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The Aretaic Turn in Constitutional Theory

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The Aretaic Turn in Constitutional Theory

Lawrence B. Solum

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THE ARETAIC TURN IN CONSTITUTIONAL THEORY^{*}

LAWRENCE B. SOLUM^{**}

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I. THE MOST DYSFUNCTIONAL BRANCH

The perennial questions of constitutional theory in the United States have been: “Is judicial review justified?” and “How should the constitution be interpreted?” These questions can be approached from a variety of theoretical standpoints. Ideal normative theory asks the enduring questions of constitutional theory by assuming that institutions and individuals will act as they should act. Nonideal theories relax these idealizing assumptions and ask contextualized questions such as the following: “How should the constitution be interpreted by the judges who actually occupy the bench? Is judicial review justified in current political circumstances? How have the political branches actually responded to the institution of judicial review?” In this essay, I argue that constitutional theory should respond to these questions by taking a turn that is both new and old—an aretaic¹ turn rooted in contemporary virtue jurisprudence² and classical republicanism.³

I begin with a speculative hypothesis: the institution of judicial review has incrementally but inexorably led to the politicization of the Supreme Court, and this politicization has led the political branches to exclude consideration of virtue from the nomination and confirmation of Supreme Court Justices. Instead, political actors tend to select Justices on the basis of the strength of their commitment to particular positions on particular issues and the fervor of their ideological passions. This has produced a court most notable for its vices. Indeed, I shall make the provocative claim that with few exceptions, vice and not virtue has prevailed on the Court since the New

¹ “Arête” is the ancient Greek word for excellence. An aretaic moral theory focuses on excellences and deficiencies of human character. An aretaic theory of constitutional interpretation focuses on the excellences and deficiencies of officials, characteristically judges, who engage in the practice of constitutional interpretation. “Aretaic” is thus a synonym for “excellence focused.” The Greek aretaic is frequently translated as “virtue” from “virtu” the standard Latin translation for “arête.” See generally *Aretaic Turn*, http://en.wikipedia.org/wiki/Aretaic_turn (visited February 27, 2004) (“In moral philosophy, the phrase “aretaic turn” refers to the renewed emphasis on human excellence or virtue in moral theory and ethics.”).

² Prior work that that is explicitly within “virtue jurisprudence” includes, Lawrence, B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 SO. CALIF. L. REV. 1730 (1988); Lawrence B. Solum, *Equity and the Rule of Law*, NOMOS XXXVI: THE RULE OF LAW 120 (1994); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) reprinted in MORAL AND EPISTEMIC VIRTUES (Michael Brady & Duncan Prichard eds. 2003) [hereinafter, Solum, *Virtue Jurisprudence*].

³ Although virtue jurisprudence is rooted in classical moral and political philosophy, its shape is conceptually distinct from the similarly rooted “republican revival” in constitutional theory. See *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); *Conceptions of Democracy: The Case of Voting Rights*, 41 U. FLA. L. REV. 409 (1989); *Symposium: Roads Not Taken: Undercurrents of Republican Theory in Modern Constitutional Theory*, 85 NW. U. L. REV. 1 (1990).

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Deal. The Justices, of the right and of the left, are most notable for what they lack, the virtue of justice.

This is a tragedy, and it has implications far beyond the cases the court decides. The Supreme Court's elevation of results over reasoning and politics over principle has inevitably infected practical jurisprudence in courts high and low, state and federal, liberal and conservative. As a working empirical hypothesis, I suggest that the result poses a significant threat to the rule of law. Because of the Supreme Court's prominent role in our public political culture, its vices shape popular understanding of the role of law. Judges can make law indeterminate,⁴ and when they do, the ability of the law to do its jobs—to create *ex ante* predictability, to establish stable expectations, and to provide neutral dispute resolution—is undermined. If the Justices lack the virtue of justice, then we should not be surprised if it is little valued by other courts, the political branches, and the culture at large.

I shall return to these polemic claims in the conclusion to this essay, but the argument that leads to these conclusions begins, in Part II, "Institutionalism and Constitutional Interpretation," by engaging Cass Sunstein and Adrian Vermeule's recent essay, *Interpretation and Institutions*.⁵ Sunstein and Vermeule contend that theories of constitutional interpretation are most fundamentally flawed because of their failure to take an *institutional turn*, but their supporting arguments lead to a related but quite distinct conclusion. Only a theory of judicial character can supply the diagnosis for the ills that Sunstein and Vermeule identify: constitutional theory must take an aretaic turn. In Part III, "Making the Aretaic Turn in Constitutional Theory," I sketch an alternative approach to judicial review and constitutional interpretation that is rooted in contemporary virtue ethics. In Part IV, "Constitutional Virtues and Vices," this sketch is given flesh and bones in the form of a theory of constitutional virtue and vice. In Part V, "The Aretaic Reconstruction of the Institutional Critique," I return to institutionalism as an approach to the theory of constitutional interpretation and argue that institutionalists cannot coherently refrain from making the aretaic turn. I end with speculation about the possibility of a path to the restoration of judicial virtue.

II. INSTITUTIONALISM AND CONSTITUTIONAL INTERPRETATION

This section begins by offering a very general account of what it means to contextualize a constitutional theory. It then proceeds to a detailed examination of Sunstein and Vermeule's argument for a particular contextualizing strategy, institutionalism. Finally, it takes a hard look at this argument and exposes the ways in which Sunstein and Vermeule have assumed but concealed the crucial role of character in constitutional theory.

⁴ Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

⁵ Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

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A. *The General Role of Context*

Some theories of judicial review and constitutional interpretation are *acontextual*. Constitutional theories frequently focus on questions of ideal theory to exclusion of factors that may undermine (or enhance) a theory's practical workability.⁶ Of course, idealizing assumptions have an important role to play in constitutional theory, as they do in the natural sciences, economics, and elsewhere. But if an ideal theory is offered as a guide to practice, then at some stage in the full development in the theory, the idealizations must give way. The relaxation of idealizing assumptions is a process of contextualization. We begin with an abstract constitutional theory. We then consider that theory in the context of an abstract institutional structure. When next situate the normative theory and the abstract account of institutional structure in the context of a historical account of the causal forces that have influenced institutional practice. Finally, we consider the particular circumstances in which we find ourselves here and now. As abstraction decreases and contextualization increases, the complexity of the theory grows and its ability to guide particular choices will become dependant on empirical judgments that are frequently, but not always, disputed or uncertain. Abstraction permits generalization. Contextualization implies the priority of the particular.⁷

B. *The Case for the Essential Role of Institutionalism*

In their important and illuminating essay, *Interpretation and Institutions*, Cass Sunstein and Adrian Vermeule argue that the prevailing approach to theories of legal interpretation is fundamentally inadequate because it fails to adequately integrate an account of the institutional dimension.⁸ In particular, they argue that prevailing

⁶ Sunstein and Vermeule emphasize the *abstraction* rather than *idealization*. See Sunstein & Vermeule, *supra* note 5, at 885 (observing that "interpretive issues are debated at a high level of abstraction"). This formulation does not well capture Sunstein and Vermeule's claims. First, interpretative theories are frequently debated through the use of concrete examples. Second, all theories, including Sunstein and Vermeule's own views are abstract, because they are theories. Thus, Sunstein and Vermeule discuss "institutions" and "institutional capacities" for the most part in the abstract, with occasional use of concrete examples.

⁷ Arguments about contextualization and idealization must proceed cautiously, in order to avoid the problem of double standards. It is all too easy to criticize a theory on the ground that it is insufficiently realistic. One identifies the idealizing assumption, substitutes a factually realistic premise, and then shows that theoretical claims are no longer valid. So far, so good. The difficulty arises if the critic then proposes an alternative theory that rests on different, but still idealizing, assumptions. Thus, an institutional critique of a constitutional theory demands that idealizing assumptions about institutional capacities be relaxed, but this entails an obligation to build an institutional alternative that observes real-world constraints.

⁸ Richard Posner argues that Sunstein and Vermeule have ignored work that does take institutional factors into account. See Richard Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952 (2003). Sunstein and Vermeule replied in Sunstein & Vermeule, *Interpretive Theory in Its Infancy: A Reply to Posner*, 101 Mich. L. Rev. 972 (2003).

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approaches to legal interpretation fail for two reasons: (1) they lack an account of *institutional capacities*;⁹ (2) they fail to consider *dynamic effects*, e.g., the consequences of Congressional reaction to judges interpreting texts in accord with a particular theory.¹⁰ The content of these two arguments can be illustrated by considering them in the specific context of constitutional theory.

Although Sunstein and Vermeule aim their critique at theories of legal interpretation in general, they single out constitutional interpretation and the theory of judicial review¹¹ as a particular example of the ill they have diagnosed in constitutional theory, and *Marbury v. Madison* is identified as a particularly egregious example of institution blindness. They write,

Many of the most well-known arguments on behalf of judicial review, including those in *Marbury* itself, are blind to institutional consequences. They ignore the risk of judicial error and the possibility of dynamic consequences. In American law, Chief Justice John Marshall might even be deemed that father, or the founder, of the kind of institutional blindness that we are criticizing.¹²

Sunstein and Vermeule argue that the case for judicial review is based on assumptions about institutional capacities that may well be untrue. For example, they write, “[I]t is easy to imagine constitutional systems that would refuse to give judges the power to strike down legislation. If judges are corrupt, biased, poorly-informed or otherwise unreliable, it would hardly make sense to entrust judges with that power.”¹³ They also argue that the power of judicial review may have dynamic effects or unintended consequences. For example, suppose “that the power of judicial review would weaken the attention paid by other institutions to constitutional requirements—so that judicial review . . . would weaken the grip of constitutional limitations on other branches.”¹⁴

Their critique is not limited to Justice Marshall’s opinion in *Marbury*; it extends to contemporary theorists as well, singling out Ronald Dworkin,¹⁵ Akil Amar,¹⁶ and Lawrence Lessig.¹⁷ For example, they fault Dworkin’s use of philosophical arguments about morality in “The Philosophers’ Brief.” Before courts should accept this kind of

⁹ Sunstein & Vermeule, *supra* note 5, at 886 (arguing that the question for a theory of legal interpretation should be “how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?”).

¹⁰ *Id.*

¹¹ Sunstein and Vermeule are careful to acknowledge the important strands of constitutional theory that incorporate institutional considerations. They single out for praise on this score James Bradley Thayer, *id.* at 936, Alexander Bickel, *id.*, Lawrence Sager, *id.* at 937, Neil Komesar, *id.*, Einer Elhauge, *id.*, Jeremy Waldron, *id.*, Mark Tushnet, *id.*, and Larry Karmer, *id.*

¹² *Id.* at 933 (arguing that John Marshall is the parental unit of institutional blindness).

¹³ *Id.* at 935.

¹⁴ *Id.*

¹⁵ *Id.* at 938.

¹⁶ *Id.*

¹⁷ *Id.*

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argument, Sunstein and Vermeule argue, “it is necessary to ask about judicial competence to evaluate moral arguments of this sort.”¹⁸ Similarly, they criticize Akil Amar’s insistence that the constitution’s text be read as a “coherent, integrated whole” on the because Amar does not consider the possibility that “real-world judges charged with holistic interpretation will simply blunder, producing a patter of incoherent outcomes, or worse yet, producing an internally coherent but morally misguided vision of public law.”¹⁹ Sunstein and Vermeule argue that “Lessig fails to consider the possibility that judges might be poor translators, garbling meanings so badly that a simple-minded mistranslation would preserve more of the original than would an ambitious and mistaken attempt to capture the original’s real sense.”²⁰

A clear theme emerges from Sunstein and Vermeule’s criticisms of Dworkin, Amar, and Lessig. In each case, by “institutional capacities,” they refer to the capacities of the individuals who occupy the role of judges. Judges may lack the intellectual capability or the moral character necessary to carry out the tasks demanded by particular theories of constitutional interpretation. The unstated assumption of their argument is that *institutional analysis* can fill this gap.

C. Hard Look Review of the Case for Institutionalism

Sunstein and Vermeule are undoubtedly on to something important. In this section, I clarify their argument. I begin by attempting to disentangle conceptually distinct strands of interpretation theory.

1. Untangling the Strands of Interpretation Theory

What kinds of questions does a theory of interpretation answer? What sorts of theories are theories of constitutional interpretation? Until we answer these questions, it will not be clear whether Sunstein and Vermeule are criticizing theorists like Dworkin, Amar, and Lessig, or if they are simply changing the subject. We might categorize theories of interpretation as operating at three distinct levels.

Level One: Conceptual Theories of Interpretation. Some theories of interpretation seek to answer questions like: “What is interpretation?” and “How is it possible for a reader to understand a text?” Hans-Georg Gadamer’s magnum opus, *Truth and Method*,²¹ addresses this kind of question as does Donald Davidson’s work on interpretation.²² As applied to constitutional theory, the questions are: “What is

¹⁸ *Id.* at 939.

¹⁹ *Id.* at 942.

²⁰ *Id.*

²¹ HANS-GEORG GADAMER, TRUTH AND METHOD 265-66 (Joel C. Weinsheimer & Donald G. Marshall, eds., 2d ed. 1989) (describing the hermeneutic circle whereby each part is understood in light of the whole and vice versa as view about how understanding is possible as distinguished from a method of interpretation).

²² Davidson and Gadamer, although working within very different philosophical traditions, both argue that truth is the key to interpretation. As Davidson put it, “This method is intended to solve the problem of the interdependence of belief and meaning by holding belief constant as far

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constitutional interpretation?” “What does it mean to say that one has an ‘interpretation’ of a constitution?” “How is it possible for contemporary readers to understand the meaning of the Constitution?” “What are the requirements for understanding a legal text?” An answer to questions like these might begin: “We are able to understand the constitution because we are linked to it by a continuous tradition.” or “We are able to understanding the meaning of particular parts of the Constitution by placing them in the context of the whole document.”

Level Two: Substantive Theories of the Meaning of Particular Texts. What does the United States Constitution mean? Some theories of constitutional interpretation are aimed squarely at the meaning of particular constitutions. Such theories can be developed in a number of ways, ranging from the relatively abstract theory of textualism to very concrete and particular theories based on constitutional history. Thus, one might assert that the meaning of the United States Constitution is equivalent to the plain meaning of the text of each clause of the constitution. Or one might assert that the meaning of the United States Constitution is that it is a charter of liberty preserving the maximum possible freedom of each individual.²³ Alternatively, one might say, the meaning of the Second Amendment to the United States Constitution is that each citizen has an individual right to own and practice the use of weapons of the type that would be used by foot soldiers in a war.

Level Three: Normative Theories of Interpretive Methodology. Finally, there are theories that prescribe particular methodologies for judicial interpretation of the constitution. Such theories address questions like the following: “What interpretive rules or techniques will be enable judges to render decisions that accord with the true meaning of the constitution?” or “What interpretive methodologies will produce the best social consequences?” or “What rules of thumb are most likely to reduce judicial error in interpreting the Constitution?” We can further distinguish between two varieties of normative theory. *Ideal Normative Theories* ask these questions from the point of view of ideal theory, i.e. on the basis of the assumption of perfect compliance with the theory. *Nonideal Normative Theories* address the same questions from a different perspective, i.e. on the basis of the capacities and attitudes of real-world judges and other interpreters.

Coherent discourse about theories of constitutional interpretation requires that these three different levels be clearly distinguished. Theories at level one make conceptual claims about the nature of and necessary preconditions for interpretation and understanding. Theories at level two make hermeneutic claims about what the meaning of particular texts. Theories at level three make normative claims about practical methodologies for constitutional interpretation.

The distinction between the three levels can be illuminated with an analogy between constitutional interpretation and the art of archery. A level one theory of

as possible while solving for meaning. This is accomplished by assigning truth conditions to alien sentences that make native speakers right when plausibly possible, according, of course to our own view of what is right.” See <http://www.utm.edu/research/iep/d/davidson.htm>. See generally Donald Davidson, *INQUIRIES INTO TRUTH AND INTERPRETATION* (1984).

²³ See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

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archery tells us that archery involves a target, a bow, and arrows, and that the aim of any particular archery contest is to hit the target. A level two theory of archery tells us where the target is located for a particular contest. That round canvas—there—with the red bull's eye—that is the target. A level three theory of archery tells archers how to hit the target—hold the bow like this, notch the arrow thus and so, aim in such and such a manner.

One of the difficulties with Sunstein and Vermeule's arguments is that, with an important exception, they conflate these conceptual levels. For the most part, Sunstein and Vermeule simply assume that theories of constitutional interpretation all operate at the third level; that is, they assume that Dworkin, Amar, and Lessig all are proposing normative theories of interpretive technique. By way of analogy, they assume that Dworkin, Amar, and Lessig are offering judges instructions in practical archery. This assumption is implicit in the criticisms that Sunstein and Vermeule make; all of the criticisms are aimed at the use of the theories as practical interpretive methods.

But is this assumption correct? Even a cursory examination of the question points in the direction of "no." The constitutional theories that Sunstein and Vermeule are attacking may be ambiguous, operating at all three levels to some extent, but all three theorists tend to bounce between level one and level two. That is, they make arguments about the nature of interpretation and meaning, and then use those arguments to construct views about what the United States Constitution actually means, in both abstract and particular contexts.

Let me illustrate this claim by reference to Dworkin's judge Hercules, who constructs the theory that best fits and justifies the law as a whole to decide each particular case.²⁴ Now, if Dworkin were offering a level three theory, he would quite obviously have done a very bad job indeed. If each judge undertook the Herculean task of constructing the theory that best justifies the law as a whole each time a particular issue of law came up, then judges would run into severe problems. Most obviously, no cases would ever be decided in a timely fashion, as the judge was snagged in the seamless web of the law. Laying this problem aside, it is not clear that any actual judges have the ability to construct such a theory. But this should make us suspicious of the premise that Dworkin is offering a level three theory. A more plausible interpretation is that Hercules is a heuristic device, the purpose of which is to lay bare the general structure of legal interpretation. That is, the fictional figure of Hercules is used to develop a conceptual theory about the nature of legal interpretation. Dworkin then uses this theory to support further claims at level two, i.e. claims about what the United States Constitution actually means.²⁵ An institutional critique that assumes that Dworkin has a pure level three theory, i.e. that Hercules was offered only as a fictional role-model, makes a category mistake.

²⁴ See RONALD DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* (paperback ed. 1977); see also RONALD DWORKIN, *LAW'S EMPIRE* (1986).

²⁵ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985).

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2. *The Second-Best Defense is a Good Offense*

When I argued that Sunstein and Vermeule conflated the three levels of interpretation theory, I said there was one important exception. In Part II of *Interpretation and Institutions*, they consider the possibility that non-institutional theories of constitutional interpretation may be necessary because they specify what counts as the *correct outcome* in constitutional interpretation.²⁶ Although Sunstein and Vermeule do not employ my terminology or conceptual mapping, we might say that they recognize that some of the theories they critique operate at level two, e.g. as theories of constitutional meaning—as descriptions of the particular target at which constitutional interpreters should aim.

In reply to this objection, Sunstein and Vermeule offer what they call a “minimal response.”²⁷ This response distinguishes between “first best” and “second best,”²⁸ drawing on the familiar distinction from economic theory.²⁹ The very general idea of the theory of the second best can be expressed as follows. Assume a system with multiple variables. Take the most desirable state the whole system could assume and the associated values that all of the variables must assume to produce this state: call this condition, the *first-best* state of the system and call the associated values of the variables, *the first-best values*. Now assume that one variable will not assume the value necessary for the first-best state of the whole system: call this the *constrained variable*. Next take the next to the most desirable state the whole system could assume and the associated values of all the variables must assume to produce this state: call this the *second-best* state of the system. There are systems in which achieving the second-best state will require that at least one variable other than the *constrained variable* must assume a value other than the *first-best* value: call the *value* the *second-best* value. One expects that there are examples where many or even all variables must assume *second-best* values.

Sunstein and Vermeule are arguing that theories of constitutional interpretation ignore institutional capacities as a *constraining variable*. In particular, judicial capacity may not be able assume the value required by the *first-best* theory of constitutional interpretation. Therefore, another variable, i.e. the normative theory of interpretive methodology must assume a *second-best* value in order to produce the *second-best* state of the system of constitutional interpretation. In other words, if the judiciary lacks the institutional capacity to do what Dworkin, Amar, or Lessig’s first-best theory requires, then an institutional theory is required in order to produce second-

²⁶ Sunstein & Vermeule, *supra* note 5, at 914.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See R.G. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1956) (articulating theory of second best in economics); see also, Lawrence Solum, *Legal Theory Lexicon 011: Second Best*, November 23, 2003, http://legaltheorylexicon.blogspot.com/2003_11_01_legaltheorylexicon_archive.html#106961201321647437 (viewed February 27, 2004).

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best outcomes. For this reason, “institutional analysis is necessary, even if not sufficient, to an adequate evaluation of interpretive methods.”³⁰

3. *Incompletely Theorized Agreements*

Sunstein and Vermeule then argue that a “second-best assessment of institutional issues might, in some cases, be not only necessary but indeed sufficient to resolve conflicts over interpretive theories.”³¹ What Sunstein and Vermeule mean is that it is possible that theorists whose views differ at levels one and two (i.e. they have different views of the nature of interpretation and the meaning of the constitution) might converge at level three, once they took institutional problems into account. The different theorists would agree on a methodology (perhaps clause bound textualism), but that agreement would be incomplete theorized, because each theorist would provide a different theoretical foundation for the methodology.

The reader may immediately be struck by the intuition that Sunstein and Vermeule are overly optimistic. Of course, it will depend on the particular theorists. For

³⁰ Sunstein & Vermeule, *supra* note 5, at 915.

³¹ Sunstein & Vermeule, *supra* note 5, at 915. Notice the subtle difference in wording: “an adequate evaluation,” in the text quoted TAN 30, versus “to resolve conflicts” in TAN this note. This subtle difference is actually crucial to Sunstein & Vermeule’s claims. An institutional theory is necessary to know whether a given first-best theory will work in practice, but is not sufficient for that purpose. An institutional theory may be sufficient to resolve conflicts over interpretive theories, but not necessary for that purpose. Suppose Dworkin, Amar, and Lessig all have first-best level one theories, about the nature of meaning, that produce level two results in the form of claims about what the U.S. Constitution means. Let us suppose counterfactual that Dworkin, Amar, and Lessig each believe that their level one theories should be used as level three methodologies.

Consider first *necessity*. Evaluation of Dworkin, Amar, and Lessig’s theories requires institutional analysis, because we need to know whether judges have the capacities to produce the level two meanings using the level three methods. But institutional analysis is not necessary to resolve conflicts between our three theorists. First, the conflict may be irresolvable; they may not be able to agree on the appropriate methods. Second, they may be able to agree on the appropriate methods without engaging in institutional analysis. For example, Lessig might convince Dworkin and Amar that his level one and two views were correct. Perhaps, Dworkin could convince Amar and Lessig that their theories, despite surface structure differences, were really the same as his theory in their deep structures.

Consider second *sufficiency*. An institutional theory is not sufficient to determine whether a given theory of constitutional interpretation will work in practice. This is obvious, because the practical workability of a theory requires that the theory be worked out, institutional analysis cannot, by itself, tell us anything about whether a particular theory is viable. An institutional theory may be sufficient to resolve conflicts over interpretive theories, but this will, of course, depend on the particular constellation of theories. One can easily imagine that Dworkin, Amar, and Lessig are unable to reach agreement, despite institutional analysis. For example, Dworkin might insist that “the law is a seamless web” while Lessig might deny that premise. This theoretical disagreement might lead Dworkin and Lessig to disagree about the question whether judges in constitutional cases should seek constitutional interpretations that cohere with the general topology of the common law and statutory law.

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example, if the theorists who are to come to an incompletely theorized agreement find themselves disagreeing at level one but in substantial agreement at level two, then, given institutional limitations, they might converge at level three. That is, if they agree on what the constitution means, but have different theories as to why it means that, then they might well agree on a set of interpretive methods that approximate the agreed-upon meaning. But suppose we have theorists who disagree at both level one and level two. Then it seems unlikely they will agree at level three. To take a tried and true example, if two theorists disagree about the constitutional right to privacy, then it is most unlikely that they will agree on a simple methodology such as clause-bound textualism or some simple form of originalism. Why would they agree?

Constitutional theorists who disagree about the question as to what the constitution means are like archery instructors who disagree about the nature and location of the target. Although they might converge on how best to grip the bow, they will surely not agree on where their archers should aim.

4. The Deep Problem of the Constitutional Second Best

Moreover, there is another, deeper, problem with Sunstein and Vermeule's claim that an institutionally grounded level-three second-best (or nonideal) theory is sufficient to resolve theoretical first-best disagreement. The first-best theory is actually necessary for agreement to be reached. Each theorist relies on her first-best theory to make the judgment about what is second-best. Without the normative components of first-best theories, there would be no criteria for what the second-best state of the system is. Put another way: level three judgments about second-best normative theories of interpretive methodologies presuppose level two judgments about first-best constitutional meanings. This is an obvious point, and surely Sunstein and Vermeule must have recognized it. Perhaps, they simply mean that first-best theories need not be part of articulated reasons for decisions. Rather, the first-best theories would lurk in the background as the criteria to be employed by legal analysts who reflect on interpretive methodologies employed by judges and other officials.

5. Consequentialism versus Right Reason

Finally, Sunstein and Vermeule's views rest on a controversial assumption about political morality. We might call this a *consequentialist* assumption about the role of reasons for action: the assumption is that it is only the outcomes of judicial practice that count in evaluation. This assumption has a corollary: if judges make the decision that will lead to the best-available outcome (i.e. the second-best state of the system), then the fact that they reached that decision for the wrong reasons is not relevant to (or perhaps, does not bear decisively on) the question whether they have acted rightly.

But this assumption is hugely controversial. Many important views about morality assert that right action is action on the basis of right reason. It is not enough to hit the target by accident; one must be aiming at the right to target to act rightly. This abstract point can be made more concrete by considering examples. I want to take an extreme example first, and then consider an example that is close to the spirit of Sunstein and Vermeule's articulation of their position.

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The Bribery Example. Suppose it were possible to produce the second-best outcome through a systemic practice of bribing judges. For example, suppose that the first-best interpretation of the constitution is that the constitution is a charter for economic efficiency and personal liberty, and that bribery can create a market for efficient, liberty-enhancing judicial decisions. Judges need not aim at getting cases right. Rather, they can approximate the correct outcomes by auctioning their decision to the highest briber. But this would be an abhorrent system of judging, even if it did produce the second-best outcomes, in the sense that they best approximated the outcomes that judges with idealized institutional capacities would reach. A corrupt decision is not rendered virtuous because the outcome was the same as the outcome of a virtuous decision. Reasons count.

The Clause-Bound Textualism Example. Now consider the possibility that judges adopt clause-bound textualism as their practical decision strategy. A particular judge says to himself:

The constitution really means X (where X could be the original meaning as understood by the ratifiers, the holistic meaning of the clause in the context of the entire constitution, or something else), but I shall not aim at X. Instead, I shall decide the case before me on the basis of the literal meaning of the particular clause considered in isolation. Even though I know that getting the Constitution right would require me to examine the meaning of the whole document, I will not do this, because I am likely to screw it up. Therefore, I will aim at making the wrong decision.

Setting aside the difficulties a judge might have taking up such an attitude, the question arises whether they can possibly act rightly if they decide in this way. For many moral theories, the answer to this question is “no.”

Consider then, an alternative. Suppose our judge were to reason as follows:

I should aim at deciding the case in accord with the true meaning of the constitution, M, which is specified by theory X (holism, originalism, or whatever theory the judge believes to be correct). However, I should recognize that I have limited institutional capabilities to determine M. I have limited time. I am smart, but I am not Justice Holmes or Judge Posner. I am knowledgeable about many areas of the law, but there are gaps in my knowledge. Therefore, I should take these limitations into account as I attempt to determine M. For example, if my research reveals a surprising piece of history that would fundamentally alter constitutional doctrine, I should be humble and assume that the conventional wisdom is probably more likely correct than my new-found discovery, unless I am very, very sure of myself.

There is an obvious difference between the two judges. The first judge aims at the wrong decision. The second judge aims at the right decision. As a practical matter, they may reach the same outcomes, but the second judge will reach the outcome for good reasons. To consequentialists, there is no important difference between the two judges except insofar as their differences reliably produce better or worse expected consequences, but too many moral theorists and ordinary citizens, this difference is vitally important.

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At this point, my presentation and assessment of Sunstein and Vermeule's views is complete and we can make what I shall call *the aretaic turn*. What are the implications for institutionalism of a theory of judicial excellence or virtue?

III. MAKING THE ARETAIC TURN IN CONSTITUTIONAL THEORY

Sunstein and Vermeule's critique focuses on the abilities of judges to live up to first-best theories of constitutional interpretation. They connect this critique to institutions. In this section, I argue that the focus on judges' abilities is on target, but that institutions are only part of the story and not the most important part. Instead, we need to ask the question, "What makes judges excellent?" Once this question is on the table, it raises issues that require a conceptual reformulation of the problems that Sunstein and Vermeule address.

A. The Aretaic Approach to Constitutional Theory

The aretaic turn begins with a brief introduction to *virtue jurisprudence*, the normative and explanatory theory of law that builds on the insights of contemporary virtue ethics. My exposition of this theory begins with a brief comparison of the situation of contemporary legal theory with that of modern moral philosophy as it was situated in the 1950s.

1. Law and Modern Moral Philosophy

In *Modern Moral Philosophy*, Elizabeth Anscombe famously noted persistent problems with the deontological and utilitarian approaches that dominated normative ethics when she wrote in 1958.³² Modern legal theory has strong connections with modern moral philosophy. Historically, the connection is evident in the work of Jeremy Bentham:³³ his work combined a conceptual separation of law and morality with a utilitarian program of legal reform. Contemporary legal scholarship frequently invokes general moral theories, including preference-satisfaction utilitarianism³⁴ and deontological theories like Kant's,³⁵ to make arguments about what the law should be.

³² Elizabeth Anscombe, *Modern Moral Philosophy* in VIRTUE ETHICS: OXFORD READINGS IN PHILOSOPHY, at 26-44 (originally 33 PHILOSOPHY (1958)), also reprinted in RELIGION, ETHICS, AND POLITICS, 3 THE COLLECTED PAPERS OF G.E.M. ANSCOMBE (1981) and in ETHICS (Judith Thompson & Gerald Dworkin, eds. 1968).

³³ See generally JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (J. H. Burns, Ross Harrison, & Herbert L. Hart eds. 1988); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. H. Burns, Herbert L. Hart, & J. Rosen eds. 1996).

³⁴ Preference satisfaction utilitarianism provides the moral foundation for most of normative law and economics. For a general statement, see LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

³⁵ See, e.g., David C. Bricker, *A Kantian Argument for Native American Cultural Survival*, 76 U. DET. MERCY L. REV. 789 (1999); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999); Robert F. Housman, *Kantian Approach to Trade*

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Such normative legal theories are addressed to lawmakers (in the broad sense), including legislators and adjudicators. Developments in political philosophy, sparked by John Rawls's *A Theory of Justice*³⁶ and its libertarian³⁷ and communitarian³⁸ critics, have met with avid attention from the legal academy.

There is, however, an exception to the general rule that contemporary legal theory reflects developments in modern moral and political philosophy. Legal theory (as practiced by philosophers or academic lawyers) has paid scant attention to one of the most significant developments in moral theory in the second half of the twentieth century, the emergence of virtue ethics.³⁹ An outpouring of articles and monographs

and the Environment, 49 WASH. & LEE L. REV. (1992); Richard B. Lillich, *Kant and the Current Debate Over Humanitarian Intervention*, 6 J. TRANSNAT'L L. & POL'Y 397 (1997); R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271 (2002); see also *Symposium on Kantian Legal Theory*, 87 COLUM. L. REV. 421 (1987) (collection of articles on Kant and law).

³⁶ Use of Rawls's theory in general and the original position in various forms has become commonplace in legal scholarship. See, e.g., THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986) (bankruptcy law); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency Consent, And Encouragement Theory*, 41 STAN. L. REV. 1343 (1989) (intellectual property law); Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495 (1986) (tort law); see also Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI-KENT L. REV. 549 (1994) (discussing use of Rawls in legal scholarship and judicial opinions).

³⁷ The contemporary classic is ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1977). For applications in legal scholarship, see, e.g., Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 771-89 (1995); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 1008-07 (2000). An influential libertarian theory of law is offered in RANDY BARNETT, *THE STRUCTURE OF LIBERTY* (1998); see also James E. Fleming, *The Parsimony of Libertarianism*, 17 CONST. COMMENT. 171 (2000) (discussing Barnett); Lawrence B. Solum, *The Foundations of Liberty*, 97 MICH. L. REV. 1781 (1999) (discussing Barnett).

³⁸ One prominent communitarian critique is found in Michael J. Sandel, *Liberalism and the Limits of Justice* (2d ed. 1988). For discussions by legal academics, see, e.g., C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1886 (2001); Kevin P. Quinn, S.J., *Viewing Health Care as a Common Good: Looking Beyond Political Liberalism*, 73 S. CAL. L. REV. 277 (2000).

³⁹ The literature on virtue ethics is now vast. My own work has been especially influenced by the following contemporary works. See, e.g., PHILIPPA FOOT, *NATURAL GOODNESS* (2001); PHILIPPA FOOT, *VIRTUES AND VICES* (1978); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999); ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); NANCY SHERMAN, *THE FABRIC OF CHARACTER* (1989); CHRISITINE SWANTON, *VIRTUE ETHICS: A PLURALISTIC VIEW* (2003); see also *VIRTUE ETHICS: OXFORD READINGS IN PHILOSOPHY* (Roger Crisp & Michael Slote, eds. 1997); *VIRTUE ETHICS: A CRITICAL READER* (Daniel Statman, ed. 1997); *HOW SHOULD ONE LIVE?: ESSAYS ON THE VIRTUES* (Roger Crisp, ed. 1996).

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attests to the interest of philosophers in aretaic moral theory.⁴⁰ In the law, the situation has been different. The hegemony of deontological and utilitarian theories prevails, at least among legal theorists working in the common-law tradition.⁴¹ There are, however, a growing number of exceptions to this hegemony,⁴² including work on antitrust law,⁴³ bioethics,⁴⁴ civil rights law,⁴⁵ corporate law,⁴⁶ criminal law,⁴⁷

⁴⁰ See the sources cited *supra* n. 39; see also, e.g., Arthur Fleming, *Reviewing the Virtues*, 90 ETHICS 587 (1980); Gregory Pence, *Recent Work on the Virtues*, 21 AMERICAN PHILOSOPHICAL QUARTERLY, 281 (1984); Gregory Pence, *Virtue Theory* in A COMPANION TO ETHICS 249 (Peter Singer ed. 1991); Marcia Baron, *Varieties of Ethics of Virtue*, 27 AMERICAN PHILOSOPHICAL QUARTERLY, 47 (1985); Gregory Trianosky, *What Is Virtue Ethics All About?*, 27 AMERICAN PHILOSOPHICAL QUARTERLY 335 (1990); Phillip Montague, *Virtue Ethics: A Qualified Success Story*, 29 AMERICAN PHILOSOPHICAL QUARTERLY 53 (1992). On the history of virtue ethics, see Richard White, *Historical Perspectives on the Morality of Virtue*, 25 JOURNAL OF VALUE INQUIRY 217 (1991).

⁴¹ For a particularly self-conscious choice to discuss deontology and utilitarianism at the expense of virtue ethics, see Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375, 381 & n. 20 (1999) (“For the purposes of this Article, we identify utilitarianism as the main normative alternative to deontological theory. We do so for two reasons. First, proponents of economic analysis, the dominant approach to insider trading, often regard utilitarianism as the moral foundation of economic analysis. . . . Second, utilitarianism has historically been perceived as the strongest competitor to deontology. . . . Because of considerations of space, we have had to make some editorial choices about moral theories we discuss and to omit discussions of theories other than deontology and utilitarianism. We intend no slight to virtue ethics, moral development theory, social contract theory, or any of the other moral theories we do not discuss.”).

⁴² See, e.g., Robert J. Araujo, S.J., *Moral Issues and the Virtuous Judge: Reflections on the Nomination and Confirmation of Supreme Court Justices*, 35 CATH. LAW. 311 (1994); Donald F. Brosnan, *Virtue Ethics in a Perfectionist Theory of Law and Justice*, 11 CARDOZO L.REV. 335 (1989); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CALIF. L. REV. 329 (1994); J.L.A. Garcia, *Topics in the New Natural Law Theory*, 46 AM. J. JURIS. 51 (2001); Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851 (1992); Linda R. Hirschman, *The Book of 'A'*, 70 TEX. L. REV. 971 (1992); Linda R. Hirschman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 998 (1990); Kyron Huigens, *Nietzsche and Aretaic Legal Theory*, 24 CARDOZO L. REV. 563 (2003); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003).

⁴³ Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741 (2000).

⁴⁴ Shawn E. Peterson, *A Comprehensive National Policy to Stop Human Cloning: An Analysis of the Human Cloning Prohibition Act of 2001 with Recommendations for Federal and State Legislatures*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 217, 261-62 (2003).

⁴⁵ Robert John Araujo, S.J., *Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377, 433-34 (2002).

⁴⁶ Mark Neal Aaronson, *Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 ST. THOMAS L. REV. 113 (1995); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 890 (1997); Caryn L. Beck-Dudley, *No More Quandries:*

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employment law,⁴⁸ environmental law,⁴⁹ terrorism law and policy,⁵⁰ torts,⁵¹ legal ethics,⁵² military justice,⁵³ pedagogy,⁵⁴ and public interest law.⁵⁵

A Look at Virtue Through the Eyes of Robert Solomon, 34 AM. BUS. L.J. 117, 119-24 (1996); Jeffrey Nesteruk, The Moral Dynamics of Law in Business, 34 AM. BUS. L.J. 133, 135-37 (1996); Jeffrey Nesteruk, Law, Virtue and the Corporation, 33 AM. BUS. L.J. 473 (1996).

⁴⁷ See Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1473-76 (1995); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000) (explaining criminal fault generally in virtue ethics terms); Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195 (2000) (dealing with death sentencing in virtue ethics terms). Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 435-36 (1998); Kyron Huigens, *Solving The Apprendi Puzzle*, 90 GEO. L.J. 387 (2002); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288 (1993); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 31 (2003); Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology Of Blame*, 56 VAND. L. REV. 1383, 1430-31 (2003); Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002); .

⁴⁸ Alison M. Sulentic, *Happiness and ERISA: Reflections on the Lessons of Aristotle's Nicomachean Ethics for Sponsors of Employee Benefit Plans*, 5 EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 7 (2001).

⁴⁹ Jeffrey Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Value*, 24 COLUM. J. ENVTL. L. 249 (1999); Jeffrey M. Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*, 24 COLUM. J. ENVTL. L. 249 (1999); Bradley A. Harsch, *Consumerism and Environmental Policy: Moving Past Consumer Culture*, 26 ECOLOGY L.Q. 543 (1999).

⁵⁰ Theodore P. Seto, *The Morality of Terrorism*, 35 LOY. L.A. L. REV. 1227, 1245-56 (2002).

⁵¹ Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1435 (2000); see also Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well As Efficiency Values*, 54 VAND. L. REV. 901, 933-34 (2001).

⁵² Robert Araujo, S.J., *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433 (1997); Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 214 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305 (2000); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-At-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. 327 (1998); Robert F. Cochran, Jr., *Lawyers and Virtues*, 71 NOTRE DAME L. REV. 707, 708 (1996); Heidi Li Feldman, *Beyond the Model Rules: The Place of Examples in Legal Ethics*, 12 GEO. J. LEGAL ETHICS 409 (1999); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 908-09 (1996); James W. Perkins, *Virtues and the Lawyer*, 38 CATH. LAW. 185 (1998); Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching For Clients: Advocacy And "The Manner That Is The Man Himself"* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145 (1993); Abbe Smith and William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 511-33 (1999); Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489 (1999).

⁵³ Major Walter M. Hudson, *Book Review, Obeying Orders: Atrocity, Military Discipline and the Law of War*, 161 MIL. L. REV. 225 (1999); Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and The Law Of War*, 86 CALIF. L. REV. 939, 1115 (1998).

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2. *From Virtue Ethics to Virtue Jurisprudence*

A full account of the implications of virtue ethics for legal theory is a very large topic. Normative law and economics is modeled on utilitarian moral theory. Rights-based legal theories are modeled on deontological moral theories. Likewise, virtue jurisprudence is modeled on contemporary virtue ethics. As a comprehensive legal theory, virtue jurisprudence addresses the full range of normative legal questions—ranging from the proper end of legislation to the normative theory of judging. Moreover, because virtue jurisprudence is embedded in a larger aretaic enterprise—including virtue ethics, virtue politics, and virtue epistemology—the whole story about virtue jurisprudence is a long one indeed.

So we need to take a shortcut. If the case for virtue ethics is compelling, then there will be *prima facie* reasons to believe that virtue jurisprudence is plausible as well. But this creates a bit of sticky wicket for this Essay. The philosophical case for virtue ethics is complex, resting both on metaethical considerations and on arguments within normative ethics. That case might be summarized in a long law review article, but it surely cannot be summarized in a few pages. So rather than presenting the arguments, we might instead observe their traces in the sociology of professional moral philosophy. Conferences,⁵⁶ monographs, anthologies,⁵⁷ and encyclopedia articles⁵⁸ are testify to the seriousness with which philosophers take contemporary virtue ethics. From the point of view of legal theory, we might proceed as follows. For the sake of argument, let us assume that there is something to virtue ethics. We can then ask the very interesting question, “If virtue ethics were sound, what would the implications for constitutional theory be?”

The first step towards answering the implications question is to distinguish virtue ethics from rival approaches to moral theory. One way to see how virtue ethics is different from deontology and consequentialism is to attend to the distinctive foci of virtue ethics. Consequentialism focuses on states of affairs; actions are right insofar as they produce valuable states of affairs. Deontology focuses on actions; actions are right insofar as they conform to the principles of right action—a system of rights and duties. Virtue ethics focuses on character; actions are right insofar as they would be performed by a person of excellent character. These different foci correspond to

⁵⁴ Mark Neal Aaronson, *We Ask You To Consider: Learning About Practical Judgment In Lawyering*, 4 *CLINICAL L. REV.* 247, 259-60 (1998); Linda R. Hirshman, *Nobody in Here But Us Chickens: Legal Education and the Virtues of the Ruler*, 45 *STAN. L. REV.* 1905 (1993).

⁵⁵ Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475 (1999).

⁵⁶ A representative list is generated by a search of the newsgroup *fa.philos-l*. The following URL generates such a search: <http://groups.google.com/groups?hl=en&lr=&ie=UTF-8&oe=UTF-8&c2coff=1&q=virtue&btnG=Google+Search&meta=group%3Dfa.philos-l>.

⁵⁷ See *supra* note 39 (representative collection of monographs and anthologies).

⁵⁸ See Rosalind Hursthouse, *Virtue Ethics*, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/ethics-virtue/> (visited March 3, 2004) (“Virtue ethics is currently one of three major approaches in normative ethics.”).

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differences in way that deontology, consequentialism, and virtue ethics conceive of the primary aim of morality. For consequentialism, the aim is to produce the best possible states of affairs. For deontology, the aim is right action. For virtue ethics, the aim is excellence of human character.

Virtue ethics is distinctive in another way. Both deontology and consequentialism claim to provide a decision procedure for ethics. An example of a deontological decision procedure is the categorical imperative: act so that the maxim of your action could be willed as a universal law of nature, in one of Kant's formulations. Act utilitarianism—act so that your action produces the greatest utility as compared to the alternatives—is an example of a consequentialist decision procedure. Deontologists and consequentialists agree that there is a rule that—at least in principle—provides a sure guide to right action in every circumstance. Virtue ethics denies this premise. The complexity of the world outruns the capacity of any set of moral rules—the virtue ethicist maintains. Right action requires what we might call “moral vision”—the ability to perceive the morally salient aspects of particular situations.

There are many possible virtue ethics,⁵⁹ but historically, one of the most important and influential varieties of virtue ethics is associated with Aristotle. For Aristotle, the highest achievable human good is *eudemonia* (roughly translated as happiness), which consists in a life of activity in accord with the human excellences (or virtues).⁶⁰ Aristotle divided the virtues into two categories. The intellectual virtues were *sophia* (theoretical wisdom) and *phronesis* (practical wisdom). The moral virtues included courage, temperance, good temper, and justice. Importantly, Aristotle argued that the moral virtues can be conceptualized as mean between two opposing character deficiencies with respect to a morally neutral emotion. Courage, for example, is a mean between the opposing vices of cowardice and rashness; the morally neutral emotion is fear. Cowards are disposed to fear too much; those who are rash are insufficiently sensitive to danger and fear too little. The courageous human is disposed to fear that is proportionate to the situation.

Contemporary virtue ethics extends and develops the Aristotelian framework. Beginning with Philippa Foot⁶¹ and Peter Geach's⁶² pioneering work and extending through the recent articulations by Rosalind Hursthouse,⁶³ Nancy Sherman,⁶⁴ Michael Slote,⁶⁵ Christine Swanton,⁶⁶ and many others, contemporary virtue ethics has joined consequentialism and deontology as one of the three main families of contemporary ethical theory. Among the key ideas of contemporary virtue ethics is Rosalind

⁵⁹ For example, Michael Slote has developed a distinctly Humean approach to virtue ethics. See MICHAEL SLOTE, *MORALS FROM MOTIVES* (2001).

⁶⁰ My understanding of Aristotle's ethics has been strongly influenced by Gavin Lawrence. See Gavin Lawrence, *Aristotle and the Ideal Life*, 102 *PHIL. REVIEW* (1993).

⁶¹ See Foot, *NATURAL GOODNESS*, *supra* note 39, Foot, *VIRTUES AND VICES*, *supra* note 39.

⁶² PETER GEACH, *THE VIRTUES* (1977).

⁶³ See Hursthouse, *ON VIRTUE ETHICS*, *supra* note 39.

⁶⁴ See Nancy Sherman, *THE FABRIC OF CHARACTER*, *supra* note 39.

⁶⁵ See Michael Slote, *MORALS FROM MOTIVES*, *supra* note 65.

⁶⁶ Christine Swanton, *VIRTUE ETHICS: A PLURALISTIC VIEW*, *supra* note 39.

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Hursthouse's suggestion that virtue ethics can guide action—to the extent that guidance is possible and desirable—by adopting the principle that an action is right if and only if the action would characteristically be performed by a virtuous agent under the circumstances.

The move from virtue ethics to virtue jurisprudence is simply the translation of the aretaic turn in moral theory to the context of lawmaking and adjudication. For example, virtue jurisprudence postulates that the proper aim of legislation is the promotion of human flourishing through creation of the conditions for the development of human excellence. Virtue jurisprudence also provides a distinctive approach to the theory of judging. Like virtue ethics, virtue jurisprudence begins by arguing against the assumption that there is a single “decision procedure for judging”—some role that would guarantee the correct outcome in every single case. Just as the world is more complex than any set of moral rules, so too, the complex facts of particular cases can outrun the capacities of any single uniform decision procedure for judging. Discerning the right approach to the particular case may require the judges to possess legal vision—the ability to discern the legally salient aspects of the case and to select the doctrines and remedies that are appropriate.

B. The Aretaic Turn in Constitutional Theory

I shall now turn from virtue jurisprudence in general to an aretaic theory of constitutional interpretation in particular. Let us begin with a brief overview of the implications of the aretaic turn for ideal and nonideal theories of constitutional interpretation. As a matter of ideal theory, the aretaic approach to constitutional interpretation focuses on the decisions that would be made by a virtuous judge. 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.

When it comes to nonideal theory, virtue jurisprudence offers a set of practical recommendations. First and foremost, the process of judicial selection should prioritize the nomination and confirmation of individuals who possess the judicial virtues. Second, programs of judicial education should aim to cultivate these virtues in those who are already judges. Third, judges who lack the full array of judicial virtue should be aim to emulate the decisions of excellent judges when they can and to exemplify the virtue of judicial humility when they cannot. Fourth, especially vicious judges—those who are corrupt or incompetent—should be removed from office.

In this part, I lay out the bare bones of a virtue-centered theory of constitutional adjudication. I shall begin with the uncontroversial idea of a “thin theory of judicial virtue” and then move to the idea of a virtue-centered approach to interpreting the Constitution. Before I begin, let's adopt the following terminology. We have been calling the virtues of judges, “judicial virtues.” Let us put to one side the question whether constitutional cases require special virtues that are not required for judging in general. From this point forward, I shall occasionally use the phrase “constitutional virtue” to refer to the excellences appropriate to the judge deciding a constitutional case.

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1. Thin and Thick Theories of Constitutional Virtue

There is a sense in which the notion of constitutional virtue is unlikely to be controversial for constitutional theorists. For any given normative theory of constitutional adjudication, there is a corresponding account of the qualities that make for a good judge in a constitutional case. If we are permissive in our criteria for the qualities that we are willing to call “virtues” or “excellences,” then we can offer accounts of constitutional virtues that correspond to almost any theory of constitutional interpretation.

Ronald Dworkin’s theory of law as integrity provides an exemplar, both of a general theory of judging and of a theory of constitutional interpretation. As we have already seen,⁶⁷ Dworkin believes that judges should decide cases in accord with the normative theory of law that best fits and justifies the law as a whole. For judges to be able to do this reliably, they will need to possess certain character traits that are appropriate to the social role of a judge in a constitutional case. On Dworkin’s theory, for example, the intellectual virtue of theoretical wisdom is clearly a prerequisite for excellence in constitutional adjudication. Dworkin’s imaginary judge, Hercules, decides cases by constructing the theory that fits and justifies the law as a whole; this task can only be accomplished by someone who is able to appreciate legal complexity and to see the subtle interconnections between various legal doctrines summarized in the slogan, “the law is a seamless web.”

Different normative theories of constitutional interpretation may result in different lists of the excellences that are appropriate to judges in constitutional cases. Originalist theories of constitutional interpretation, for example, may place special emphasis on the ability to understand historical materials and take up the perspective of citizens in the founding era—excellence as a judicial historian. Welfarist theories of constitutional interpretation might emphasize the ability to engage in economic analysis of legal rules and to make legislative findings of fact—excellence as a judicial economist. A contemporary ratification theory could prioritize the ability to discern contemporary values and commitments that undergird current acceptance of the constitution—excellence as a judicial sociologist.

Suppose that it were the case that some qualities of judicial character are necessary for reliably good judging given any plausible normative theory of judicial decision. If this were so, then an account of these qualities would be what I shall call a “thin” theory of judicial virtue. On this picture, the judicial virtues are simply those qualities of character that are required to realize one’s conception of good judging, whatever that might happen to be. Thus, a thin theory of the judicial virtues necessary for constitutional adjudication might include the intellectual virtue of theoretical wisdom, which plausibly is necessary for judges to understand complex legal material. Likewise, irrespective of one’s particular theory of good judging, it might turn out that certain vices are inconsistent with reliably good judging. Judges who are civic cowards, slavishly seeking approval from others, may be incapable of reliably adhering

⁶⁷ See Ronald Dworkin, *Hard Cases*, *supra* note 24; Ronald Dworkin, *LAW’S EMPIRE*, *supra* note 24.

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to any coherent and plausible theory of good judicial decision.⁶⁸ A similar claim might be made about judges who are avaricious and hence prone to sharp dealing or susceptible to bribery and corruption. Thus, civic courage and temperance might be considered “thin” constitutional virtues.

A thin account of constitutional virtue can be contrasted to theories that are “thick.” What count as virtues for originalism may be vices for contemporary ratification. Whereas attention to consequences may be the highest virtue for a welfarist theory of constitutional interpretation, this characteristic may actually be a vice for a rights and principles approach. Corresponding to each theory of constitutional interpretation, therefore, we can construct a thick theory of constitutional virtue.

Both thick and thin theories of constitutional virtue share one important feature in common. As we have defined these categories, both thick and thin theories view the constitutional virtues as *instrumental*. The goal of constitutional interpretation is set by some other theory—originalism, welfarism, contemporary ratification, or rights and principles. For both thick and thin theories of constitutional virtue, the excellences of judicial character are *means* to independently specified ends.

2. From Thick and Thin to Virtue-Centered

To make the aretaic turn in constitutional theory, we must move beyond thick and thin theories of constitutional virtue, to a virtue-centered account of judicial excellence. Like thick theories of constitutional virtue, a virtue-centered theory is not limited to those qualities of judicial character that would count as means to good decisions for any plausible theory of what counts as a good decision. But thickness is not sufficient to make a theory virtue-centered. One way to bring out this point is to distinguish theories that are decision-centered from those that are virtue-centered.

Many normative theories of constitutional adjudication are decision-centered. A decision-centered theory offers criteria for what should count as a good, right, just, or legally valid decision. For a decision-centered theory of constitutional virtue, the notion of a correct constitutional decision is primary and the constitutional virtues are derived from it. Thus, Dworkin’s description of Hercules begins with the criteria for good decisions and then constructs the ideal judge who is able to render such decisions. A second-best theory like that offered by Sunstein and Vermeule begins with criteria for good outcomes and then asks what interpretive methodologies come closest to these outcomes, given institutional constraints. A virtue-centered theory does not proceed in this way. Rather, an aretaic theory begins with an account of the virtuous judge as primary and then proceed to derive the notion of a virtuous constitutional decision.

By way of clarification, consider some of the claims that a virtue-centered theory of constitutional adjudication does *not* need to make. For a theory to be virtue-centered, it need not make the transparently silly claim that constitutional adjudication can be explained solely and exclusively by reference to the virtues. Thus, the full story about correct or just or virtuous constitutional decision making will necessarily make

⁶⁸ Perhaps some theories that place a very high value on democratic decision making would turn civic cowardice from a vice into a virtue.

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reference to facts about the world (including the facts of the disputes which judges decide) and legal facts (including facts about what provisions are really part of the Constitution, what prior of the Supreme Court are binding precedent, and so forth). A virtue-centered theory must claim that judicial virtues are a necessary part of the best theory of constitutional adjudication and that judicial virtue plays a central explanatory and normative role, but a theory does not lose its status as virtue-centered simply because it does not limit its explanatory resources to the virtues alone.⁶⁹

IV. CONSTITUTIONAL VIRTUES AND VICES

The substance of an aretaic theory of constitutional interpretation is given by its account of the constitutional virtues. The enterprise in this section of the paper is to develop an account of constitutional excellence: what makes for excellence in constitutional adjudicators.

A. Constitutional Vice

Although there is considerably controversy about what constitutes a good constitutional decision, there is considerable agreement about some of the characteristics that would make someone a truly awful constitutional judge. Let us begin, then, with these easy cases and work from them to an account of the judicial virtue.

Corruption. The first (perhaps the worst) judicial vice is avarice or corruption. We know from experience that corruption is a real danger for judges. Judicial avarice expresses itself in the blatant and obvious form of bribery, and in more subtle financial conflicts of interest such as accepting favors from a litigant or trading on advanced knowledge of the outcome of judicial proceedings or setting a precedent that will benefit a company in which one owns stock.⁷⁰ Corruption is not, of course, a uniquely constitutional vice, but constitutional corruption is particularly bad, because judges in constitutional cases occupy a position of special importance, trust, and responsibility. Because constitutional decisions cannot be overturned by ordinary legislation and because some constitutional cases are extraordinarily significant, judicial corruption can lead to grave injustice to innocent third-parties unable to protect themselves. That is, an avaricious decision may lead to the denial to a defendant or litigant of that to which she is entitled under the law. Corruption or avarice is an especially heinous fault in judicial character, because we expect judges to display exemplary respect for the law. A corrupt or avaricious judge cares too much for material rewards or the

⁶⁹ Indeed, it is difficult to imagine how a theory could explain judging without reference to concepts other than virtues. Facts about the world and the law are obviously necessary to describe the cases that judges decide. The question is not whether we admit such facts into our virtue-centered theory. Rather, the question is how such facts relate to the judicial virtues.

⁷⁰ For general background on judicial corruption and efforts to control it, see NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT (1993); Maria Simon, Note, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment of Federal Judges*, 94 COLUM. L. REV. 1617 (1994).

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pleasures to which they are means, and accepts the wrong rewards from the wrong people for the wrong reasons.

Notice, however, that the objection to judicial avarice is not reducible to the concern that litigants get their due. Many constitutional questions involve “hard cases,” where the law underdetermines the outcome such that a judge can plausibly rule for either side. In the United States, the Supreme Court does not regard itself as bound by its own precedents, and many constitutional issues are hotly contested by closely divided courts. A corrupt decision on such an issue is evil, even if the judge “votes the right way, getting the law right and deciding for the party who is entitled to win. A judge is not better for accepting bribes to render the correct decision.

Civic Cowardice. A second vice is constitutional cowardice. I do not mean a disposition to excessive fear of physical danger. Judges in the United States rarely makes constitutional decisions that expose them to significant risks of physical danger—although Supreme Court Justices may be exposed to danger in unpredictable ways because of their celebrity. In some constitutional cases—abortion cases may be an example—passions may be so strong that judges may in fact receive serious threats of death.

More frequently, however, judges may fear the loss of office or fear the loss of the opportunity to gain promotions. The election of judges is common in state judicial systems in the United States, for example. In some legal systems, judges earn promotions from lower courts to higher courts through a civil service system. Even in a system with life tenure (such as the federal system in the United States), opportunities for promotion to a higher court or other position of prestige may depend on avoiding unpopular decisions on matters of public interest. It is conventional wisdom that judges who seek promotion to the Supreme Court are careful in their decisions on politically contentious issues. Associate Justices of the Supreme Court may hope for promotion to the august position of Chief Justice of the United States. More simply, ordinary judges and even Supreme Court Justices may fear the consequences of negative elite or public opinion for their social positions. Judges with the vice of civic cowardice fear too much for their careers and social prestige, and hence are swayed by concern for their reputation on the wrong occasions and for the wrong reasons.

Cowardly decisions are bad ones for reasons that are much the same as those advanced for the conclusion that corrupt decisions are evil. Judges who rule against the constitutional claims of unpopular criminal defendants because they fear they will not be reelected are likely to render decisions that are unjust because they deny to defendants that to which they are due. Moreover, a cowardly decision is properly criticized, even if the outcome of the decision is within a judge’s range of discretion or is, in fact, legally correct. Good judging requires that the right decision be reached for the right reason.

Bad Temper. A third judicial vice is bad temper. Trials in particular and the processes of civil and criminal justice in general are emotionally charged. Criminal defendants, litigants, and lawyers are all likely to disagree with, criticize, and even to disrespect judicial officers. Judges who are quick to anger or who harbor resentments that occasionally burst into inappropriate explosions are likely to damage the judicial process. Their anger may cloud their judgment, leading them to render constitutional

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decisions that are biased. Even when inappropriate anger does not directly affect the outcome of judicial proceedings, it may undermine the confidence of the participants and public in the judge's fairness, and hence impair the effectiveness of the judicial process as a mechanism for resolving conflicts in a manner that gains acceptance and support from those affected.

The three judicial vices that I have considered so far (avarice, cowardice, and bad temper) involve defects in judges' affective states, their emotions or desires. What of defects in their intellectual equipment? Sometimes constitutional law is subtle or complex, and a judge may go wrong by failing to grasp the constitutional rule. When judges fail to understand the law, their decisions are likely to be unjust. The judge who fails to comprehend a complex rule or subtle distinction lacks the equipment to reliably hit the target, a legally correct result. Of course, even a blindfolded archer may hit the target, and even a foolish judge may stumble on a legally correct result. If the decision is the kind that requires justification in the form of a written opinion, however, even a lucky guess about the outcome will not save a judge without the ability to grasp the law intellectually. A well-reasoned opinion on a complex issue of constitutional law cannot be the product of good luck. In a system that incorporates the rule of *stare decisis*, a badly written opinion can result in injustice in the decision of many other cases, even if the outcome in the case in which the opinion was rendered was correct.

Although lawyers are well familiar with the problem of intellectually deficient judges, our vocabulary is not rich with respect to this vice. We might say that the intellectually deficient judge suffers from judicial stupidity, or we might employ a less direct locution, saying such judges are "less than brilliant" or "somewhat dense." Even less directly, a senior lawyer might advise junior colleague, "All you can do is make your record for appeal."

If one intellectual failure is related to legal complexity or subtlety, there is another sort of intellectual failure associated with a lack of sound judgment. A judge can be foolish because he lacks the ability to distinguish between what is workable and what is impracticable. A related failure is the inability to distinguish between the aspects of a dispute that are important and those that are trivial. A judge who is poor judge of character will be unable to tell honest witnesses from liars or to discern the difference between zealous advocacy and sharp dealing. Even judges who have a strong theoretical grasp of the law may go badly wrong if they lack common sense and sound practical judgment.

Failures in practical judgment by judges can have serious consequences. Judicial responsibility extends beyond the task of simply getting the law right and then applying it to the undisputed facts. Perhaps the clearest example of the dangers of bad judgment is the complex injunction in a constitutional case. When the remedy for a constitutional violation requires a trial judge to supervise a complex institution, such as a prison (or penal system) or a school district, the consequences of bad judgment can be serious indeed. Getting the law right may help the judge to see the legal goal that ongoing supervision of a complex injunction requires, but this is not sufficient. An impractical mandate or a poor allocation of resources can have devastating consequences, even without a mistake of law.

At this point, I imagine that many readers are becoming impatient with my list of constitutional vices. "Yes, of course," I imagine readers saying to themselves, "we

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don't want corrupt, cowardly, bad-tempered, stupid, or foolish judges. But none of those is the most dangerous constitutional vice. Our real problem is with those judges who are imposing their own political ideology on the Constitution." And of course, this reaction can come from any part of the political spectrum. The right sees constitutional vice in judges of the left. The left sees right-wing judges as intellectually and morally deficient. The center has a similar perception of judges from both the far right and the far left. The most dangerous constitutional vice—everyone might agree as a suitable level of abstraction—is the disposition to decide cases on the basis of the wrong political ideology.

Let us pause and examine our brief and incomplete list of judicial vices. Judges who are avaricious, cowardly, bad-tempered, stupid, impractical, or ideological are likely to go systematically wrong in their decisions. What are the qualities of character that avoid these defects? What qualities of character dispose a judge to make excellent decisions? In other words, what constitutes excellence in constitutional adjudication?

B. Constitutional Virtue

Our investigation of the judicial vices suggests that at least some of the qualities that make for an excellent judge are the same qualities required for a flourishing human life in general. The intellectual virtues of theoretical and practical wisdom and the moral virtues of courage, temperance, and good temper are required for excellence in judging, just as they are required for any flourishing human life. To put it the same point negatively, a vicious person—someone who is foolish, lacks common sense, is avaricious, cowardly, and prone to disproportionate anger—lacks the equipment for excellence in any social endeavor,⁷¹ including a career as a judge.

Assuming that judicial excellence requires the possession of the virtues to at least some degree, the next step is to give an account of the virtues as they operate in the context of constitutional adjudication. I will briefly describe five aspects of judicial and constitutional virtue: (1) judicial temperance, (2) judicial courage, (3) judicial temperament, (4) judicial intelligence, and (5) judicial wisdom. And of course, there is the virtue of justice—which will receive extended treatment in due course.

Before proceeding, two qualifications are in order. First, by calling these qualities "judicial virtues," I do not mean to imply any strong claim about their underlying nature. The psychology of the judicial virtues may well be the same as the virtues in general. The only distinctive feature of the judicial virtues that I want to claim might⁷² be attributed to the contexts in which they are exercised. Because judges assume a special role and face situations that are frequently different from those faced by the rest of us, the virtues they exercise can be described in a distinctive way. Second, I do not

⁷¹ It is not clear to me that virtue is required for excellence in all human endeavors. It may, for example, be possible to be a great painter or singer, despite a vicious character. The claim that I make in text is that virtue is required for human endeavors that are social in nature, although I offer no defense for that claim on this occasion.

⁷² The use of "might" indicates that I do not take a stand here. I am not ruling out the possibility that good judges develop emotional responses that are psychologically different from those who do not occupy this (or a relevantly similar) social role.

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mean this list to be exhaustive. Good constitutional adjudication requires more than just these six qualities of mind and character. The list of judicial virtue that is offered here is intended to be illustrative but not exhaustive.⁷³ Suzanna Sherry, for example, has suggested that humility⁷⁴ is a judicial virtue.

Temperance. Consider first the virtue of temperance. Good adjudication requires that one's desires be in order. This is clear when the temperate judge is contrasted to the judge who without the ability to control her appetites. Judges who care too much for their own pleasures are prone to temptation; they are likely to be swayed from the course of reason and justice by the temptations of pleasure. A libertine judge may indulge in pleasures that interfere with the heavy deliberative demands of the office. Hence, the saying "sober as a judge," reflects the popular understanding that excessive indulgence in hedonist pleasures would interfere with excellence in the judicial role.

Courage. A second virtue, judicial courage, corresponds to the vice of civic cowardice.⁷⁵ The ordinary moral virtue of courage is sometimes thought to serve as a relatively clear example of Aristotle's doctrine of the mean.⁷⁶ Courage is a mean with respect to the morally neutral emotion of fear. The disposition to inordinate fear is cowardice. The opposing vice, rashness, is the disposition to insufficient fear. The coward is easily intimidated and does not take worthwhile risks. The rash person fails to perceive genuine danger and so is prone to injury from foolhardy risk taking.

Judicial courage is a form of what we can call "civic courage." The courageous judge is willing to risk career and reputation for the ends of justice. In the case of judging, it is a bit difficult to see the virtue as a mean between two opposing vices. If civic cowardice, too much fear of risk, is a familiar judicial vice, it is a bit difficult to imagine the judge who cares too little for his career and reputation. In special circumstances, we can imagine a judge who is too willing to throw away reputation and influence on a case that is not worthy of the sacrifice. But this case will need to be a special one, because in ordinary circumstances we believe that judges should do as the law and justice requires in every case, not just important ones. Even the "small injuries" of "little people"⁷⁷ should be important to judges. Perhaps in a defective society, where one's ability to prevent grave injustice depended on one's willingness to inflict minor injustice, we might say that judges should be neither too fearful nor too careless of the risks of unpopular decision. Such a society is defective, however, just because it puts judges in just such a position.

⁷³ A number of readers have suggested judicial virtues that might be added to my list. Judges in common law systems are sometimes required to write opinions that justify their decisions. In order to do this well, judges need certain skills and capacities that might be called virtues—eloquence and wit come to mind.

⁷⁴ See Sherry, *Judges of Character*, *supra* note 42, at 799-803.

⁷⁵ See *id.* at 803-810.

⁷⁶ For doubts about this, see David Pears, *Courage as a Mean* in *ESSAYS ON ARISTOTLE'S ETHICS* (Amélie Oksenberg Rorty, ed. 1980).

⁷⁷ A similar notion attributed to Learned Hand is "It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect... if we are to keep our democracy, there must be one commandment: thou shalt not ration justice." See Dick Baldwin, *Lawyers, Justice & Money*, *OR. ST. B. BULL.*, October 1997, at p. 78.

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This is not to say that a judge should not care about his reputation or public opinion. A judge whose public reputation is good may be enabled to do good judicial work. Civic rashness is indeed a vice, when judges sacrifice their reputation on the wrong occasions, for the wrong reasons, or by doing the wrong things. A judge may engage in extrajudicial behavior that brings shame or ridicule. But the defect here is not too little fear of civic disrepute for unpopular decisions. Rather, some other defect is likely to be involved. Bad temper, immoderation, or poor judgment all may result in a poor reputation or damage one's opportunities for civic rewards, but all of these vices should also be avoided in themselves and not simply because they reflect a lack of civic courage.

Good temper. A third virtue, judicial temperament corresponds to the vice of bad temper. The traditional concern in judicial selection with judicial temperament is illuminated by Aristotle's account of the virtue of good temper or *proates*: the disposition to anger that is proportionate to the provocation and the situation.⁷⁸ Good temper is a mean between a disposition to excessive and deficient dispositions to anger. The vice of excess was illustrated in the United States in the 1968 and '69 by Judge Hoffman's disproportionate rage in the Chicago Seven trial, where his actions produced a spectacle that undermined public confidence in the orderly administration of justice. But being too slow to anger is also a judicial vice. A judge who fails to respond with appropriate outrage in the face of misconduct can have a similar, if less dramatic, effect: a courtroom that is out of control is almost as bad as one in which defendants are bound and gagged. The virtue of good temper requires that judges feel outrage on the right occasions for the right reasons and that they demonstrate their anger in an appropriate way.

Intelligence. The corrective for the vices of judicial stupidity and ignorance is a form of *sophia* or theoretical wisdom. I shall use the phrase "judicial intelligence" to refer to excellence in understanding and theorizing about the law. A good judge must be learned in the law; she must have the ability to engage in sophisticated legal reasoning. Moreover, judges need the ability to grasp the facts of disputes that may involve particular disciplines such as accounting, finance, engineering, or chemistry. Constitutional adjudication may require an understanding of constitutional history, statistics, and political philosophy. Of course, judicial intelligence is related to theoretical wisdom in general, but the two are not necessarily identical. The talents that produce theoretical wisdom in the law may be different from those that produce the analogous intellectual virtue in physics, philosophy, or microbiology. Or it may be that theoretical wisdom is the same for all these disciplines. If this is the case, then judicial wisdom may simply be general theoretical wisdom that is supplemented by the skills or knacks that produce fine legal thought combined with deep knowledge of the law.

Practical Wisdom. The final virtue in my short list is the corrective for bad judgment or foolishness. I shall use the phrase "judicial wisdom" or more particularly "constitutional wisdom" to refer to a judge's possession of the virtue of *phronesis* or practical wisdom: in the constitutional context, the excellent judge must possess

⁷⁸. ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 1125b27-31 (J.A.K. Thomson trans., Hugh Tredennick rev., 1976).

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practical wisdom in the choosing of constitutional ends and means.⁷⁹ Practical wisdom is the virtue that enables one to make good choices in particular circumstances. The person of practical wisdom knows which particular ends are worth pursuing and knows which means are best suited to achieve those ends. Judicial wisdom is simply the virtue of practical wisdom as applied to the choices that must be made by judges. The practically wise judge has developed excellence in knowing what goals to pursue in the particular case and excellence in choosing the means to accomplish those goals. In the literature of legal theory, Karl Llewellyn's notion of "situation sense" captures much of the content of the notion that judicial wisdom corresponds to the intellectual virtue of *phronesis*.⁸⁰

This abstract account of judicial wisdom can be made more concrete by considering the contrast between practical wisdom and theoretical wisdom in the judicial context. The judge who possesses theoretical wisdom is the master of legal theory, with the ability to engage in sophisticated legal reasoning and insight into subtle connections in legal doctrine. But a judge who possesses judicial intelligence is still not necessarily a reliably good judge, even if she affirms the correct decision procedure for judicial decision-making. The need for common sense at the trial level is relatively obvious: trial judges need managerial skills that are not supplied by legal theory.⁸¹ But the virtue of practical wisdom is a prerequisite for excellence in appellate judging as well. The practically wise judge has an intuitive sense as to how real live lawyers and parties will react to judicial decisions. Judicial wisdom is required to know whether a particular doctrinal formulation will work in the real world of adversary proceedings and evidentiary rules. A multi-factor balancing test that is theoretically sound may be impracticably indeterminate in practice; a bright line that is attractive in the abstract may be too rigid in concrete cases.

Suzanna Sherry's recent essay *Judges of Character* nicely summarizes the importance of practical wisdom in judging:

Readers may complain that rather than describing how pragmatist judging might be accomplished, I have focused only on who might make a good pragmatist judge. That is because, in one sense, pragmatist judging is like good writing: you cannot teach someone to do it by laying down rules, or even guidelines. Indeed, rules tend to diminish rather than improve the quality of writing. (Look at any example of good writing and see how many times it violates the "rules" you were taught in school.) Experience, particularly under the careful tutelage of a good writer, is the best teacher. And so it is with pragmatism: at best, we can provide exemplars, we can rely on experience to

⁷⁹ My account of *phronesis* has been influenced by many sources. See, e.g., A. MacIntyre, *After Virtue*; W. Hardie, *Aristotle's Ethical Theory*, at 212-239; Troels Engberg-Pedersen, *Aristotle's Theory of Moral Insight* (Oxford: Oxford University Press, 1983).

⁸⁰ KARL LLEWELLYN, THE COMMON LAW TRADITION 59-61, 121-57, 206-08 (1960); WILLIAM TWining, KARL LLEWELLYN AND THE REALIST MOVEMENT 216-27 (1973); see also Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 544-49 (1991) (contemporary application of Llewellyn's idea).

⁸¹ See Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

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guide judges, and we can look for character traits--akin to an inborn ear for language in good writers--that lend themselves to good judgment.⁸²

The *phronimos* has an ear for justice and an eye for legal salience. In the constitutional cases, we might call this situation sense, "constitutional vision."

C. The Virtue of Justice

Justice is next. We are not tempted to name the distinctively judicial or constitutional form of this virtue, "judicial justice" or "constitutional justice," as we could so name judicial courage, judicial wisdom, or judicial temperament. This is not because there is no association, but rather because the association is too close. We call judges on the Supreme Court, "Justices," we call the buildings that judges occupy the "halls of justice," and we call what they do, "the administration of justice." If we know anything about judges, it is that they ought to be just. If constitutional adjudicators should possess any virtue, then surely they should possess the constitutional form of the virtue of justice.

1. The Centrality of Justice

If justice is a virtue, how does it relate to the others? It seems clear that the virtue of justice is central. We can imagine a Supreme Court Justice who has the natural virtues of temperance, civic courage, and good temper. Suppose this Justice has the right intellectual equipment as well, a strong intellect, a good sense of practicality, and what Llewellyn called "situation sense" in matters legal.⁸³ But if our hypothetical Justice lacked the virtue of justice, then all the rest would seem to be for naught.

For the moment, I want to set aside the question whether one could possess all the other virtues (as natural virtues) but lack justice.⁸⁴ If, for the sake of argument, we can imagine the unjust woman or man, fully endowed with the natural virtues, but lacking in justice, it is clear that such an adjudicator would be an especially bad Supreme Court Justice. Taking the problem from the other end, if there could be a Justice who lacked the other natural virtues, but possessed a strongly developed virtue of justice, then we might have a Supreme Court Justice who was a superb interpreter of the Constitution but not a very good human. Off the bench, the life of the just (but otherwise vicious) judge might be a disaster, but we would seem to lack grounds for criticism if all of the Justice's decisions were just.

Laying the thought experiment to the side, our working hypothesis is that justice is an essential virtue for excellence in constitutional interpretation. Without justice, constitutional adjudication cannot be good. With justice, judging in constitutional

⁸² See Sherry, *Judges of Character*, *supra* note 42, at 810.

⁸³ See *supra* TAN 80.

⁸⁴ It may well turn out that a judge cannot have the virtue of "judicial wisdom" or *phronesis* and lack a sense of justice. Questions about the unity of the judicial virtues will be touched on below.

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cases must be good. Justice, we might say, is the cardinal virtue of constitutional interpretation.

At this point, I suspect that my readers are dividing into two groups. One group is happily endorsing the implications of my discussion of the virtue of justice. I imagine someone from this group thinking: "I'm not sure we need to make the aretaic turn to get to this conclusion, I am quite happy to accept the conclusion that good constitutional adjudication must aim at justice and hence that judges should be selected for their possession of the virtue of justice." Another group of readers is getting rather antsy and beginning to formulate a critique of my theory. I imagine a member of this second group saying to herself: "Supreme Court Justices are supposed to follow the Constitution and not impose their own sense of justice in the guise of constitutional law." If you find yourself falling into one of these two camps, you might suspend judgment for just a few more pages. Members of the first group: before you know it, you will be disappointed. Members of the second group: you may be pleasantly surprised. But before we can get to the punch line, we need to think harder about the idea that *justice* is virtue.

2. *Is Justice a Virtue?*

There are a number of difficulties with incorporating the virtue of justice into a virtue-centered theory of constitutional adjudication. To begin, it is not easy to pin down the sense in which "justice" is a moral virtue in the Aristotelian sense. Aristotle found it difficult to fit justice into the schema of virtue as a mean between two opposing vices with respect to a morally neutral affective state such as an emotion or desire.⁸⁵ If justice is giving persons their due, or doing what is fair, then what are the opposing vices? In the case of an individual, we might be tempted to postulate justice as a mean between the disposition to take more than one's share and the disposition to take less, but this solution has many well-known difficulties, including the problem that taking too little for one's self is not usually characterized as an instance of injustice. In the case of judges, this solution is unavailable in any event. In the usual case, judges do not take for themselves when they decide cases.⁸⁶

If justice does not fit the pattern of temperance, courage, and good temper, then what kind of disposition could justice be? Bernard Williams suggests that the notion of a just outcome "is prior to that of a fair or just person. Such a person is one who is disposed to promote just distributions, look for them, stand by them, and so on."⁸⁷ "The disposition of justice," Williams continues, "will lead the just person to resist unjust distributions—and to resist them *however they are motivated*."⁸⁸ On Williams's

⁸⁵ See Bernard Williams, *Justice as a Virtue* in *ESSAYS ON ARISTOTLE'S ETHICS* (Amélie Oksenberg Rorty, ed. 1980).

⁸⁶ There are, however, unusual cases. As the discussion of the vice of judicial avarice reminds us, judges sometimes do "take for themselves" when they decide cases. This occurs when a judge takes a bribe or fails to disqualify herself from a case in which she has a financial stake.

⁸⁷ Williams, *supra* note 85, at 196-97.

⁸⁸ *Id.* at 197 (emphasis in original).

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account, then, justice is a virtue, but it does not fit the pattern of the other moral virtues. Justice is not a mean with respect to a morally neutral emotion or desire; rather, justice, the virtue, is the disposition to aim at fairness (for a judge, to give the parties that which is due to them). The latter is prior to the former.

William's picture of the virtue of justice poses an important problem for a virtue-centered theory of constitutional interpretation. If the concept of justice were prior to the virtue of justice, then it would follow that a normative theory of constitutional interpretation cannot be virtue centered. Rather, we would begin with a theory of constitutional interpretation *and then* define the constitutional virtue of justice as the disposition to adhere to *that theory*. Theory first, virtue second—that is the picture implied by Williams's analysis.

Of course, it might turn out that justice is not wholly independent of the virtues, even if it is prior to them. Thus, it might turn out that only someone with the right character will be good at devising just solutions to difficult problems or discerning the just outcome in a hard case. "But even there," Williams points out, "it is important that, although it took [a virtuous constitutional interpreter], or someone like [a virtuous constitutional interpreter], to think of it, the [constitutional interpretation] can then be recognized as fair independently of that person's character."⁸⁹ Moreover, it may turn out that only someone with the virtues will be capable of the disposition to promote just outcomes. That is, nothing in William's account precludes the possibility that disposition to do justice is simply not, as a matter of fact, consistent with possession of the vices of avarice, civic cowardice, bad temper, stupidity, or foolishness.⁹⁰

Thus, if we accept the centrality of justice for constitutional interpretation and Williams's view that theories of justice are prior to the virtue of justice, it would seem that we cannot have a virtue-centered theory of constitutional adjudication. How can virtue jurisprudence answer Williams's challenge?

3. The Structure of the Virtue of Justice

Justice is the disposition to give each what they are due. Can we say anything more about this disposition? A full account of the structure of justice is outside the scope of our current inquiry, but we can, nonetheless, make some progress by considering impartiality, lawfulness, and legal vision as constituents of the virtue of justice.

Impartiality. Consider the quality that we might call "judicial impartiality," the disposition to even-handed sympathy or empathy with the parties to a legal dispute. Judges should not identify more strongly with one side than with the other,⁹¹ but a good judge must be able to understand the interests and passions of all the parties. The degree of "partiality" or identification with the viewpoints and interests of the litigants that is appropriate to the role of judge is different from that which is appropriate to

⁸⁹ *Id.*

⁹⁰ To avoid confusion, I should note that I do not believe that the paragraph in text is an answer to the challenge that William's argument poses for a virtue-centered theory of judging.

⁹¹ "The judicial virtues are those that allow people to stand back from their personal commitments and projects and judge them from an impersonal point of view." STEPHEN MACEDO, *LIBERAL VIRTUES* 275 (1990).

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other situations. Parents should be partial to their children, and friends partial to one another. Judges should be partial to none, but should possess an appropriate degree of sympathy and empathy with all who appear before them.⁹² A disposition to fairness is constituted in part by having the right sort of emotional equipment for sympathy, an appropriate, evenhanded, concern for the interests of others.

In the context of constitutional adjudication, the temptation to be resisted is frequently ideological. The great ideological struggles of partisan politics frequently come before the courts in constitutional guise. Judges are nominated and confirmed by the political branches at the federal level and may run for office at the state level. It would not be surprising then, if judges found themselves tempted to use their power of constitutional interpretation to advance their own political ideologies. Ideological partiality is a special temptation for judges in constitutional cases. Judges with the constitutional form of the virtue of justice are disposed to impartiality, even when their deepest political commitments are at stake.

Lawfulness. There is another quality that is closely connected with the disposition to do what is just. The good judge must have a special concern for fidelity to law and for the coherence of law. Let us call this “justice as lawfulness.” To understand Aristotle’s own account of justice as lawfulness, we need to say a bit about the Greek word *nomos* which is translated as law. The eminent Aristotle scholar, Richard Kraut explains:

[W]hen [Aristotle] says that a just person, speaking in the broadest sense is *nomios*, he is attributing to such a person a certain relationship to the laws, norms, and customs generally accepted by some existing community. Justice has to do not merely with the written enactments of a community’s lawmakers, but with the wider set of norms that govern the members of that community. Similarly, the unjust person’s character is expressed not only in his violations of the written code of laws, but more broadly in his transgression of the rules accepted by the society in which he lives.

There is another important way in which Aristotle’s use of the term *nomos* differs from our word ‘law’: he makes a distinction between *nomoi* and what the Greeks of his time called *psēphismata*—conventionally translated as ‘decrees’. A decree is a legal enactment addressed solely to present circumstances, and sets no precedent that applies to similar cases in the future. By contrast a *nomos* is meant to have general scope: it applies not only to cases at hand but to a general category of cases that can be expected to occur in the future.⁹³

⁹² I do not mean to imply that judges may never be partial or that persons who do not occupy the judicial role should never be impartial. All of us, judges and nonjudges alike, should be partial on the right occasions, toward the right persons, for the right reasons. Similarly, we all need the capacity and propensity for impartiality when the situation demands it.

⁹³ RICHARD KRAUT, ARISTOTLE 105-06 (2002).

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Rule by decree, Aristotle believed, was typical of tyranny—the rule of individuals and not of law; a regime that rules by decree does not provide the stability and certainty that is required for human communities to flourish.⁹⁴ Kraut continues:

We can now see why Aristotle thinks that justice in its broadest sense can be defined as lawfulness, and why he has such high regard for a lawful person. His definition embodies the assumption that every community requires the high degree of order that that comes from having a stable body of customs and norms, and a coherent legal code that is not altered frivolously and unpredictably. Justice in its broadest sense is the intellectual and emotional skill one needs in order to do one's part in bringing it about that one's community possesses this stable system of rules and laws.⁹⁵

Once we understand Aristotle in this way, it become apparent that Williams's view of the virtue of justice was in a sense topsy turvey. Williams seems to suggest that having the virtue of justice consists in the disposition to act in accord with the right theory of justice, but, of course, different individuals will have different beliefs about which theory is the right theory. If each constitutional adjudicator acts on the basis of her own theory of justice—her own political ideology—then constitutional adjudication will become an ideological struggle, with the content of the law shifting with the political winds. Aristotle's view is quite different. The excellent judge is a *nomimos*, someone who grasps the importance of lawfulness and acts on the basis of the laws and norms of her community.

Constitutional vision. In the context of constitutional adjudication, the virtue of justice requires the ability to perceive the salient features of particular situations. We can use Llewellyn's term, "situation sense," or by way of analogy to the phrase "moral vision," we might say that a sense of justice requires "constitutional vision," the ability to size up a constitutional case and discern its constitutionally salient dimension. This requires an intellectual grasp of the content of the law, an understanding of the underlying purposes the law serves, and an ability to pick out the features of particular cases that are important for those rules and purposes. In other words, the virtue of justice is strongly connected to *phronesis* or practical wisdom and the truly excellent constitutional adjudicator must be a *phronimos*—a person of practical wisdom.

In sum, the virtue of justice can be given determinant content by decomposing the abstract idea of justice into its component dispositions and abilities. Although the account offered here is partial and incomplete, it nonetheless points in the direction of a fuller account of the structure of justice. That structure includes impartiality, lawfulness, and legal vision. To be an excellent interpreter of the constitution, a judge must (1) be impartial among persons and ideologies, (2) be dedicated to the rule of law, and (3) possess constitutional vision, the ability to discern the constitutionally salient dimensions of particular constitutional cases.

⁹⁴ *Id.* at 106.

⁹⁵ *Id.*

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D. A Preliminary Statement of the Theory

For the sake of simplicity and clarity, I shall formulate a virtue-centered theory of constitutional adjudication in the form of a series of definitions:

- *A judicial virtue* is a naturally possible disposition of mind or will that when present with the other judicial virtues reliably disposes its possessor to make just decisions. The judicial virtues include temperance, courage, good temper, intelligence, wisdom, and justice. *A constitutional virtue* is simply a judicial virtue in the context of constitutional adjudication.
- *A virtuous judge* is a judge who possesses the judicial virtues, and a *virtuous constitutional adjudicator* possesses those judicial virtues that are relevant to constitutional interpretation.
- *A virtuous constitutional interpretation* is an interpretation of the constitution made by a virtuous judge acting from the judicial virtues in the circumstances relevant to the case in which the interpretation was rendered.
- *A legally correct constitutional interpretation* is an interpretation that would be characteristically made by a virtuous judge in the circumstances relevant to the case in which the interpretation was rendered.⁹⁶
- *A just decision* of a constitutional case is the decision that would be rendered in accord with a *virtuous constitutional interpretation*, in cases in which the constitutional interpretation would control the outcome of the case.⁹⁷

Thus, the central normative thesis of a virtue-centered theory of constitutional adjudication is that judges ought to be virtuous and to make virtuous decisions. Judges who lack the virtues should aim to make lawful or legally correct decisions, although they may not be able to do this reliably given that they lack the virtues. Judges who lack the judicial virtues ought to develop them. Judges ought to be selected on the basis of their possession of (or potential for the acquisition of) the judicial virtues.

Unlike other theories of constitutional adjudication, a virtue-centered theory makes the claim that virtue is an ineliminable part of the explanation for and justification of the practice of judging. According to a virtue-centered theory, the whole story about what the Constitution requires in particular cases includes the virtues. If they were to

⁹⁶ The distinction between virtuous and correct decisions is introduced to distinguish between a fully virtuous decisions (made by a virtuous judge acting from the virtuous) from a merely correct decision (made for the wrong reasons). In order to be legally correct, a decision need only conform to the virtues; it need not be made for the right reason.

⁹⁷ Of course, in many constitutional cases, a *virtuous decision* would be rendered on grounds that are independent the constitution. For example, a dormant commerce clause case might be resolved on the basis of a procedural rule that does not implicate the constitution. For ease of exposition, the account in text focuses only on cases in which the constitutional interpretation is the basis of a virtuous decision. The definitions in text can be generalized so that they encompass virtuous decisions generally and not simply virtuous constitutional interpretations. See Solum, *Virtue Jurisprudence: A Virtue Centered Theory of Judging*, *supra* note 2.

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be left out, the story would be incomplete. Moreover, a virtue-centered theory suggests that it sometimes requires judicial virtue to recognize the legally correct result. It always requires judicial virtue to make reliable judgments about the just outcome. The rules do not apply themselves; judgment is always required for a general rule to be applied to a particular case. Practical wisdom or good judgment is required to insure that the rules are applied correctly.

In the end, agreement and disagreement about what rules mean and how they are applied are rooted in practical judgments. Even with respect to some easy cases and more frequently with respect to complex cases, articulated reasons will not suffice to explain why, in cases of bottom-line disagreement about the application of a rule to the facts, one judgment is legally correct and competing judgments are not.

Indeed, a virtue-centered account allows us to appreciate the fact that explanations or justifications of legal decisions play more than one role. In some cases, when a judge explains a decision, the intention is to lay bare the premises and reasoning that moved the judge from accepted premises about the law and the facts to some conclusion about what result is legally correct. There are other cases, however, where explanations play a different role. When the decision of a case is based on legal vision or situation sense—that is, when the decision is based on the virtue of judicial wisdom of *phronesis*—then the point of an explanation is to enable others to come to see the relevant features of the case. Such explanations do not recreate a decision procedure; rather, they are aimed at enabling others to acquire practical wisdom.

E. Aretaic Constitutional Formalism

Even with all of that said, big questions remain. At this point the reader might reasonably ask for a less abstract account of the aretaic approach to constitutional interpretation:

But all this is so abstract. What does justice as lawfulness really mean? How would a virtuous constitutional interpreter apply the principle of lawfulness to the practical problem of abstracting meaning from the Constitution?

And of course, all that I can really do by way of answer is to sign a promissory note, because the articulation of a fully developed aretaic theory of constitutional interpretation requires an extended articulation—a short monograph of its own, at the very least. Nonetheless, a sketch is possible. Here are six principles that give more shape and structure to the idea of constitutional justice as lawfulness:

Principle One, Precedent: Judges in constitutional cases should follow an adequate and articulated doctrine of stare decisis. Among the features of such a doctrine is that even courts of last resort (i.e. the United States Supreme Court) should regard their own decisions as binding, unless there is a compelling reason to do otherwise.

Principle Two, Plain Meaning: When the precedents run out, judges should look to the plain meaning of the salient provisions of the constitutional text.

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Principle Three, Intratextualism and Structure: When the text of a particular provision(s) is ambiguous, judges should construe that provision so as to be consistent with other related provisions and with the structure of the Constitution as a whole.

Principle Four, Original Meaning: If ambiguity still persists, judges should make a good faith effort to determine the original meaning, where original meaning is understood to be the meaning that (i) the framers would have reasonably expected (ii) the audience to whom the Constitution is addressed (ratifiers, contemporary interpreters), (iii) to attribute to the framers, (iv) based on the evidence (public record) that was publicly available.

Principle Five, Default Rules: And when ambiguity persists after all of that, then judges should resort to general default rules that minimize their own discretion and maximize the predictability and certainty of the law. The default rules should include a presumption in favor of 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.

Principle Six, Lexicality and Holism: The first five principles are to be understood as lexically ordered in the following sense. Judges should order their deliberations by the first five principles--attempting to structure their conscious deliberations by attending to the features highlighted by each principle in order before proceeding to the next principle. But this requirement does not entail that judges either will not or should not recognize that the considerations thematized by one principle may be relevant to deliberations explicitly organized by another principle. Thus, the interpretation of a precedent will sometimes (perhaps always) require consideration of the text, structure, and original meaning, and so forth. These are principles not rules, and lexical ordering operates a methodological heuristic and not as a rigid rule.⁹⁸

There is more than one way to skin a cat, and there are many ways to articulate an aretaic theory of constitutional interpretation that realize the ideal of constitutional justice as lawfulness. But even this very sketchy account is sufficient to point in the right direction. These six principles provide an articulated framework for constitutional justice as lawfulness.

⁹⁸ A slightly different version of these principles was originally presented on Legal Theory Blog as part of an exchange with Jack Balkin. See Lawrence Solum, *A Neoformalist Manifesto*, http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200307682 (visited March 3, 2004).

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V. THE ARETAIC RECONSTRUCTION OF THE INSTITUTIONAL CRITIQUE

How does the aretaic turn affect our understanding of institutionalism? Recall that Sunstein and Vermeule were primarily concerned with the institutional capacities of judges. Indeed, the examples they provided consistently focused on the abilities of individual judges as opposed to the institutional design of the judiciary as a system. We are now in a position to restate their position from the perspective of virtue jurisprudence.

Where Sunstein and Vermeule raise the possibility that judges would be unable to fulfill the demands of a particular theory of constitutional interpretation, virtue jurisprudence seeks to diagnose the reason for the failure. For the most part, Sunstein and Vermeule seem to be focused on intellectual deficiency—although they never given a very detailed explanation as to what the nature of the deficiency might be. Virtue jurisprudence can embrace this insight, but it supplements this account by offering a richer and more fully developed account of judicial vice. Moreover, virtue jurisprudence offers a positive account of the judicial excellences.

Sunstein and Vermeule's analysis assumes that institutional capacities are a given. That is, our analysis of the second best takes judicial incapacity as a constant and treats interpretive methodology as a variable. An aretaic approach rejects this assumption and suggests that judges ought to be selected for their possession of the judicial virtues. It is inevitable that some judges will possess the judicial excellences to a higher degree than others. Virtue jurisprudence suggests that the most virtuous judges should be appointed to the courts with the greatest responsibilities. Most obviously, our very best judges ought to serve on the Supreme Court.

Of course, an institutionalist critic of virtue jurisprudence might argue that the aretaic solution is utopian. Although the first-best system of constitutional adjudication might have excellent judges, mediocre judges populate the real world. Even if some judges on the federal appellate courts have the requisite virtues, is it realistic to imagine that such virtues will ever be possessed by the judges on the Circuit Court of Cook County? Moreover, real-world political processes are unlikely to result in the appointment or election of excellent judges. Judgeships are sometimes rewards for political service. Supreme Court Justices may be selected on the basis of their ideological fervor on key issues (such as *Roe v. Wade*) rather than their intelligence, wisdom, good temper, or courage. Indeed, from the point of view of the President seeking to achieve a political agenda, these characteristics might be viewed as negatives. The President might want a Justice who will reliably cast votes that are politically correct. Indeed, it might appear that Presidents, who nominate Justices, and Senators, who confirm them, are themselves unlikely to possess the executive and legislative virtues. Rather than aiming at the common good, executives and legislators may aim at their own reelection.

Thus, the institutionalist critic of virtue jurisprudence might argue that, for institutional reasons, we should not even aim at virtue. Instead, we should try to design institutions that are vice-proof. The next section suggests that institutionalism is itself subject to this kind of criticism.

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A. *The Institutional Tu Quoque*

Adding institutional concerns to the agenda of constitutional theory does not make our choices easier. It makes them more complex. The world of the second best is a world of imperfect information, decision making under conditions of uncertainty, and unintended consequences. If there is a virtue deficit, who shall make the decisions that seem to require extraordinary virtue? Can institutional analysis solve the problem of institutional capacity? Or ought we say to the institutionalist, “*tu quoque*”: your theory suffers from the very problems of institutional incapacity and unintended dynamic effects that infect first-best theories.

The institutional *tu quoque* can operate at two distinct levels, each of which deserves separate comment. First, Sunstein and Vermeule’s institutionalism need to address the question whether second-best interpretive methodologies really overcome the problems of institutional incapacity. Second, institutionalism must address the question as to which institutions have the capacity to act as the architect for an institutionally sensitive approach to constitutional interpretation.

1. *Institutional Deficits and Second-Best Methodologies*

The first level at which the institutional *tu quoque* operates is the level of second-best methodologies. Sunstein and Vermeule offer a set of suggestions for interpretive practice. Roughly speaking, they argue that judges may do better with simple interpretive strategies, such as clause-bound interpretivism, because these simple second-best principles demand less of judges than do more complex first-best principles.

There is, however, no a priori reason to believe that simple interpretive methodologies will actually improve decision making of real world judges, “[I]f judges are corrupt, biased, poorly-informed or otherwise unreliable,”⁹⁹ they might do rather badly using *clause-bound interpretivism* or some other simple-minded methodology. Consider an obvious example. The first amendment says, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁰⁰ A corrupt, biased, poorly informed, or otherwise unreliable judge might conclude that when this clause says “Congress,” it means to exclude the states and the judiciary from the scope of the first amendment. Given this possibility, is it so clear that “poor translators” would “garbl[e] meanings so badly that a simple-minded mistranslation would preserve more of the original than would an ambitious and mistaken attempt to capture the original’s real sense”?¹⁰¹ The answer, of course, is “No, it is not clear.” The reason is that application *even* of the plainest version of plain-meaning textualism requires the virtues of judicial intelligence and wisdom.

⁹⁹ Sunstein & Vermeule, *supra* note 4, at 935.

¹⁰⁰ U.S. CONST. Amend. I.

¹⁰¹ Sunstein & Vermeule, *supra* note 4, at *Id.* at 942.

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2. Institutional Deficits and Institutional Design

The second level at which the institutional *tu quoque* operates is the level of institutional design. Institutionalism cannot assume that real-world institutional design is acontextual. Rather, in the real-world, institutions are designed and built by other institutions and individuals, themselves subject to institutional limitations. The question then becomes, which institutions have the institutional capacity to design interpretive practices that are likely to overcome the institutional deficiencies of first-best theories of constitutional interpretation? There are at least three candidates for the role of institutional architect: (1) the judiciary, (2) the political branches, and (3) legal analysts.

a) The Judiciary as Institutional Architect

Could judges serve as the institutional architects of a second-best interpretive methodology? The crafting of rules and principles to guide constitutional interpretation would naturally seem to be a judicial role. In a common law system, interpretive methodologies emerge from accumulated judicial decisions. Thus, in a constitutional system that incorporates a strong common-law tradition, the judiciary might be the obvious candidate for the role of institutional architect.

There is, however, an obvious difficulty with candidacy of judges for the role of institutional architects. Sunstein and Vermeule hypothesize that judges lack sufficient virtue to make the relatively less complex decisions that involve only first-best considerations. Judgments about the second best start where first-best analysis leaves off. Second-best decision making requires mastery of first-best theory and institutional analysis. If judges lack sufficient virtue to use first-best interpretive methodologies, then it would seem unlikely that they be able to serve as institutional architects. If they made the attempt, they might craft interpretive methodologies that would lead institutionally crippled judges to make even worse decisions than they would make by employing the first-best interpretive strategies.

Perhaps this problem can be avoided if the higher courts possess the institutional capacity to serve as institutional architects for lower courts. Although Cook County Circuit Court judges may lack the necessarily institutional capacities, perhaps those capacities can be found in some of the Judges on the United States Court of Appeal for the Seventh Circuit. Appellate rather than trial judges may be institutionally capable of shaping interpretive rules and practices that achieve second-best outcomes.

If we assume that appellate courts possess the requisite institutional capacity, this raises an obvious question: why are appellate courts incapable of supervising the lower court's application of first-best methods of constitutional interpretation? If lower courts attempting to make holistic sense of the constitution go badly wrong, then appellate courts can reverse them. Over time, this process should result in the emergence of a first-best body of constitutional precedent. It might be argued that lower courts are capable of employing second-best rules and principles of constitutional interpretation, but incapable of following precedents based on first-best interpretive methods. But why would this be so? To the contrary, it seems intuitively plausible to believe that it would be no harder to adhere to constitutional doctrine based on holistic

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meaning or based on faithful translation (to take Amar and Lessig's approaches as illustrative) than to follow less coherent doctrines or doctrines that mistranslate original meanings.

Thus, it appears that the first option is not available to Sunstein and Vermeule. Judges cannot be the institutional architects of second-best methods of constitutional interpretation, if the assumptions behind the critique of first-best methodologies are correct.

b) The Political Branches as Institutional Architects

The next possibility is that the political branches (either legislative or executive) might contain the necessary institutional capacities. Perhaps Presidents or Senators can construct the necessary rules and principles. If the judicial branch is not up to the task, then the next place to look would seem to be the other branches of government.

There are, however, difficulties with this solution as well. Although some members of the political branches are trained in the law, many are not. Even those with legal training may lack sufficient judicial experience to craft second-best principles that will actually suffice to guide incapable judges towards second-best outcomes. For example, a President might instruct his appointees to "strictly construe" the constitution without realizing that a rule of "strict construction" does not actually provide guidance in particular case. Or Senators might admonish judicial appointees "to apply the law and not make it," without realizing that the difference between law application and law making is subtle and that this principle does not apply itself.

Moreover, it is not clear that the political branches are better staffed than the judiciary. Presidents and Senators, too, may be "corrupt, biased, poorly-informed or otherwise unreliable."¹⁰² Because electoral processes are shaped by a variety of factors, importantly including the ability to raise money, it might even be argued that the political branches are more likely than judges to be corrupted by political contributions, biased in favor of donors, ill-informed about issues not of concern to contributors, and otherwise unreliable.

One might argue that while elected officials are may lack the requisite institutional capacities, their professional staffs may be incorruptible, evenhanded, well-informed, and otherwise reliable. Perhaps, the staff of the Senate Judiciary Committee or the Office of Legal Counsel has the requisite institutional capacities. There are, however, problems with this option. Initially, it is not clear why incapable elected officials would select capable staff members. It seems likely that many elected officials would select staff members whose capacities and motivations were aligned with their own. Moreover, it is not clear whether professional staffs have the requisite institutional authority to impose second-best interpretive methodologies on judges, even assuming the staff members have the ability to devise the requisite rules and principles.

This last point leads to another. Assuming that the political branches include actors with virtues sufficient to craft second-best principles of constitutional interpretation, what institutional mechanism is available to insure the implementation of the principles? At the federal level in the United States, judges are appointed for life terms

¹⁰² *Id.* at 935.

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with guarantees against diminished compensation. Even assuming judges were to pledge adherence to the second-best methodologies as part of the nomination and confirmation process, is there any institutional mechanism that can insure that corrupt, biased, ill-informed and other incapable judges will fulfill these pledges? In our constitutional system, Congress cannot legislate constitutional methodology, nor can the President do so through executive order.

A more radical institutional reform could provide for more direct control by the political branches of the process of constitutional interpretation. After all, the Constitution can be amended. Life-tenure could be abolished, or we could allow an appeal from the Supreme Court to the Congress on constitutional issues. Perhaps, the contemporary political branches can provide us with a better constitutional plan than did those assembled who assembled at Philadelphia. But if contemporary institutional architects are not up to the task, the result might be a constitutional system even worse than the status quo.

c) Legal Analysts as Institutional Architects

It is possible that the institutional *tu quoque* has, so far, been aimed at straw men. Perhaps, we should look for the requisite virtues in the legal analysts rather than in government officials. There are, however, obvious problems with this solution. First, it is not clear how legal analysts will influence outcomes. They can diagnosis institutional ills, but how will their prescriptions affect the decisions made by political institutions? If the judges, executives, and legislators possessed sufficient virtue to grasp academic criticism and act on it wisely, they would have the virtues requisite to implement first-best judicial appointments and interpretive methods. But if they lack these virtues, they lack the capacity to respond appropriately to academic criticism and advice.

Second, do legal analysts themselves have the requisite virtues? Or is the legal analyst open to an *institutional tu quoque*? Is institutionalism, considered pragmatically as it is rally practiced by academics in particular institutional contexts, itself open to an institutional critique? There are reasons to believe that it is and that institutional legal analysts may lack the capabilities necessary for their work to achieve the effects they intend.

How might an institutionalist critique of institutionalism proceed? Let us begin with the institutional context for legal analysis. Legal analysts are isolated in ivory towers. This does not facilitate the full development of the crucial virtue of *phronesis* or practical wisdom. But institutional analysis suggests that this virtue is crucial. When academic theories are translated into practice, there may be unintended consequences. Without practical wisdom, academicians are unlikely to foresee such consequences. That is, academicians would seem to systematically lack an institutional capacity requisite for the role of institutional architect.

Utilization of legal analysts as institutional architects might also lead to dynamic effects. Sunstein and Vermeule recommend that judges should eschew aiming at first-best interpretations of the Constitution, but how do they know that they have been able to foresee the unintended consequences that this proposal might have when implemented? Might a variety of institutional actors attempt to exploit this proposal,

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using Sunstein and Vermeule's argument to justify the selection of mediocre judges who pledge allegiance to a simplistic methodology ("strict construction" or "clause bound interpretivism") that is merely window dressing for ideological commitment to particular outcomes on politically important issues? Or if academics became the institutional architects of constitutional reform, might powerful interests seek to corrupt the legal academics, perhaps establishing well-funded societies and think tanks that would offer grants or travel opportunities to academics who would adopt preferred theories of constitutional interpretation?

In sum, from the armchair perspective of Sunstein and Vermeule's essay, it isn't clear that there is any set of institutional actors who have the requisite capacities to act as the institutional architects of a second-best system of constitutional interpretation. But if no one can serve this role, then it would seem to follow that the charge of *tu quoque* is rightly aimed at institutional analysis.

B. The Lesson of the Institutional Tu Quoque

The point of the institutional *tu quoque* is not to undermine institutional analysis. Indeed, all of the criticisms that I have advanced of Sunstein and Vermeule's particular arguments and proposals are in the spirit of institutional analysis itself. Rather, the point of the *tu quoque* is to lay bare a hidden premise in Sunstein and Vermeule's analysis. Institutionalism implicitly assumes that some actor possesses the virtues of mind and character that are required for institutionalist criticisms to be translated into practice. That is: *institutional analysis itself requires the aretaic turn*.

Institutionalism moves thinking about constitutional interpretation from ideal theory to a contextualized analysis that focuses on the real-world capacities of judges. By making this move, institutionalists have already made the aretaic turn. The institutionalist observation—that various theories of constitutional interpretation make minimal assumptions about the character and capacities of judges—is equivalent to the aretaic notion of a thin theory of virtue. But institutionalism requires more than this, because successful institutional architecture requires more than a thin theory of judicial virtue. An excellent institutional architect must be a *phronimos*, with the ability to make complex practical judgments under conditions of uncertainty.

Thus, institutionalism points us in the direction of virtue. This leads naturally to the next question. How can we create a virtuous judiciary? Can we map a path for the law that is a road to virtue?

C. The Path of the Law and the Road to Virtue

The introduction to this essay made a series of provocative claims. It may disappoint the reader, but I shall not attempt to prove those claims now. (This is yet another case of academic bait and switch!) I claimed that Justices are marked more by virtue than by vice, and that the political branches are deliberately aiming at the appointment of mediocre but ideologically committed judges. Whether these claims are true depends on very complex and contested empirical judgments. But for the sake of argument, let us assume that these claims are substantially correct. That is, let us assume that many judges on both our lowest and our highest courts lack the judicial

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virtues, especially the virtue of constitutional justice as lawfulness. Is this situation inevitable or is there a road to virtue?

Consider the following possibility. Let us suppose that the rule of law provides very great goods. Among the benefits of the rule of law are predictability and certainty, which in turn facilitate planning. The rule of law may also increase voluntary compliance with legal norms and therefore reduce the costs of law enforcement. Yet another benefit of the rule of law is conflict avoidance. It seems plausible to believe that the rule of law is a great good to groups with diverse interests and ideologies. Suppose that these goods are so large, that almost all political factions would prefer to maintain the rule of law, even at the price of losing out on all or most of the groups' agenda on controversial legal issues.

If this were the case, then it might well be that an overlapping consensus¹⁰³ could support the appointment and ratification of judges who placed a very high value of the rule of law. That is, political actors might be persuaded that the politicization of judicial appointments is too high a price to pay for short term gains on particular controversial issues. Familiar questions about prisoner's dilemma's and defection arise, and familiar solutions such as the development of informal norms or bargains might be offered.

I cannot demonstrate that there is a realistic path to the restoration of judicial virtue, but I am also unaware of any argument that shows that impossibility of a consensus that virtue should be the primary basis for judicial selection. What seems clear is that the case for judicial virtue is not helped by the assumption that judicial incompetence is a given. Sunstein and Vermeule argue that one unintended consequence of purposive interpretation may be legislative carelessness. Likewise, an unintended consequence of institutional analysis that eschews the aretaic turn might be to reinforce the causal factors that lead to judicial incompetence. Virtue jurisprudence does not run this risk. When we make the aretaic turn in constitutional theory, we are inevitably driven to the conclusion that constitutional virtue is the *sine qua non* of constitutional justice.

¹⁰³ See JOHN RAWLS, POLITICAL LIBERALISM 133-172 (paperback ed. 1995); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987); see also Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549 (1994); Lawrence E. Mitchell, *Trust And The Overlapping Consensus*, 94 COLUM. L. REV. 1918 (1994); Susan K. Houser, Comment, *Metaethics and the Overlapping Consensus*, 54 OHIO ST. L.J. 1139 (1993).