

JUST BECAUSE YOU CAN MEASURE SOMETHING, DOES IT REALLY COUNT?

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I am pleased to have an opportunity to comment on *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges* by Professor Stephen J. Choi, Professor Mitu Gulati, and Professor Eric A. Posner.¹ In this day in which computer models are used to analyze so many aspects of American society, and in which statistical analysis is so often turned to as a substitute for individual or subjective analysis, it is not surprising that scholars may be interested in determining whether one could apply similar measurement models to other arenas as well, including the work of the courts.

Such empirical research can be of value in certain areas involving the courts. Missouri uses such analyses, for instance, to help compare how many cases are filed in one part of the state versus another, whether the numbers of certain types of cases rise or fall, the length of sentence relative to different geographic areas and recidivism rates, the cost and benefit of incarceration versus assignment of offenders to drug or other problem-solving court programs, and similar uses.

It is less clear that empirical methods can be usefully applied to areas of the law that are, if undertaken properly, intended to be subjective and to involve complex judgments or that are supervisory or educational in nature. Such is my and other judges' concern with the authors' attempt to examine the quality and industriousness of various state supreme courts by attempting to measure their productivity, influence, and political independence based on a quantitative analysis of the number of opinions handed down, the number of out-of-state citations to those opinions, and the degree of political independence of court members as measured by number of

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1. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313 (2009).

dissents written. The quantitative measures chosen seem to be unrelated to the qualitative inferences the authors derive from them.

I can understand why, in the academic arena, methods that measure the number of articles written and how often they are cited could be a useful part of evaluating the quality or stature of a professor.² In fact, I wrote an article in 2004 that was cited in a United States Supreme Court decision, *Danforth v. Minnesota*,³ on why it is not improper for states to apply different standards in determining their habeas jurisdiction than are applied by federal courts, which are limited by principles of federalism.⁴ I was delighted by the citation, and felt it added to my article's stature.

But that is not how or why I write my opinions as a judge, nor, in my estimation, should it be. On a fundamental level, I reject the attempt to quantify the work of courts by placing courts on a grid, with each box standing for a measure such as number of opinions, citations, dissents, motions ruled, rules adopted, and so forth. The authors themselves note that similar attempts at using studies of objective output to measure subjective quality since the early 1900s have been sporadic and have not developed into a consistent school of study.⁵

I would suggest that this approach does nothing beyond providing an accurate measure of those things it sets out to quantify. No matter how much one breaks down the criteria used as measures, those criteria still miss the essence of judging. By their nature these criteria can measure only what they are set up to measure.

By way of a perhaps somewhat controversial example, I would analogize to the Federal Sentencing Guidelines. However many new boxes the Guidelines create for different facts, and however useful they are as part of the larger dynamic of making good sentencing policy, they are still just boxes, and judges find that although

2. Although, I would suggest, the value of what is contained in the articles, whether it is a piece of serious scholarship or just plays to currently popular but passing legal fads, whether the professor can teach, both measured by popularity and by student learning, and so forth, are equally important measures.

3. *Danforth v. Minnesota*, 128 S. Ct. 1029, 1039 n.14 (2008).

4. Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 449 (2004).

5. Choi et al., *supra* note 1, at 1329–31 (recognizing that, even with the popularity of ranking systems—specifically the Chamber of Commerce rankings—there are only five academic studies that attempt to rank the state high courts).

measures help, they cannot replace the ultimate, unquantifiable measure—judgment.⁶

How then could the three criteria the authors propose to use (or double that number) accurately judge the quality of justice provided in our state supreme courts? Sections I, II and III analyze these three criteria—productivity, influence, and political independence, as measured, respectively, by the number of opinions issued per year, the number of times those opinions are cited by other state or federal courts, and the number of times a judge dissents from opinions written by a judge of the same party. Section IV then offers a broader commentary on the work of state supreme courts. I conclude that those measures do not, in turn, provide useful indicia of judicial quality or even competence, particularly when the court being measured is a state supreme court.

I. NUMBER OF CITATIONS AS A MEASURE OF QUALITY OF JUDGMENT

The first criterion of a good court, the authors suggest, is productivity, as measured by the number of opinions written by each court on average.⁷ The authors say that they chose this criterion based on an underlying assumption that, “all else being equal, a judge who publishes more opinions is better than a judge who publishes fewer opinions.”⁸ They also assume that state high courts that publish few opinions risk allowing inconsistency to arise in opinions written by the lower courts.⁹

The paper suggests that state supreme court judges write an average of a little more than twenty opinions per judge per year,¹⁰ and that those who write fewer than that number, basically, need to just work harder so they can be as successful as their more prolific counterparts.

6. See KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 82 (1998) (“The Guidelines have replaced the traditional judicial role of deliberation and moral judgment . . . with complex quantitative calculations that convey the impression of scientific precision and objectivity.”).

7. Choi et al., *supra* note 1, at 1320 (“‘Productivity’ refers to the number of opinions a judge publishes in a year.”).

8. *Id.*

9. See *id.* at 1321 (“[A] judge who publishes an opinion shares her reasoning with . . . other judges who seek to understand the resolution of the dispute.”).

10. *Id.* (“[T]he median state was Kansas (23.0 opinions per judge per year).”; *id.* at 1338–40 tbl.4 (showing the number of citations/judge/year for all 52 “states”).

I would suggest that numbers are not a valid measure of judicial competence or even of judicial work ethic. As I am most familiar with Missouri's judiciary, I will use it as an example. I was not a supreme court judge during the 1998–2001 period analyzed by the authors, but I was a Missouri court of appeals judge from October 1994 until February 2001. During that time, I wrote approximately 275 published opinions and 125 unpublished ones, averaging between sixty-five and seventy-five opinions per year, in addition to handling hundreds of writs each year that were denied without opinion. Since I joined the Supreme Court in 2001, I have probably authored an average of fifteen opinions or fewer per year. Did I go from being a great judge to being a lazy judge? Do I just need to write more opinions to become a great judge so I am pulling my share of the load and so I can better police and correct inconsistencies in intermediate appellate decisions?

The short answer to both questions is no. In the 1960s and early 1970s, Missouri did not have a unified court system, had only a small intermediate appellate court and supreme court judges averaged forty to fifty published decisions each year. But, as Missouri unified the court system and the court took on a larger supervisory role as head of Missouri's court system, the court's philosophy changed from taking any case that might theoretically be a useful subject of supreme court opinion, to limiting its consideration to those areas on which it had not yet or recently spoken, or as to which the court of appeals or trial courts or lawyers seemed to evidence confusion and a need for guidance.

Missouri also rejected the model, perhaps still popular in some other jurisdictions, of taking larger numbers of cases than necessary on transfer—what others would call granting certiorari—and then for the most part adopting the court of appeals' very accurate reasoning so that the decision would be one from the supreme court. While this certainly would increase supreme court decision statistics, Missouri believes it is more efficient, and leads to better decisionmaking, to allow court of appeals judges to know that, even in an important area of law, if they correctly understand, explicate and apply the law, their opinion will be the one to be published.¹¹

11. If the Missouri Supreme Court takes transfer of a case, it hears the case as if on original appeal, MO. CONST. art. V, § 10. This historically always meant the court of appeals opinion drops out of the case and is not officially published nor can it be cited. *State v. Norman*, 380 S.W.2d 406, 407 (Mo. 1964) (“We shall determine the cause as on [of an] original appeal.

This approach also allows the court to give more attention to its supervisory role, through which it studies and adopts consistent rules for our trial and appellate courts, has developed a judicial education system that is the envy of most of our sister courts, ensures that the quality of justice does not vary from area to area in our state, and assures that rulings of its intermediate appellate courts are not inconsistent with each other or with decisions of the supreme court. It may also assure that issues of first impression or requiring clarification are transferred to the supreme court for decision.

How does the Missouri Supreme Court accomplish these goals if it actually takes transfer of only a relatively small number of cases each year?¹² Its judges, I estimate, spend one-third to one-half of their time deciding which cases to take as they consider requests by the parties for further review of court of appeals decisions to determine whether they are correct and are *not* inconsistent with each other or with prior supreme court cases. Each such request (as well as each petition for writ filed in the Missouri Supreme Court) is assigned to a particular supreme court judge's office for preparation of a memorandum addressing whether a conflict exists, whether an issue of first impression is presented, and whether a trial court has acted beyond its authority. The supreme court as a whole decides some 600 or 700 writ or transfer motions each year, with each judge's office preparing a memorandum on one-seventh of this number to be shared with the other judges' offices. The court grants review of perhaps 15 percent of these cases, and discusses, but ultimately denies review to, another 10 to 20 percent of them.

It would be a simple matter to double the number of these transfer cases that the court takes and, with little additional work, to use the transfer memorandum as the basis for an opinion of the supreme court rather than leaving the court of appeals' opinion in place. This technique would increase our ranking in the authors' system. But I suggest that this approach would not usually be a good or even efficient use of limited state resources. I know that, as a court of appeals judge, I took great care in my work and undertook

Section 10, Article V, Constitution of Missouri 1945, V.A.M.S. By reason of the order transferring the cause to this Court, the opinion and decision of the St. Louis Court of Appeals was necessarily vacated and set aside and may referred to as *functus officio*.”)

12. The court initially transfers more cases than result in opinions because, if the briefing in a case reveals that the issues involved have not been preserved or do not in fact require a decision on the issues raised in the transfer application, the court may, under its rules, retransfer the case to the appellate court. MO. SUP. CT. R. 83.09.

difficult, scholarly analyses. I knew that if I did, my opinion would remain the final, published opinion on the matter; the work would have been wasted—and the time it took wasteful—if I knew there were a good chance that the supreme court would substitute its opinion for mine on the cases involving the most difficult issues. Instead, I was able to take pride that, in over six years of work, less than half a dozen cases were ever transferred to the supreme court, and most of those adopted my reasoning. This is not the only way a supreme court can review the work of its intermediate courts. But I suggest it is a good one that works for Missouri much as it does for the United States Supreme Court. The “publish or perish” syndrome is decried in academia, so why import it to judicial evaluation, especially when applied in bulk?

Nonetheless, if the type of numbers game advocated for by the authors comes into vogue, so that quantity rather than quality forms the basis of judge evaluation, Missouri and other state supreme courts like it will be forced to change how they work to play to the numbers. They will decide whether to hand down more cases not because more guidance is needed, but because by doing so they will do better in empirical ratings. This trend would be much like the often-criticized practice of undergraduate and law schools in skewing their admissions criteria and how they measure their resources and outcomes to emphasize those factors included in *U.S. News & World Report* ratings, instead of those they think help them select the best students.¹³

II. NUMBER OF CITATIONS BY OTHER COURTS AS A MEASURE OF JUDICIAL QUALITY

The second criterion the authors use to measure judicial quality is the number of citations to the court’s opinions by other state or federal courts.¹⁴ The larger the number, they suggest, the more influential the state’s courts must be, and therefore, the better they must be. Otherwise why be influenced by them?¹⁵

13. See, e.g., Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 312 (2006) (“Given the near-perfect correlation between the median LSAT score and the school’s ranking, a school may raise its median LSAT score and presumably ranking by rejecting students with lower LSAT scores.”).

14. Choi et al., *supra* note 1, at 1321 (“We measure opinion quality by using a proxy: the number of times that out-of-state courts cited the opinion.”).

15. *Id.* at 1322 (“[O]ut-of-state citations are also a (more) direct measure of out-of-state influence.”).

What does the number of citations measure?¹⁶ Of course, in part, it measures quantity, as did the first measure—the more opinions a judge writes, the more there are to be cited. As the authors also note, however, it is unlikely that other jurisdictions will cite just any opinion by a state supreme court.¹⁷ Rather, they are likely to cite opinions resolving issues that were either unresolved or differently resolved by their own court. This leads the authors to conclude that it must be better scholarship that leads to some courts being cited more than others.¹⁸ The authors find it curious, therefore, that other groups that rate courts tend to come to different conclusions regarding what constitutes good reasoning or scholarship.¹⁹

I do think that an extraordinary number of citations to a particular state's cases—nearly all studies show that California's decisions are cited more than those of any other state, for example²⁰—does indicate that other states look to that particular state's reasoning on issues. It is not because other courts believe that California's fine state judges reason better or make better decisions, however. Rather, the number of out-of-state citations largely measures a characteristic other than the intrinsic worth of the opinions; it measures which state courts take the lead in addressing new and developing areas of the law.

California quite often fits that mold. This is in part because of its size: Issues tend to arise there more often than they would in a smaller state in which a smaller number of cases are filed. And it is partly because, at least in the estimation of many judges of other states, California is looked at as being “friendly” to new and novel theories. So, if a Missouri judge wondered what new types of cases are likely to be filed in the next half a dozen years, or to estimate what new theories may be adopted in the tort field—in other words, what will be the new lead paint or class action or novel product

16. So far as I can determine from the article, I believe only two members of the 2009 Missouri Supreme Court were members at the time that the study of citations was made, so I believe I can be relatively neutral in my analysis of this measure.

17. Choi et al., *supra* note 1, at 1322 (“We assume that a high-quality opinion is more likely to be useful for out-of-state courts and therefore is more likely to be cited.”).

18. *Id.*

19. *Id.* at 1340–41 & tbl.5 (contrasting the citation counts of the Choi, Gulati, and Posner study with other contemporary studies).

20. *E.g., id.* at 1340 tbl.5; see also Jake Dear & Edward W. Jessen, “Followed Rates” and *Leading State Cases*, 41 U.C. DAVIS L. REV. 683, 710 (2007) (“Our preliminary results show that over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues.”).

liability theories that other courts around the country will find themselves faced with in the next four or five years—California is the first jurisdiction where they would look. It is indeed a bellwether state in that regard.

This is an important role, and California's decisions can properly be seen as leaders in certain fields as a result. But whether this characteristic makes it a great court, a terrible court, or just a pilot court for new ideas, depends on who is doing the judging. In many areas of the country, including Missouri, stability rather than change or adoption of new theories of recovery is usually more positively valued; the latter may be considered a matter more properly reserved to the other, elected branches of government by such groups as the U.S. Chamber of Commerce.²¹ The point is not that either perspective is the correct one. Rather the point is that which perspective one takes is a subjective judgment based on views of the proper role of the judicial branch of government; neither is an intrinsic part of being a good—or bad—judge.

That does not mean Missouri and other more cautious states do not write leading opinions that have long-lasting jurisprudential value. The original 1990 right-to-die case, *Cruzan v. Director, Missouri Department of Health*,²² came out of Missouri, as did *Planned Parenthood of Central Missouri v Danforth*.²³ In 2003, I authored the state supreme court opinion in the juvenile death penalty case in which the United States Supreme Court held it violated the United States Constitution to execute someone who was under age eighteen when they committed a murder.²⁴

But the Missouri Supreme Court did not decide these cases so it could get cited; the Missouri Supreme court decides cases as it believes the law requires, neither looking for nor shying away from the limelight of citation by others.

As a final comment on this issue, I would at least raise a question as to whether it is “better” to decide a case based on federal law or on

21. See Choi et al., *supra* note 1, at 1355 (“[T]he Chamber of Commerce is hardly a neutral organization; it is a lobbying group that even becomes involved in individual elections, spending large sums attacking and supporting different candidates.” (citing Nina Totenberg, *Report: Spending on Judicial Elections Soaring*, NAT'L PUB. RADIO, May 18, 2008, <http://www.npr.org/templates/story/story.php?storyId=10253213>)).

22. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

23. *Planned Parenthood of Cent. Mo. v Danforth*, 428 U.S. 52 (1976).

24. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003) (en banc), *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551 (2005).

some other basis that necessarily has a direct relevance to how another state may decide a similar issue. In particular, I want to mention that state courts like Missouri often prefer to decide cases based on their own state law rather than federal law. This preference may be related to an increasing belief by many states that their own constitutions have for too long been considered as poor cousins of the U.S. Constitution. In fact, additional rules or protections set out in those state constitutions are seen as reflecting state values that should be independently reviewed and, when appropriate, made the basis of decision in state supreme court decisions.

Two Missouri Supreme Court cases provide a great example of this distinction. Missouri's decision in the juvenile death penalty case, *State ex rel. Simmons v. Roper*,²⁵ relied on federal constitutional law and was cited and used as the basis for mock arguments throughout the United States for the next year or so, until the United States Supreme Court issued its decision in the case in 2005. By contrast, in 2006, the Missouri Supreme Court struck down Missouri's voter photo ID law in *Weinschenk v. State*²⁶ on the basis that the law violated Missouri's state constitution, which provides special protections to the right to vote once a person is validly registered.²⁷ Because *Weinschenk* is based on Missouri's state constitution, it has had less influence, as measured by citations by other states, than did similar decisions by courts in Georgia and Indiana.²⁸ But, on the other hand, it still stands as the law of Missouri, unlike the cases decided under federal law, which were effectively overruled by the United States Supreme Court.²⁹ I would argue that Missouri's opinion will have the more lasting influence, as it still governs who may vote in Missouri.

25. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003) (en banc), *aff'd sub nom. Roper v. Simmons*, 543 U.S. 551 (2005).

26. *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006) (en banc).

27. *Id.* at 204 (citing MO. CONST. art. I, § 25, art. VIII, § 2).

28. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *Common Cause/Georgia v. Billups*, No. 07-14664, 2009 U.S. App. LEXIS 593 (11th Cir. Jan. 14, 2009).

29. Missouri's case also had a much more fully developed record in which both local and state election officials, official records, and a number of individual disenfranchised voters testified as to interference of the law with their ability to vote due to their inability to reasonably obtain the very limited types of photo IDs permitted. *Compare Weinschenk*, 203 S.W.3d at 209 (describing affidavits averring that specific plaintiffs had their right to vote burdened by the Missouri Voter ID law), *with Crawford*, 128 S. Ct. at 1622–23 (describing the “limited evidence” in the federal challenge to the Indiana voter ID law that anyone in Indiana had actually had their right to vote unduly burdened).

III. JUDICIAL INDEPENDENCE AS MEASURED BY DISSENTING OPINIONS

Finally, the authors suggest that a measure of a state supreme court's political independence can be obtained by tallying up the number of times a judge of a particular party dissents from an opinion written by a judge of that same party.³⁰ Respectfully, this approach does not give sufficient deference to the other, far more real differences that are much more often the basis for these dissents. Neither does it measure what may be a truer indicator of lack of partisanship, and certainly is a truer indicator of a better court: the number of times that judges of different parties or appointed by governors of different parties vote together.

Judges in Missouri are appointed under a nonpartisan court plan—the Missouri Plan, as it has come to be known throughout much of the country.³¹ The three finalists for a vacancy are nominated based on merit by a merit selection commission.³² The governor then selects one of the three, and that person then must stand for a retention election before he or she begins a term as an appellate or supreme court judge.³³ A similar process is used in Missouri's largest urban areas;³⁴ in the smaller communities, where judges can run for office without seeking large campaign contributions and where their reputations are a matter of personal knowledge for the voters, judges are still elected.³⁵ Once these judges are on a court, though, few lawyers would be able to determine their prior political affiliation, and those chosen under merit selection are affirmatively nonpartisan.

Of course, the executive and legislative branches of state and federal government are often dominated by party affiliation, and a vote that is not in line with the party's position is looked at with disfavor. Judges are not in a political branch of government, however, or at least they are not supposed to be. A bill may have been adopted

30. Choi et al., *supra* note 1, at 1323–24 (“Our measure gives a judge a high score if he is more likely to vote with opposite-party judges and a low score if he is more likely to vote with same-party judges.”).

31. Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 637 (2009).

32. MO. CONST. art. V, § 25(a).

33. *Id.* § 25(c)(1).

34. *Id.* § 25(a) (making the nonpartisan plan applicable to the “city of St. Louis and Jackson County”).

35. *Id.* § 25(b) (allowing “any judicial circuit outside of the city of St. Louis and Jackson county . . . to discontinue [the Section 25(a)] plan”).

by a Republican majority, or by a Democratic majority, but once it becomes law, there is only one way of reading it: as it was written. If a judge thinks there is a Republican way of interpreting a statute that is different from a Democratic way of doing so, then that individual should not be a judge. Reporters, public officials, and political pundits nevertheless try to overlay a political gloss on decisions that simply does not exist in the eyes of the judges themselves.

I suspect that, if it were possible to do a true empirical study, one would find that differences in voting most often reflect different approaches to the law not based on political party but on other life experiences that affect the judge's general approach to issues. These life experiences may include living in a small town as opposed to a big city or a rural area, or experience in a small, general-practice firm versus a big firm or insurance defense firm, or because of religious or other cultural differences.³⁶ But more importantly, even were political party a determinant—and I have never heard it expressed as such—it would be impossible to tease out and separate from all of these other factors.

A better barometer of independence from all of these influences, social or political, would be to look at how often the judges of a court *agree*. In a time when all or most members of a court came from the same social strata and party, this would not have been as effective a measure, for there simply would not have been differences in background worth noting. But, in the twenty-first century, most courts are made up of persons from very different party, practice, and social backgrounds. If they are nonetheless able to overcome these differences, and agree the vast majority of times, and if, even when there are dissenting opinions, persons of different parties are on the *same* side, then it is a true indicator of a willingness to set aside one's personal views and rule based on the law as adopted by the legislature or the people.

Equally importantly, most judges would say that the ability to draw together judges of different backgrounds and help them reach consensus is the mark of a good court, for lawyers, trial judges, and the public want the law to be clear and consistent. They want to know it will not vary depending on what party is in power or which part of

36. See, e.g., Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 app. at 961–65 (2003) (outlining twenty-two studies analyzing the effects of various prior career experiences on judicial decisionmaking).

the state the newest judge calls home. They want to know that the law is the same for all people. And that is what consensus, not dissenting opinions, measures. A statute is a statute is a statute, and if courts are doing their jobs correctly, all or almost all judges of a court will interpret it in the same way unless it is ambiguous, even if it is viewed as controversial or is supported by those in one party but not in another.

IV. AN ALTERNATIVE, NONQUANTIFIABLE MODEL OF THE ROLE OF STATE SUPREME COURTS

If one cannot measure the worth of a state supreme court by tallying cases or citations or dissents, then can one do so at all? That is a question only time will answer, but I can suggest that an important part of that answer would require a more complete understanding and consideration of the role of a state supreme court in our justice system.

One does not judge a state legislature by the number of bills passed or how often those bills are copied by other legislatures, just as one does not judge a governor by how many executive orders are signed or how many regulations executive agencies issue. And it is particularly unwise to judge the performance of these branches of government in a vacuum without knowing what economic, social, cultural, or natural problems that state strives to overcome. So too, measuring a court's worth by tallying the number rather than the quality of limited aspects of its work says little about how well it fulfills its role as the head of the justice system for the state.

In this regard, allow me to quote a comment made by Duke Law School's own Dean David Levi in an address to the Albuquerque Bar Association discussing the differences between his former role as Chief Judge of the United States District Court for the Eastern District of California and his current role as a law school dean. Dean Levi noted that, in his role as judge, only limited leadership opportunities existed, even though he was chief judge of the busiest federal district court, because he was occupied managing cases and dockets.³⁷ By contrast, in his role as dean he has learned that law schools thrive on leadership:

37. David F. Levi, Dean, Duke Univ. Sch. of Law, *From Judge to Dean: Reflections on the Bench and the Academy*, Address to the Albuquerque Bar Association (May 1, 2008) (transcript at 4, on file with the *Duke Law Journal*).

As dean I am expected to think about the future of the legal profession and legal education, and I am expected to lead the Duke Law School community so that we anticipate the needs of the changing, dynamic world of law practice and law scholarship. This is a very great responsibility³⁸

As a state supreme court judge, I have a similar responsibility to lead and to anticipate and provide guidance through changes and problems in the dynamic world of the law. A state supreme court's role is not to resolve individual cases in the first instance, as do trial courts; nor is it to correct errors in these individual judgments, as do state or federal courts of appeals. Rather, it is to head a third, coequal branch of government. This does, in part, involve reviewing and deciding cases, to be sure. But, like the U.S. Supreme Court, a state supreme court should do so to the extent necessary to clarify the law of the state, to resolve conflicts in the law as applied in the intermediate appellate courts, and to determine policy issues not resolved by prior cases or which are issues of first impression. In fact, the more cases a state supreme court finds it must take to clarify the law, arguably the less well it has done its job of making the law clear in the first instance in prior opinions, rules, and directives.³⁹

In most states there are many other aspects of the state supreme court's role, however. What they include necessarily varies depending on whether the particular supreme court supervises the lower courts, oversees the lawyer and judge discipline systems in the states, devises

38. *Id.* (transcript at 5).

39. I would note that federal and state opinions cannot be reasonably compared in regard to number of citations, because federal trial court decisions are so often published, whereas state trial court decisions normally are not. *E.g.*, John T. Hundley, *Inadvertent "Waiver" of Evidentiary Privileges: Can Reformulating the Issue Lead to More Sensible Decisions?*, 19 S. ILL. U. L. REV. 263, 263 n.3 (1995) ("State court decisions also are more rare than federal, in part because trial judges most often decide the issue and state trial court opinions rarely are published."). That means that a federal court decision that clarifies the law will very often be cited as the basis of a federal trial court's decision, and so the number of citations of federal appellate or other trial court decisions is accordingly quite large. By contrast, hundreds of state trial courts may rely on the clarifying state appellate court decisions each year, but that reliance will not be evident in any published cases unless questions about it arose that caused an issue regarding it to be addressed on appeal. A good example is an opinion I wrote for the Missouri Supreme Court that adopted what is basically the state version of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but with a major variation required by Missouri statute. *See State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003) (en banc). This decision was the basis of many dozens of educational seminars over the next few years and is the guideline used throughout Missouri for the admission of expert testimony, but because it settled the law in most regards, there is little reason to cite to it unless as part of a rote litany of the standards for admission of evidence.

rules governing court procedure, oversees the bar, appoints and often heads or serves as a liaison to numerous committees and commissions that address issues such as professionalism, children's justice or alternative dispute resolution; plays a role in judicial selection, and performs budget and other oversight functions of a branch of government, as is the case in Missouri. In some states, separate entities such as judicial counsels are assigned some of these roles.

And, of course, essential to its success in these tasks is ensuring that trial courts perform efficiently and effectively, justice is evenhanded and fair throughout the state, court doors remain open to those entitled to protection or recompense under the law, that bias and discrimination do not play any role in determining cases, and that respect for individual rights and liberties exists.

One also cannot ignore that a court does not perform its various roles in a vacuum. The court must communicate with lawyers and other players in the justice system to see what is working and what needs to be improved, coordinate its work with executive branch departments such as corrections or social services or child welfare agencies, and work with the legislature and executive branch on budgets and other economic issues.

If, as in Missouri and many other states, a supreme court oversees a unified court system, it creates an administrative arm to oversee the day-to-day workings of the courts and to provide support for their work in the form of computer support, logistical support, support services such as translators and interpreters, clerk and judge education, and training—and, yes even to measure the workload of the various trial courts and court clerks. A supreme court does not undertake these efforts in order to measure the quality of justice delivered, however. That is what appeals are for. That is the purpose of judicial performance evaluations and voters decisions in contested or retention elections. That is where quality is determined.

Because of the often confidential or even esoteric nature of the work of the courts, the judiciary is also often referred to as “the least understood branch.”⁴⁰ Yet, confidence in the fairness of the courts is indispensable to the effectiveness of our justice system and the workings of our democracy. Therefore, most judges believe that reaching out to the public through educational programs and through

40. *E.g.*, William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1190 n.122 (1978).

programs designed to help the public better understand the workings of the court system also are critical to the judicial branch's fulfillment of its societal role. Leadership of these efforts, too, properly often falls on the state supreme court.

There is no single or all-encompassing manner of judging how well a court fulfills these goals, for each state is in a unique situation and must deal with its individual history and issues. A particular opinion, program, or rule may be judged as good or bad, but a court cannot be judged by attempting to quantify its work product any more than a particular governor or legislator can be judged as good or bad based on how many bills he or she signs or vetoes, or how well a particular state program works, without looking at both the whole of its work and the issues and problems it faces.

This is not to say that I oppose any attempt to assess how well a court is accomplishing particular goals; I simply do not believe that the three noted criteria provide a valid measure. For instance, in 2006, Missouri became the first state in the nation to accept the American Bar Association's offer to evaluate its court system.⁴¹ That 2006 study surveyed a broad group of knowledgeable persons throughout Missouri concerning, as the paper itself describes, matters "pertinent to a properly functioning court system: (1) Qualifications, Experience, and Diversity; (2) Judicial Powers; (3) Financial Resources; (4) Structural Safeguards; (5) Accountability and Transparency; (6) Needs and Expectations of the Community; and (7) Efficiency."⁴² Missouri was rated very positively on almost all indicators except those involving funding decisions over which it has little control.⁴³ Following completion of the Missouri study a few other states are undergoing a similar assessment.

41. AM. BAR ASS'N STANDING COMM. ON JUDICIAL INDEPENDENCE, STATE COURT ASSESSMENT PROJECT, THE MISSOURI COURT SYSTEM: AN ASSESSMENT i (2006), *available at* <http://www.abanet.org/judind/scap/missouri.pdf>.

42. *Id.*

43. For instance, the study rates Missouri positively regarding the qualifications of its judges, their mode of selection, the training provided judges upon taking office, and continuing judicial education. *Id.* at 3. Missouri measures positively concerning allocation of jurisdiction among the courts, administrative unification, and judicial control over rulemaking, as well as structural safeguards such as length of judicial terms, immunity for actions taken by judges in official capacity, and unbiased assignment of judges; accountability and transparency through open proceedings; absence of improper influence, code of conduct, judicial evaluations and discipline structure; and case flow management. *Id.* at 3–5. It receives mixed ratings on technology, because although it has a top rated case management and information sharing system, budgetary restraints have not yet allowed it to adopt e-filing. *Id.* at 64–65. It also needs more frontline clerks to move cases faster, and more staff in the office of the state court

There no doubt are other methods of looking at a court system also, and none of them is perfect. I would suggest that no system can be successful that does not take into account the subjective nature of judging; empirical measures, by their nature, are unable to do so.

administrator, again a function of budget. *Id.* at 61–62. Missouri needs to also work on increasing the confidence of communities of color and the percentage of women and minorities on the courts as compared to the population as a whole, as well as on increasing funds for legal services and public defenders, *id.* at 15–17, 51–52, but it receives very positive evaluations for its handling of pro se litigants, problem-solving courts, translation services, and absence of improper input on judicial decisionmaking, *id.* at 4–5.