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JUDICIAL CHARACTER (AND DOES IT MATTER)

CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION. H. Jefferson Powell.[1] University of Chicago Press. 2008. Pp. x + 149. $22.50 (cloth).

HOW JUDGES THINK. Richard A. Posner.[2] Harvard University Press. 2008. Pp. 387. $29.95.

JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW. Daniel A. Farber[3] & Suzanna Sherry.[4] Oxford University Press. 2009. Pp. xv + 201. $29.95 (cloth).

Paul Horwitz[5]

I. INTRODUCTION

The three works under review in this Essay cover a wide variety of approaches to thinking about and describing the task of judging, in its ideal and not-so-ideal states. Even so, they reflect only a sliver of a vibrant and burgeoning academic literature analyzing and assessing the nature of the judicial

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5. Associate Professor, University of Alabama School of Law. I am grateful to the John Marshall Law School in Atlanta and the Prawfsfest conference hosted by Florida State University College of Law for comments received on a presentation of an early draft of this paper, and to Bill Araiza, Marc DeGirolami, Michael Dimino, Dave Fagundes, Brian Galle, Andy Hessick, Carissa Hessick, Rob Kar, Erik Knutsen, Zak Kramer, Dan Markel, Chad Oldfather, and Lesley Wexler for comments. Thank you to Jennifer Michaelis and Martha Rogers for valuable research assistance and Kelly Horwitz for support. The title of this Review Essay is inspired by Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995).

function.[6] The questions they ask, and even some of the answers they provide, are hardly new; in many respects, we all stand in the shadow of Benjamin Cardozo's grand work on this topic, now approaching its ninetieth anniversary.[7] Thanks to interdisciplinary work drawn from political science, psychology, behavioral economics, and other fields, however, the work on this subject has approached a new level of sophistication and a fever pitch of interest. Today, more than at any period since the first flush of legal realism, judges stand at the bar of judgment, by their peers and themselves.[8]

Each of the books discussed here approaches the subject of judging, and the question of what constitutes the proper nature and role of judges, in a different spirit, whatever common features they may happen to possess. H. Jefferson Powell's book, *Constitutional Conscience: The Moral Dimension of Judicial Decision*, offers what its title suggests: a moral account of judging, focusing particularly on constitutional interpretation, that describes the ideal judge in terms of the virtues that should be embodied in his or her work.

In *How Judges Think*, Judge Richard Posner, who figures as a foil in Powell's book (Powell 3–6, 9–10, 91, 107), provides a far less idealistic account of judging, one that is based substantially on empirical studies of the judicial task and that describes judges rather less romantically as being driven by the incentives of a highly specialized job market. Although Posner too has a judicial method to offer—pragmatism—it is not nearly as romantic a vision of judging as Powell's, and the book on the whole is a typical Posnerian soak in the acid bath.

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6. For one among many examples, see Symposium, *Measuring Judges and Justice*, 58 DUKE L.J. 1173–1823 (2009). For a superb syllabus for a course on judging and the judicial process that collects many relevant sources, see Chad M. Oldfather, *Course Materials for a Seminar on Judging and the Judicial Process*, Marquette University Law Sch. Legal Studies Research Paper Series, Research Paper No. 08-28 (Nov. 2008), *available at* http://ssrn.com/abstract=1297423.

7. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). Charles Clark and David Trubek noted the fortieth anniversary of Cardozo's book by observing that a then-contemporary "strange recrudescence in legal literature of the thesis that judges must find or restate, and not make, law suggests that every generation must rediscover these truths for itself." Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255 (1961).

8. *Cf.* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 5 (1995) ("In the past it was enough simply to praise a lawyer for possessing good judgment, without inquiring too deeply into the nature of this complex power. That is no longer true.").

Finally, Daniel Farber and Suzanna Sherry, in *Judgment Calls: Principle and Politics in Constitutional Law*, attempt to split the difference between Posner and Powell. Like Posner, they offer an account of judging, again focused on the Supreme Court's role as constitutional interpreter, that draws, albeit lightly, on empirical work on the judicial role and promotes a pragmatic approach to judging. Like Powell, however, there is a distinct air of idealism to their conclusions, and they too draw on a list of virtues that they argue should characterize the work of the courts.

What all these disparate visions of the judicial role arguably have in common is a focus on what I will call the role of judicial character. How to define judicial character at all, let alone how to define and spot *good* judicial character, is, of course, itself a difficult question. "Character" in a broad sense can mean nothing more than the "assemblage of qualities that distinguish one individual from another."[9] Whether there is such a thing as a distinctly "judicial" character even in this narrow sense can be controversial. Posner, for example, suggests that "no general analytic procedure distinguishes legal reasoning from other practical reasoning," that judges by and large engage in "ordinary, everyday reasoning" rather than something distinctive (Posner 248). Still, even denying the distinctiveness of judicial character can serve to put the question of character at issue. In a sense, then, all theories about the nature of the judicial role must begin by asking whether there is anything *special* about judges and judging.

One way to begin to answer these questions is to draw on a stronger conception of judicial character—a virtue-centered, or "aretaic," approach to character. The aretaic approach does not simply ask what (if anything) makes judges distinct but is concerned instead with what makes *good* judges distinct. In this sense, "[w]hen we speak of a moral virtue or an excellence of character, the emphasis is not on mere distinctiveness or personality, but on the combination of qualities that make an individual the sort of ethically admirable person he is."[10] In various ways, that is the concern of each of these books: identifying the character traits that distinguish the admirable, excellent, or virtuous judge.

9. Marcia Homiak, *Moral Character*, *in Stanford Encyclopedia of Philosophy*, (2007), *available at* http://plato.stanford.edu/entries/moral-character.

10. *Id.*

Happily, we have tools at hand that might help us to consider this question in a more thoughtful and detailed way. The revival of virtue ethics in philosophy has begun to make its way into legal theory, and with it, we have seen a slowly increasing interest in "a virtue-centered theory of judging—an account of adjudication based on a theory of judicial excellence."[11]

This approach is not without its dangers or limitations. Substantively, the kinds of virtues that such an inquiry usually comes up with in considering the judicial role risk being so abstract or bland as to deprive them of any meaningful guidance and do not contribute anything we would not already have heard in what Posner aptly calls "the loftiest Law Day rhetoric" (Posner 1). Or the aretaic account may be treated as leading to a thick view of what judicial character demands; the thicker the account, however, the more likely it is to be controversial.

Descriptively, one has reason to worry about the value of an aretaic approach if the judicial virtues, so identified, are simply too unrealistic. A theory of judging, or of judicial excellence, may be so unrooted from the actual practices and incentives of judges that it becomes nearly mythic—a sort of Easter Bunny for lawyers.

Of course, a virtue-centered account of judicial character might be an ideal or benchmark rather than being assumed to describe any particular judge.[12] But if this account is *too* normative and not descriptive enough, and if it fails to capture the actual moves made by judges and the reasons for their moves, the gulf between "is" and "ought" will threaten to capsize the project.[13] Descriptions of even virtuous judging must not fail to take into account what Frederick Schauer calls "the inglorious determinants of judicial behavior."[14]

11. Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 478 (2005); *see generally* VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence Solum eds., 2007).

12. *See, e.g.*, Kronman, *supra* note 8, at 5.

13. In a recent paper, Richard Fallon observes that "the general topic of existence, nature, and efficacy of constitutional constraints has received little systematic exploration by legal scholars," owing largely to the normative focus of most constitutional theory. Richard H. Fallon, Jr., *Constitutional Constraints*, 97 Stan. L. Rev. 975, 977 (2009); *see also* Clark & Trubek, *supra* note 7, at 268 (arguing, against those who would "develop[] a new mythology of the judicial process to replace the myth destroyed by the realists," that any such vision "is a vision purchased at the price of omitting a crucial aspect of the judicial process as it really is. The omission, we submit, is dangerous").

14. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

In this Review Essay, I use the books under review, supplemented by a dose of aretaic jurisprudence, to attempt to thread the needle between the "is" and the "ought"—between the worldly, post-realist, post-interdisciplinary view of the judge that features in books like Posner's and, to a much lesser extent, Farber and Sherry's, and the more idealistic vision of judicial character represented in Powell's paean to "constitutional conscience" (and, again to a lesser extent, in Farber and Sherry's work).

I should acknowledge up front that this goal will remain at least partly unfulfilled. There simply *is* a gap between what we might want to believe about judging and the actual task of judging, let alone the performance of that task. One may thus leave this Essay with a sense of being caught between the judicial world that one wishes existed and the one that actually does exist.[15] Still, I will argue in this Essay that it is possible to bridge the gap—a little. We can do so largely by taking the accounts of the real world of judging as a given reality, and working within the internal and external constraints on judges' roles and motivations to find gaps and crevices in which a more idealistic conception of judicial character might take root and even thrive.

The Essay proceeds as follows. Part I provides an introduction to the renewed empirical and theoretical interest in judicial role and character, and summarizes some of the dominant approaches to these subjects. Part II offers a descriptive reading of what each of the authors of the books under review contributes to these questions. Part III builds on this descriptive account by offering a more critical assessment of these books.

In Part IV, I ask whether it is possible to split the difference among these books in a more detailed and thoughtful way, by asking what virtue ethics might add to our understanding of judicial character. In doing so, I also necessarily ask whether judicial character actually matters. It will come as no surprise by now to say that I conclude that it does. But *how* it matters is a complicated question with many implications for a sound understanding of the judicial role and judicial character.

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15. Or, as I put it in a shorter review of the Posner and Powell books, "my heart . . . lies substantially (although not entirely) with Powell," but "[m]y head is with Posner." Paul Horwitz, 9 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 143, 145, 146 (June 2008). http://www.fed-soc.org/publications/pubid.1069/pub_detail.asp.

Ultimately, the vision I offer involves a mix of the descriptive and the normative. To say that judicial character matters, and that it makes sense to think in terms of judicial character and judicial virtue, is as much or more an "ought" than an "is." I argue, however, that there may be ways to bridge the distance a little between the two. One important vehicle for doing so is a renewed focus on the judicial oath as a means of understanding the role that judicial character might play in a sound understanding of the judicial role. That approach might itself seem romantic or quixotic: do judges *really* spend much time pondering their oaths? I argue, however, that the oath might be a means of using the internal and external constraints on judging considered by Posner to bring us somewhat closer to the conception of judicial virtue advanced by Powell.

I. THEORIES OF JUDGING: A FIELD GUIDE

As Frank Cross has recently observed, the prevailing approaches to understanding the judicial function often reduce to two antagonists: "the legalist theory of formalist decision-making and the attitudinal theory of political decision-making."[16] In its strongest form, the legalist model is often identified with formalist and, in the constitutional field, originalist judges like Antonin Scalia and Clarence Thomas. But legalism encompasses much besides this extreme version. Indeed, the legalist model is perhaps the most familiar understanding of judges for a wide range of lawyers, including strong formalists but extending to the Legal Process model of judging that continues to have a strong foothold in common professional understandings of the judicial role.[17]

16. Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 187 (2008). As Cross notes, the strategic theory of judging, which is sometimes identified as a third model of understanding the judicial process, can be viewed as "simply an approach to studying how the legalist and attitudinal theories are best implemented." *Id.*

17. *See, e.g.*, William N. Eskridge, Jr., & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994) (arguing that the legal process school commanded a majority of judges on the Supreme Court as it was constituted at the time). In Posner's terms, Justice Breyer, who is counted on this view as a member of the Legal Process school, would be identified as a pragmatist rather than a legalist (Posner 254). Even if we agree with this description, both Chief Justice Roberts and Justice Alito arguably count as legalists, and thus maintain the primacy of both legalism in general and the Legal Process school in particular on the Supreme Court. *See, e.g.*, Akhil Reed Amar, Heller, *HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 181–82 (2008) (arguing that Roberts is influenced both by his education at Harvard Law School, the Ur-Legal Process law school, and by his clerkship for Henry Friendly, a Legal Process-oriented judge); Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 819 (2005) (predicting that Chief

Posner describes legalism as the belief that "judicial decisions are determined by the 'law,' conceived as a body of preexisting rules found in canonical materials . . . or derivable from those materials by logical operations" (Posner 41). The legalist's hope is that "a judicial decision [can] be determined by a body of rules constituting the 'law' rather than by factors that are personal to judges, in the sense of varying among them, such as ideology, personality, and personal background" (Posner 41). Thus, in the legalist universe, all judges are potentially the same, all have the same task, and all are working from the same materials in search of an elusive but non-mythical beast: the "right answer" to a legal question.[18] The belief in a single right answer is not essential to legalism; not every legalist believes that law lacks discretion. But the legalist does believe that there are at least "good," "better," or "best" answers, and that these answers can be derived largely if not wholly from the legal materials at hand.[19]

Legalism is the prevailing mindset of the American lawyer, even in a post-realist age. That mindset is inculcated almost from the beginning of law school. It begins with the fundamental basis for legal education, the casebook. These tomes, departing a little from their Langdellian roots, often now contain the subtitle "cases and materials."[20] But no matter how many "materials" are shoehorned into a casebook, the primary text remains the judicial opinion, leavened in some courses with a diet of statutory materials.[21] Although even the most traditionally oriented law school features traces of the influence of Yale Law School's Legal Realist challenge to the Langdellian tradition of legal education,[22] so that classroom discussions may be salted with occasional references to policy or interdisciplinary materials, for most law students these discussions are a side

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Justice Roberts will follow the Legal Process tradition).

18. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1977) (claiming that even hard legal questions can yield one right answer).

19. Although they describe themselves as pragmatists rather than legalists, Farber and Sherry's views of judging have a distinctly legalist cast. They argue that although legal reasoning is not "a purely objective exercise," judges can "responsibly exercise their leeway in deciding hard cases" in a way that "makes it possible for the rule of law, rather than lawless fiat, to operate in a world that lacks the comforting certainty of mathematical reasoning" (Farber & Sherry 4).

20. *See* Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1064 (1988).

21. *See generally* Russell L. Weaver, *Langdell's Legacy: Living With the Case Method*, 36 VILL. L. REV. 517 (1991).

22. *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927–60 (1986).

show. The main event is still learning legal rules and methods from legal materials, primarily judicial opinions. Law students, like judges, remain largely "uninterested professionally in the social sciences, philosophy, or any other possible sources of guidance for making policy judgments," because they believe that task is secondary to the job of making "legal" judgments (Posner 42).

From this acorn grows the judge, and judges especially are likely to pay at least lip service to the legalist model. Although Posner, after collecting a number of examples of judges speaking in openly pragmatic terms about their work, suggests that "[j]udges' writing on judging, as well as what they say in interviews, ... is striking for the infrequency of legalist manifestos" (Posner 252), there is a problem of selection bias in this conclusion, because the most thoughtful and reflective judges are the most likely to write and talk about judging, and their departures from the conventional legalist model are likely to be all the more striking and memorable because they are exceptional. Most judges are apt not to say much about their job at all, and any law student or law professor who has sat through an array of speeches or classroom appearances by visiting judges is more likely to hear references to "reason" or "the rule of law"[23] than to the latest social science research. The standard pronouncement of a judge, whether it is for public consumption only or accurately reflects the judge's self-perception, is still usually the kind of legalism that is reflected in "the loftiest Law Day rhetoric."[24] (Posner 1). Indeed, although they argue for the value of "transparency" in judging (Farber & Sherry 97–104), Farber and Sherry warn against "[a]ttributing a judge's decisions to political motives" (Farber & Sherry 96) and argue that legal

23. For classic written examples, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779 (1989). For a recent example by a sitting judge, see William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1013 (2008) (asserting, against Posner's advocacy of judicial pragmatism, that "I consider myself to be a formalist or what Judge Posner calls a 'legalist.'") (citation omitted).

24. *But see* David F. Levi, *The Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1795–96 (2009) (book review) ("[M]ost judges would vociferously deny that their decisions are ever influenced in the slightest by 'political' or personal considerations, and [that] most judges pretend that they are finding the law and not making it," that "most judges are more than aware that they are 'making law.... [M]ost judges, particularly the very best ones, are acutely aware of the potential of personal factors, including judicial philosophy, life experience, and personality, to affect how judges approach and then decide legal issues").

academics should "proselytiz[e]" for "the rule of law as an ideal" (Farber & Sherry 130).

In contrast to the legalist model is the attitudinal model of judging, which (with important variants) is the dominant model of political science thinking about the judicial function.[25] This model, drawing on studies of datasets involving judicial decisions, argues that judges can best be understood as "acting purely on the basis of their policy preferences."[26] Judges appointed by Republican presidents are thus more likely to favor "conservative" outcomes, all things being equal, and judges appointed by Democratic presidents are more likely to favor "liberal" outcomes, although both purport to be deciding the same case with the same legal materials (Posner 19–23). Frank Cross observes that "[t]he evidence of an ideological, attitudinal role in judicial decision making is now enormous."[27] Posner argues that "[t]he attidudinalists' traditional preoccupation with politically charged cases decided by the Supreme Court creates an exaggeration of the permeation of American judging by politics" (Posner 27). But he points out that "[*a*]*ny* amount of political judging challenges orthodox conceptions of the judicial process, . . . and the attitudinalists have shown that there is plenty at all levels of the American judiciary" (Posner 28).

The strategic model of judging is a variant of the attitudinal model. It argues that attitudinalism does not capture the array of factors that will press on judges who wish to decide cases according to their policy preferences, including the need to account for the potential reaction of other judges, legislators, and the public. (Posner 29). Judges thus "do not simply do the right thing as they see it," but instead "seek to have the right thing triumph in their court's decision and, more important, in public policy as a whole," which entails "think[ing] ahead to the prospective consequences [of their votes] and choos[ing] the

25. Lawrence Baum argues that the "strategic conception of judicial behavior is now the closest thing to a conventional wisdom about judicial behavior." LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 7 (2006). Although it is not clear, Baum's statement appears to be directed primarily toward the field of political science, and I take his statement as most accurate if referring to political scientists rather than legal academics. The attidudinalist model is still the prevailing model in political science, if we count strategic models of judging as a more nuanced subset of attitudinalism. *See* Cross, *supra* note 16, at 187.

26. Chad M. Oldfather, *Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 132 (2007).

27. Cross, *supra* note 16, at 188.

course that does most to advance their goals in the long term."[28] A strategic judge might thus forgo a vote for a particular result that she favors on policy or ideological grounds, in order to achieve the greatest likelihood of having her preferences win out when all the necessary factors and constituencies are considered.[29] Strategic judges may even behave in a legalist fashion, although for very different reasons: they may believe that "the public expects them to act on a legal basis," and that "if they act in accord with public expectations, the public will be more willing to accept and comply with their decisions."[30] In short, the strategic judge is an attitudinalist who games the system.

Although the legalist, attitudinalist, and strategic models have been the dominant theories of the judicial function, that may now be changing. Critics of these approaches argue that, perhaps in order to provide the simplicity and predictability that one properly values in a model, these theories neglect the "messy and complex" character of human nature.[31] That judges are human is no new insight, of course; Jerome Frank was putting judges on the psychoanalyst's couch almost 80 years ago.[32] The prevailing models, it is argued, pay insufficient attention to this fact, instead treating judges as acting "without emotion or self-interest in order to advance the general good."[33] That assumption ignores a host of internal and external incentives and constraints on judges' motivations and actions, including, in addition to emotion and self-interest, bounded rationality, the desire to please particular audiences, the hope of promotion, the love of leisure, and the drive to reduce cognitive dissonance between what judges do and how they perceive themselves (Posner 31–39, 57–77).[34]

For this reason, and because the interdisciplinary tools available for understanding these incentives and behaviors have grown much more sophisticated in recent years and gradually found their way into the legal academy, legal scholarship has witnessed a profusion of recent work focusing

28. BAUM, *supra* note 25, at 6.
29. *See id.*
30. *Id.* at 7.
31. Oldfather, *supra* note 26, at 143.
32. JEROME FRANK, LAW AND THE MODERN MIND (1930); *see also* Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931).
33. BAUM, *supra* note 25, at 18.
34. *See also* Oldfather, *supra* note 26, at 133–34, 142–44.

on both the "judicial mind"[35] and the institutional and other external forces that may affect judges' decision-making process. The primary tools of this analysis have been economic,[36] psychological,[37] and, falling between the two,[38] behavioral psychology or behavioral law and economics.[39] This sort of analysis focuses on two aspects of judicial decision-making: the social and cognitive influences on judicial decisions, including the suite of cognitive limitations that have become familiar to readers of the literature on behavioral analysis of law, and the set of internal or external incentives or factors that influence judicial decisions. Scholars in this line consider what it is like for the judge, as a human being—whether a rational and self-interested one, or a cognitively bounded one—to do his or her job.[40] By multiplying the factors involved in analyzing the judicial function, they sacrifice some of the simplicity and predictability offered by other models of the judicial process, but gain considerable descriptive force.[41]

One last model completes this brief tour of the prevailing models of the judicial process. That is the virtue-centered, or aretaic, model of judging, which I discuss at length in Part IV. This is the "account of adjudication based on a theory of

35. *See, e.g.*, Chris Guthrie, et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jeffrey J. Rachlinski, et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227 (2006).

36. *See, e.g.*, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 S. CT. ECON. REV. 1 (1993).

37. *See, e.g.*, Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998); Lawrence S. Wrightsman, *Judicial Decision Making: Is Psychology Relevant?* (1999).

38. *See* Posner 35 (discussing the overlapping nature of the economic and psychological models of judging). What Posner, using some latitude, calls the "sociological" model of judging "straddles" these two approaches (Posner 34–35).

39. *See* Oldfather, *supra* note 26, at 142–43; *see also* Stephen M. Bainbridge & Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 Emory L.J. 83 (2002); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1 (2003).

40. Posner treats separately the "phenomenological theory of judicial behavior," which "studies first-person consciousness—experience as it presents itself to the conscious mind," so that we ask "what it *feels* like to make a judicial decision" (Posner 40). Posner distinguishes this from the psychological model, which studies "primarily the unconscious processes of the human mind" (Posner 40). For present purposes, I group the phenomenological and psychological theories of judging together, since both depart from the more abstract and mechanical attitudinal model of judging and focus on the complexities of judges as individual decision makers.

41. *See* Oldfather, *supra* note 26, at 144; *see also id.* at 144 n.104 ("'In theory-making, descriptive accuracy is purchased at a sacrifice of predictive power.'") (quoting RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 263 (2001)).

judicial excellence."[42] It focuses on the desirability of judges possessing "the judicial virtues—courage, temperance, judicial temperament, intelligence, and practical wisdom."[43] As we will see, both Powell and Farber and Sherry draw heavily on this model. Its usual sources are philosophical in nature, relying in particular on Aristotelian models of virtue.[44] There is some room, however, for more empirically based virtue-oriented theories of judging. Lynn Stout, for instance, draws on the social science literature to argue that judges, for a variety of reasons, may act as altruists, who "care not just about costs and benefits to themselves but also about costs and benefits to others, including perhaps such abstract 'others' as the rule of law, or ideals of proper judicial conduct."[45] This is an important possibility. It suggests that virtue-centered models of judging need not be wholly aspirational, that they need not be simply idealized benchmarks for evaluating judicial character that bear no resemblance to the work done by judges on the ground. It means that, if we can find and encourage or exploit factors that might tend to push judges toward a virtuous model of judging, we might bridge the gap between "is" and "ought" a little.

II. THE JUDICIAL "IS" AND "OUGHT": OF POSNER, POWELL, AND FARBER AND SHERRY

This brief description of the dominant approaches to the judicial function and their recent competitors should serve as a suitable foundation for a consideration of the books under review. In this Part, I consider each of these books in turn. This section is intended to be simply a descriptive account of these books. I will take up a more critical assessment of the books in the next Part.

A. POSNER

How Judges Think begins bluntly and forthrightly with the statement that although legalism places some constraints on judges, "its kingdom has shrunk and grayed to the point

42. Solum, *supra* note 11, at 478.

43. *Id.*

44. Besides Solum and others who self-identify as virtue jurisprudes, Kronman's work on the lawyer-statesman ideal also draws on Aristotle. *See generally* KRONMAN, *supra* note 8.

45. Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1610 (2002).

where today it is largely limited to routine cases, and so a great deal *is* permitted to judges. Just how much is permitted and how they use their freedoms are the principle concerns of this book" (Posner 1).

Posner argues that conventional views of judges, including those held by many lawyers and even judges, are lacking in reality. Among the guilty parties for this air of unreality are the judges themselves, who "are cagey, even coy, in discussing what they do" (Posner 2). Another reason for the opacity in the judicial function is the difficulty of determining criteria for evaluating whether an opinion is "good" or "bad." This leads to the book's inquiry into "whether there are grounds for confidence in the design of the [judicial] institution and in the competence and integrity of the judges who operate it" (Posner 2). For Posner, this means studying the incentives driving judges, "which may in turn depend on the judges' cognition and psychology, on how persons are selected (including self-selected) to be judges, and on the terms and conditions of judicial employment" (Posner 5).

Considering the nature of judicial employment is one of the key moves in Posner's book. Judges, he writes, "are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work" (Posner 7). At the federal level, lifetime tenure, salary protections, and looseness in the agency relationship make the judicial market insensitive to many of the standard incentives of the employment market. We must therefore look to other, less conventional incentives. That includes both the desire for leisure and the desire for public recognition (Posner 59–60). Judges may also have or develop "a taste for being a *good* judge" (Posner 60). That taste "requires conformity to the accepted norms of judging" (Posner 61), which in turn suggests that they will often abide by the standard legalist model of judging.

Often, but not always. Legalist tools quickly fall short in deciding difficult cases. And that means that judges, particularly appellate judges, "are *occasional legislators*" (Posner 81), operating interstitially within the sometimes broad spaces left open to them by the law and legal doctrine.[46]

46. Posner is here echoing Justice Holmes's statement that judges "do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Whether Posner would emphasize the word "only" in that sentence, or would emphasize the word "must" instead, is a separate question.

This leaves much to consider about the nature, scope, and proper limits of judges' actions as occasional legislators. One response might be to say that, within this open space, "judges are [still] motivated by a desire to be thought, not least by themselves, as 'good' judges" (Posner 88). But that "leaves the matter too vague. For what is a 'good' judge exactly, especially when he is legislating?" (Posner 88).

One piece of the answer that is perhaps more satisfactory is to think of judging, whether in the open or closed spaces of the law, as a practice, or a "game" (Posner 91). The game of judging involves not just legalism, but "rules of articulation, awareness of boundaries and role, process values, a professional culture" (Posner 91). In this sense, judges operate under *some* constraints even when they decide cases within the area of discretion, albeit imperfect constraints that only mark the outer limits of what is acceptable.

Within these broad boundaries, Posner argues that a number of sources may influence the judge as occasional legislator. These sources include ideology, which Posner describes not narrowly, in terms of partisan leanings, but broadly, to include a range of personal factors and influences (Posner 94). They also include emotion and other "psychological variables," which themselves "play a large role in ideological formation" (Posner 96). They also include "'good judgment,' an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense" (Posner 117). To Posner, the fact that virtually every lawyer, including the most formalist judges, respects the value of good judgment is telling, because if the law were purely a mechanical exercise, good judgment would be neither necessary nor particularly admirable for judges (Posner 117).

Judicial discretion may be further constrained by a variety of other factors, some internal and some external to the act of judging itself. Although there are some external constraints on judges—including the selection process, the hope of promotion, and (for lower court judges) the possibility of appellate review—these constraints offer only "capacious bounds" on judges (Posner 157). Internal constraints on judging are both more interesting and, perhaps, more promising. Some of them, however, Posner sees as plainly insufficient, or at least far less constraining than their fiercest advocates would admit. One such

candidate is originalism. Reaching backwards to history, he says, "actually enlarges a judge's legislative scope, and not only by concealing that he is legislating" (Posner 103). It does so both because the more ancient a historical source is, the more ripe it is for manipulation, and because the text to which originalists or textualists refer rarely states an interpretive rule in anything like a clear fashion. Thus, originalism is "an example of bad faith in Sartre's sense—bad faith as the denial of freedom to choose, and so the shirking of personal responsibility" (Posner 104).[47] Textualism, another "quintessentially legalist technique[ ]" (Posner 192), fails both because it leads to absurd consequences and imposes undue corrective costs on legislatures, and because, to the extent it is based on the "autistic theory" that legislatures lack a collective intent, it is "bad philosophy, bad psychology, and bad law" (Posner 194).

Originalism and textualism are simply subsets of legalism, however, and it is legalism that is Posner's true target here. "[L]egalist techniques give judicial decision making an appearance of intellectual rigor. But in many instances it is just an appearance" (Posner 176). The problem is not so much that legalism is useless, but that it is insufficient, incomplete, and undeserving of the amount of faith placed in it by its strongest champions. Some of its tools are not so much constraints as they are endlessly contested occasions for debate about their application. Take the debate over the value of rules versus standards. Rules, Posner suggests, provide the appearance of certainty, but because they proceed from incomplete information, new facts will either render them inadequate or honeycomb them with exceptions over time (Posner 176–78). Standards are flexible and adaptive to new information, but of course they will sometimes deprive individuals of the certainty they need to make plans (Posner 179). In short, judges "typically lack the information they would need in order to make an objective choice between the two regimes," and perforce will be influenced in their choice of a rule or a standard by a variety of factors, including personal temperament (Posner 179).

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47. *See also* Clark & Trubek, *supra* note 7, at 270–71 (explaining that judges "naturally like to clothe their pronouncements in perdurable terms. This may often be harmless; it is not, however, when it enables the judge to avoid the necessity of facing the consequences of his own decisions"). For more on the relationship between faith and law, see Marc O. DeGirolami, *Faith in the Rule of Law*, 82 ST. JOHN'S L. REV. 573 (2008).

In a boxing match, the last one left standing is the winner. So it is here. Having done his best to lay waste to the claims of his competitors, Posner is left with his preferred approach to judging: pragmatism. "The word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is 'pragmatist'" (Posner 230). For Posner, legal pragmatism means "basing a judicial decision on the effects the decision is likely to have, rather than on the language of a statute or a case, or more generally on a preexisting rule" (Posner 230; *see also* Posner 243).

These sorts of statements are mother's milk for those who are generally sympathetic to legal pragmatism. But they will be galling to others—especially the hard-core formalist or legalist, who wonders whether "legal pragmatism" is simply a contradiction in terms. Posner acknowledges the potential criticisms of legal pragmatism: that it "lacks moral earnestness" (Posner 250), that it exhibits "a casual attitude toward truth, especially moral truth" (Posner 251), that it "allow[s], invite[s], or even command[s] judges to decide cases however they want" (Posner 252). Perhaps most forcefully, critics charge that legal pragmatism is "empty," because "it does not weigh the consequences of a decision or even specify which consequences should be considered" (Posner 240).[48]

Posner is ultimately unpersuaded by these criticisms. This is so partly for positive reasons: he believes that many of the moral principles or ends that his critics say he does not provide are already obvious, at least in the sense of being uncontroversial consensus values in our society (Posner 240–41). But his defense of pragmatism rests largely on negative reasons. He does not think it "demonstrable that pragmatic adjudication is 'right'" (Posner 249–50). Indeed, he acknowledges that legal pragmatism "is not a machine for grinding out certifiably correct answers to legal questions" (Posner 249). Instead, as the title of the primary

48. For illustrative criticisms of this sort, see Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1735 (1998) ("[M]oral pragmatism has seemed to many critics an empty theory: it encourages forward-looking efforts in search of a future it declines to describe."); Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 431, 433 (1997) ("[Posner's] brand of pragmatism is empty because it instructs lawyers to attend to facts and consequences, which they already know they should, but does not tell them which facts are important or which consequences matter, which is what they worry about."); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 691 (2003) ("Posner's pragmatism offers little help when it comes to evaluating and selecting ends, which is crucial for resolving legal and policy disputes.").

chapter in *How Judges Think* describing legal pragmatism suggests, he thinks pragmatism has prevailed on American courts as a descriptive matter, and is attractive as a normative matter, because it is "inescapable."[49] The other theories that he assesses, primarily legalist theories, are no more or less likely to be "ideological" or "political" than pragmatism itself.[50] In short, "[t]rying to banish pragmatism must fail because it cannot be banished. The only effect of trying to banish it would be to make judges even less candid than they are" (Posner 251). Indeed, given the likelihood that ideological commitments, policy considerations, and personal factors will figure heavily in judicial decision making, no matter the method of interpretation being employed by the judge, openly pragmatic adjudication may be *more* restrained, or at least more candid, than legalist adjudication.[51]

Although Posner thus thinks that pragmatism is both inescapable and normatively preferable, he cautions that legal pragmatism should not be severed from some of the same considerations that drive legalists. The "good pragmatist judge . . . is not a shortsighted pragmatist. . . . But he is a *constrained* pragmatist" (Posner 253). We have already seen that Posner believes many external constraints on judges are only loose constraints. But he would appear to have greater hope for the internal constraints on judges, including pragmatist judges. Those constraints include a consideration of the systemic consequences of particular actions rather than simply engaging in a search for the "right" result in each case (Posner 238–39), and the need to conform to the "prevailing norms" of our society (Posner 241). Perhaps most importantly, recall Posner's view that judges wish to be thought of as "good" judges and will work toward that end. This desire constrains the legal pragmatist

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49. *See* Posner 230 ("Is Pragmatic Adjudication Inescapable?").

50. *See e.g.*, Posner 251 ("[J]udges who want to curtail civil liberties have at hand legalist tools as powerful as those used by civil libertarians. . . . Legalism won't resolve such disputes.").

51. *See* Posner 252 ("Judges are less likely to be drunk with power if they realize they are exercising discretion than if they think they are just a transmission belt for decisions made elsewhere and so bear no responsibility for any ugly consequences of those decisions."); *cf.* Dan Simon, *Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology*, 67 BROOK. L. REV. 1097, 1100, 1138–39 (2002) (arguing that the cognitive influences on judges that lead them to arrive at "a lopsided view of the case that provides stronger argumentative support than the legal materials would otherwise provide" may be "exacerbated" by the view in the "current legal atmosphere" that closure, in the sense of a definite and constrained legal outcome that is purportedly compelled by reason, "is broadly seen as a factor that enhances the acceptability of the decision and promotes the institutional legitimacy of the court").

against being an utterly loose cannon. "The pragmatist judge must play by the rules of the judicial game, just like other judges" (Posner 253). Thus, even committed pragmatist judges will still be considerably influenced in their work by legalist practices.[52]

Finally, given the focus of both Powell and Farber and Sherry's book, and the focus of this Essay, special note must be made of one area where Posner doubts that *any* method, including legal pragmatism, is likely to prove especially constraining on judges. That is constitutional law—particularly at the Supreme Court level, where the constraints on judicial discretion are still looser. He believes the members of the Supreme Court, insofar as they are driven mainly by "the political *consequences* of their decisions," are by definition pragmatists (Posner 269); but I doubt he would say they are very good pragmatists. "The Court is awash in an ocean of discretion," working with little meaningful guidance in difficult cases from an "old and vague" Constitution (Posner 272). The Supreme Court's primary diet in constitutional cases consists of "cases that are at once politically contentious and legalistically indeterminate," and its decisions are perforce political in nature (Posner 293).[53] It is not enough in these circumstances to say that a decision "won't write," precisely because the indeterminacy of the Constitution and the malleability of the legalist approach means that a wide range of opinions *will* write. In any event, the structure of the Court, with its heavy reliance on talented if callow law clerks, makes it unlikely that this would happen:

> [A] Supreme Court Justice—however questionable his position in a particular case might seem to be—can, without lifting a pen or touching the computer keyboard, but merely by whistling for his law clerks, assure himself that he can defend whatever position he wants to take with enough professional panache to keep the critics at bay" (Posner 286).

In these circumstances, Posner argues, the best we can hope for from a Court that is more conscious about the pragmatic basis for its decisions will be more careful consideration of consequences and more modesty on the part

52. *See* Posner 246 ("Just as legal pragmatism incorporates economic analysis of law as one of its methods, so, we must not forget, it incorporates legalism as another.").

53. *See also* Posner 312 ("A decision taking sides on a moral issue that divides the public along approximately party lines and cannot be resolved by expert analysis, let alone by conventional legal reasoning, is a political decision.").

of the Court. On the latter front, however, he argues that "[j]udicial modesty is not the order of the day in the Supreme Court" (Posner 290). On the former front, he argues that even the Court's more openly pragmatist judges, like Justice Breyer, are inconsistent in their pragmatism and short-sighted in their consideration of consequences (Posner 324–42), and that their narrow backgrounds and "cosseted" status make it less likely that they will be adequate pragmatists and more likely that, egos suitably inflated, they will become "moral vanguardist[s]" like Justice Kennedy (Posner 306, 310).[54] He would like to see the Court clip its own wings a little, but I doubt he thinks it is likely to do so.

B. POWELL

At one point in *How Judges Think*, Posner cites, with evident derision, a "purple passage" from Henry Hart's famous *Harvard Law Review* Foreword discussing the role of the Supreme Court:

> [T]he Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law.[55]

This is a fitting jumping-off point to describe H. Jefferson Powell's book *Constitutional Conscience: The Moral Dimension of Judicial Decision*, because it seems likely that Powell would gladly adopt as his own just about any proposition that Posner would view with disdain. Posner serves as a foil in Powell's book, because Posner, according to Powell, believes that "a judge has no kind of moral or even political duty to abide by constitutional text" (Powell 4).[56] This runs directly contrary to the argument

54. Of Justice Kennedy's opinion in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), he writes: "What does it tell us about the commitment to legalism of the four most conservative Justices of the Supreme Court that they should have joined such a wild opinion?" (Posner 311 n.95).

55. Henry M. Hart, Jr., *The Supreme Court, 1958 Term: Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959) (quoted in Posner, 301).

56. He bases this on Posner's statement about the pragmatist judge's duty, discussed above, to consider systemic consequences when making pragmatist decisions: "The point is not that the judge has some kind of moral or even political duty to abide by constitutional or statutory text, or by precedent; that would be formalism." Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002) (quoted in Powell 4).

Powell wants to develop over the course of his short but elegant book.

Powell takes as his central text Chief Justice John Marshall's statement in *Marbury v. Madison* concerning the importance of the judicial oath in justifying judicial review. Because the oath figures in the arguments I develop below, it is worth quoting at length, just as Powell does:

> Why otherwise does [the Constitution] direct the judges to take an oath to support it?
>
> This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?
>
> The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution of the United States."
>
> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.[57]

Marshall's invocation of the oath "has not fared well among modern scholars, who argue that it begs the real question raised by judicial disregard of a statute . . . , or even that the oath requirement actually undercuts Marshall's overall reasoning" (Powell 2).[58] But what matters here is that Marshall *thought* this

57. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179–80 (1803) (quoted in Powell 1–2). As Powell notes, federal judges continue to take essentially the same oath. (Powell 123 n.2, citing 28 U.S.C. § 453 (2006)).

58. For examples of this criticism, see ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 7–10 (1962); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 25–26. As Powell acknowledges (Powell 123 n.3), this argument stems back almost to the date of the *Marbury* decision itself. *See Eakin v. Raub*, 12 Serg. & Rawle 330, 352 (Pa. 1825) (Gibson, J., dissenting) (criticizing Marshall's invocation of the oath in defense of

argument mattered. Why did the oath matter so much to Marshall?

Powell's answer forms the core of his book: it matters because

> the practice of judicial review rests not only on the structural features of the American Constitution that [Marshall] emphasized earlier in his opinion . . . but flows as well from the judge's individual obligations as a moral actor. [Marshall] perceived in the oath requirement a juxtaposition of the judiciary's governmental role and the judge's personal conscience, one that gives moral weight to the individual's exercise of the power of judicial review that the community has entrusted to him (Powell 2–3)

Thus, there is an irreducibly moral and individual component to the judicial function in constitutional cases. Powell asserts that "Chief Justice Marshall was right to believe that the exercise of the power of judicial review presents profound moral questions for those who wield it." (Powell 9). Any effort to interpret the Constitution leaves the judge in a position to exercise good or bad faith in his decision-making process. Once that occurs, "we clearly have entered the realm of moral obligation to which Marshall appealed in his discussion of the judicial oath." (Powell 10). He writes:

> Our actual practices of interpreting the Constitution presuppose the existence of a moral dimension to those practices; put another way, much of what we say and do in constitutional interpretation is meaningless—a "solemn mockery" indeed—if constitutional decision is in fact free of the sort of moral commitment that Marshall invoked in his opinion in *Marbury* (Powell 10).[59]

Powell offers two central premises for his book. The first is that there are, in fact, bases for "moral or ethical evaluations" of constitutional law, although they may be fairly thin (Powell 6). They include the possibility of good and bad faith that I noted above. He takes this as a governing assumption of American law

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judicial review on the grounds that "[t]he oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty").

59. *See also* Powell 12 ("The moral circumstances of a judge asked to exercise the power of judicial review involve considerations of constitutional structure and of what it means to call a court's judgment a 'decision according to law' that are inextricably linked with his or her moral choices.").

and society, and says that, "[f]or anyone who sincerely disagrees with it, I have nothing (in this work) to say." (Powell 7). His second premise is that "constitutional law's central function is to provide a means of resolving political conflict that accepts the inevitability and persistence of such conflict rather than the possibility of consensus or even broad agreement on many issues" (Powell 7). The means of resolving these conflicts are simply the stuff of "our actual, traditional practices of constitutional interpretation. A substantial divergence between what constitutional decision makers say they are doing and what they actually are or are perceived to be doing would undermine in the long term the value of constitutional law to American society" (Powell 9).[60]

The remainder of the book rests on these premises. Powell wants to argue that "[t]he key to understanding the moral dimension of constitutional decision . . . is the demand it places on the conscience of the judge" (Powell 10). In each case, the judge "can act in accordance with the language and ideals of our traditional practices only by deciding in good faith, according to her conscience" (Powell 11). Powell's concern is to "explore[ ] what it means to have a good (or bad) conscience in constitutional decision-making" (Powell 11). A host of virtues are involved in good-faith constitutional decision making, and the need for these "constitutional virtues . . . is implicit in our constitutional practices" (Powell 11). Sounding a note similar to his invocation of Marshall's "solemn mockery" language, he adds: "Without them, constitutional law as this society has traditionally understood it and our language today still implies is impossible" (Powell 11; *see also* Powell 42).

A variety of interpretive practices are argued by their adherents to eliminate precisely this sense of weighty moral obligation, by removing any significant discretion—and thus any particular need for good or bad faith—from the decision maker, whose task is rendered mechanical and amoral. Powell, like Posner, will have none of these arguments. Textualism will not succeed as a response, both because it does not describe the judges' actual practice and because the (generally indeterminate) "constitutional text itself presupposes that its interpreters will go outside the four corners of its language."

60. Again, he invites anyone who disagrees with him on this premise to take his business elsewhere. *See id.* ("[I]f this last assumption seems wrong or wildly implausible to the reader, this book will not attempt to persuade him or her otherwise.").

(Powell 44). Comprehensive theories of constitutional interpretation, which seek "an intellectual technology . . . that can prevent judges from importing politics (or the wrong sort of politics) into constitutional law," are also doomed, because none of them is persuasively drawn from within the four corners of the Constitution itself (Powell 46–47). No theory can "exclud[e] politics from constitutional law," which leaves us with only "moral, not technical" means of "achieving fidelity to the rules of the [judicial] game" (Powell 47). In short, constitutional interpretation is "intrinsically a moral activity," albeit one that Powell sees as relying not on external moral criteria but on moral criteria that are "internal to the game" of judging (Powell 52–53).

What are those criteria? Drawing on a number of what he considers exemplars of moral judging—including, most interestingly, a legal opinion written not by a Justice but by an executive branch official, Amos Akerman, who served as Ulysses S. Grant's Attorney General (Powell 56–79)—Powell identifies several such criteria. These criteria do not reduce to an algorithm that will spit out correct answers; rather, in the open spaces, constitutional decision making must "be governed only by conscience, by a dutiful attempt to resolve the conflict of constitutional provisions, interests, and principles as seems most proper to the decision maker" (Powell 79). It requires the decision maker "to come to a moral conclusion that cannot be, by definition, anything other than a question of degree" (Powell 79). Still, Powell thinks that the American constitutional system does "generate a . . . set of virtues[ ] that define and inform fair play in constitutional decision-making" (Powell 82). Without tying himself too strongly to the project of virtue ethics, Powell raids its larder to outline some "habits of mind and will that our practices demand we develop in order that the Constitution may be interpreted" in a virtuous fashion (Powell 82–83).

Powell identifies the first constitutional virtue as "faith." Faith follows from his view that the Constitution is an intelligible document, not simply an excuse for the exercise of raw and unconstrained power; were it otherwise, "American constitutional interpretation as socially understood [would be] impossible" (Powell 85). Faith—or good faith—thus demands "both an acceptance of the Constitution's intelligibility . . . and an undertaking to govern oneself as a constitutional actor in accordance with the Constitution's intelligible meaning" (Powell 85).

Although he believes the Constitution is intelligible, Powell also acknowledges that it is ambiguous, and thus that its interpretation is open to uncertainty (Powell 87). Accordingly, "if constitutional interpretation is not to devolve into cynical posturing" in the presence of this interpretive ambiguity, constitutional decision makers "must display the constitutional virtues of integrity and candor: integrity in coming to decision, candor in the presentation of arguments that often can be said to be only the interpreter's best judgment, not the text's unmistakable bidding, on how to enforce the Constitution" (Powell 88). Importantly, if controversially, Powell argues that integrity, by demanding that judges, "as a matter of personal and institutional morality, . . . treat the Constitution not as a tool that they can use to achieve whatever goals they choose on other grounds, but itself as the ground for their decisions," precludes the "instrumentalist view of law of the sort that Judge Posner and others advocate" (Powell 91). On this view, judicial integrity is apparently anti-pragmatic.

Another constitutional virtue is humility. Humility, which is not to be confused with timidity or self-doubt, is "the habit of doubting that the Constitution resolves divisive political or social issues as opposed to requiring them to be thrashed out through the processes of ordinary, revisable politics" (Powell 93–94). It leads to "a humble or limited conception of the role of the Constitution, of the Supreme Court, and of one's own constitutional convictions" (Powell 94).

Powell's next constitutional virtue, "the virtue of acquiescence" (Powell 99), seeks to find space in constitutional decision making for the recognition of the wisdom of the ages represented by stare decisis, without treating it as a straitjacket. Acquiescence is "the disposition to accept the premises of existing decisions even when they are not our own premises, to accept that a question can be settled and ought to be taken as a starting point for further constitutional thought, not as an opportunity for endless reargument" (Powell 99). It requires judges to see themselves as existing within a substantial constitutional tradition, but cannot free them from the obligation to make good-faith decisions for themselves; it is, he writes, "the exercise of a moral obligation rather than obedience to an invariant rule of decision" (Powell 99–100).

This completes the list of "Powellian" constitutional virtues. Again, it is important to note that Powell sees them both as centered in the individual virtues of constitutional decision

makers (Powell 101), and essential to the system as a whole: "Without those virtues as ideals, and as realities, to the extent that is possible for fallible human beings, American constitutionalism is a fraud" (Powell 100). These virtues are necessarily and ineluctably moral in nature: "There is no escape, not even for legal instrumentalists such as Judge Posner, from individual moral responsibility in constitutional law" (Powell 107).

Powell concludes on a note that again sounds in the inevitability and necessity of conscience and moral choice in the exercise of constitutional decision-making authority. He writes:

> Our constitutional practices . . . assume, in both the language we use and the authority we grant them, that constitutional decisions can be made through a principled evaluation of constitutional arguments—and not on the basis of the will, the preferences or the extraconstitutional values of the decision makers. Those practices can only make sense, therefore, if such a mode of principled constitutional decision is possible. The only possible locus for such a mode of decision lies in the constitutional conscience of the decision maker, a conscience shaped by the virtues that correspond to the basic presuppositions of the Constitution (Powell 114).

C. FARBER AND SHERRY

Daniel Farber and Suzanna Sherry's book, *Judgment Calls: Principle and Politics in Constitutional Law*, requires less space to summarize, and may suffer from the fate of the middle child who receives less attention than her older or younger siblings. This is a consequence of the fact that, in many respects, *Judgment Calls* splits the difference between Posner and Powell's books. Like *How Judges Think*, it draws (more lightly, however) on various internal and external constraints on judging. Also like Posner, it advocates a form of judicial pragmatism. Like *Constitutional Conscience*, however, it offers a somewhat romantic faith in the rule of law and the possibility of something other than purely "political" constitutional decision making, and attempts to provide a list of virtues that might guide judges in this effort. Whether this approach succeeds in mediating between the two extremes, or whether it is bound to satisfy neither side in the debate, is a question I take up in Part III. First, though, a brief summary is needed.

In some ways, *Judgment Calls* could have been titled *The New "New Legal Process."*[61] The book announces itself as a defense of constitutional judicial review (Farber & Sherry ix–x, 3), but that defense employs values that are characteristic of the Legal Process school.[62] Unlike the Legal Process school, however, Farber and Sherry reject the Legal Process faith in the notion that "reason will necessarily produce 'right answers' if judges are sufficiently smart and sufficiently principled" (Farber & Sherry ix–x). Decisions involving the ambiguities of the Constitution "inevitably involve judgment calls, and reasonable people will sometimes disagree about the best answers" (Farber & Sherry ix–x). Like Posner and Powell, they believe that no comprehensive theory of judicial review can dissolve this problem; all of them share a "common inability to constrain judicial decision-making" (Farber & Sherry 27).[63] With Powell, they conclude that no theory of constitutional interpretation can "purg[e] the exercise of judgment" (Farber & Sherry 29).

What does judicial review consist of, if constraining theories of constitutional interpretation are ultimately unavailing? Is law nothing more than politics, as the attitudinalists would have it? Farber and Sherry deny this. Instead, they say,

> Constitutional decisions can be judicial and principled (and thus firmly rooted in the rule of law rather than in politics), as well as judicious and pragmatic (and thus range beyond the narrow confines of text and original intent). Good constitutional adjudication should be neither the mechanical application of formal rules nor the freewheeling exercise of pure politics (Farber & Sherry 4).

This is not to say that constitutional decision-making is purely objective. A host of factors, including judges' backgrounds and political perspectives, may influence their decision-making in the open spaces of discretion. Nor do they reject any role for "creative statesmanship" in judging (Farber &

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61. That title, alas, had already been taken by Nicholas Zeppos. *See* Nicholas S. Zeppos, *Justice Scalia's Textualism: The New "New Legal Process,"* 12 CARDOZO L. REV. 1597 (1991).

62. *See, e.g.*, Farber & Sherry ix–x:

> Our major aim is to explain and defend the thesis that even in hard cases, reasoned legal decisions are possible. . . . We believe . . . that the reasoned exercise of discretion is not an oxymoron. In this, we follow in the footsteps of the old 'legal process' theorists of the 1950s.

63. *See also* Farber & Sherry 26–29; *see generally* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002).

Sherry 6). But the discretion exercised by constitutional judges is bounded by internal and external constraints. Those constraints "make it possible for the rule of law, rather than lawless fiat, to operate in a world that lacks the comforting certainty of mathematical reasoning" (Farber & Sherry 6). They make it possible to judge constitutional decisions on the basis of a "standard of reasonableness," and to believe that this standard is capable of being achieved (Farber & Sherry 4).

The middle section of *Judgment Calls*, before examining the constraints on judges, attempts to identify criteria by which sound judging can be identified in the absence of comprehensive theories of constitutional law. These are fairly broad criteria, but Farber and Sherry argue that nothing more constraining or mechanical is possible; the inability to define solutions to hard problems in uniform or perfectly predictable ways is "simply part of the human condition" (Farber & Sherry 37).

At the same time, they argue that it is not enough simply to say that judges exercise discretion and leave it at that. This is how they characterize Posner's description of constitutional decision making in the Supreme Court.[64] In their view, this "'if not the heavens, then the abyss' syndrome" is mistaken because "it refuses to see the middle ground between complete constraint and boundless leeway" in constitutional adjudication (Farber & Sherry 39). It is wrong both because it does not fit with judges' own perceptions of their work, in which they believe they are working "'inside the law' for concepts and values"[65] (Farber & Sherry 39), and because simply referring to judges as gap-fillers within the discretionary spaces "does not provide enough of a basis for evaluating judicial decisions." (Farber & Sherry 39). They believe it is necessary to offer guideposts that enable a "positive description of judging," one that "offer[s] both guidelines for judges who honor the rule of law and criteria for evaluating judicial decision-making" (Farber & Sherry 6).

Farber and Sherry point to several such criteria. The first, drawing on administrative law models for the evaluation of agency exercises of discretion (Farber & Sherry 40–42), is the

64. *See* Farber & Sherry 38 (quoting Posner's statement that the Court is swimming in an "ocean of discretion").

65. As Frank Cross notes, Posner, in contrast, "cautions against overreliance on such internal perspectives." Cross, *supra* note 16, at 184 n.6 (quoting Posner 2) ("Biographies are more reliable than autobiographies, and cats are not consulted on the principles of feline psychology.").

need for "[r]easoned justifications, based on relevant factors" (Farber & Sherry 43). Reasoned elaboration is, of course, one of the hallmarks of Legal Process thinking.[66] In contrast to Posner, they believe the requirement of reasoned elaboration provides a useful psychological constraint on judges, who may find that a decision "won't write" in a way that conforms with this requirement (Farber & Sherry 44).

Because reasoned elaboration cannot be distilled into a set of "clear and formulaic" limits, it must perforce involve the exercise of judgment (Farber & Sherry 52). Farber and Sherry acknowledge that judgment is a capacious concept, and one that inspires unease among many legal scholars as a basis for evaluating sound constitutional decision-making (Farber & Sherry 55). I do not think this chapter will change the doubters' minds. On the other hand, they argue, also correctly, that judgment is a familiar, if difficult to define, term for American lawyers and judges (Farber & Sherry 54).

What Farber and Sherry mean by judgment, precisely, is difficult to discern, although they might argue that this is inevitable. They argue that judgment involves knowing what constitutes a reasonable or plausible legal argument in light of "precedent, constitutional history, and public values" (Farber & Sherry 55). "[M]ore than one reasonable outcome may exist" in some cases, although, unlike Posner, they think such cases constitute an "unusual event" rather than a "routine phenomenon." (Farber & Sherry 55). Importantly, "[j]udgment can be independent and objective," in the sense of "being properly responsive to opposing evidence and arguments and less likely to succumb to the various cognitive biases that can negatively affect decision-making" (Farber & Sherry 56). Drawing in fairly general terms on psychology, they argue that a number of factors in the judicial environment, including judges' accountability to unknown evaluators (unknown because a judge cannot be certain which panel will review her decision), heterogeneity in the pool of judges, and the development of critical thinking skills, suggest that "judges are likely to be about as good as possible . . . at making reasoned legal judgments"[67]

66. *See, e.g.*, G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973); *see also* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 205–300 (1995).

67. *See also* Farber & Sherry 56–58. This chapter is, it should be noted, very thinly sourced compared to, say, Posner's use of the psychological literature on judging. Farber and Sherry rely almost entirely on a couple of sources discussing expert judgment in

(Farber & Sherry 56). They conclude that the psychological literature to some extent redeems the view that legal judgment can be improved by careful attention to "'craft values' or 'professionalism'" in judging (Farber & Sherry 58).

In addition to these "intangible psychological factors," Farber and Sherry argue that several "internal and external constraints on judges" also help to "keep them from lapsing into arbitrariness or purely political decisions" (Farber & Sherry 58–59). The first is precedent. Like Powell, they believe that precedent strengthens the integrity and legitimacy of the judicial system by "transform[ing] the Court from an ever-changing collection of individual judges to an institution, one which is capable of building a continuing body of law rather than merely a succession of one-time rulings" (Farber & Sherry 71). They stress that respect for precedent not only adds to judicial efficiency, but also reinforces humility, teaching us that "[i]t would be arrogant to assume that we alone have access to wisdom" (Farber & Sherry 70).

A second set of constraints arises from the structure of the judicial process itself. That includes the tiered and multi-member nature of the state and federal court systems, in which the diversity of judicial personnel staffing the courts means that "the only commonality" these judges will have "is their mutual faith in the rule of law and their sworn oath to uphold it," and in which they will "have to appeal to this shared vision" in order to persuade their colleagues and have their decisions stick (Farber & Sherry 89). The Supreme Court, which sits at the top of the judicial hierarchy, may seem more loosely constrained by this phenomenon, but Farber and Sherry argue that even Supreme Court Justices must persuade each other, and must persuade

general, and neglect the growing literature suggesting that judges can in fact suffer from significant cognitive biases. *See, e.g.*, *supra* note 39 (collecting sources). In the bibliographical essay that follows the main text, they add: "We would be remiss if we did not mention that there is a substantial body of literature suggesting that judges suffer from the same cognitive biases as most people, and are therefore no better at making sound decisions" (Farber & Sherry 188). They argue that this literature has been "persuasively critiqued" by Gregory Mitchell in a single article. *See* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics*, 91 GEO. L.J. 67 (2002) (cited in Farber & Sherry 188). With respect, this seems to me both an inadequate response to the literature on cognitive biases in judges, and a curious one, since, as the title of his article suggests, Mitchell is arguing by implication for the retention of rational actor models of decision making, which I should think would be both equally unrealistic to Farber and Sherry and normatively unattractive, to the extent that they are arguing for a non-instrumental view of judging.

lower court judges if they wish to avoid having their decisions resisted (Farber & Sherry 89–90).

Another systemic constraint is the need to deliberate. Deliberation not only improves decisions (Farber & Sherry 90),[68] but also implicates "the judge's own self-respect," and thus serves as a constraint on arbitrary decisions (Farber & Sherry 90, quotation marks and citation omitted). Interestingly for our purposes, Farber and Sherry argue that deliberation is also a means of "shap[ing] the character of judges" (Farber & Sherry 91). It fosters a kind of "judicial character" that is open to new ideas and to criticism, that is both confident and humble at the same time (Farber & Sherry 91). Still other structural constraints exist, including even the presence of law clerks, which provides a push-and-pull element in the judicial function that may "reduc[e] the likelihood of weak or unreasoned decisions." (Farber & Sherry 94). More broadly, the trappings of legal pomp—the robe, the bench, the genuflection of the courtroom audience—impress upon the judges the seriousness of their role and "contribute[ ] to fostering adherence to the core principles of the rule of law." (Farber & Sherry 94). Public scrutiny of judicial opinions also assists in reinforcing judicial integrity. (Farber & Sherry 94–96). Interestingly, however, Farber and Sherry argue that the courts' professional critics should refrain from criticizing judges for possessing political motives, because it may "incrementally persuade[ ] the public or the judges themselves that law is *about* politics and therefore that we should expect judges to be blatantly political."[69] (Farber & Sherry 96).

Another constraint, transparency, Farber and Sherry deem "perhaps the least discussed but the most important" constraint on judges (Farber & Sherry 97). Like Powell, they describe the transparency constraint as the demand that "[a] judge's written opinions . . . fairly reflect her actual reasoning" (Farber & Sherry 97). It requires that judges both be honest with others about their grounds for decision, and attempt to be sufficiently honest with themselves about their grounds for decision. It is "both an internal and an external constraint," because it subjects judges' actual reasons to public scrutiny but also demands that they face up to their own reasons (Farber & Sherry 98).

68. *But see* Posner 301–07 (arguing that deliberation is largely non-existent on multi-member courts and is unlikely to count for much in the absence of shared premises, which are less likely to be present in "political" cases). Farber and Sherry acknowledge this possibility and call it "worrisome if true" (Farber & Sherry 92).

69. *See also* Stout, *supra* note 45, at 1625 (making a similar argument).

Farber and Sherry also believe that a series of internal constraints helps to make sound reasoned judgment possible. The most familiar and the most central is the presence of professional norms in the law (Farber & Sherry 113–15). For the most part, however, their discussion of internal constraints on judging is more critical, and they offer a series of suggested structural reforms to buttress the internal constraints, by enhancing judges' sense of judicial professionalism and integrity and dissuading them from adopting a habit of thinking of law as politics. For example, they suggest that the Court might hear more cases, voluntarily or as a result of congressional expansion of the Court's now effectively non-existent mandatory docket, and that Justices might be required to ride circuit. Both measures are intended to force the Court to consider more routine and uncontroversial cases, and more non-constitutional cases, thus encouraging them to adopt a habit of thinking in apolitical and professional terms (Farber & Sherry 120).

Farber and Sherry close with a set of case studies that they argue demonstrate the possibility of evaluating legal decisions for their adherence to, or departure from, the standards they set for reasoned legal judgment. To take one example, they argue that Justice O'Connor's plurality opinion in *Hamdi v. Rumsfeld*[70] is commendable because it makes the most open and "serious effort to reconcile the [conflicting] interests" between liberty and security that the Court confronted in that case (Farber & Sherry 137). It is not perfect, in their view, but it is "admirable for its principled stand against arbitrary arrests and for its effort to find a solution that also respected our constitutional history and the need for some flexibility in protecting national security" (Farber & Sherry 137). They also treat the votes in that case as "evidence that ideology is not everything, even in the hardest constitutional cases" (Farber & Sherry 138).

Farber and Sherry conclude with a "perhaps deceptively simple" prescription: "Respect precedent, exercise good judgment, provide reasoned explanations, deliberate with your colleagues, and keep in mind the possible responses of critics. In our view, the first virtue of judges is prudence" (Farber & Sherry 167). But prudence is "not enough to make a great judge. For that, vision is also required—not in the sense of a comprehensive roadmap, but in an ability to sense the deep constitutional values underlying a hard issue" (Farber & Sherry 167). They describe

70. 542 U.S. 507 (2004).

constitutional decision-making as "a quest to temper politics with law," and argue that "that quest is not quixotic" (Farber & Sherry 168). They write, responding to their early critics and perhaps anticipating others:

> We envision a Court that respects precedent, seeks to articulate constitutional values and reconcile them when they conflict, and explains the reasons for its decisions clearly and honestly. We do not believe that this is a utopian vision, though it *is* utopian to expect it to be satisfied every day in every case. We also reject the view, expressed by some who have read our manuscript, that this is an inherently ideological vision suitable only for the politically wishy-washy (Farber & Sherry 168).

* * * * *

This brings a perhaps overlong summary of these three books to a close. We have seen that these books, despite areas of overlapping consensus, ultimately represent three points on a spectrum of views about judging and judicial character. Posner would not deny the role played by judicial character, but neither would he romanticize it; the character of judges, for him, can best be seen as a mix of factors, including professionalism and the wish to be *viewed* by their peers as professionals, but also including factors of personal background and political ideology. The best hope for sound judgment—sound in the sense of contributing to sensible policy outcomes, taking into account relevant systemic considerations—is a thoroughgoing, if (for consequentialist reasons) constrained, brand of pragmatism.

Powell's is a far more idealistic vision. Like Mark Twain on infant baptism, he believes in the possibility of a "constitutional conscience" because he has seen it,[71] in the legal interpreters he views as paragons of sound constitutional decision making. But he is less concerned, perhaps, with the *possibility* of the constitutional virtues than he is with their *necessity*. Without them, constitutional law is a sham and an impossibility. For Powell, the very nature of constitutional law renders the practice ineluctably moral in nature; judges can choose to exercise good or bad faith in carrying out that moral purpose, but they cannot avoid the moral element of that choice.

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71. Twain, asked whether he believed in infant baptism, was said to have replied, "Believe in it? Hell, I've seen it done!" *See, e.g.*, TOM QUIRK, MARK TWAIN AND HUMAN NATURE 1 (2007).

Farber and Sherry bring up the middle. Their vision of constitutional judging is surely far more idealistic and romantic, and in that sense far closer to Powell, than that of Posner. For if Posner thinks "objective" or legalist judging is unlikely in the most difficult common-law or statutory cases, he thinks it is all the more exotic in constitutional law, the subject of Farber and Sherry's book; and even here, as we have seen, Farber and Sherry think "[j]udgment can be independent and objective" (Farber & Sherry 56). Their Polonian list of the qualities that comprise good judgment is far closer to Powell than to Posner, and although they call themselves pragmatists, they reject the kind of instrumentalism that Posner sees as all that we have left when law is stripped of its illusions. But they resemble Posner in their rejection of comprehensive theories that promise to provide meaningful constraint in the face of an aged and ambiguous Constitution, and in their attempt to draw on the social sciences and on institutional factors to find means of constraining the judicial function and staving off cognitive bias and raw politics. Their heads are in the stars, but they have a foot planted, albeit unsteadily, on the ground.

III. BETWEEN THE JUDICIAL "IS" AND "OUGHT": A CRITICAL EVALUATION

All of these books share some common themes, and all of them make valuable contributions to the debate over judicial character and the judicial role. In this Part, however, I offer a more critical assessment of these books. That assessment will in turn help lay the foundation for a more constructive effort, in Part IV, to find a *via media* in thinking about these issues, one that is based explicitly on a combination of virtue jurisprudence and the role of the judicial oath. To do so, I consider what the books under review lack—what may strike their readers as unsatisfying in their account of the real and the ideal worlds of judging in general, and constitutional judging in particular.

As I will make clear, I find Powell's book, bracing as it is, too airy in its account of judging, and I believe Farber and Sherry's book shares this problem, notwithstanding its effort to paint a more realistic picture of judging. Both books give a fine account of the judicial "ought," as it were, but an insufficient account of the judicial "is." Posner's book, on the other hand, is largely persuasive in its account of judging as a lived reality.[72]

72. *But see* Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185

What is missing here, perhaps, is a sense of the "ought" that might complement his description of the judicial "is." Largely absent from Posner's book is the quality of idealism and moral clarity that is the beating heart of Powell's book—although I doubt that Posner would be especially disheartened by this criticism. Still, there are aspects of *How Judges Think* that may open a space for a more constructive and somewhat more idealistic vision of judging. They may be mere traces, but, with some supplementation, they may prove enough to build on.

Begin, then, with Powell and *Constitutional Conscience.* That this is an intentionally idealistic account of constitutional judging is apparent from the very first pages of Powell's book, in which he rejects those who would embrace an ideological explanation for constitutional judging because "it seems the product of hard-bitten realism," and instead urges us to see the constitutional tradition as one involving "the faithful interpretation of a fundamental law that is this republic's chosen means of self-governance" (Powell ix–x). He adds that the theme of the book will be "[h]ow we can believe that to be so in the face of all the evidence to the contrary" (Powell x).

Powell's insistence on focusing on the judicial "ought" rather than the judicial "is" is equally apparent in his refusal to engage with anyone who objects to some of the central, and decidedly idealistic, premises of his book. Thus, in placing good faith at the center of his account, he says brusquely that he has "nothing . . . to say" to any skeptics (Powell 7). Similarly, he brushes off anyone who might doubt the destructive force of a "substantial divergence between what constitutional decision makers say they are doing and what they actually are or are perceived to be doing." (Powell 9). And he offers a blunt response to any argument that the judicial virtues he recounts might not be as essential as all that, arguing that to ignore them would make "constitutional law as this society has traditionally understood it and our language still implies . . . impossible" (Powell 11).

Powell is commendably clear about the idealistic premises of his book. But although he would evidently view too much cynicism about the judicial process as corrosive of the constitutional enterprise, I think it is rather his idealism that proves corrosive, or at least tends to diminish the value of this

(2009) (disagreeing with Posner's explanation of judging); Levi, *supra* note 24 (disputing Posner's descriptive account of judging).

work. I agree with Powell that there is an irreducible moral component to the act of judging. But to say this is not to say that judging that falls short of Powell's high standards, or even that rejects some of his key premises, will not be recognizable as judging or will destroy the constitutional project. We *live* in such a world, and however disenchanted Powell may be by it, it continues to turn. Moreover, to construct a thin account of judicial virtue without a thicker account of the real world of judging, and the actual and inglorious determinants of judicial behavior, risks leaving us with a very thin broth indeed.

Let me take these complaints in order. Again, as we have seen, Powell builds his foundation on certain premises about the necessity of good faith and integrity, by which he means that there should be no disjunction between what judges do and what they say they are doing, and offers the back of his hand to anyone who disagrees. He derides the ideological view of judging as, in essence, being attractive only to the sort of sophomoric person who sees it as "the product of hard-bitten realism" (Powell ix). He does not name Posner here, but it is evident he has him in mind. And he suggests that attitudinal views like those that have "many adherents in political science departments, and not a few (usually unacknowledged) within law faculties," are "a recipe for personal moral catastrophe" (Powell 51). What he does not do is *engage* with these views, let alone refute them. As Posner's book demonstrates, there is an ample literature that offers at least partial support to the attitudinalist model of judging, and particularly constitutional judging, which is less constrained than other areas of law. From reading Powell's book, however, one would barely be aware of the existence of this literature, except in a general sense that something bad and misguided has happened somewhere in the academic literature.

Powell is aware of this literature, of course.[73] But his response is a normative one and not a descriptive one. It denies that those conversations are worth having. More than that, it suggests that to plunge too deeply into these discussions is to risk

73. Although he does not seem very happy about it. *See* H. Jefferson Powell, *A Response to Professor Knight, Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1725, 1725 (2009):

> When I do dip into [empirical works], I often find them rather difficult or even alien, both in style and in focus. I also find them frustrating: the empiricists frequently appear to be battling a formalist straw man who believes that law can be done by following rules that do not allow for discretion in their interpretation or application. I do not know anyone who thinks that.

halting the enterprise of constitutional law as we know it. It is an "ought" response to an "is" question. Powell's answer to the question of what judges *actually* do is like that of the religious believer who thinks that God must exist because life without God would be unthinkable. That is no kind of proof.

In any event, *is* the more "hard-bitten" conception of the judicial role unthinkable? Does it *really* render constitutional law as we know it impossible or meaningless? I very much doubt it. It may leave constitutional law in a rather chastened and disenchanted position. It may suggest that the most sweeping and grand discussions that we have been accustomed to put in terms of constitutional law are, to some extent, window dressing. It may even render constitutional law "an exercise in hypocrisy" (Powell ix), a prospect that Powell dreads, although he might have remembered the old saw about hypocrisy being the tribute that vice pays to virtue. But that does not render it impossible; it simply re-describes what we have been up to over the last two centuries in less romantic terms. Indeed, Powell's failure to genuinely engage the attitudinalists, and others, such as Posner, who have described constitutional judging as a "political" exercise, leaves him in something of a bind. On the one hand, he apparently finds *something* of value in the constitutional enterprise as it has unfolded over time. On the other, if the attitudinalists are right—and Powell never shows that they are not—then this is simply what we have been doing all along.

Powell might respond that we have simply lost our way; that the constitutional virtues exercised by men like Marshall and Akerman have been lost somewhere along the journey. This declinist view is apparent in his sympathetic treatment of the possibility that the "effort to exclude politics from law by moral effort" is "in an advanced stage of decay at present" (Powell 49–50). This is a typical view in constitutional scholarship, which is a field of nostalgists, who hearken back to some lost age—the Marshall Court, the Warren Court, the Founding era—or some individual *beau ideal* judge and sigh, "There were giants in those days. . . ."[74] But it is mistaken. The giants were not so giant, and in any event they hardly carried the whole enterprise on their own shoulders; they worked with any number of partners whose own talents were no greater or lesser than those of our present

74. *Cf.* Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1528 (1997) (calling the present generation of political leaders a "generation of midgets," in contrast to those "Americans who actually accomplished something very great indeed in the annals of the Republic").

constitutional interpreters. Quite apart from the serious question whether Marshall is really an exemplar of good-faith judging, one Marshall, or Akerman, does not a Golden Age make. Unless Powell can show us that constitutional law, *in practice*, was ever a completely morally serious enterprise—and he neither can nor does do so—then we must conclude that constitutional law has *always* survived as an enterprise despite the possibility that judges have been influenced all along by their political priors.

So there is a gap between the "ought" that Powell urges and the "is" we have had all along. That might not be a fatal blow, if we could become convinced that Powell's vision is possible in the real world of judging. But that real world plays a vanishingly small role in Powell's book. It is not just that he fails to seriously engage with the attitudinalist model of judging: it is that he fails to engage with almost *any* empirical or psychological insights into judging. Missing almost entirely from *Constitutional Conscience* is any descriptive account of how the work of judging proceeds from day to day. Instead, we are given a fairly abstract vision of judging, divorced from the realities of dockets, caseloads, and so on. We are given judges, functioning in a more or less monastic way,[75] but no information about who appoints them and why, or about the machinery that surrounds them—especially their law clerks, who, as Posner observes, may actually be charged with the burden of doing all the reasoning that Powell loads onto the judges' own shoulders alone. We are given a discussion of judges' motivations that rests on a set of archetypical characters (Powell 16–27), but no sense of the welter of "inglorious determinants" that actually drive judges, from the political to the personal to the institutional. We are told to assume that "meaningful conversation" can take place among judges (Powell 85), but we are told very little about whether it *does* take place and whether it changes anyone's minds. In place of a non-ideal reality—although it is difficult to charge this reality with being non-ideal unless we have a realistic sense of what is actually possible—we are given an ideal fantasy.[76]

75. *See* Powell 49 (describing, with a mixture of criticism and wistfulness, Felix Frankfurter's description of judges as being under an obligation to live and work monastically).

76. *Cf.* Powell 121 (acknowledging that the virtues he describes "can be accused of fantasy, a failure to see that the political enjoys priority in a much harsher sense than I have conceded, that there is not and cannot be anything other than the agonistic struggle of political preferences").

Of course, one might respond that this is the very point of Powell's book: to give us an ideal sense of what judges should aspire to. But no aspirational guide can be of much use unless it is at least somewhat tied to the real forces that move and affect judges.[77] Untethered to a more well-grounded account of what judging involves, Powell's account threatens to simply float away.

Powell is aware of the dangers of too "ought"-focused an account of constitutional virtue. He writes that "[a] line of moral thought unable to shape decisively the moral practices to which it is directed is of dubious value to anyone" (Powell 50). It is for this reason that he supplies the list of constitutional virtues that make up the latter part of his book. But I wonder whether he has escaped the danger of vacuity that he warns of, for two reasons. First, it is questionable that one can speak confidently of being able to "shape decisively" the moral practices of judges unless one has a far more accurate and realistic understanding of what judges can actually achieve, given their limitations and motivations and the institutional forces that surround them. To do so is like describing the ideal swimmer without asking whether the actual swimmer is chained to an anchor.

Second—and, as we shall see, this is a common attack on any virtue-centered account of ethical practice—the actual virtues Powell ascribes to the ideal judge are arguably too thin to be called decisive. Even if we assume away all the real-world influences on judges and rely only on Powell's moral account, that account supplies very little by way of actual guidance.

Where Powell's account is thicker, it is also more questionable. Like many theorists who want to make the fraught move from a general sensibility to a more specific set of substantive implications, Powell offers up a set of "substantive commitments [that] correlate with the constitutional virtues" (Powell 110). But those commitments are both too abstract and too specific to be convincing or useful. At the abstract level, injunctions about the "absence of orthodoxy" or the "priority of the political" are not terribly helpful decision guides (Powell 110–11). If, on the other hand, we treat these commitments in a thicker fashion, we may wonder how they are related to Powell's

77. *Cf.* Julia Annas, *Virtue Ethics*, *in* THE OXFORD HANDBOOK OF ETHICAL THEORY 515 (David Copp ed., 2006) ("[A]n ethical theory is weakened if the best contemporary science conflicts with its claims or makes it hard to see how they could be true.").

broader virtue-centered account. Do virtues such as integrity and candor really tell us anything about whether government can prescribe orthodoxy, or about whether "[t]he community of those who count" under the Constitution includes gays and lesbians for purposes of the Fourteenth Amendment? (Powell 113). Or are those substantive commitments another thing entirely, with little relation to any account of judging that centers on the judicial agent and his or her virtues?

I must emphasize that I find much of Powell's idealized account of constitutional virtue compelling, particularly his view that judging contains an irreducible component of moral choice and obligation. But his book demonstrates the dangers of focusing too heavily on the judicial "ought" without adequate consideration of the judicial "is." Powell may content himself by asserting that he has nothing to say to those readers who question whether his idealized account is too far-flung from lived reality, and that any other approach would render constitutionalism "a fraud" (Powell 100). But that move excludes most sensible readers, in my view, and certainly anyone who has been at all persuaded by the voluminous literature on judging that I only touched on in Part I. Those who live in the world of the judicial "is" may be moved by Powell's eloquence, but that is not the same thing as being persuaded by it.

Farber and Sherry's *Judgment Calls* falls next on the spectrum from judicial "ought" to "is." It is neither as idealistic as Powell's book nor as realistic as Posner's. Despite my sympathies with its effort to split the difference between Posner and Powell, however, I will argue here that its attempt is still unconvincing, largely because it is resides too much in the world of "ought" and not enough in the world of "is."

To be sure, *Judgment Calls* is far more aware of the actual practices of judging. Although I have already suggested that its use of the psychological and other literature on judging is thin, certainly it is far more active in its use of these sources than Powell's book is, although that is a low standard and Powell's approach is less dependent on those kinds of arguments. Farber and Sherry are explicit in acknowledging that "[j]udges do not operate in a vacuum" (Farber & Sherry 4), and they offer a tally of internal and external factors that may influence judges in their work.

By straddling the line between a descriptive and a normative account of judges, however, Farber and Sherry fail to satisfy the demands of either approach. This is especially

apparent in their defense of judicial review. Farber and Sherry write that the judiciary is "a human institution, and so we ask only whether the judiciary can do its job well enough to make the enterprise worthwhile" (Farber & Sherry x). More clearly still, they write that critics of judicial review fall short because they "fail to compare judicial review in a realistic way with its alternatives. We cannot ask whether judicial review is desirable without asking 'compared to what?'" (Farber & Sherry 13). But they do not undertake a full-fledged comparative institutional analysis, one that views each of the competing institutions in a non-ideal fashion and balances the costs and benefits of giving the primary interpretive role to any one of them. Adrian Vermeule, by contrast, has undertaken just this sort of analysis, and has argued that the judiciary may not be the institution best suited to this task.[78] One need not agree with Vermeule's conclusions to conclude that a more vigorous defense of judicial review is required, especially if that defense is going to be situated in comparative institutional terms.

Given how firmly entrenched judicial review is in the constitutional game as it is played today, Farber and Sherry's book would be no weaker if they had bypassed this issue altogether. So let us assume that the legitimacy of judicial review is not at issue. The question, then, is whether Farber and Sherry's account of constitutional judging, both in descriptive and in normative terms, achieves its aims. They write that judicial decisions can be evaluated on the basis of "reasonableness," a catch-all phrase that takes into account whether a decision acknowledges competing arguments, whether it "articulate[s] plausible distinctions and intelligible standards," and so on (Farber & Sherry 4). They add: "This may seem like an uncontroversial thesis—and it should be—but in fact we have received remarkably sharp rejoinders from skeptics" (Farber & Sherry 4).

Small wonder. Of course, Farber and Sherry's very point is that constitutional decision-making involves judgment calls. But putting "judgment" in such capacious terms as "the strength of . . . legal reasoning" (Farber & Sherry 4) approaches circularity. Constitutional judgments are legitimate if they are reasonable, if they involve "the rule of law" rather than "lawless fiat" (Farber

78. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006); ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2008).

& Sherry 4), and we can tell if they are reasonable because they display good judgment. It is not completely circular—they certainly do not believe that *any* set of reasons falls within the scope of "reasonable" constitutional practice—but it is so general as to be unhelpful. It does little to exclude any but the most obvious departures from standard judicial practice. It does not blunt Posner's charge that the Supreme Court swims in an ocean of discretion; it merely suggests that this discretion is lightly bounded by a set of acceptable rhetorical moves and practices, a point that Posner would hardly contest.

Farber and Sherry think reasonableness does more than this. They think it provides a serious constraining force on judges, who may find that an opinion "just won't write" (Farber & Sherry 44). More generally, they argue that judges don't perceive themselves as exercising boundless discretion: "they may feel that they are not reaching 'outside the law' for a policy solution, but 'inside the law' for concepts and values" (Farber & Sherry 39). There are three problems with this response. First, it neglects the institutional world in which judges operate, and particularly the ability of both judges and, importantly, their law clerks to translate the vaguest intuitions or policy sentiments into the language of judging.[79] That is why Posner argues that judges might be *more* constrained if they acknowledged the extent of their discretion, and drew in a more explicit way on pragmatic considerations that ostensibly lie "outside the law," rather than taking too seriously their own urge to believe that they are acting "within the law." (Posner 252). Second, notwithstanding their occasional efforts to draw on psychological research, Farber and Sherry here neglect the point that judges may not be aware of the cognitive influences that press them toward what they see as a "reasonable" decision in spite of equally reasonable counter-arguments.[80] Finally, even if reasonableness, as they describe it, acts as something of a constraining force, it does not constrain very much: it is a muu-muu, not a corset. At this level of generality,

79. *See, e.g.*, Oldfather, *supra* note 26, at 144 ("[G]iven the number of cases on [the judge's] docket and the amount and nature of assistance provided by his law clerks, it may not even be that we can meaningfully count on him to 'decide' some of the cases before him at all."); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 752 (1992) (making the now widely understood point that "[b]ecause most opinions are now drafted by law clerks, the opinions may not represent the work of the Justice making the decision").

80. *See, e.g.*, Simon, *supra* note 51, at 1112.

the line between the "rule of law" and "lawless fiat" is hard to perceive.

The loose nature of the constraints offered by Farber and Sherry is evident in their discussion. We have already dealt with the requirement of reasoned elaboration and the view that some opinions "won't write." To take another instance, Farber and Sherry, like Powell, write of the constraining force of deliberation on collegial courts. But Posner, among others, has questioned the role that collegial deliberation actually plays in judicial decision-making. They write that "[t]here is some evidence that deliberation among judges, especially on the Supreme Court, is decreasing," and chalk some of this up to the different forms that deliberation may take in an electronic age (Farber & Sherry 92). It would be better, perhaps, to question whether collegial deliberation has *ever* played that significant a role.[81]

Farber and Sherry also argue that transparency is another important constraining factor on judges (Farber & Sherry 97–104) But this discussion seems to conflate transparency with candor.[82] Whether judicial candor is really a necessary aspect of judicial decision-making is a debatable point.[83] At present, suffice it to say that it is unclear that judges need be candid about what they are doing, provided that they are transparent about providing some set of reasons for their actions. As Tushnet observes, because opinions are "a form of persuasive writing" directed at an audience, "[w]hat moves the audience need not be what moves the author."[84] Certainly, notwithstanding their appeal to "the way judges themselves perceive their work" (Farber & Sherry 39), it is not clear that

81. We might also note Clark and Trubek's observation, in criticizing Karl Llewellyn for arguing that deliberation, among other "checks and controls," can "wash out individual bias," that Llewellyn's examples of great judges are, paradoxically, "just those men who could and did influence a whole court to follow their views." Clark & Trubek, *supra* note 7, at 263. The same could be said of some of the Justices who serve as exemplars for Farber and Sherry.

82. *See, e.g.*, Farber & Sherry 98:

> Transparency is both an independent value and a necessary concomitant of the other constraints we discuss in this book. If a judge is not candid about what she is doing and why, then it is impossible to know whether she is being faithful to precedent or to the principles of incrementalism.

83. *See, e.g.*, Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155 (1994); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008).

84. Tushnet, *supra* note 79, at 752–53.

judges are actually candid to themselves about what they are doing. We might wish for them to be—a point that tends to favor Posner's arguments in favor of an open appeal to pragmatic considerations rather than conventional rule-of-law values—but that does not make the wish any less quixotic.

The looseness of the constraints Farber and Sherry offer is finally evident in their case studies of particular fields of constitutional law. It should be unsurprising that differences of opinion arise when we get to particulars, and one should not hold this fact against them too much. But the fact that the conclusions reached by Farber and Sherry in each of the realms they evaluate—cases involving terrorism, abortion, and affirmative action—are either tendentious or, to use their critics' phrase, "wishy-washy" (Farber & Sherry 168), tends to suggest the difficulty of moving from general principles such as "exercise good judgment" or "provide reasoned explanations" (Farber & Sherry 167) to actual constraints on constitutional judgment itself. For example, Farber and Sherry attempt to distinguish the Court's abortion jurisprudence from the *Lochner*[85] line of cases by arguing that the *Lochner*-era Court "conspicuously failed to connect its view of 'freedom of contract' with constitutional traditions," and that its subsequent decisions attempting to justify the original decision were "fitful and hard to reconcile," whereas the Court in its abortion jurisprudence "has tried to accommodate opposing values when it became clear that its ruling was deeply opposed" (Farber & Sherry 50–51). Even if we accept that these sorts of responses to public opinion represent acceptable judgment calls rather than "lawless fiat," however, it would take a more discerning eye than mine to show that the *Lochner* Court was more untethered to constitutional tradition than the *Roe* or *Casey* Courts, or that the post-*Roe* decisions of the Court have been any less "fitful and hard to reconcile." Similar criticisms could be made about the conclusions that Farber and Sherry draw in each of their case studies. What this suggests is not that the Court has or has not exercised good judgment in any of these areas, but that the issues themselves rest on such contested policy and ideological grounds that "reasonableness" cannot point the way to one conclusion or another—that they are "political" issues, in Posner's sense of the term. But that suggests either that *any* decision in these kinds of areas, and in

85. Lochner v. New York, 198 U.S. 45 (1905).

constitutional law more generally, will be closer to "lawless fiat" than "rule of law," or that *any* judgment, suitably dressed up in constitutional language, might be said to be reasonable—in which case "judgment calls" will be of very little help.

My point is not to lambaste a fine work for what it does not accomplish rather than for what it does. It is that the flaws in this work are intimately connected to an uneasy tension between the judicial "is" and "ought." Farber and Sherry want to argue that there is no tension there: the virtues that they see as crucial to the constitutional enterprise, that make "judgment calls" legitimate and worthwhile, are immanent in the actual activity of judging and offer meaningful restraints on that activity. As an "is," however, this argument is too thin to be wholly convincing. And as an "ought," it is only valuable if it is suitable to judges in the real world and actually likely to constrain them. *Judgment Calls* may fail to satisfy on either side of the line.

Indeed, in some respects, the effort to straddle the line between is and ought in *Judgment Calls* makes it a book at war with itself. This is especially clear in the tension between Farber and Sherry's praise on the one hand for candor and transparency, their disdain for those who believe that "the public . . . cannot be trusted with various kinds of knowledge" (Farber & Sherry 102), and their argument on the other hand that critics of the Court should not attribute its decisions "to political motives," because "it incrementally persuades the public or the judges themselves that the law is *about* politics and therefore that we should expect judges to be blatantly political." (Farber & Sherry 96). It is hard to see how the public, in Edenic fashion, can be trusted with "various kinds of knowledge," *except* for the crucial knowledge that some of the Court's most thoughtful critics think its constitutional decisions are, at bottom, political.[86] In any event, Farber and Sherry then immediately violate their own injunction by saying—and not without reason—that *Bush v. Gore*[87] "betrayed all of the principles discussed so far" (Farber & Sherry 110). They may be right, although it is quite possible to construct a lawyerly defense of even that decision.[88] But the tension in their views is a result of

86. *See* CARDOZO, *supra* note 7, at 167 ("There has been a certain lack of candor in the discussion of the theme [of the non-legal influences on judges], or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations.").

87. 531 U.S. 98 (2000).

88. *See, e.g.*, Jonathan L. Entin, *Equal Protection, the Conscientious Judge, and the*

the difficulty that *Judgment Calls* faces in trying to achieve both a descriptive and a normative goal. I tend to think that the book is ultimately best viewed as an "ought" book rather than an "is" book, but it is not clear that it succeeds on either front.

Of the three books under review, *How Judges Think* is most clearly an "is" book. Not for Posner are any rhapsodies to the moral seriousness of judging or to the triumph of the rule of law over lawless fiat. He will have no truck with "Law Day rhetoric" (Posner 1) or "professional mystification" (Posner 3). This is squarely a book about the "actual practices" of judges, not their ideal practices (Posner 2). And this is a book that draws not on moral theories, or somewhat vain hopes about the constraining features of general principles such as candor or humility, or warnings about the corruption of the "constitutional enterprise." Instead, it draws heavily and richly on empirical studies and social science literature, with a completeness that would neither be possible in a book the size of *Judgment Calls* nor, ultimately, especially complementary to that book's underlying "ought"-centered motivations. With barely restrained glee, Posner warns readers to "brace themselves" for the use of tools and terms like "reversal aversion," "Bayes's theorem," "monopsony," "authoritarian personality," and "agency costs." (Posner 11). Unlike Farber and Sherry, who warn about studies of judging that depart from judges' own purported mental image of their own work, Posner is unapologetic about "discussing judicial thinking in a vocabulary alien to most judges and lawyers. Judicial behavior cannot be understood in the vocabulary that judges themselves use, sometimes mischievously" (Posner 11). Although, as its title suggests, *How Judges Think* takes an internal as well as an external view of judging as an activity, it is a decidedly different internal view than the one that is sometimes touched on by Farber and Sherry, one that focuses on what judges *actually* think at a subconscious level, *why* they think the way they do and what motivations lead to these thoughts, rather than on judges' surface level self-perceptions. Even Posner's spirited defense of constrained judicial pragmatism, which might seem

2006 Presidential Election, 61 MD. L. REV. 576 (2002) (arguing that there are reasonable, but contestable, defenses of the Court's decision in *Bush v. Gore*); Richard L. Epstein, *"In such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended*, 68 U. CHI. L. REV. 613 (2001) (defending the outcome on other legal grounds); Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 CARDOZO L. REV. 1219 (2002) (defending the decision).

to take on a more idealized view of how judges should behave, begins at base with the argument that judges are already actually constrained pragmatists.

As an "is" book, I find Posner's book largely compelling and persuasive. As against Farber and Sherry, who attempt to split the difference between idealized and actual judging practices, it is a far more thorough and successful effort. As to Powell's *Constitutional Conscience*, one should not so much compare the two books as contrast them. They are close to mirror opposites, and one may find each persuasive in its own way—one as a description of what judges actually do and the other as an account of what judges *must* do to make constitutional judging a morally serious enterprise. For all that, despite the deep emotional appeal of Powell's book, it is difficult to escape the sense that Posner's book is more convincing; that, like a cockroach after a nuclear holocaust, it will survive, ugly perhaps but adaptive and nimble, long after its rival.

An "is" argument cannot wholly vanquish an "ought" sentiment, however, although it can certainly inform and should probably chasten those sentiments. So it seems to me that *How Judges Think* cannot wholly undermine those who would like to think about how judges *ought* to think, although it demonstrates that any idealized account of the latter cannot persuade too deeply if it is insufficiently attentive to the former. For one thing, in some sense the two projects are simply different; they can influence but not overcome each other. More deeply, however, and despite what Powell writes (Powell 4, 9), I do not read Posner as denying Powell's fundamental point that judging contains an irreducible moral component. Although that is the evident spirit of Powell's judgment of Posner's approach, what he actually says about Posner is closer to the truth: that Posner denies that a judge has a "moral or even political duty to abide by *constitutional text*" (Powell 4) (emphasis added).

That may be right, although Posner would surely argue that constitutional text is among the principal matters that judges in constitutional cases must reckon with, if only for pragmatic reasons. But, as Powell's own account surely acknowledges, constitutional text is only one part of the activity of constitutional judging, leaving aside the matter of statutory or common-law judging. It involves a rich variety of legal—and, I would say along with Posner, extralegal—considerations besides the text itself. In that wider realm, Posner, like both Powell and Farber and Sherry, does not believe that any comprehensive

theory or mechanism of judging can be reduced to an algorithm. Although the kinds of considerations that Posner believes may enter into the work of judges as occasional legislators center around pragmatic considerations, those considerations do not exclude, but rather necessarily must include, moral considerations, although they might not be recognizable to Powell as the kinds of moral considerations he thinks ought to hold sway in the constitutional realm. To the extent that Posner is arguing that judges cannot be fully constrained in their work by any mechanical forces, he is perforce agreeing that judging includes a moral component. That should be clear from his invocation of Sartre's concept of bad faith, which he describes as "the denial of freedom to choose, and so the shirking of personal responsibility" (Posner 104). Posner's judge, too, cannot escape the weight of moral choice, although Posner may think that a suitably "moral" approach to judging should be more instrumentalist than abstract.

In short, although Posner does a splendid job of describing the actual and inglorious determinants of lived judicial reality, he does not exclude the possibility of thinking about the judicial role and judicial character in a more normative fashion. More than that, to the extent that his denial of any absolutely constraining theories of judicial interpretation is correct and the judge is thrown back on her own judgment, however defined, Posner's description of the judicial "is" provides very fertile space for thinking anew, but now in a suitably informed fashion, about the normative ideals judges should strive for. By focusing so relentlessly on the "is," Posner may, somewhat paradoxically, lay stronger foundations for thinking about the judicial "ought" than either Powell or Farber and Sherry.

Furthermore, Posner provides some useful spaces in which a normative theory of judging, but one that is grounded on a more practical sense of what is possible for judges, might develop. Recall that one of the "tastes" that Posner argues judges have for the job, and that leads them to choose the judicial office over more lucrative options, is "a taste for being a *good* judge" (Posner 60). This taste Posner describes as being both "intrinsic" and "validated and reinforced by a judge's reputation in the judicial and the broader legal community, and sometimes in other communities as well" (Posner 60). Thus, a judge with average tastes wants "[t]o regard [himself] and be regarded by others, especially [his] peers, as a good judge." (Posner 61). That means, among other things, following the rules of the judicial

game, as set out in the judicial oath and elsewhere (Posner 70). Judges do not want to be thought of as "politicians in robes," since that would deprive them of both the intrinsic satisfaction of the job and the benefits of being regarded by others as a good judge (Posner 61). Moreover, according to Posner, since judging and its satisfactions are intimately connected to the exercise of power, the good judge may be motivated by a sense of responsibility and conscience (Posner 62).

This is, to be sure, close to Farber and Sherry's concern with judicial self-perception, and in some ways to Powell's more virtue-oriented account of judging. But it is a more persuasive account. Unlike Farber and Sherry, Posner does not treat judicial self-perception as accurate; unlike Powell, he treats the judicial taste for being, and being regarded as, a good judge as one among many psychological motivations rather than as a moral demand, and he thus does not raise the stakes of the judicial game to the breaking point. But Posner does suggest that among the motivations that may drive judges, an important one is the desire to be and be thought of as a "good" judge, with all the demands on conscience that may make; and he suggests that this desire may be shaped by the conventional norms and expectations that surround judging, including the norms derived from the judicial oath. In so doing, Posner gives us room to think again about what judicial character is, what it might demand, and how, in something other than the best of all possible worlds, we might shape and constrain judicial character in positive ways.

IV. JUDICIAL CHARACTER, JUDICIAL VIRTUE, AND THE OATH: A (SOMEWHAT) ARETAIC PERSPECTIVE

We are left, then, with the following questions. How can we adopt a vision of judging that is more realistic, more willing to take into account the "inglorious determinants" of judicial behavior rather than simply rejecting them, than Powell's vision? What sort of normative vision can we use to fill in the gaps left by Posner's largely descriptive account, without ignoring the psychological and institutional influences on judging that he brings to life? Can we, finally, thread the path between the judicial "is" and the judicial "ought" in a way that builds on but is richer and more convincing than the attempt offered by Farber and Sherry? In some measure, I think we can.

We might see our way clear to such a vision by beginning with some important common ground among all three books. We might begin by insisting, with Powell, on the irreducible and ineluctable "presence of a moral dimension to the role of the judge" (Powell 41),[89] and with Posner on the ineliminable role of a sense of personal responsibility and conscience in the typical judge's motivations (Posner 62).

Similarly, and on this all three books are clearly in agreement, we might accept the premise—a fighting premise, to some, but one that will find many adherents in the legal academy and even more in the judiciary—that *no* purportedly comprehensive theory of constitutional (or legal) interpretation can so perfectly constrain the judge as to render the gravity of the moral choices entailed in judging inconsequential. Whatever its theoretical merits, a formalist or originalist approach to judging certainly cannot, in practice, eliminate the need for practical judgment in particular decisions, nor can it eliminate the specter of Sartrean bad faith that Posner describes.[90] In this sense, Justice Scalia's phrase "faint-hearted originalist"[91] is not an epithet but a saving grace.[92] Neither legalism, in the more general sense of doctrinalism, nor pragmatism deny the moral component to judging—a point that incidentally suggests that the distinction urged by Powell between instrumentalist and non-instrumentalist approaches to judging is not always as important as it may seem. Whether a judge's discretion is somewhat constrained or utterly unbounded, discretion there must be. There will always be open spaces in judging. With them come the obligation of moral choice and the need for practical wisdom.

These premises redeem the promise I made early in this Essay to show that judicial character matters. For, where discretion cannot be eliminated and there is no perfect set of decision rules for the person charged with the obligation to make

89. *See also* R. George Wright, *Dependence and Hierarchy Among Constitutional Theories*, 70 BROOK. L. REV. 141, 196 (2004) ("To decide a constitutional question is inescapably a moral activity.").

90. This is true even if one adopts formalism for instrumental reasons. See Solum, *supra* note 11, at 530 (arguing that even the institutionally grounded argument for formalist judging made by Cass Sunstein and Adrian Vermeule, see Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003), "requires the aretaic turn").

91. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862, 864 (1989).

92. *But see* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006).

judgments, we are perforce thrown back to the question of character. That is so not because a focus on character will necessarily provide a perfectly clear description of judicial behavior, let alone a decision guide for judges in particular cases that allows us to assess definitively the rightness or wrongness of particular decisions. It is because, for all the difficult questions it may leave to be addressed, character simply is an ineluctable part of the judicial role.[93] Because it cannot be avoided, it must not be neglected.

Once we agree that character is an unavoidable part of the judicial role and worthy of study in its own right and for its own sake, we have taken what Larry Solum calls an "aretaic turn."[94] That is, we have moved away from "a myopic focus on either moral rules or the calculation of consequences to a broader vision of normativity that focuses on human excellence."[95] The aretaic turn in law is similar to the aretaic turn in contemporary moral and ethical philosophy. In philosophy, the aretaic turn is both a positive and a negative project. Negatively, what it entails is a rejection of the two approaches to moral philosophy that reigned more or less alone before virtue ethics entered the scene: utilitarianism, with its focus on consequences, and deontology, represented most strongly by Kant, with its focus on rights and duties. Positively, virtue ethicists not only finds significant problems with these approaches as a guide to ethical conduct,[96] but suggests a new approach to ethical theory, one that is distinctly agent-centered and focused on questions of character. Although Solum notes that legal theory for a long time neglected the emergence of virtue ethics as a competitor to utilitarian or deontological approaches to moral philosophy, the tide has plainly shifted, and an increasing number of articles applying virtue ethics across a range of legal problems suggest that "[l]egal theory has begun, at least tentatively, to make the aretaic turn."[97]

If the time lag between the flourishing of virtue ethics in philosophy and its emergence in legal theory is unsurprising—

93. For observations along these lines, see, Tushnet, *supra* note 79 (arguing that because constitutional theory cannot serve as a strong constraint on judges, we must look to judges' character); *see also id.* at 763 ("Analyzing character now makes more sense to me than paying attention to theory.")

94. *See* Solum, *supra* note 11.

95. *Id.* at 495.

96. *See,e.g.*, G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1 (1958).

97. Solum, *supra* note 11, at 495.

legal scholarship is, after all, generally parasitic on the developments of the *prior* generation of work in other disciplines—neither should its eventual attraction to legal theory be surprising. Just as, in philosophy, utilitarianism and deontology were generally seen as being attractive because they offered a sure-footed and detailed guide to proper action, a claim that arguably has been undermined by the virtue ethicists, so legal theory, and constitutional theory in particular, have sought to find clear decision guides for judges—whether methodological, as in formalism or originalism, or more abstract, as in rights-based theories of judging and other recourses to "principle" in judicial conduct, of which Dworkin is perhaps the modern exemplar. But the one thing that the authors under review agree on, and in this they are joined by many in legal and constitutional theory, is that there is no "single 'decision procedure for judging'—some rule that would guarantee the correct outcome in every single case."[98] The aretaic turn in jurisprudence is thus similar in important respects to the aretaic turn in moral philosophy. It involves both a negative project and a positive project. Negatively, it rejects the view that some single method, whether focused on outcomes or on abstract duties, can provide a decision procedure for judging. Positively, it argues that the failure of these competing approaches is best responded to by focusing instead on the *character* of the agents charged with making judicial decisions and attempting to evaluate the judicial role by asking in the first place what constitutes a "virtuous judge."[99] If we view the central questions of legal theory in this agent-centered way, we can see that the ultimate focus of each of the books under review is ultimately one of judicial *character*, however divergent the approaches of those books may seem at first.

Although this Essay is too short a space for a full description of even virtue jurisprudence,[100] let alone virtue ethics, a few words about each are obviously appropriate. Begin with virtue ethics.[101] Although there are many potential versions of

98. *Id.* at 498.

99. *Id.*

100. For their best explication, see the sources cited in note 11. KRONMAN, *supra* note 8, offers a description of the "lawyer-statesman" ideal that owes much to virtue ethics as well.

101. Among the sources on which I rely are ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999); ALISDAIR MACINTYRE, AFTER VIRTUE (3d ed. 2007); VIRTUE ETHICS (Roger Crisp & Michael Slote eds., 1997); VIRTUE ETHICS: A CRITICAL READER (Daniel Statman ed., 1997); VIRTUE: NOMOS XXXIV (John W. Chapman & William A.

virtue ethics, and not all of them are necessarily Aristotelian,[102] modern virtue ethics has often drawn heavily on Aristotle's *Nichomachean Ethics*. As we have already seen, it draws on Aristotelian ethics (and is often called "neo-Aristotelian" in approach) in large measure to seek a way out of what it sees as the flaws of the prevailing approaches to moral philosophy: utilitarianism and deontology. In contrast to those approaches, it argues that "the basic judgments in ethics" are not about either consequences or duties, but "judgments about character."[103] In other words, rather than moving from a consideration of right or wrong actions to a consideration of what constitutes virtue, virtue ethics treats "the concept of virtue [as] explanatory prior to that of right conduct."[104] Virtue ethics claims, most centrally, that "[a] right action is one that is in accordance with what a virtuous person would do in the circumstances, and what *makes* the action right is that it is what a person with a virtuous character would do here."[105]

Central to this (very basic) account of virtue ethics are two underlying principles. The first is the Aristotelian concept of *eudaimonia*, which has been variously translated as "happiness," "flourishing," or "well-being."[106] The ethical project thus begins teleologically, by treating human flourishing as the highest aim toward which we can aspire and asking how we might achieve it.

The answer lies in the virtues. As MacIntyre puts it, "The virtues are precisely those qualities the possession of which will enable an individual to achieve *eudaimonia* and the lack of which will frustrate his movement toward that *telos*."[107] A life of *eudaimonia* is simply "a life of activity in accord with the human excellences (or virtues)."[108] The virtues are thus viewed as those qualities that are "necessary conditions for, or . . . constitutive elements of, human flourishing and wellbeing."[109] As one can

Galston eds., 1992); Annas, *supra* note 77.

102. *See* HURSTHOUSE, *supra* note 101, at 9–10.

103. Daniel Statman, *Introduction to Virtue Ethics*, *in* VIRTUE ETHICS, *supra* note 101, at 1, 7 (emphasis omitted) [hereinafter Statman, *Introduction*].

104. *Id.*; *see also* Gary Watson, *On the Primacy of Character*, *in* VIRTUE ETHICS, *supra* note 101, at 56.

105. Justin Oakley & Dean Cocking, *Virtue Ethics and Professional Roles* 9 (2001) (emphasis in original). In offering this description of virtue ethics, Oakley and Cocking are drawing on the work of Rosalind Hursthouse and Philippa Foot, although most virtue ethicists would agree with this basic premise.

106. *See, e.g.*, HURSTHOUSE, *supra* note 101, at 9.

107. MACINTYRE, *supra* note 101, at 148.

108. Solum, *supra* note 11, at 497.

109. Statman, *Introduction*, *supra* note 103, at 8.

imagine, what constitutes the list of virtues is a debatable point, but it is certainly taken to include what we would commonly and intuitively think of as belonging on such a list: qualities like "courage, temperance, good temper, and justice."[110] They are the virtues without which *eudaimonia* is unattainable.[111]

The virtues are both "character traits" and, more deeply, "excellences of character."[112] They involve not merely a disposition to act in particular ways, but without particularly virtuous reasons for doing so,[113] but actually *acting* virtuously and for virtuous reasons.[114] Central to the ability to act soundly in accordance with the virtues is a particular virtue, that of *phronesis*, or practical wisdom: "the ability to reason correctly about practical matters."[115] Although Aristotle exalts *sophia*, or theoretical wisdom, for its concern with the "highest" things,[116] for the virtuous actor, *phronesis* is "the overarching virtue."[117] It is what "guid[es] us to what should be done in [given] situations, and thus "always ensures right action and response."[118] *Phronesis* is thus central to any account of the virtuous actor in the world, such as a judge.

Even on this abbreviated account, we can see certain central traits that might be said to characterize a virtue ethics approach. It rejects the competing approaches to ethics characterized by utilitarianism and deontology; indeed, it argues that these "principled" approaches have failed to help us with practical ethical problems.[119] Accordingly, it moves away from attempts to find a clear set of "right" and "wrong" answers to ethical problems and move from those to questions of character, and instead treats the question of character as having primacy in ethics. It focuses in particular on what constitutes virtuous conduct in any given situation, by which it means that right

110. Solum, *supra* note 11, at 497.

111. *See, e.g.*, Oakley & Cocking, *supra* note 105, at 15.

112. HURSTHOUSE, *supra* note 101, at 12.

113. *See id.* at 11.

114. *See, e.g.*, Robert B. Louden, *On Some Vices of Virtue Ethics*, *in* VIRTUE ETHICS, *supra* note 101, at 180, 182.

115. HURSTHOUSE, *supra* note 101, at 12.

116. *See, e.g.*, Edmund D. Pellegrino, *Professing Medicine, Virtue Based Ethics, and the Retrieval of Professionalism*, *in* WORKING VIRTUE (Rebecca L. Walker & Philip J. Ivanhoe eds., 2007) at 61, 77.

117. Jennifer Radden. *Virtue Ethics as Professional Ethics: The Case of Psychiatry*, *in* WORKING VIRTUE, *supra* note 116, at 113, 129.

118. *Id.*

119. *See, e.g.*, HURSTHOUSE, *supra* note 101, at 40; Statman, *Introduction*, *supra* note 103, at 6; Watson, *supra* note 104, at 60.

conduct is simply what any virtuous actor, blessed among other things by a strong sense of practical wisdom, would do in the circumstances. Although it may be objected that there is a note of circularity in the virtue ethical approach, Hursthouse argues that this is not true: virtue ethics "specifies [the virtuous agent] in terms of the virtues, and then specifies these, not merely as dispositions to right action, but as the character traits (which are dispositions to feel and react as well as act in certain ways) required for *eudaimonia*."[120]

Virtue jurisprudence builds on virtue ethics in the realm of legal theory. It is, Solum writes, "simply the translation of the aretaic turn in moral theory to the context of lawmaking and adjudication."[121] Of particular relevance for our purposes, the aretaic turn in jurisprudence does not begin with an ideal theory of judicial interpretation, including an ideal theory of constitutional interpretation, and then ask what judicial virtues might ensure the achievement of that interpretive approach; indeed, as we have seen, it begins by assuming that there is no "single 'decision procedure for judging.'"[122] Instead, it takes questions of judicial character, or virtue, as prior and primary. "In response to the question of ideal theory—'How in principle should judges decide the constitutional controversies that are presented to them?'—a virtue-centered theory of judging gives an aretaic answer—judges should decide constitutional cases in accord with the judicial virtues."[123] It is "virtue-centered," not "decision-centered."[124]

Like virtue ethics, virtue jurisprudence generates a list of virtues from the *telos* of judging, asking "what makes for excellence in constitutional adjudicators" given the basic aims of judging, most centrally the achievement of justice.[125] Those virtues include such uncontroversial traits as temperance, courage, and humility,[126] virtues we have already seen at work

120. Rosalind Hursthouse, *Virtue Theory and Abortion*, *in* VIRTUE ETHICS, *supra* note 101, at 227, 229.

121. Solum, *supra* note 11, at 498.

122. *Id.*

123. *Id.*

124. *Id.* at 501–02; *cf.* KRONMAN, *supra* note 8, at 16 ("The ideal of the lawyer statesman was an ideal of character. This meant that as one moved toward it, one became not just an accomplished technician but a distinctive and estimable type of human being—a person of practical wisdom.").

125. *Id.* at 502. Although Solum's account, and mine too, focuses on constitutional judging, the same would be true if we focused on other areas of judging.

126. For a detailed examination of the role of humility in judging, see Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS. L. REV. 127 (1998).

in Powell and Farber and Sherry's books; they also, crucially, include practical wisdom, "the virtue that enables one to make good choices in particular circumstances."[127] A judge imbued with practical wisdom has thus "developed excellence in knowing what goals to pursue in the particular case and excellence in choosing the means to accomplish those goals."[128] And, just as virtue ethics also generates a list of vices in contrast with the virtues, so virtue jurisprudence generates a list of judicial vices: corruption, cowardice, bad temper, and so on.[129]

This is, again, an abbreviated account. And it is likely that virtue jurisprudence will face some of the same criticisms that have been raised against virtue ethics.[130] Perhaps the most common objection to virtue ethics is what has been called the "action-guiding objection."[131] This objection argues that virtue ethics "lacks the capacity to yield suitably determinate action guides."[132] It does not, in short, tell us what to do in particular circumstances, besides the unhelpful advice that we do what a virtuous person would do.[133] And even if it offers us *some* useful guidance—even if, for example, we have before us an uncontroversial model of a virtuous person—whatever guidance it provides is uncodifiable. Similarly, a critic of virtue jurisprudence might well make the standard faculty workshop move on just about any subject: that whatever is true about virtue jurisprudence is banal and unhelpful.[134]

To this objection we might make two responses.[135] The first is the common response to similar objections to virtue ethics: the

127. Solum, *supra* note 11, at 510.

128. *Id.* For a thoughtful examination of the role of practical wisdom within judging, see Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733 (2004).

129. *See, e.g.*, Solum, *supra* note 11, at 503–06.

130. For a recent critical discussion of the use of virtue ethics in legal theory, see Ekow N. Yankah, *Virtue's Domain*, 2009 U. ILL. L. REV. 1167. Yankah's criticisms are, however, directed primarily at the use of virtue ethics in criminal law theory, and are less pertinent to either a judge-centered approach to virtue jurisprudence in general or an aretaic account of constitutional judging in particular.

131. David Solomon, *Internal Objections to Virtue Ethics*, in VIRTUE ETHICS, *supra* note 101, at 164, 169.

132. *Id.*

133. For a strong statement to this effect, see Louden, *supra* note 114.

134. *See, e.g.*, HURSTHOUSE, *supra* note 101, at 39; Watson, *supra* note 104, at 59.

135. A third possible response, which I set aside here, is that the criticism itself is mistaken: that virtue ethics, and by extension virtue jurisprudence, *does* provide a useful guide for right conduct. *See, e.g.*, HURSTHOUSE, *supra* note 101, at 36.

"partners in crime," or *tu quoque*, response.[136] Just as the action-guiding objection to virtue ethics "places demands on [virtue ethics] which neither deontological nor consequentialist normative theories can satisfy,"[137] so similar objections to virtue jurisprudence, whether grounded on Dworkinian principle or legal formalism or some other general decision-oriented theory of judging, suffer from similar frailties. *They* cannot supply a strong set of codifiable rules that will guide us in making particular decisions. This not only places those critiques in a "rhetorically awkward position" and shifts the burden to the objectors.[138] It also reminds us of the centrality of character in *any* reasonably accurate account of judging, and the extent to which judicial character is simply an unavoidable feature of the judicial role, thus making an aretaic approach all the more attractive as a starting point.

The second response is a more positive one. It argues that what critics of virtue jurisprudence see as bugs in the system are actually features. It takes the position that, just as the search for action-guiding rules in moral philosophy has failed, so any search for an overarching set of rules to guide adjudication, and particularly constitutional adjudication, is likewise bound to fail. No rule-centered approach to constitutional judgment can substitute a set of guiding principles that work in practice;[139] none of them can substitute for the "situation sense" that is required in the act of judging, constitutional or otherwise.[140] We are better off focusing on what a sound sense of judicial character requires than we are hoping for a comprehensive action-guiding theory of judicial and constitutional interpretation that almost certainly will never arrive.

That the relative uncodifiability of an agent-centered, aretaic approach to either moral philosophy or judging is, on this

136. Solomon, *supra* note 131, at 171.

137. *Id.*

138. *Id.*

139. I emphasize the words "in practice." Some legal academics may continue to insist on the rightness of some particular method of constitutional or legal interpretation. Although I think they are wrong, it suffices for now to note Posner's view that "there are no consistent legalists . . . in the judiciary, as distinct from the academy, where reality does not constrain imagination" (Posner 48); *see also* KRONMAN, *supra* note 8, at 319 ("[S]ince judges are neither constrained by the need to make money from their work nor encouraged to turn their opinions in specific cases into academic theories, one might expect them to place a higher value on practical wisdom than law teachers and practitioners do.").

140. *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

view, treated as, well, a virtue of that approach, suggests something about what I would argue are the limitations of virtue jurisprudence and its dangerous temptations. On the view I have offered here, virtue jurisprudence is not and should not be treated as a decision guide in any thick sense. Aristotle famously observed that "the whole account of matters of conduct must be given in outline and not precisely," and that "the account of particular cases . . . [does] not fall under any art or precept but the agents themselves must in each case consider what is appropriate to the occasion."[141] As such, although virtue jurisprudence may help us in forming and framing an understanding of the traits that should constitute any virtuous judge, and may help us identify clear examples of judicial virtue or vice, it will not offer a more exacting and precise guide to right judicial conduct in particular cases. There is generally no one right answer to the question what a virtuous person should do in any given case.[142] So it is with virtuous judging too.

So a virtue jurisprude should be comfortable with the fact that virtue jurisprudence, constitutional or otherwise, is neither a clear *ex ante* guide to right judicial methods, although it may tell us something about what *kinds* of people we want on the bench,[143] nor a terribly useful *ex post* basis for critiques of particular judicial results. She should be comfortable with the fact that virtue jurisprudence is a guide to the decision makers, not the decisions. We should avoid the obvious temptation that so frequently infects constitutional theorists, who, having erected a fairly broad theory of sound judging, engage in (generally unconvincing) efforts to show how that particular theory cashes out precisely in a series of cases.[144] Perhaps the least persuasive

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141. Aristotle, *Nichomachean Ethics* 1104a1–7 *in* THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., 2001).

142. *See* Statman, *Introduction*, *supra* note 103, at 13.

143. *See, e.g.*, Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

144. To take one example, consider Jed Rubenfeld's elegant theory of the role of commitment, writtenness, and time in constitutionalism, and his less convincing effort to build and apply an interpretive guide based on that theory, centered around the idea of paradigm cases. I feel confident in saying that one can wholly embrace the first half of his important project without feeling especially compelled to adopt the second half. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001); JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (2005). *See, e.g.*, Erwin Chemerinsky, *A Grand Theory of Constitutional Law?*, 100 MICH. L. REV. 1249, 1261 (2002) (book review) (arguing that the paradigm case method, as presented in *Freedom and Time*, is "very sketchy"); Brannon P. Denning, *Brother, Can You Paradigm?*, 23 CONST. COMMENT. 81 (2006) (book review) (arguing that *Revolution by Judiciary* does not solve these

aspect of Farber and Sherry's *Judgment Calls*, I have argued, is that book's effort to demonstrate the applicability of its approach through a series of case studies involving abortion, affirmative action, and the war on terror. We should take a lesson from this about the limitations of virtue jurisprudence.

Similarly, virtue jurisprudence should avoid the urge to advance too thick a set of conclusions about what a virtue account of constitutional law requires; or, at the least, it should recognize the unlikelihood that those conclusions will necessarily be persuasive to fellow virtue jurisprudes, who may be more attracted to the uncodifiability of the judicial virtues than to the notion that they can result in a thick account of judicial interpretation that ends up looking substantially like the action guides offered by non-aretaic theories of legal interpretation. Here, I regretfully part company with Larry Solum, who is surely the leading writer on virtue jurisprudence. For those who would insist on "a less abstract account of the aretaic approach to constitutional interpretation,"[145] Solum offers a set of principles "that give more shape and structure to the idea of constitutional justice as lawfulness,"[146] and that he aptly labels "aretaic constitutional formalism."[147] Thus, it turns out, in his view, that virtuous constitutional judges must look, more or less in ranked order, to precedent, plain meaning, constitutional structure, original meaning, and a set of default rules favoring "settled historical practice by the political branches, weighted by duration, proximity to ratification, the soundness of the reasons offered for the practice, and strength of consensus among the political branches."[148]

Solum acknowledges that "there are many ways to articulate an aretaic theory of constitutional interpretation that realize the ideal of constitutional justice as lawfulness."[149] So we need not take him as offering the final word on what constitutional virtue requires of judges. I, for one, am not willing to follow him very far down the path he sets out. In my view, constitutional virtue does not convincingly demand that the virtuous judge be a formalist. Perhaps more controversially, there is no reason to think that a virtuous judge cannot be

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problems).

145. Solum, *supra* note 11, at 520.
146. *Id.* at 521.
147. *Id.* at 520.
148. *Id.* at 521–22.
149. *Id.* at 522.

substantially similar in his or her conduct to the kind of constrained pragmatist that Posner offers up as the preferable judge in a non-ideal world. That may seem a strange conclusion, since Posner's pragmatism seems to suggest the kind of instrumentalism that an aretaic theory of judging might reject, just as virtue ethics typically rejects utilitarianism as a moral theory. But pragmatism strikes me as an approach that better responds to and accounts for the myriad complexities of judging, for which no action guide is possible; and its *constrained* nature, which Posner is at pains to emphasize, suggests that it need not be a free-for-all and, indeed, will be suitably hedged in by the very questions of virtue and character that a sound virtue jurisprudence places at the center of the judicial enterprise.

Contrary to both Solum and Powell, then, I think a virtuous judge can indeed take into account instrumental considerations, although he should do so in all the fullness of practical wisdom. But that debate can perhaps wait for another day. For now, it is enough to observe that virtue jurisprudence should avoid the temptation to codify itself too precisely or offer too thick an account of what it requires. To those who demand "a less abstract account of the aretaic approach to constitutional interpretation," the best answer may be, to paraphrase Rosalind Hursthouse, "it depends on what you mean by abstract."[150] Or perhaps we should simply acknowledge that virtue jurisprudence cannot offer a clear fixed account of what judging requires in particular cases, and see this as a virtue rather than a defect of the aretaic approach. As Solum suggests, this response may leave some unsatisfied readers in its wake. But it should be clear that, while the aretaic turn may have many useful things to say about the judicial role, and even *some* useful things to say about how well or poorly particular cases instantiate them, the belief that particular decisions can be evaluated in a comprehensive fashion according to some overarching constraining theory of constitutional interpretation ought to have been laid to rest by now. Virtue jurisprudence ought not fret too much about meeting its competitors head-on if they ultimately offer no better guide to judicial decision making.

If it is the case that a virtue jurisprudence approach to the judicial role, and to constitutional law in particular, is not and should not be treated as an action guide or as providing an especially detailed means of evaluating particular judicial

150. *See* HURSTHOUSE, *supra* note 101, at 39.

opinions, then what value does this approach have, and why pursue it? We have already seen one answer: that whether or not virtue jurisprudence can provide these goods, it is far from clear that any competing account of constitutional interpretation can ultimately offer them either. Those approaches, too, fail to provide meaningful action guides. All of them ultimately must rely to some degree on questions of judicial character, and so it is surely worthwhile to explore this question on its own terms, putting the question of character first rather than treating it as secondary. That leads to another answer. As Solum suggests, at least a thin theory of judicial virtue is likely to result in a list virtues that might "correspond to almost any theory of constitutional interpretation."[151] Thus, no matter what one's normative interpretive starting point, there is likely to be not only room for, but a necessity for, some attention to judicial character and virtue. Again, recall Posner's observation that even the most rigid legalists, whose theories would (if they could) eliminate "judgment calls" from the judicial role, continues to admire the "elusive faculty" of good judgment (Posner 117).

Finally, we might respond that an aretaic approach to the judicial role, whether in constitutional law or elsewhere, can be a valuable supplement to or substitute for other approaches to thinking about judging because it can help us thread a more useful path between the descriptive and the normative, between the real world of the judicial "is" and the more ideal world of the judicial "ought." For an aretaic approach to judging, although it builds from a model of virtue and compares actual decisions to the decision that an ideally virtuous judge might make in particular circumstances, is also an approach that can build on the actual limited capacities of judges in the real world. Rather than wait for the perfectly virtuous judge to emerge from over the horizon like a sun god, it can and does ask questions of immediate pertinence to the judges we actually have. As Solum writes, "When it comes to nonideal theory, virtue jurisprudence offers a set of practical recommendations."[152] What virtue jurisprudence offers is a useful and practical, but not utterly disenchanted, way of thinking about how we might design our judicial institutions and practices in light of both what we know about non-ideal judges, and what we might hope for from ideally

151. Solum, *supra* note 11, at 499.
152. *Id.* at 498.

virtuous judges. In particular, it can ask two questions: What set of institutional norms, practices, and constraints might help constrain our (judicial) vices? And what set of institutional norms, practices, and constraints might help nourish our (judicial) virtues?

These questions might seem to be in some tension with what readers would expect of a virtue-centered theory of judging, particularly one that builds on Aristotelian theory. To concede that we are concerned with building the best judges possible out of non-ideal material, and that we will use specific rules or practices to do so, may seem to move closer to an action guide for judges, or might seem to deny from the start the possibility of genuinely virtuous judging, in the Aristotelian sense of judging in the right way *and* for the right reasons, not because of some external set of constraints.

For a variety of reasons, I think such an objection would be mistaken. Because one of those reasons arguably moves a step away from Aristotelian or neo-Aristotelian virtue ethics, I have called mine only a somewhat aretaic perspective on judging. Perhaps that is somewhat misleading or unnecessary, given the wide acknowledgement that virtue ethics need not necessarily be Aristotelian in nature.[153] I simply want to emphasize that the approach I offer here, while distinctly aretaic in nature, by no means assumes the perfect virtue of the judges, human as they are, who inevitably will be the ones actually charged with the duty of decision.

First, then, virtue theory, while recognizing that much depends on the practical wisdom of individual agents, and that no codifiable set of rules or practices can determine in advance the exercise of practical wisdom in judgment, does not scorn helpful advice about how the virtuous agent should act. It does believe that no rulebook of practical wisdom is possible, and that no one can be a virtuous actor unless he or she has accumulated a capacity for practical wisdom that can only come from time and experience.[154] But it also assumes that even imperfectly virtuous people have some sense of what virtue requires, and that when faced with a dilemma they can always also "seek moral guidance from people [they] think are morally better than [themselves]," either literally or by taking the actions of morally

153. *See, e.g.*, HURSTHOUSE, *supra* note 101, at 8–9.
154. *See id.* at 59–61.

superior agents as models for future conduct.[155] So virtue ethics assumes both the moral imperfection of most agents and the possibility that the imperfect may seek guidance from the more perfect.[156] It is but a short step from this to the view that virtue ethics can accept guidance from a variety of sources, even a (loosely) codified or written set of recommendations about virtuous judicial conduct.

Second, virtue ethics by no means denies or neglects the importance of institutions and institutional structures in helping to form and constrain the virtuous actor. To the contrary, the *Nichomachean Ethics* concludes with a preview of Aristotle's *Politics*, asking what sort of society and what set of laws might aid human flourishing, and thus virtue, by ensuring that men are "well trained and habituated" and "spend [their] time in worthy occupations and neither willingly nor unwillingly do bad actions."[157] It asks, in short, what sort of society would best be suited for human flourishing, and thus virtue.

What is true for society writ large is true for the institutions within it. Particular institutions may have their own *telos*, and we may ask of those institutions whether they can be structured in a way that encourages or requires the actors within them to act virtuously in accordance with those ends. This line of inquiry has been the basis for an increased interest within virtue ethics in the application of that theory to particular practices and professions.[158]

Thus, Edmund Pellegrino argues that professions involve a literal profession, "publicly and in . . . codes and Oaths," to an un-self-interested commitment to the goals of particular professions, and that this "act of profession is at the moral center of authentic professional ethics."[159] Jennifer Radden argues that a number of virtues "have been seen as required across all professional practices," and that particular "role-constituted

155. *Id.* at 35.

156. *Cf.* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1972–73 (2001)

> The ethic of honor . . . hold[s] up for admiration figures who are widely accepted as persons of honor and say[s], in effect, 'What that person does is what you should do as well.' An honor society therefore fosters an ongoing process of introspection about the ideals to which the society aspires.

157. Aristotle, *supra* note 141, at 1180a15–17.

158. *See generally* WORKING VIRTUE, *supra* note 116; Oakley & Cocking, *supra* note 105; *see also* Robert C. Solomon, *Corporate Roles, Personal Virtues: An Aristotelian Approach to Business Ethics*, *in* VIRTUE ETHICS, *supra* note 101, at 205.

159. Pellegrino, *supra* note 116, at 62.

moral virtues within [a given] practice setting" "impose[ ] special duties on its practitioners."[160] Although Radden thinks that, in the long run, professionals come to inhabit their roles fully and cannot simply feign the virtues pertinent to their profession, particularly experience-based virtues like practical wisdom, at the outset the professional may "enact" the professional role "without an accompanying sense of authenticity or identification."[161] Thus, although virtuous practice is the long-term goal, in the short run "[a]dopting the conduct and/or virtues of the ethical [professional] may have to precede feeling like a [professional]."[162]

Similarly, Justin Oakley and Dean Cocking, who agree with Pellegrino that "the focus of virtue ethics on functions and ends fits well with professional practice, which can readily be regarded as having a teleological structure,"[163] argue for the value of "regulative ideals" within particular professions, which is to say the formulation and internalization of "a certain conception of correctness or excellence" within a professional role, such that the person who accepts it "conforms—or at least does not conflict—with that standard."[164] Because these regulative ideals "operate as guiding background conditions on our motivation, they can direct us to act appropriately or even rightly, even when we do not consciously formulate them or aim at them."[165] So, for example, someone who has studied jazz piano may "develop[ ] a conception of excellence in jazz piano," and may subsequently "be guided by this conception of jazz excellence" when playing, "without consciously formulating that conception" as he plays.[166] Their account does not depend on the codifiability of "the values that determine excellence in a certain

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160. Radden, *supra* note 117, at 114, 118.

161. *Id.* at 125.

162. *Id.*; *see also* John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119, 1124 (1987) ("To do very well at law, . . . one must be socialized in the basic concepts and the professional ethics. After that, a powerful mind will develop itself by professional endeavors.").

163. Oakley & Cocking, *supra* note 105, at 3.

164. *Id.* at 25.; *see also* W. Bradkely Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1477 (2006)

> [T]o participate in certain social practices entails accepting the authority of regulative standards as guides to behavior, and accepting the legitimacy of criticism based on those standards. These regulative standards are not arbitrary, but have their origin in some ultimate state of affairs or value that is the aim of the social practice of which they are a part. Normativity is therefore explained in teleological terms, with the norms governing a social practice being justified in terms of the ends for which the practice is constituted.

165. Oakley & Cocking, *supra* note 105, at 26.

166. *Id.*

regulative ideal," as long as those values can conceivably play some sort of "guiding or governing role in the motivation and behaviour" of the actor.[167] In short, as these examples suggest, virtue ethics is perfectly compatible with the development of some set of values, principles, or even formulated practices and rules that, through a process of internalization, help constrain vicious behavior and encourage virtuous behavior within a particular activity.[168]

Finally—and here is where I perhaps take a step away from standard aretaic discussions—we must not neglect the role of continence within our understanding of the virtues and virtuous conduct.[169] The *Nichomachean Ethics* spends some time investigating character traits—continence and incontinence—that are "not as blameworthy as the vices but not as praiseworthy as the virtues."[170] An incontinent (or *akratic)* person "goes against reason as a result of" passion or emotion; a continent, or *enkratic*, person "experiences a feeling that is contrary to reason; but, unlike the akratic, he acts in accordance with reason. His defect consists solely in the fact that, more than most people, he experiences passions that conflict with his rational choice."[171] As Hursthouse relates, Aristotle contrasts the continent character, "who, typically, knowing what she should do, does it, *contrary* to her desires," with the fully virtuous character, "who, typically, knowing what she should do, does it, desiring to do it."[172] In Aristotle's view, "the fully virtuous agent is morally superior to the merely self-controlled one."[173]

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167. *Id.* at 27.

168. *See also* Fallon, *supra* note 13, at 6–7 (noting that the Constitution "furnishes standards of legally required and forbidden conduct," or "normative constitutional constraints," that "take the form of constitutionally inspired *experiences* of obligation") (emphasis in original).

169. For useful discussions of this concept, see HURSTHOUSE, *supra* note 101, at 92–99, 103–04; Richard Kraut, *Aristotle's Ethics*, *in Stanford Encyclopedia of Philosophy*, *available at* http://plato.stanford.edu/entries/aristotle-ethics; Statman, *Introduction*, *supra* note 103, at 29–30; *see also* JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND 174–86 (1998) (focusing on incontinence rather than continence).

170. Kraut, *supra* note 169.

171. *Id.*

172. HURSTHOUSE, *supra* note 101, at 92 (emphasis in original).

173. *Id.* at 93. Readers in virtue ethics will know that the distinction between virtue and continence is the basis for a substantial debate between virtue ethics and Kantian deontology, in which there is a

> widespread view according to which Aristotle and Kant have a fundamental disagreement about whether the good person is the one with full virtue (*arête*), who does the right thing naturally and enjoys doing it, . . . or whether he/she is the self-controlled person (*enkrateie*), who does the right thing in spite of a desire to do otherwise. Statman, *Introduction*, *supra* note 103, at 29.

In keeping with virtue ethics' focus on the fully virtuous person as the model for right conduct, it is understandable that less attention has been focused on the enkratic, or continent, agent. A continent person, after all, is not, by definition, a fully virtuous person. In the nonideal world, however, there is every reason to want to focus on the continent agent, who at least does the right thing, even if she does so against her own desires. Such an approach is still aretaic, inasmuch as it is still focused on questions of character. But it may be more realistic, more "is"-centered, in its acceptance of the kinds of human limitations that form the core of Posner's work. Too lofty a normative vision of virtue may, in light of the reality of judges as "political agents making policies and laws, . . . put a strain on the notion of the virtuous judge."[174] We may conclude that if judges cannot be perfectly virtuous, still, if they can refrain from vice, they may be "'good enough'" for our purposes.[175] So, if we are to fuse the real world of judging with the more normative account of judicial virtue, we may want to consider the ways in which we can structure the moves and practices of the judicial game in a way that, if it cannot guarantee judicial virtue, can at least encourage judicial continence. In fact, the two are not in opposition to each other. Just as the fledgling doctor may begin by "enacting" her professional role "without an accompanying sense of authenticity or identification," and only acquire the "identity conferring aspect of [the] professional role[ ]" with time and experience,[176] so the same set of norms and influences that encourage continence in a judge may over time ripen into a fuller sense of judicial virtue. To attempt to encourage at least a minimal sense of judicial continence may thus in the long run maximize the possibility of judicial virtue.

In short, an aretaic approach to judging might lead us to think about what set of institutional norms, practices, and constraints might help constrain judicial vice and nourish judicial virtue. Solum, for instance, argues that the judicial selection process should "prioritize the nomination and confirmation of

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In keeping with the "dialectical development" of virtue ethics, *id.* at 30, Hursthouse and Philippa Foot have argued that Aristotle and Kant are not as far from each other as the conventional view would hold. *See* HURSTHOUSE, *supra* note 101, at 92–104. These matters are well beyond the scope of this Essay.

174. Judith N. Shklar, *Justice Without Virtue*, *in* VIRTUE: NOMOS XXXIV, *supra* note 101, at 283, 286. Shklar's short but electric essay is required reading, in my view, for anyone interested in virtue jurisprudence.

175. *Id.*

176. Radden, *supra* note 117, at 125.

individuals who possess the judicial virtues," that "programs of judicial education should aim to cultivate those virtues in those who are already judges," and that imperfectly virtuous judges "should aim to emulate the decisions of excellent judges when they can and exemplify the virtue of judicial humility"—a point which we might recharacterize in terms of continence—"when they cannot."[177]

Beyond these basic recommendations, we might also draw here on a number of possible constraints offered in the books under review. Both Posner and Farber and Sherry offer a host of practical suggestions based on the inglorious determinants of judicial behavior in the real world. Posner, for example, emphasizes that the constrained pragmatist judge is "boxed in . . . by norms that require of judges impartiality, awareness of the importance of the law's being predictable enough to guide the behavior of those subject to it . . . , and a due regard for the integrity of the written word in contracts and statutes" (Posner 13). Like Solum, he emphasizes the role of the confirmation process in "[w]eeding out candidates unwilling to play [the judicial game] by the rules" (Posner 90), and he adds that the rigorous and unpleasant nature of both the confirmation process and, to a lesser extent, legal training in general may constitute an external constraint that generates an internal constraint, a "commitment to the institution" of judging (Posner 127).[178] Similarly, Farber and Sherry argue that both legal education and legal practice creates "a professional lifetime of acquired tendencies that discourage unchecked discretion" (Farber & Sherry 115), and they offer a set of modest reforms to Supreme Court practice, such as the diversification of cases beyond controversial constitutional questions and the opening up of the "cert. pool," to "try to ensure that service on the Court reinforces rather than diminishes professionalism" (Farber & Sherry 119).

Perhaps surprisingly, though, I want to return to Powell, whose rhapsodic account of the moral dimensions of judging I have already suggested is too much fixed on the "ought" rather than the "is." Nevertheless, Powell identifies a central constraint on judges when he begins his book with a discussion of the centrality of the judicial oath, which figures so prominently in

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177. Solum, *supra* note 11, at 498–99.

178. *Cf.* Pellegrino, *supra* note 116 (discussing medical training); Radden, *supra* note 117 (discussing training in psychiatry and medicine).

Marbury v. Madison. As we have seen, Powell believes that judicial review as a practice flows not only from the Constitution, but "from the judge's individual obligations as a moral actor" (Powell 3). He thus sees in the "oath requirement a juxtaposition of the judiciary's governmental role and the judge's personal conscience, one that gives moral weight to the individual's exercise of the power of judicial review that the community has entrusted to him" (Powell 3). For Powell, the oath thus "bears directly on how the judge carries out his duties and understands his role in relationship to other governmental officials" (Powell 3).[179]

At the risk of being rhapsodic myself, I think the oath deserves this attention.[180] The short but sweeping language of the federal judicial oath, with its injunction to "administer justice without respect to persons, and do equal right to the poor and to the rich," and to "faithfully and impartially discharge all the duties incumbent upon me . . . under the Constitution and laws of the United States,"[181] is an apt, if open-ended, description of and ode to the judicial virtues. As Powell observes, the judicial oath, and the formalities attendant upon swearing it,[182] ties the judge's character intimately to his or her office, rendering every decision in office both one that has official weight and must be undertaken consistently with the judge's official duties, and one that has about it a sense of personal moral obligation. Properly understood and seriously considered, the oath can be a forceful

179. *See also* John McCarthy QC, *Contemporary Advocacy: Value-Free?*, 38 CATH. LAW. 25, 35 (1998) (arguing that "the very constitution of our courts," including the judicial oath, "manifests an immediate moral dimension" that is immanent in the act of oath-taking itself).

180. Indeed, this Essay is in a sense a preview of broader work I am undertaking on both the history and meaning(s) of the judicial oath, and of the relationship between constitutional oaths and constitutional interpretation more generally. For a short essay focusing on the Presidential oath and constitutional interpretation, see Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. 1067 (2009).

181. 28 U.S.C. § 453 (2006).

182. Although I focus on the oath here, we might add to our list of important constraints on judges all the "trappings" of the judicial role—robes, the bench, and so on—that, although they may increase the judge's self-regard and thus his tendency to fall into certain kinds of judicial vice, such as arrogance, also serve to make "judicial decision making . . . public and formal and therefore more cautious" (Farber & Sherry at 94). Chad Oldfather makes the somewhat different point that, "At least implicitly, we impute near-magical properties to the acts of taking an oath and donning a black robe, as if they somehow eliminate one's susceptibility to all the foibles, biases, and petty jealousies that are the stuff of day-to-day life." Oldfather, *supra* note 26, at 127. That is surely true, but my reliance on the oath and other solemnities here is not for their magical property to transform someone into a non-human being, but for the degree to which they may influence and constrain the actual traits and role identities of judges.

reminder of what virtuous judging demands.[183] It can also be a constraint for the potentially incontinent or imperfectly virtuous judge.

To be sure, the oath carries with it no realistic fear of penalty, and perhaps in this sense Posner is right to say that it is little more than a loyalty oath, and a lightly constraining one at that (Powell 5). Like the Hippocratic Oath, it is largely an internal constraint, and one whose ancient status (its language has barely been altered since the Judiciary Act of 1789) and open-ended terms do not, at first blush, provide much guidance for judges. It is, in Oakley and Cocking's words, a regulative ideal, but not a very precise one. I am too ill-versed in judicial psychology to know whether judges think very strongly about the oath either when they take it or long afterwards, and one can well imagine that judges might either ignore its language or fail to see any meaningful constraint on them in its terms. But I think we can say three more meaningful things about the power of the oath to encourage judicial continence or virtue, two of them fairly practical in nature and one more exploratory and speculative.

Practically, it is important to see that there is a potential connection between the oath and judges' "desire for self-respect and for respect from other judges and legal professionals generally," as well as the "intrinsic satisfactions of judging," two tastes that Posner calls "the biggest internal constraints" on judges' conduct (Posner 371; *see also* Posner 60–62, 70). The taste for both self-respect and the respect of others "requires conformity to the accepted norms of judging," which, as Posner recognizes, are captured in the oath itself (Posner 61, 70). Thus, obedience to the oath, and the vision of judicial virtue it presents, is ultimately a form of winning self-respect and the respect of others, and thus maximizing a judge's own satisfaction in her job. Second, although the oath may be a loose regulative ideal, it is still a regulative ideal of sorts. As such, it may be internalized, in a way that either encourages judicial virtue or at least demands a minimal level of judicial continence.[184]

183. For similar reflections, which capture in part the moral and jurisprudential meanings that can be gleaned from a close reading of the judicial oath, see Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's* The Impartial Judge: Detachment or Passion?, 45 DEPAUL L. REV. 633 (1996). For an article suggesting, without offering much argument, the centrality of the judicial oath to the judicial role, see Diane P. Wood, *Reflections on the Judicial Oath*, 8 GREEN BAG 2d 177 (2005).

184. *See* Oakley & Cocking, *supra* note 105, at 25 (regulative ideals may be internalized "in such a way that [agents] are able to adjust their motivation and conduct

Finally, and more positively, we might begin rethinking the importance of the oath as part of a broader aretaic turn. We might, in short, think of "reviving" the centrality of the oath along with, and as a necessary part of, a broader revival of the sense of the importance of judicial virtue. This is not so much an idealistic project as a project whose concern is to recover and reinforce the background context and conditions in which judicial virtue might flourish in the real world. To the extent that, as Posner argues and Powell agrees, judging involves playing the "judicial game," this project may be seen as an effort to reinforce those rules of the game that emphasize and encourage the flourishing of the judicial virtues. The "revival" of the oath might be one piece, although a symbolically important and practically constraining one, of that broader project.

Although this is not a purely idealistic project, it is a substantial one. As some virtue theorists have noted, the aretaic turn can be seen as "opting ultimately for a different kind of society and for different relationships among its members."[185] Thus, reviving a sense of the centrality of the judicial oath, as Powell recommends, or the centrality of a virtue-oriented account of constitutional law more generally, may ultimately entail rethinking and reshaping the values that surround the American constitutional enterprise more broadly, and perhaps the wider American political *nomos*. The oath itself, for instance, is broadly tied to questions of personal and political honor;[186] and honor itself is generally taken to be a weak or obsolete virtue today.[187] To be sure, we might rely, as we have seen, on the connection between the oath and the judicial taste for self-respect and the respect of others. But the oath was once arguably tied to a thicker sense of honor than that, one which ran deep in the American political mind.[188] So a revival of the oath entails a revival of the sense of honor as an important spur

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so that it conforms—or at least does not conflict—with that standard").

185. Statman, *Introduction*, *supra* note 103 at 2.

186. *See, e.g.*, Horwitz, *supra* note 180, at 1071–72.

187. *See, e.g.*, Peter Berger, *On the Obsolescence of the Concept of Honour*, 11 EUR. J. SOC. 39 (1970), *reprinted in* LIBERALISM AND ITS CRITICS 149 (Michael J. Sandel ed., 1984); Wendel, *supra* note 156, at 1969 (noting the "anachronistic resonance" of the use of honor and shame as a regulatory mechanism); *cf.* KRONMAN, *supra* note 8, at 13 ("The classical figure of the lawyer-statesman has in my generation become a quaint antique with little of the power it once possessed to inspire or excite"); *id.* at 165 (arguing that the virtue- and character-centered ideals that underlie the ideal of the lawyer-statesman "no longer possess the authority they once did").

188. *See generally* JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC (2001).

toward virtuous conduct and constraint against vicious conduct.[189]

We might, to be sure, find some support for this project in history, and judicial history in particular. Philip Hamburger has written recently in strong terms about the constraining force of judicial duty, a concept with deep roots in Anglo-American judicial history and one that is intimately tied to the obligations of the judicial oath.[190] But Hamburger may have romanticized somewhat his account of judicial duty;[191] and in any event, we have plainly moved a long way from any simple reliance on judicial duty or the oath, and an appeal to history will not change that any more than a visit to Colonial Williamsburg will turn us all into the Founding Fathers.[192]

CONCLUSION

This may seem a somewhat romantic note on which to close this Essay. It is not meant to be. In its fullest form, the aretaic turn may indeed involve the kind of imaginative reconstruction of the norms and values of the judicial enterprise that I have described. It may be that the judicial virtues cannot flourish without planting new soil in which they can grow.

But, as I have argued, we can see ways in which even the "hard-bitten realism" that Powell laments in Posner's vision of the judicial role provides some spaces in which an aretaic account of judging might take root. Indeed, it may be that we cannot attain Powell's broader goals *without* beginning with hard-bitten realism.[193] It may be that working within the spaces

189. I should note that Aristotle himself did not count honor as a virtue, although he saw it as "the greatest of external goods," and one that a proud man is justly concerned with as "the prize of virtue," albeit one that he should only receive to the extent of his deserts. Aristotle, *supra* note 141, at 1123b–1124a.

190. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

191. Or so I argue in a review of his book in 10 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS 131 (2009), http://www.fed-soc.org/doclib/20090720_Engage102.pdf.

192. *See* KRONMAN, *supra* note 8, at 13–14:

> [The lawyer-statesman ideal cannot be revived] merely by repeating what others have said about the ideal in the past. For it is just this—the traditional portrait of the lawyer-statesman—that has lost its power to inspire. . . . To regain some sense of its appeal, therefore, we must reconstruct the ideal of the lawyer-statesman from the bottom up . . . . [O]nly philosophy can breathe life back into an ideal when the tradition that sustained it dies away. The recovery of every lost ideal is in that sense a philosophical project, and the model of the lawyer-statesman is no exception.

193. *Cf.* Annas, *supra* note 77 ("[A]n ethical theory is weakened if the best contemporary science conflicts with its claims or makes it hard to see how they could be

that Posner provides may, in the long run, best satisfy Powell's desires without slighting Posner's realism, and might be more realistic and less abstract than Farber and Sherry's own attempt to bridge the gap between the extremes. Within the crucial internal constraint of the judicial taste for respect and self-respect, we can see ways in which both judicial continence and the judicial virtues might be encouraged. Within the judicial oath, we can see the seeds of a regulative ideal that might inform, constrain, and even inspire judges to virtue, or at least steer them toward continence and away from vice. It may be that once we have taken the aretaic turn, our thoughts will inevitably bend towards a broader imaginative reconstruction of the judicial role in accordance with judicial excellence. For the time being, however, it is enough to observe that an account of judging, constitutional and otherwise, that places judicial character at its center may be the best way to rethink the judicial role in a way that both takes the realities of the judicial "is" into account and tries to find new language, or revive old language, in a way that moves us toward a worthier, but still attainable, judicial "ought."[194]

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true."); Oldfather, *supra* note 26, at 145 ("Only by first locating the potential weak points in the judicial psyche can we hope to create institutions and develop mechanisms that serve as prophylactics against any resulting undesired consequences.").

194. *Cf. Fallon, supra* note 13, at 977-79 (arguing that constitutional scholars have been too focused on normative theories and too inattentive to practical constraints on constitutional judging, while political scientists have been more focused on constraints but insufficiently aware of "the ways in which legal norms may shape officials' goals and thereby constrain their behavior," and proposing that we "open up the subject of constitutional constraints as a topic for inquiry in American constitutional theory").