine who among the lower court judges should be rewarded").

32. *See* WALZER, *supra* note 23, at 136; Miller, *supra* note 24, at 166–69.

But the notion of an official position such as that of Supreme Court Justice being “deserved” by a specific individual or an individual with specific characteristics seems incongruous, at best. It is doubtful that there is any moral sense of desert in which someone could deserve a seat on the Supreme Court.³³ A meritorious candidate for appointment to that office is not denied anything to which he or she is morally entitled if he or she is passed over in the nomination process for a less meritorious candidate. The candidate has no moral claim of right to the position, no matter how outstanding the candidate may be.³⁴ This is not to deny that he or she or anyone else could ever rightly complain that the relevant appointment power was abused or exercised improvidently. The point is that there is no moral, prelegal, preconstitutional imperative that determines the proper application of the appointment power itself. There is no preinstitutional moral desert with respect to offices such as a position on the Court: there is no norm of desert that is conceptually antecedent to, rather than derivative of, the institutional (legal) sources of the constituted authority in which the relevant appointing power resides.³⁵

If we want to hold the view that the normativity of merit derives from its being a desert-entailing concept, then, we will have to interpret “desert” in this context as carrying something other than a moral, preinstitutional sense. The difficulty is that there does not even seem to be any institutional sense of desert under which any particular candidate could be seen as having a privileged claim to an appointment to the Supreme Court. By institutional desert, I mean the sort of desert that arises from an individual’s doing everything that some institutional system requires for the receipt of

33. Indeed, it is doubtful whether moral desert is relevant at all to questions of fair or just distributions. See Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CAL. L. REV. 965, 965–66 (2000) (noting that contemporary liberal theories of justice “attach relatively little importance to the concept of desert”). For the classic view rejecting the role of desert in determining the distribution of social goods (including offices), see JOHN RAWLS, *A THEORY OF JUSTICE* 89 (rev. ed. 1999) (arguing that we do not deserve our “native endowments” nor even the “superior character that enables us to make the effort to cultivate our abilities” and so also do not deserve in any strong moral sense the social advantages that flow from these attributes). For an opposing view, see, for example, ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 216–31 (1974); GEORGE SHER, *DESERT* 22–36 (1987).

34. This is Walzer’s view, as well. See WALZER, *supra* note 23, at 136 (arguing that “the competition for a particular office is a competition that no particular person deserves (or has a right) to win,” so that “[w]hatever an individual’s qualifications, no injustice is done to him if he isn’t chosen”).

35. As Walzer puts it, even though we commonly say that an individual deserves or does not deserve an office, strictly speaking, nobody “really deserves it.” *Id.* at 137. For a helpful discussion of the distinctions between institutional, preinstitutional (and also “pre-justicial”) desert, see Scheffler, *supra* note 33, at 978–79.

some benefit or reward.³⁶ Desert in this sense is tantamount to the legitimate expectations set up by a public system of rules.³⁷ I doubt that even the staunchest advocates of merit-based selection would claim that the appointment of a less meritorious candidate to the Supreme Court would violate any entitlement or legitimate expectation on the part of a more meritorious one under extant legal constraints on the exercise of the presidential appointment power.³⁸ As Choi and Gulati themselves concede, “there appears to be little room for an argument that the Constitution requires the president and the Senate to use [merit-relevant] standards in selecting judicial candidates.”³⁹ Thus, the normativity of merit in the context of Supreme Court appointments cannot plausibly have its source in any notion of institutional entitlement or legitimate expectation.

In a way, what Choi and Gulati are really advocating is that we should adopt standards under which the judicial candidates who were the most meritorious in the descriptive sense the authors favor would, in fact, have a legitimate expectation of at least receiving a level of consideration commensurate with their merit. Indeed, if we regard Choi and Gulati’s project as a proposal for institutional reform rather than as an empirical ranking of judicial merit (which is how the authors tend to characterize it), then it becomes clear that institutionalizing a set of standards under which certain judges would become entitled to special consideration for Supreme Court appointments is precisely what the point of the Tournament seems to be.⁴⁰ If this is right, however, the authors face something of a bootstrapping problem. Why should we want to institutionalize a set of standards under which the particular attributes that lead to success in the Tournament generate claims of desert-entailing merit? We cannot simply assume at this point, as the authors do, that individuals with these attributes are meritorious in a desert-entailing sense, since there is no preinstitutional

36. See RAWLS, *supra* note 33, at 88–89; T.M. Scanlon, *The Significance of Choice*, in EQUAL FREEDOM 73, 76–77 (Stephen Darwall ed., 1995).

37. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 72–73, 77–79 (Erin Kelly ed., 2001).

38. For example, there were many who believed that Judge Robert Bork was an extremely meritorious nominee. Yet, even those who most lamented the rejection of his nomination described the episode as a “tragedy,” rather than as a violation of law or of entitlement. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988).

39. Choi & Gulati, *supra* note 1, at 38. See *id.* at 27 & n.7 (citing Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 627–31 (2003); *id.* at 37 & n.26 (citing Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL’Y 467 (1998)); John S. Baker, Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177, 178 (2001).

40. For a general discussion of the way in which contests and other conventional structures give rise to claims of desert, see SHER, *supra* note 33, at 115–19.

moral desert with regard to offices, and institutional desert is what the adoption of the Tournament is supposed to set up; and whether the Tournament should be adopted is exactly what is at issue. In simpler terms, if the conclusion the authors want to establish is that we should adopt a set of evaluative standards under which judges like Judge Posner would be the most deserving of a Supreme Court nomination, they cannot simply assume the normative significance of a conception of merit under which Judge Posner and judges like him are already the most deserving; the normative significance of that conception is the very conclusion to be established.

IV

What, then, is the normative significance of the descriptive conception of merit embedded in the Tournament? The answer that seems most consonant with the idea and design of the Tournament draws on a notion of desert that is neither preinstitutional nor expressed in the terms of entitlement or expectation. It is a sense of desert that comes up commonly in the evaluative judgments we make about individual performances in certain kinds of competitive athletics. Rawls illustrates the notion in this way:

[A]fter a game one often says that the losing side deserved to win. Here one does not mean that the victors are not entitled to claim the championship, or whatever spoils go to the winner. One means instead that the losing team displayed to a higher degree the skills and qualities that the game calls forth, and the exercise of which gives the sport its appeal.⁴¹

Rawls characterizes this idea of desert as “non-moral,”⁴² but this is potentially misleading.⁴³ This idea of desert may not be tied to morality in the narrow sense of judgments of right and wrong or what is permissible and impermissible,⁴⁴ but it is morally laden in the broader sense that it implicates judgments about what we have reason to value in connection with certain kinds of activities. When we say that someone who comes up short in a contest or competition deserved to win more than the actual victor, we are making the judgment that the loser has a greater claim to

41. RAWLS, *supra* note 33, at 276. For a similar discussion, see FEINBERG, *supra* note 14, at 64.

42. RAWLS, *supra* note 33, at 276.

43. In characterizing this idea of desert as nonmoral, Rawls probably means simply that an individual's being deserving in this sense does not depend on his or her moral virtue or worth. See Scheffler, *supra* note 33, at 976.

44. Cf. Stephen Darwall, *Valuing Activity*, 16 SOC. PHIL. & POL'Y 176, 179 (1999) (suggesting that merit notions are connected with ideals, such as ideals of activity, rather than to theories of moral right and wrong).

praise, admiration, or recognition for the qualities and virtues of his or her performance, even though he or she has no entitlement—no claim of institutional desert—to the prize awarded to the victor under the rules of the competition. A judgment of this sort is an expression of what we have reason to value in the performance of someone who participates in the activity, assuming that we value the activity itself.

I think a similar idea of desert can be applied in institutional contexts, such as where the analog to the competitive victory is a job or an office. For example, we might say that a particular unsuccessful applicant for some desirable job really deserved to be hired over the person who actually was hired. In such a case, we do not usually mean that the person who was actually hired is not entitled to take the job, or was impermissibly selected. Rather, we might typically mean that the rejected candidate better exemplified the virtues, talents, and excellences of performing the job and could have been expected to continue to do so if actually hired. The applicant would have been, we might say, a credit to the job.

It is this sense of desert that I believe accounts for the normative significance of the conception of merit embedded in the Tournament. The claim that Judge Posner is the most meritorious candidate for appointment to the Supreme Court implies that in virtue of his possessing the attributes that compose the relevant merit base, he most deserves the appointment. He can be said to deserve it not in the sense of being morally or legally entitled to it, but in the nonmoral sense that he best exemplifies the virtues, capabilities, and excellences of a Supreme Court Justice and would continue to do so if he were appointed.⁴⁵ He would be, we might say, a credit to the office.

More generally, in contexts where there is no existing institutional rule structure that sets up entitlements or definite expectations, selecting someone for a position or office on the basis of merit means selecting in accordance with this nonmoral sense of desert—that is, governing one's decision by a principle of selection that focuses on which candidate best exemplifies the virtues and excellences of the position in question. The objection that a particular selection was not decided on the basis of merit amounts to the claim that the person selected was chosen on some basis that did not give due regard to these virtues and excellences. The “wrong”

45. This account of merit is similar to one of the possible conceptions described by Richard Fallon. See Fallon, *supra* note 12, at 826 (describing the view of “merit as possession of precisely those qualities of excellence needed to perform a functionally defined task”). See also Darwall, *supra* note 44, at 178 (proposing that merit be understood as a “kind of value . . . that persons and actions have in being worthy of admiration or emulation”).

committed by disregarding merit in this sense is not a moral wrongdoing of the meritorious individual, but a kind of failure to respect the institution, insofar as valuing the excellences and virtues of officeholders is important from an institutional perspective. The objection to nonmerit-based selection is, in essence, an objection from institutional integrity.

An important consequence of this view is that the normativity of merit has its source in the values of the relevant institution. This means that the objection to nonmeritorious selection will not have force if the mode of evaluating potential officeholders that I have been describing is not required by a commitment to the institution itself. Walzer provides a useful example that illustrates this possibility:

X is the most qualified candidate for a hospital directorship in the sense that he possesses to a greater degree than anyone else those managerial talents commonly agreed to be required in the office. But a group of men and women who want to turn the hospital in a certain direction persuade their fellows on the selection committee to choose Y, who shares their commitment.⁴⁶

On the view of merit I have been describing, we can say of this case that X is the more meritorious candidate, with the normative force of that assertion amounting to some claim about X's deserving the directorship more than Y in a nonmoral sense. The hospital committee itself may agree about X's impressive merit. Still, it chooses to act on a different consideration. It chooses to override any desert-entailing claim of merit that X might have in favor of realizing its commitment to "turn the hospital in a certain direction." The choice expresses the committee's judgment that having a director who will effectuate the desired policy change is more important to the hospital than having a director who most excels as a director under some policy-blind mode of evaluation. The committee's selection of Y gives effect to a decision that is, in a sense, not merit-based; yet so long as the policy change is an institutionally valid goal, the selection of Y is presumably still justifiable on the basis of legitimate considerations. Giving decisive effect to claims of merit may simply not be required as a matter of institutional integrity.

And so it seems to be in the context of choosing Supreme Court Justices. The Tournament embodies a conception of judicial merit that seems plausible enough, whether or not it is as widely held as Choi and

46. WALZER, *supra* note 23, at 137. Walzer's point in describing this case is that whether or not the committee is right about the direction in which they want to take the hospital, "they have not treated X unfairly" by not choosing him. *Id.*

Gulati assume. But it does not follow that we should institutionalize it as the primary mechanism of selection. We might be inclined to agree that the top performers in the Tournament are in fact the most meritorious candidates in the sense that these judges, in virtue of the degree to which they demonstrate the virtues of productivity, diligence, independence, and skill in opinion writing, are truly deserving of consideration as candidates for a Supreme Court appointment—that is, that they exhibit certain qualities and excellences of a Supreme Court Justice. But, despite all this, we might nevertheless have significant reservations about giving institutional effect to the Tournament as a device for identifying the next presumptive nominee. The Tournament rewards the instantiation of judicial excellence, understood from the viewpoint of a sort of clinically detached professionalism that values a judge's industry and competence in the craft over matters relating to substantive views or philosophical outlook. The argument that the Tournament should be taken seriously as a selection mechanism depends on the judgment that judicial excellence conceived in this way is institutionally the most important consideration in deciding who should sit on the Supreme Court. But is it?

Even Choi and Gulati do not seem to think that judicial excellence in the purely content-blind sense tested by the Tournament is the only thing that matters. As they say, we might not want to accept the results of the Tournament if it turned out that the top performers were “too ideological or plain crazy.”⁴⁷ But even beyond caring that our Supreme Court Justices not be “crazy” in their substantive views, it is not obvious to me that we have good, institutionally legitimate reasons to structure our selection deliberations to subordinate all considerations of the substance of a candidate's views (on the Constitution and other matters of legal and philosophical outlook) to considerations of the candidate's technical competence and proficiency in the judicial craft. As Choi and Gulati characterize their project, they seek an empirical method for identifying who is the “best or most influential” judge today.⁴⁸ But the “best judge”—the most meritorious judge—by the lights of the Tournament may not necessarily be the best person for the job.⁴⁹ Even if we recognize the

47. Choi & Gulati, *supra* note 1, at 81.

48. *Id.* at 32.

49. In their account of the Clarence Thomas nomination, Jane Mayer and Jill Abramson report that at the press appearance immediately following the nomination's announcement, President Bush was to have read a speech in which Thomas was described as the “best man” for the position. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 20 (1994). Instead, in responding to reporters' questions, the President stated that Thomas was “the best qualified” person for the position. *Id.* Although Mayer and Abramson's claim that this misstatement (if it really

Tournament winners as deserving of our praise and admiration, we may—like the hospital committee in Walzer’s hypothetical case—choose to place a higher priority on a different set of institutional values or objectives. The claim that a merit-based selection principle should be given primacy requires showing that we would not be justified in such a choice.

Some meritocrats might at this juncture say that, really, all I am claiming is that the conception of merit implicit in the Tournament may simply be too narrow in its descriptive content, and that judicial merit could be defined to include considerations relating to the substantive content of candidates’ writings and general views. That may be so.⁵⁰ My point, however, as it pertains to the significance of the Tournament, has not been primarily about what should be included in the definition of merit. It is, rather, that whatever our favored conception of merit in a particular institutional context, its normative significance depends on our being able to justify its importance, to show that we have reason to care about it, given the broader values and principles that define our commitment to the institution itself. The question of how we should select our Supreme Court Justices cannot be answered without addressing the question of what we have legitimate reason to want from the Court as an institution. Whether what should matter most is that the Justices maximally embody the virtues and excellences tested by the Tournament is a substantive judgment that must be made and justified before we can decide whether to take it

was one) “inadvertently raised the bar for Thomas’s appearance before the Judiciary Committee,” *id.* at 21, may be exaggerated, their suggestion that one could have accepted Thomas was the “best man” for the job without necessarily believing he was the “best qualified” (or vice versa) is essentially the point I am making.

50. It has been helpfully suggested to me that there are two different ways in which judicial merit could be thought to encompass the substantive content of a judge’s views. One way would involve understanding the substantive soundness of a judge’s views on various matters as an analytic condition of that judge’s meritoriousness, such that it would be impossible to conclude that a judge was a meritorious candidate without evaluating the content of the judge’s views. On this sort of account, it is doubtful that there could be any widely held definition of merit that crossed political and ideological lines, for all disputes about the defensibility of a candidate’s substantive views or ideology would become disputes about the candidate’s merit. A second way would involve treating the substantive soundness of a judge’s views as evidence of the judge’s skill and competence as a judge. On this kind of account, merit could still be defined in terms of the same nominal criteria as those identified by Choi and Gulati, but whether a judge satisfied the criteria would be informed by an evaluation of the substantive content of the judge’s writings. There would, of course, be sharp disagreement about how to understand the evidential relation between the holding of a particular substantive view and judicial competence, which would in turn drive substantial disagreement about who instantiates merit. What is clear, in any event, is that any attempt to bolster the normative significance of merit by redefining it to encompass considerations of judges’ substantive views would have negative implications for the usefulness of the Tournament.

seriously. It is certainly not a conclusion that the Tournament itself can deliver.