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Judicial Selection: Ideology versus Character

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Spring 2004

Judicial Selection: Ideology versus Character

Lawrence B. Solum

D R A F T March 23, 2004

JUDICIAL SELECTION: IDEOLOGY VERUS CHARACTER*

LAWRENCE B. SOLUM**

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** Professor of Law, University of San Diego. I owe thanks to the University of San Diego and Dean Daniel Rodriguez for generous research support for this paper and to Loyola Law School of Loyola Marymount University and Dean David Burcham for support for prior research used in this paper. Keith Whittington and Dawn Johnsen provided helpful comments on an earlier draft of this essay.

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I. INTRODUCTION

The process of federal judicial selection¹ has become overtly ideological. Political ideology has played an important role in judicial selection, from John Adams's entrenchment of federalists as judges after the election of 1800 to the Roosevelt's selection of progressives, liberals, and New Dealers, the contemporary era, from the failed nominations of Fortas, Haynsworth, Carswell to the defeat of Robert Bork, the narrow confirmation of Clarence Thomas. But until recently, political ideology has played its role behind the scenes—mostly off the record of the judicial nomination and confirmation process. As recently as 1997, Sheldon Goldman could observe that while the nomination of a Supreme Court Justice is big news, “throughout American history we find little such national attention given to the selection of lower federal court judges.”² But recently, political ideology has taken center stage. The recent history of Republican obstruction of several Clinton nominees, the Democratic filibuster of several Bush nominees, and most recently, Bush's use of the recess appointments power to circumvent the filibusters is evidence that the role of political ideology as the explicit focus of judicial selection seems to be waxing rather than waning.

Perhaps the most important evidence of the new emphasis on political ideology in judicial selection is Senator Charles Schumer's op/ed *Judging by Ideology*,³ which argued for the proposition that political ideology and not character or competence should be the explicit basis for Democratic opposition to Republican judicial nominees. In the legal academy, Jack Balkin (sometimes with co-author Sandy Levinson) has argued that constitutional change has been and legitimately should be accomplished through ideological appointments to the Supreme Court. Although legal realism has always played a role in the judicial selection process, these developments signal a *realist turn*, from a prior practice that emphasized competence and character as the overt criteria for judicial selection to an emerging practice that explicitly acknowledges ideological appointments as a legitimate basis for changing the law without amendment the Constitution or enacting new statutes.

¹ The literature on judicial selection is too large to summarize. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (3d ed. 1992); HENRY J. ABRAHAM, GRIFFIN B. BELL, CHARLES E. GRASSLEY, EUGENE W. HICKOK, JOHN W. KERN III, & WILLIAM BRADFORD REYNOLDS, JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS (1990); SHELDON GOLDMAN, PICKING FEDERAL JUDGES (1997); JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 93-97 (1995); GEORGE WATSON & JAMES STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS (1995); THE JUDGES WAR: THE SENATE, LEGAL CULTURE, POLITICAL IDEOLOGY AND JUDICIAL CONFIRMATION (Patrick B. McGuigan & Jeffrey P. O'Connell eds. 1987).

² *See* Sheldon Goldman, PICKING FEDERAL JUDGES, *supra* note 2, at 1.

³ Charles Schumer, *Judging by Ideology*, NEW YORK TIMES (July 26, 2001), at <http://query.nytimes.com/gst/abstract.html?res=F50D17F83B540C758EDDAF0894D9404482>. also available at http://schumer.senate.gov/SchumerWebsite/about_chuck/op-ed_ideology.html.

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Not surprisingly, this realist turn in judicial selection has raised the political stakes for the President, Senators, and interest groups. Recent events, particularly the filibuster of several judicial nominees and the use of the recess appointments power to circumvent the filibusters, may constitute a downward spiral of politicization.⁴ Of course, the judicial selection process is part of a complex political system. The polarization of the judicial selection process may, in part, be driven by larger forces, and in particular, by the general trend toward polarization of the political parties and political ideology.⁵ But whatever the causes of the downward spiral of politicization that has characterized the judicial selection process, this phenomenon is surely of interest to normative and explanatory legal theory.

This paper argues for a very old-fashioned position,⁶ dressed up in somewhat new-fangled clothes: *character* should be of primary importance in the judicial selection process,⁷ and *political ideology* should play a relatively minor role. It will come as no surprise that these simple assertions stand in for more complex positions, but in the end, they capture important truths. Any sensible normative theory of judicial selection must admit that character counts. It is very hard to defend the proposition that we should select judges with truly bad characters but good ideologies. The real question is whether there is a tenable argument for the proposition that we should select judges whose ideologies we dislike but whose characters we admire? This article argues for an affirmative answer to that question: we ought to adopt an *aretaic*⁸ approach to judicial selection.

⁴ See STEPHEN CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (Basic Books 1994); John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1 (2003).

⁵ RICHARD FLEISHER & JON R. BOND, *CONGRESS AND THE PRESIDENT IN A PARTISAN ERA*, IN *POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA* 1-8 (Jon R. Bond & Richard Fleisher, eds., CQ Press 2000).

⁶ The notion that judicial selection should focus on character goes back to the founding. For example, James Madison stated that the primary reason behind senatorial participation in the appointments process was that Senators would be better informed about the characters of the candidates. See MAX FARRAND, ed, 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 357 (Yale, 2d ed 1937). Alexander Hamilton wrote in the *Federalist Papers* that the Senate's confirmation power "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters." *THE FEDERALIST* No. 76.

⁷ See Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 SO. CALIF. L. REV. 1730 (1988); see also Carter, *supra* note 4.

⁸ "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.").

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The case for a character-focused approach to judicial selection can be made in a variety of ways. One line of argument begins in moral theory. Fundamental debates at the deepest levels of moral theory have interesting parallels to debates about judging and judicial selection. The argument for the primacy of character in judicial selection could begin with the premise that character is fundamental in ethics and morality. If virtue ethics⁹ provides the best account of morality, the argument goes, then one ought to be able to show that candidates for judicial office should be selected for their possession of the judicial virtues. We might summarize this argumentative strategy with the slogan: *virtue ethics implies virtue jurisprudence*. That is not the strategy that I will pursue today. Rather, my argument will proceed in the opposite direction. I will begin with the case that ideology rather than character should be the primary criterion for judicial selection. I will try to show how the premises that underlie the case for ideological selection of judges might actually turn out to be consistent with the case for the selection of judges on the basis of character.

Along the way, I will explore the current political controversy over the selection of federal judges, using the views of Senator Charles Schumer as my foil. I will then present a simple two-dimensional model of judicial dispositions or attitudes and show how that model might lead to view that judges should be selected based on their ideologies. After presenting the case against character, I will try to present the case for character in a way that it consistent with the premises of the ideological view. This involves the introduction of a thin theory of judicial vice, followed by a thin theory of judicial virtue, leading to a discussion of the virtue of justice, and finally to my argument that we should select judges who possess the judicial virtues. The key to my argument will be an account of the virtue of justice.

Part

II. THE CASE FOR IDEOLOGY: A REALIST THEORY OF JUDICIAL SELECTION

We begin with the case against character and for ideology as the primary criterion for judicial selection. How might we come to think the traditional judicial virtues (judicial temperament, civic courage, judicial intelligence, practical wisdom, and so

⁹ 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); 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).

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forth¹⁰) should not be the focus of the judicial selection process? To answer this question, let's begin with the contemporary political debates over the judicial nomination process.

A. Senator Schumer and the Realist Turn in Judicial Selection

In an influential op/ed essay in the *New York Times*, Senator Charles Schumer has argued that ideology rather than character should be the explicit focus on judicial selection. He began his argument with the following observation:

For one reason or another, examining the ideologies of judicial nominees has become something of a Senate taboo. In part out of a fear of being labeled partisan, senators have driven legitimate consideration and discussion of ideology underground. The not-so-dirty little secret of the Senate is that we do consider ideology, but privately.¹¹

Unfortunately, the taboo has led senators who oppose a nominee for ideological reasons to justify their opposition by finding nonideological factors, like small financial improprieties from long ago. This "gotcha" politics has warped the confirmation process and harmed the Senate's reputation.¹²

And Schumer continued:

[S]ince Judge Robert Bork's nomination was defeated in 1987 largely because of his positions on abortion, civil rights and civil liberties, ideology has played more of a behind-the-scenes role in nomination hearings. It would be best for the Senate, the president's nominees and the country if we return to a more open and rational debate about ideology when we consider nominees.¹³

I come to bury Schumer, not to praise him. But before I begin my critique, I should note one important issue upon which Schumer and I agree. If *ideology* is to play a role in judicial selection, that role should be *transparent* and not *covert*.¹⁴ With that out of

¹⁰ See Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, *supra* note 7; 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*]; Lawrence B. Solum, *Equity and the Rule of Law*, *NOMOS XXXVI: THE RULE OF LAW* 120 (1994).

¹¹ Charles Schumer, *Judging by Ideology*, *supra* note 3.

¹² *Id.*

¹³ *Id.*

¹⁴ There are many reasons for this conclusion. Here are three: (1) As Schumer notes, if ideology is the driving force but excluded from public debate, then character assassination may be the tool for advancing ideology. This is harmful to the individuals involved and may discourage qualified candidates from accepting nominations; (2) If ideological selection of judges is undesirable (as I will argue), public debate and discussion of the judicial selection requires (or will be enhanced by) open acknowledgement of the role of ideology the nomination and confirmation of judges; (3) Dissimulation and deception in public debate is an evil in itself.

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the way, let me say a few words about the political context of the current controversy over judicial selection.

B. The Context for the Realist Turn

Schumer's remarks have become very important in current debates about the judicial selection process.¹⁵ This importance is, in part, a function of the current constellation of party control of the Senate and the Presidency. With a Republican President and a Republican majority in the Senate, one might expect that the Senate would confirm almost all of the President's nominees—barring of course, scandal or personal opposition by a Senator from the state in which the nominee will sit. But the Republican majority in the Senate is thin, short of the 60 votes necessary for cloture. Led by Senator Schumer, Democrats have filibustered a small number of judicial nominees, including Miguel Estrada,¹⁶ Priscilla Owen,¹⁷ and Bill Pryor.¹⁸ This has led to a contentious partisan struggle. The Republican Senate leadership has discussed the *nuclear option*—essentially the use of parliamentary maneuvers to circumvent the filibuster.¹⁹ Others have suggested that the President could make extensive use of the Recess Appointments Clause to circumvent the Democrats use of the filibuster.²⁰ In this context, the question as to the proper roles of ideology and character in the judicial selection process has come to the fore.

Another word about context is required before I get on to the core of my argument. The role of character and ideology in judicial selection are likely to vary with political circumstances. Senator Schumer made this point in his editorial, using the Eisenhower Presidency as an illustration of his point:

How important should ideology be in the confirmation decision? The answer can vary depending on three factors: the extent to which the president himself makes his initial selections on the basis of a particular ideology, the composition of the courts at the time of nomination and the political climate of the day.

¹⁵ Schumer elaborated on the themes in his New York Times editorial in hearings before the Subcommittee on the Constitution, Civil Rights, and Property Rights, of the Senate Committee on the Judiciary. *See* Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent, <http://judiciary.senate.gov/hearing.cfm?id=744>. *See also* Lawrence B. Solum, *Blogging from the Senate Judiciary Hearing Room*, May 6, 2003, http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200252231.

¹⁶ Jesse J. Holland, *Filibuster Continues on Hispanic Nominee*, Guardian Unlimited, Thursday July 31, 2003, <http://www.guardian.co.uk/uslatest/story/0,1282,-2971388,00.html>.

¹⁷ Senate Democrats Stall Bush Nominee Again, Fox News Channel, July 29, 2003, <http://www.foxnews.com/story/0,2933,93226,00.html>.

¹⁸ Andrew Mollison, *Court nominee draws spotlight in Ala. saga*, Atlanta Journal-Constitution, August 22, 2003, <http://www.ajc.com/news/content/news/0803/22pryor.html>.

¹⁹ Geoff Earle and Sarita Chourey, *'Nuclear' option retained to break filibuster*, The Hill, June 25, 2003, <http://www.hillnews.com/news/062503/nuclear.aspx>.

²⁰ Randy E. Barnett, *Benching Bork*, National Review Online, April 29, 2003, <http://www.nationalreview.com/comment/comment-barnett042903.asp>.

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During the presidency of Dwight D. Eisenhower, political ideology played a lesser role in the confirmation hearings. Eisenhower had been elected by overwhelming majorities in both 1952 and 1956, while the Senate was closely divided and four out of every five federal judges were Democrats.

Moreover, Eisenhower sought candidates with, as he put it, "solid common sense," eschewing candidates with "extreme legal or philosophical views." And he asked the American Bar Association for its evaluation of potential nominees. Thus, in a time when the courts were dominated by Democrats, a split Senate had little reason to oppose the nonideological nominees of an overwhelmingly popular Republican president.

In a footnote, I flesh out Schumer's point, just a bit, by laying out three scenarios, involving the relationships of ideological factions²¹ to control of the presidency and the Senate.²² Finally, in this essay, I lay to one side the possibility that the judicial selection process is driven by its effects on electoral politics.²³

C. A Simple Model of Judicial Attitudes and Dispositions

My next task is to present a simple model of judicial attitudes and dispositions.²⁴ The model begins with political ideology. The story about judicial selection that I will

²¹ By "ideological faction," I simply mean a group (e.g. a political party or other political grouping) that can be identified as a significant actor in the political process generally and the judicial selection process in particular.

²² Here are the scenarios:

1. One Faction Controls the Presidency and Has a Super-Majority of the Senate-- Under these circumstances, the dominant ideological faction would have the power to select judges whose judicial philosophies and political ideologies were congruent with the aims of the faction.
2. Different Factions Control the Presidency and the Senate. Given this scenario, neither faction can impose its will on the other. The Senate can reject presidential nominees, but cannot select judges on its own. The President can make recess appointments, but these appointments expire at the end of the following term of the Senate.
3. One Faction Controls the Presidency and Has a Simple Majority in the Senate. This is approximately the current situation. A concerted minority can block nominations, unless the majority is willing to alter the filibuster rule. As in two, the President can make recess appointments.

In addition, the political ideology of judges may become particularly important during periods of political transition. See Sheldon Goldman, *Judicial Appointments and the Presidential Agenda* in *THE PRESIDENCY IN AMERICAN POLITICS* (Paul Brace, Christine B. Harrington, & Gary King eds. 1989); Sheldon Goldman, *supra* note 2, at 4.

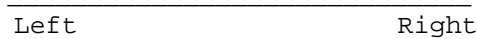
²³ See Sheldon Goldman, *supra* note 2, at 3 (distinguishing the "policy agenda" and the "partisan agenda" of the President, with the latter representing electoral concerns).

²⁴ By "judicial dispositions, I mean the stable tendencies of judges to decide cases in particular ways. Given the simple left/right model of political ideology, this translates in to dispositions to vote in ways conforming to a particular point on the ideology spectrum.

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tell uses a very simple, one-dimensional, left-to-right continuum to represent political ideology. This model assumes that each judge has dispositions to exercise judicial power in accord with her political ideology (her beliefs and attitudes about politics). Thus, each judge occupies some point on a real line from left to right.

Figure One: One Dimensional Model:
Political Ideology



Just as judicial candidates occupy a point on this line, so do other political actors, e.g., the President and Senators.

In the real world, of course, political ideology is multidimensional. For example, the political right includes both moral conservatives and libertarians. So, this model presents an absurdly simple picture of political ideology, but let's put that issue aside at this point.²⁵ If we assume that the President and Senators select judges solely on the basis of their ideology, this informal model might lead to the conclusion that when both sides have the ability to block nominations but only the President can nominate, that candidates would be selected from somewhere near the right of the political center. As the first mover, the President has an advantage in the judicial selection game.

There is another dimension of judicial disposition to consider. Let's construct a very simple model of *judicial philosophy*. Let's assume that we can plot a candidate's judicial philosophy as a point on a continuum from realist to formalist, as illustrated by figure two.

Figure Two: One Dimensional Model:
Judicial Philosophy



Stipulate that the most extreme realist judge views the law as purely instrumental, and is willing to decide cases on purely ideological grounds. By similar stipulation, the most extreme formalist judge decides cases entirely on the basis of the authoritative legal sources (the text of the constitution and statutes and *stare decisis*). Of course, in

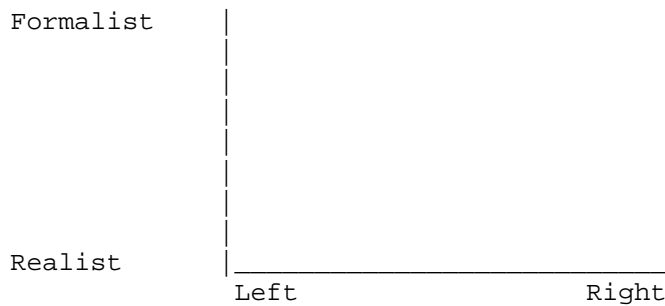
²⁵ So far as I can tell, nothing in my argument would be affected by the substitution of a richer, more accurate model of political ideology.

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the real world, judicial philosophies are not so simple. There are many varieties of realism and formalism; more importantly, there are other normative theories of judging that are not easily captured by this continuum.²⁶ Again, let us bracket this concern.²⁷

When our two simple models combine, we get a two dimensional space, with each judge's attitudes and dispositions occupying a point in that space as represented in Figure Three.

Figure Three: Two Dimensional Model:
Political Ideology and Judicial Philosophy



If we assume that the two dimensions are independent of one another,²⁸ then in theory a judge could occupy any point in two dimensional space. Notice that judges who occupy distant points on the plane may reach the same result in particular cases, although the explanation (or reason) will be different. For example, a right-formalist judge might reach the same result as a left-realist judge in a case involving the Eleventh Amendment or the doctrine of constitutional sovereign immunity of states from suit in

²⁶ For example, Ronald Dworkin's theory is not well captured by this simple model. See RONALD DWORIN, *Hard Cases in TAKING RIGHTS SERIOUSLY* (1978); see also RONALD DWORIN, *LAW'S EMPIRE* (1986).

²⁷ In her oral comments when this paper was presented at the Benjamin Cardozo law school, Dawn Johnsen suggested that the two-dimensional model (political ideology and judicial philosophy) should be replaced by a different metric which Professor Johnsen labeled "judicial ideology." My view is that this move is troublesome for two reasons. First, the notion of "judicial ideology" is not well defined. Even the two-dimensional model is extremely simplified. Without further clarification, the one-dimensional model seems to obscure rather than clarify judicial dispositions and attitudes. Second, the "judicial ideology" label obscures the nature of both dimensions of judicial disposition.

²⁸ This assumption is controversial. For example, some may believe that formalism systematically favors the political right. "Originalism," a formalist methodology for constitutional interpretation is frequently associated with the political right on issues such as federalism and substantive due process; the "living constitution" or "contemporary ratification" approach is sometimes associated with the political left. But this story is too simple. If formalism includes a strong doctrine of *stare decisis* (as I think it does), then the story becomes more complicated, as many Warren and Burger Court decisions and even some Rehnquist Court decisions are supported by the political left.

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federal court. Suppose, for example, that a left-realist judge decides to limit the constitutional sovereign immunity of the states on the ground that such immunity interfered with the enforcement of federal civil rights, and a right-formalist judge reached the same result on the ground that there is no grant of sovereign immunity to the state's in text of the Eleventh Amendment or elsewhere in the Constitution. Each judge reaches the same outcome on the basis of different dispositions and attitudes.

Let's make another simplifying assumption. Let's assume that formalist judging is politically neutral. That is, let's assume that deciding cases in accord with the authoritative legal texts produces outcomes that are randomly distributed along the left-to-right political line.²⁹ As a consequence, both those on the extreme left and the extreme right of the political spectrum are indifferent between a perfectly realist judge who occupies a position at the center of the political ideology line and a perfectly formalist judge who occupies any position on the political ideology line.³⁰

D. Implications of the Model: The Case for Ideological Selection of Judges

Our two dimensional model allows us to tell a simplified story about how political actors ought to select judges, given a particular set of political circumstances. We begin by setting aside ultimate questions about the correctness of political ideologies. We assume that both left and right believe that their ideology is correct as a matter of political morality. Further, let's assume that political circumstances are roughly those that prevail today. That is, the successful appointment of a judge requires cooperation from the right (which controls the Presidency and Senate Majority) and the left (which controls a Senate Minority sufficient block a nominee by filibuster).

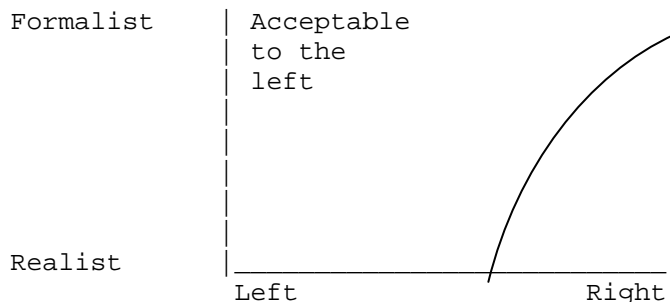
Under these circumstances, from the point of view of the left, the best move would be to filibuster judicial nominees who have both a right-wing political orientation and a realist judicial philosophy. Of course, the right would be unwilling to nominate left-realist candidates. Assuming that both sides have an interest in avoiding deadlock, we would expect that a compromise would be reached, allowing the right to select judicial candidates who were realist and politically centrist *and/or* candidates who are formalist and politically right wing. We can posit an indifference frontier of judges who are acceptable to the left—as candidates move to the right of the political center, the frontier moves towards the formalist pole of the judicial philosophy axis. This is illustrated in figure four.

²⁹ This assumption may well be wrong. For example, it may well be the case that the authoritative political materials which generally favor centrist outcomes. In that case, formalist judging would frequently approximate realist-centrist judging.

³⁰ Politicians on the extreme will be indifferent as between a realist-centrist and perfect formalist because their mean political ideology scores would be identical. Not everyone will be indifferent, however. Someone who is ideologically centrist would prefer a realist-centrist judge to a formalist judge (regardless of the formalist judge's position on the left-to-right political ideology line. Realist-centrist judges are disposed to reliably make decisions that accord with centrist political ideology. If we assume that formalism is politically neutral, then formalist judges will make left, right, and centrist decisions. Centrists will prefer formalist judges to right-realists and left-realists, but not centrist realists.

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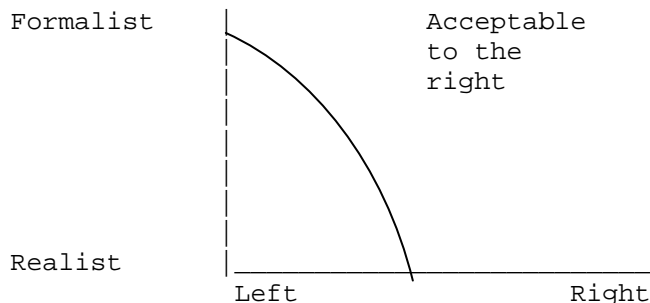
Figure Four: Left Indifference Frontier:
Political Ideology and Judicial Philosophy



In figure four, candidates who are acceptable to the left are below and to the right of the upward sloping indifference curve that marks the acceptability frontier. As candidates move the right on the political ideology line, they must be more formalist to be acceptable. As they move up on the realist to formalist line positions further and further to right are inside the acceptability frontier.

Let's assume that the indifference frontier of the right is symmetrical. We then get figure five:

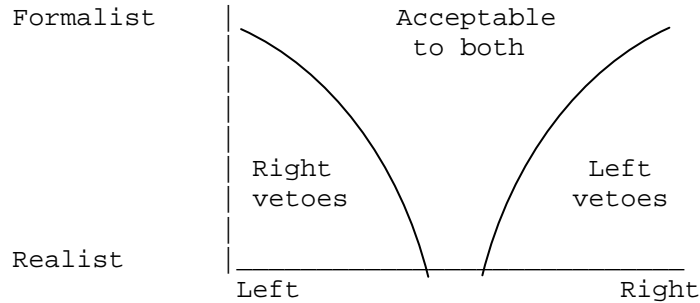
Figure Five: Right Indifference Frontier:
Political Ideology and Judicial Philosophy



If we combine the two acceptability frontiers, we get the space that defines the set of judicial candidates who can be both nominated and confirmed, given that either the left or the right can block a candidate. This is illustrated in figure six.

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Figure Six: Confirmable Candidates:
Political Ideology and Judicial Philosophy



This model predicts that judges will be selected from within the zone of confirmable candidates, but it does not tell us which confirmable candidates will actually be nominated and selected. Since the President moves first, we would predict that a right-wing President would nominate candidates located on the indifference curve sloping downward from right to left that is closest to the President's own position but still contains points that are inside the left-wing Senate minority's acceptability frontier. More simply, of those candidates whose dispositions and attitudes are acceptable to the Senate minority, the President will nominate those dispositions will produce mean outcomes as close as possible to the outcomes favored by the President's own political ideology.

My very simple story gets quite complex if we relax the simplifying assumptions in the model. Here are some examples:

- The left and the right are not unitary actors. We can disaggregate the right into the Senate majority and the President, with distinct ideologies and interests in reelection. Further disaggregation might identify distinct groups within both the Senate and the executive branch.
- The left and the right may have different perceptions of a given judicial candidates position in the two dimensional space. For example, the left may perceive a candidate as a realist, while the right perceives the same candidate as a formalist. In this situation, the two sides might disagree on what constitutes a fair compromise given the ability of the left to block right candidates.³¹
- Both *political ideology* and *judicial philosophy* are multidimensional, and hence the dispositions of actual judges are located in a complex multidimensional space.

³¹ In other words, there might be either asymmetrical information or asymmetrical perceptions or both.

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- Formalist judging may not be ideologically neutral. Judges who decide on the basis of the authoritative legal texts may systematically favor one ideology over the other.³²
- Information about the position of judges on the two-dimensional plane may be imperfect. A seemingly formalist judge might turn out to be realist. A seemingly centrist judge might turn out to be an ideological extremist.

If the simplified model (partially but meaningfully) captures the judicial selection process, it follows that from the point of view of the participants, there are two important dispositional characteristics in candidates for judicial office, *judicial philosophy* and *political ideology*. The goal of each side would be to get their own realists on the courts and to block the realists for the other side. When the left controls the Presidency, their goal is to appoint judges who are as left-realist as possible. When the left is in the blocking position, their goal is to force the right to accept either political centrists or formalists. And *vice versa* for the right.

Of course, the outcome of the game will depend on political circumstances. If one side were to gain control of both the Presidency and a super-majority in the Senate, that side would be able to appoint its own realist judges to the Court.³³ So long as both parties must cooperate, we would expect that only centrist or formalist judges would be selected.

Setting these complications aside, the normative implications of the simple model seem to be obvious. If you believe that your political ideology is normatively correct, it would seem to follow that you should select judges who are as close as possible to being perfectly realist and matching your own position on the ideological spectrum. If your first-best choice is unavailable, then you should select judges who are as close as possible to your position.

III. THE CASE FOR CHARACTER: AN ARETAIC THEORY OF JUDICIAL SELECTION

Let's wipe the slate clean, and start over. What case can be made for the consideration of character in judicial selection? My answer to this question will begin very weak assumptions about the role of character in judging. These weak assumptions

³² In discussions of the themes of this paper, several colleagues have suggested that formalist judging systematically favors the right in current political circumstances. In my opinion, this perception is based on the notion that the Warren and Burger Court legacy cannot be justified on formalist grounds. I have grave doubts about these issues, but they are outside the scope of this paper.

³³ Whether a party with effective control over the selection process would select realist judges is itself a complex problem. If the party believed that its super-majority position would persist over time, then the institutional interests of the political branches might lead to the selection of formalist judges, who would be more faithful to the political decisions reached by the other branches. On the other hand, if the party believe that its super-majority status was temporary, there might be an incentive to select realist judges who would continue to implement that party's political agenda after it had lost the ability to do so through legislative and executive action.

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lead to the conclusion that everyone, irrespective of their political ideology, has a good reason to care about certain character defects—which I call a “thin theory of judicial vice.” I then argue that acceptance of the thin theory of judicial vice leads inexorably to a “thin theory of judicial virtues”—an account of those qualities necessary for excellent judging, irrespective of one’s views about political ideology. This leads to a discussion of the virtue of justice, and the problems that this virtue poses for a character-focused theory of judicial selection.

A. The Thin Theory of Judicial Vice

Let’s assume that humans have characters.³⁴ More particularly, let’s assume that humans have dispositional traits that incline them to behave in more or less predictable ways. Our vocabulary is rich with words to describe such traits. We use terms like “coward,” “procrastinator,” “reliable,” “hard-working,” “studious,” “curious,” “sensitive,” and so forth. Following Aristotle, let’s sort the traits, picking out those which we count as human excellences, “virtues,” and those which we count as defects, “vices.” Let’s set the virtues and any traits that are neutral to the side, and focus on the defects—traits like cowardice, gluttony, avariciousness, foolishness, and so forth.

Are there judicial vices that should disqualify (or at least count against) judicial candidates irrespective of political ideology? For example, are there vices that should lead a Senator to vote against a candidate for judicial office, even though the candidate’s political ideology is in perfect agreement with the Senator’s ideology? Once asked, the question answers itself. Of course, there are some characteristics that disqualify candidates from judicial office irrespective of political ideology. Hardly anyone thinks that we should select corrupt or incompetent judges.³⁵

We can systematize the worst judicial vices, borrowing Aristotle’s distinction between intellectual and moral character traits. There are two important *intellectual vices* that should disqualify candidates from judicial office. The first of these is *judicial stupidity*. Judges who suffer from this vice in its worst form lack the intelligence (and hence also the knowledge) necessary to do the complex intellectual work required of judges. They do not know what the rules of law are, and they are unable to see how they could be applied in particular fact situations. The second intellectual vice is *judicial foolishness*. Even a very smart judge can have terrible practical judgment. A

³⁴ I should concede at the outset that this seemingly modest assumption is controversial among social scientists. For a rich explication of the view that humans do not have robust dispositional traits, see JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* (2002). Doris’s book is based on research by social psychologists. In simple terms, *situationalism* is the view that human behavior is caused by the situations in which humans find themselves as opposed to human character traits. For a brief introduction to these issues, see Lawrence B. Solum, *Do Humans Have Characters?*, Legal Theory Blog, August 12, 2003, http://www.lsolum.blogspot.com/2003_08_01_lsolum_archive.html#106045570213167158.

³⁵ There are exceptions, of course. Corrupt politicians may prefer corrupt judges for obvious reasons. Similarly, if judicial offices are treated as patronage positions, then politicians may be willing to appoint incompetent judges. Once we move to the normative realm, however, the reasons will normally become inoperative, because most normative theories of politics do not countenance corruption.

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foolish judge may know the law, but he cannot discern the difference between the rules that are important to the case and those that are only marginally relevant. Foolish judges are likely to make impractical demands are the lawyers and parties who appear before them.

There are also *moral vices* that should disqualify a judge. The most obvious of these is *corruption*. Judges should not accept bribes.³⁶ Although judges are only infrequently in physical danger, they are more frequently faced with situations in which rendering the legally correct decision might injure their popularity, social standing, or opportunities for promotion or nonjudicial work. Hence we should not select *civil cowards* for judicial office. Judges are often placed in anger-inducing situations. A judge who is prone to fly off the handle at small provocations is not likely to be effective in the courtroom, and hence we ought not to select the *hot-tempered* for judicial office.

What I have offered is a *thin theory of judicial vice*. This is a *thin* theory, because it rests on very weak³⁷ assumptions about what counts as bad character. So far as I can see, no sensible normative account of judicial selection provides good reasons to reject the normative implications of the thin theory of judicial vice. No one wants stupid, foolish, corrupt, cowardly, or hot-tempered judges. Of course, these vices are not always apparent when candidates are nominated and confirmed for judicial office. There are, I am afraid, some judges on the bench today who possess the full range of these vices.

B. The Thin Theory of Judicial Virtue

The next step in my argument is simple. If you accept the thin theory of judicial vice, you should also accept a thin theory of judicial virtues. *Why?* The basic reason is conceptual: virtue is required for the absence of vice. To select a judge who lacks the intellectual defect of *judicial stupidity*, you must select a candidate who has the corresponding virtue of *judicial intelligence*. To avoid, civic cowardice, you must select a judge with the virtue of *civic courage*. To avoid *corruption*, you must select a judge with the virtue of *temperance*. To avoid, ill temper, you must look for candidates who have *judicial temperaments*.

Once we have agreed that we should avoid vicious judges, it follows that we should aim for virtuous judges. Of course, so far we have only agreed on a thin theory of judicial virtue. That is, we have only agreed that there are some excellences of intellect and will that are required for good judging that are more or less independent of political ideology or judicial philosophy.

³⁶ Notice that judicial decision made because of a bribe is a bad decision, even if it is legally or ideologically correct. Corrupt decisions undermine respect for the law, even if a virtuous judge would have reached the same decision.

³⁷ By “weak assumptions,” I mean assumptions that are widely shared and relatively uncontroversial.

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C. The Difficulty with Moving Beyond a Thin Theory of Judicial Virtue

Can we go further than a thin theory of judicial virtue? Here is the difficulty. Those who hold differing views on matters of political ideology and judicial philosophy have different ideas about the target that judges for which judges should aim. Our crude two dimensional model suggests that we can think of the target as a point on a plane defined by the spectrum of political ideology from left to right and of judicial philosophy from realist to formalist.

Let's borrow an analogy from Aristotle and think of judges as archers. In the usual sort of archery contest, there is a target which contains a mark or bull's eye. Everyone agrees about the location of the mark; it is plain for all to see. The characteristics that make for a good archer are those which enable the archer to consistently hit the mark.

But when it comes to judging it seems that things are quite different. We disagree about the placement of the mark. Some of us (the realists) believe that the criterion by which the location of the bull's eye is set by political ideology—and in particular, by the political ideology which we personally affirm as correct. And among the realists, there are some who think the mark is located on the left side of the target, others who think it is in the center, and still others who think it is on the right. And this does not exhaust the grounds for disagreement. Yet others among us (the formalists) believe that the criteria which pick out the mark are the laws, the rules laid down. And even among the formalists, there are disagreements about the role of text, purpose, precedent, and practical judgment in defining the target.

If we all agreed about the mark, then we could all—at least in principle—agree on the answers to questions like: *Who are the best judges? What makes for excellence in judging?* But what if we do not agree on the mark? What then? Consider this elaboration of the archery analogy:

The Strange Archery Contest. Imagine a strange archery contest. The archers shoot at targets mounted on stands, but no “mark” or “bull's eye” is displayed on the target. The contest is scored by officials who each have their own ideas about where the bull's eye is located. You are one of the officials. You have your own opinion about the location of the mark. Some archers will hit the mark at which they aimed every time, but miss your bull's eye. Other archers will aim at your mark, but because they lack the requisite skill, their arrows will rarely land close to that spot. If the competition involves many trials and we score the archers by the distance between the spot at which their arrows hit the target and the place where the officials locate the mark, then your score card may rank some archers who have aimed at the wrong mark higher than those who were aiming at the mark you selected. When all the scores are tallied, a given archer may score quite high on your card but very low on the card of another official. If all the archers were of equal skill, the archer who aimed at your mark would win. If they are of unequal skill, those who aim at marks close to yours will have an advantage. The really bad archers—those who miss the target altogether—will not even be in the running. If you believe the bull's eye is located on the extreme right of the target, then you give poor marks to even the most skilled archers who are aiming at a mark on the extreme left.

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Our theories of judging and judicial virtue put us in a situation that is like *the strange archery contest*. We can agree on a set of skills that enable judges to reliably hit the target at which they are aiming. That set of skills defines a thin theory of the judicial virtues. We may even be able to reach agreement about the general shape and location of the target. Even those who are thoroughly instrumentalist about the law are likely to reject radical indeterminacy; most legal realists accept that the legal sources define a range of legally plausible outcomes, and that instrumentalism operates with these.³⁸ This zone of agreement enables us to agree that some potential judges are so bad that they are not qualified to serve.

We can agree that judges need a minimal set of judicial virtues—otherwise they will miss the target altogether. But we can agree on more than that. Among judges who are aiming at the correct mark or a point that is near enough, we can agree that some are more skillful than others, and the most skillful of these are the best judges.

But it is at this point that disagreement begins to arise. If I believe that the mark is on the right, then as far as I am concerned the very skillful judges who aim at the left are among worst judges—assuming we set aside those few judges who are incompetent, corrupt, or vicious in some other way. Within the group of judges with whom I agree about the mark, skill is positively correlated with excellence. Within the group of judges with whom I strongly disagree about the mark, skill is negatively correlated with excellence. Put more plainly, if I am on the right, I prefer a modestly competent left-wing judge to a superstar right-wing judge.

This is a crucial point in the argument. This is at this point in the dialectic that many contemporary legal theorists believe that theories of judicial virtue run out of gas. They are willing to accept a thin theory of judicial virtue, and to use the worst judicial vices as an initial test in the judicial selection process. But after that, ideology takes over as the primary test.

D. The Virtue of Justice

Is this right? In the process of judging, is the concept of virtue incapable of telling us anything about the target of good judging? To answer these questions, we need to consider a virtue that we have so far neglected—*the virtue of justice*.

A judge who possesses the virtue of justice sees the mark rightly. A judge who possesses the virtue of justice in combination with all the rest will reliably hit the mark. In *the strange archery contest*, each scorer seemed to define her own mark arbitrarily. But in the case of judging legal disputes, that is surely not right. The mark is not defined arbitrarily. Some results are just. Some are unjust. A judge with the virtue of

³⁸ That is, most instrumentalists (or legal realists as I have been using that phrase) believe that the law underdetermines the results in particular cases and that policy or ideology then selects among those outcomes which can be legally justified. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987).

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justice aims at just results. Indeed, we call the judges of our highest courts “justices” and we call the buildings in which they do their work “halls of justice.”

The account of the virtue of justice that I have offered is formal and not substantive. Because my account is formal, it relocates but does not resolve disputes about the proper aim of judging. The left and the right will disagree about who has the virtue of justice and who does not. The left will call right-wing judges unjust, while the right will label the very same judges as paragons of the virtue of justice.

Moreover, there is a deeper problem here. If the virtue of justice is simply the disposition to aim at just results, then it would seem that what does the real work is having the correct beliefs about justice. If I have the correct beliefs and the other judicial virtues, then I ought to be able to hit the mark. If I lack the correct beliefs, I will aim at the wrong mark and possession of the other virtues only serves to insure that I will miss the true target.

My point is not that we cannot talk meaningfully about a virtue of justice. Rather, my point is that the story we have told about justice makes this virtue unlike the rest. The intellectual virtues (theoretical and practical wisdom) and moral virtues (courage, good temper) *seem* to be rooted in the fabric of the person—their intellectual and moral equipment. But the virtue of justice *seems* to be a matter of belief, not of character, *per se*. Ideologies are collections of beliefs about what is just and unjust. So possession of the virtue of justice would *seem* to depend on having the correct political ideology. Because the virtue of justice determines the target for judging, justice is, in a sense, the most important of the judicial virtues. So it would *seem* that our investigation of judicial character has led us round again to the conclusion that ideology and not character should be the primary factor in judicial selection. Yes, the other judicial virtues count. And yes, they may even be essential prerequisites for good judging, but in the end it is ideology that *seems* to be the most important factor.

But are things as they seem?

IV. THE VIRTUE OF JUSTICE AS LAWFULNESS

I have done my best to lay out the case for the ideological selection of judges and the case against selection that is primarily based on character. But at this point, my argument will turn in a new direction, towards a conception of the virtue of justice that is rooted in the importance of the rule of law.

A. Judicial Philosophy as an End Rather than as a Means Only

You will recall that our simple model of judicial dispositions and attitudes had two dimensions, political ideology and judicial philosophy. And I suggested that we could plot judicial philosophy on a spectrum that ran from realist to formalist. But when it came to my story about the goals of those who selected judges, I assumed that their position could be captured entirely by the left-to-right political ideology line. The selectors took the judicial philosophies of judges into account when evaluating them, but only because judicial philosophy influence the extent to which a judge would render decisions consistent with a given political ideology. That is, I assumed that the political

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actors who select judges (Presidents and Senators) viewed judicial philosophy as a means to ends defined solely by political ideology.

But is that assumption correct? The alternative is that we ought to consider judicial philosophy as a criterion by which to evaluate the outcomes produced by the judicial selection process. That is, we might believe that judges who decide the cases before them on the basis of the law rather than their political ideologies are doing the right thing. *But why would we believe that?*

The case for legal formalism cannot easily be made in the span of a few pages or minutes. But we are all already familiar with the outlines of that case. It rests on the values we associate with the rule of law. What are those? Briefly:

- *Stability and certainty.* Decision according to law as opposed to political ideology enhances the predictability and certainty of the law. Such predictability and certainty enables individuals, organizations, and firms to plan and reduces the cost of insurance against risk.
- *Neutral arbitration of disputes about the rules of the game.* Decision according to law as opposed to political ideology enables the judiciary to act as a referee or neutral party in disputes about the secondary rules (election law, constitutional allocations of power, etc) that enable legal change. Judging aimed at advancing political ideology naturally conceives of these disputes about the rules of the game as part of the game itself. An ideological judge will use election law to rig elections for her own faction. The absence of any neutral third-party with power to define the rules of the game creates the risk that losers will perceive outcomes as fundamentally illegitimate and such perceptions can, in the long run, lead to political instability.
- *Improbability of long-run benefit from ideological judging.* Decision according to law as opposed to political ideology may well be as good in the long run as the feasible alternatives even from the perspective of those who believe that the outcomes of political processes must ultimately be measured against an ideological yardstick. Our simple model of the judicial process hinted at the reason. Unless one ideological faction believes that it is likely to obtain long-run control of the judicial selection process, the ideological selection of judges is unlikely to favor one side or the other over the long run. For every period when the left is able to dominate the selection process and appoint left-realists, there is likely to be a corresponding period during which the right will make similar gains. In periods when each side can block the other, selection will favor centrist or formalist judges even though this is the first choice of neither party.

If these arguments are correct, then we have reasons to prefer formalist judges over realist judges. In the abstract, these reasons are of equal force for those of widely varying political orientations.³⁹

³⁹ There are, however, circumstances in which some political groups might reject the third argument. One way to slice the political pie is in terms of a divide between conservatives (who want to keep things as they are) and progressives (who want things to change). If the existing

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B. Formalism and Justice as Lawfulness

Grant me, *arguendo*, that there may be a case for the rule of law that could form the basis for an overlapping consensus between adherents of a variety of political ideologies.⁴⁰ If we take the distinction between law making and law application seriously, what are the implications for the virtue of justice? Put another way, if legal formalism offers the best theory of judging, what are the implications for our conception of the virtue of justice?

Here is the first approximation to an answer to these questions: the virtue of justice is the disposition to decide according to law, as opposed to one's political ideology or beliefs about what the law should be. A judge with the virtue of justice gives the parties what they are due under the rules laid down.

This formalist idea of the virtue of justice is not unfamiliar. Indeed, the notion that justice requires decision according to law is one of the oldest ideas in legal theory. Even legal realists (or most of them) accept the rule-of-law conception of the virtue of justice as an outer limit on judicial power. Moreover, this conception of the rule of law plays a powerful role in the judicial selection process. This is reflected in the ritual question and answer in confirmation hearings:

SENATOR: Will you apply the law as it is written? Or do you regard yourself as free to make law?

CANDIDATE: Senator, I regard myself as bound to apply the law as it is written. It would be improper for me to make the law. That's the job of the legislature.

Sophisticates regard these exchanges as mere rhetoric. Washed in cynical acid—says the legal realist—this exchange is hypocritical. Both the Senator and the Candidate know that that judges make the law.

But my suggestion is that this *is* not and *should* not be the case. There is nothing in the fabric of the universe that requires a realist practice of judging. Judges can (within broad limits) be realists or formalists. But whether a particular judge will be a realist or formalist depends not solely on the judge's "judicial philosophy," her normative beliefs and attitudes towards theories of judging. Whether a particular judge will be a realist or

constitutional order is constituted by secondary rules that are biased against change, then progressives may come to believe that realist judging is better than formalist judging in the long run. This will especially be true if conservatives tend to appoint formalist judges when given the opportunity to do so. This might result in the so-called *one-way ratchet*, where periods of realist judging move the political order in a progressive direction while periods of formalist judging consolidate and institutionalize these changes. Over the long haul, this pattern would favor progressives over conservatives. If conservatives became aware of this pattern, however, the periods of conservative domination of the selection process might result in the appointment of realist-conservative judges, who would attempt to roll back progressive decisions. If the pattern changes in this way, it would no longer be clear that progressives would benefit from realist judging.

⁴⁰ As framed my argument addresses only those who adhere to political ideologies that could form part of an overlapping consensus on the great value of the rule of law and accept formalist theory of judging.

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a formalist depends also on her character—on her ability to hold her own opinions and desires in check and follow the law and customs of her community instead.

In the language of virtue jurisprudence, we might say that the good judge must have the virtue of fidelity to law and concern for the coherence of law. Let us call this “justice as lawfulness.” In conceptualizing the idea that justice as lawfulness is a virtue, it is helpful to examine Aristotle’s account of the relationship between justice and lawfulness. To begin, 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 *nomimos*, 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.⁴¹

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.⁴² 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.⁴³

Once we understand Aristotle in this way, it become apparent that the idea that the virtue of justice consists in holding the correct political ideology is topsy turvey. 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

⁴¹ RICHARD KRAUT, ARISTOTLE 105-06 (2002).

⁴² *Id.* at 106.

⁴³ *Id.*

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importance of lawfulness and acts on the basis of the laws and norms of her community.

C. Fairness versus Lawfulness

But at this stage of the argument, there will surely be objections. The virtue of justice—one objection might begin—is not exhausted by the idea of lawfulness. Even if we concede that in ordinary cases, justice requires adherence to the law, there are surely extraordinary cases—cases where we think of justice *not as lawfulness* but instead *as fairness*. One version of this objection simply rejects the idea of justice as lawfulness *tout court*. That is, it might be argued that judges should never follow the law when the law conflicts with the judge’s own sense of fairness. Whatever the merits of this argument in the context of a society where there was very little disagreement about what fairness requires, it is a nonstarter in the context of a society—like our own—which is characterized by deep and persistent pluralism about fairness. In such a society, if each judge follows her own notions of fairness, then law will simply not be able to do the job of coordinating behavior and avoiding conflict.

But the objection to the claim that justice is exhausted by lawfulness can be expressed more modestly. One version of this objection might focus on the idea that the law is cast in abstract and general rules which may lead to results that are unfair in particular cases. A virtuous judge—the objector might argue—needs to have a keen sense of fairness, so as to be able to do justice in the cases where simply following the rules laid down would lead to absurd and unintended consequences.

But of course, this version of the objection to justice as lawfulness was anticipated by Aristotle. In V.10 of the *Nicomachean Ethics*, Aristotle wrote:

What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is nonetheless right; because the error lies not in the law nor in the legislator but in the nature of the case; for the raw material of human behavior is essentially of this kind.⁴⁴

This is the core of Aristotle's view of *epieikeia*, usually translated as equity or fair-mindedness. As Roger Shiner puts it: “Equity is the virtue shown by one particular kind of agent—a judge—when making practical judgments in the face of the limitations of one particular kind of practical rule—those hardened customs and written laws that constitute for some societies the institutionalized system of norms that is its legal system.”⁴⁵

⁴⁴ ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 1137^b9-1137^b24 (J.A.K. Thomson trans., Hugh Tredennick rev., 1976) (pagination is to the Bekker edition).

⁴⁵ See Roger Shiner, *Aristotle’s Theory of Equity*, 27 *LOY. L.A. L.REV.* 1245, 1260-61 (1994).

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For our limited purposes, the important question is: “Must a judge adhere to the *correct* political ideology in order to do equity?” A negative answer to this question is, at the very least, plausible. Aristotle’s point is not that equity is opposed to lawfulness. Rather, doing equity is being true to the spirit of the law, even when we depart from the letter of the law. That is, equity can only be done by a *phronimos* who is also *nominos*. Doing equity requires that one grasp the *nomos*, the laws, norms, and customs generally accepted by the community.

There is another version of the objection to justice as lawfulness. Suppose that we live in a radically dysfunctional society, one that has gone so badly wrong that the laws do not operate to promote the flourishing of human individuals and their communities. What to say about this special case is one of the deepest and most interesting questions for virtue jurisprudence, and a satisfactory analysis is far beyond the scope of this essay. But I can gesture in the direction of an aretaic account of virtuous action in the radically dysfunctional society. That essence of the gesture is the observation that in such a society, it is not clear that there will be *nomos* in the Aristotelian sense. This is not to say that there will not be statutes, ordinances, and decrees in a radically dysfunctional society. And it may be a matter of some controversy whether such decrees are “law,” with legal positivists maintaining that they are “law” and natural lawyers taking the position that they are not. Whatever the resolution of that debate, the laws of a radically dysfunctional society are unlikely to be *nomos* in the fullest sense of that term. A *phronimos* who is also *nominos* may well take the position that the decrees of the regime in a radically dysfunctional society lack the normative force of the laws which express the *nomos* of a society that is reasonably well functioning.

So this brings us round to our original question. As we have seen, there is a sense in which the dichotomy between *character* and *ideology* in judicial selection is a false one. On the one hand, even those who believe that political ideology should drive judicial selection should accept that character is important in two senses: 1) vicious candidates should not be selected as judges, and 2) among those with the correct ideology, those with the most virtue will be the best judges. On the other hand, even those who believe that character should drive the judicial selection process must concede that ideology is relevant to judicial selection. At the very least, a candidate’s judicial philosophy ought to be considered. But there is also a sense in which dispute about the primacy of character or ideology reflects a real difference in views about general jurisprudence. If one accepts that the very great importance of the rule of law values leads to the conclusion that legal formalism is the best normative theory of judging, then there is a meaningful sense in which judges should be selected on the basis of their character and not their political ideology.

V. OBJECTIONS AND ANSWERS

What are the drawbacks to making the aretaic turn in judicial selection? This Part considers a variety of arguments that have been put forth against consideration of character in judicial selection.

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A. The Insufficient Evidence Objection

Aretaic judicial selection requires that Presidents and Senators have access to evidence of the virtues and vices of candidates for judicial office. Michael Gerhardt has argued that such evidence is unavailable or unreliable:

[F]ocus [on character] is bound to make such confirmations messier because it will invite a nominee's opponents to do whatever they can to taint her reputation. One benefit of focusing on a nominee's ideology is that it usually turns on some sort of documentation. If the focus were on a nominee's moral disposition, much of the debate is bound to turn on perceptions or even on swearing contests between conflicting character witnesses about private conduct with arguably public implications--something, say, on the order of the second phase of the Thomas hearings.⁴⁶

Before taking this objection head on, we should note that it is not always so easy to confirm the ideology of particular candidates. Harry Blackmun, David Souter, and John Paul Stevens were nominated by conservative republicans, but might well be counted as Supreme Court liberals.⁴⁷

The real point of the evidentiary objection is based on the idea that the judicial virtues and vices may not be revealed in candidates without judicial experience. One obvious rejoinder is to take this evidentiary problem into account in the nomination process. Ordinarily, important judgeships should be filled by candidates who have relevant judicial experience. Supreme Court vacancies should be filled by candidates who have served on a state court of last resort or on the United States Court of Appeals. Of course, some candidates without such experience may nonetheless have displayed their possession of the relevant virtues in some other context. The point is that the evidentiary objection suggests that judicial selection should take the availability of relevant evidence into account. The difficulty of obtaining such evidence is not a good argument for simply ignoring judicial excellence altogether.

Finally and decisively, the possibility of evidentiary insufficiency should not rule out consideration of character in those cases where evidence is available. Surely, no one would argue that the infamous former Chief Judge of the New York Court of Appeals Sol Wachtler should have been selected to fill a vacancy on the United States Supreme Court; his pattern of abuse of judicial power, which led to his resignation and imprisonment, betokened a serious character flaw.⁴⁸ Likewise, few would maintain that Judge Learned Hand's consistent display of the virtues of judicial intelligence and wisdom would not count in favor of his elevation to the nation's highest court.⁴⁹

⁴⁶ Michael Gerhardt, *The Confirmation Mystery*, 83 GEORGETOWN L. J. 395, 423 (1994).

⁴⁷ See George L. Watson & John A. Stookey, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS, *supra* note 1, at 69-71.

⁴⁸ JOHN M. CAHER, KING OF THE MOUNTAIN: THE RISE, FALL, AND REDEMPTION OF CHIEF JUDGE SOL WACHTLER (1998).

⁴⁹ GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994).

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B. The Lack of Criteria Objection

Even if evidence of character is sometimes available, the aretaic turn would be impossible if there were not criteria for what constitutes judicial virtue and judicial vice and how it should be weighted in the selection process. Michael Gerhardt seems to be making a version of this objection in the following passage:

Although good moral character might seem essential for someone to become a Supreme Court Justice, no agreement on what constitutes good moral character exists, and it is hard to say whether this quality should displace or take priority over whether the nominee has proven excellence in a relevant area of the law, demonstrated leadership or negotiation skills, or engaged in significant public service. In fact, some of the people who are commonly viewed as great Supreme Court Justices arguably lacked the "right kind of moral instincts." For example, Hugo Black had been a member of the Ku Klux Klan, and Earl Warren arguably knew that his order to detain Japanese-Americans, given during his tenure as California's Attorney General, had a dubious legal basis.⁵⁰

As applied to the position developed in this paper (a purpose that Gerhardt did not have in mind), this objection would be seriously underdeveloped. First, there is every indication that criteria for what counts as good character can be developed in the form of a theory of judicial virtue and vice. And the prototype of such a theory has been offered here and elsewhere.⁵¹ Second, to make good on the thesis implied by the examples of Black and Warren, Gerhardt would have to show that the incidents in question truly were indications of bad character and that Black and Warren were truly excellent judges. My suspicion is that in the case of Black, the early flirtation with the Klan was based on ignorance and that in the case of Warren, there is a real question as to whether he was a truly excellent judge. Third, and most importantly, a lack of current consensus about the criterion for judicial virtue and vice should not, by itself, count as an argument against an aretaic approach to judicial selection. No theory of judicial selection commands a current consensus. At the normative level, this leaves open the question whether particular theories are nonetheless correct. At the level of practical politics, the lack of current consensus leaves open the question whether the aretaic turn is politically feasible—a question to which we will turn in due course.

C. Judicial Virtue and "Personal" Morality

A third objection to the consideration of character in judicial selection is based on a distinction between the public realm of law and political ideology and the private realm of personal values and individual character. Judicial selection—this objection would maintain—should focus on the public and exclude consideration of the private. Again, Michael Gerhardt gives voice to the objection:

⁵⁰ See Michael Gerhardt, *The Confirmation Mystery*, *supra* note 46, at 423-24.

⁵¹ See Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, *supra* note 7; Lawrence B. Solum, *Virtue Jurisprudence*, *supra* note 10; Lawrence B. Solum, *Equity and the Rule of Law*, *supra* note 10.

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[A character-based] approach would allow senators to evaluate a nominee based on their agreement with her lifestyle choices, although ... these decisions are constitutionally protected and none of the government's business. Furthermore, focusing on a nominee's moral character contradicts [a] desire to distinguish constitutional interpretation from personal preference: if the Senate focuses on the moral implications of a nominee's personal choices, the public may figure that no meaningful distinction between constitutional interpretation and personal preference exists.⁵²

This objection has no force against the theory of judicial character sketched in this Essay. The judicial virtues and vices are directly relevant to judicial performance. In particular, selection of judges for the virtue of justice as lawfulness is precisely aimed at creating a “meaningful distinction between constitutional interpretation and personal preference.”

D. The Feasibility Objection

Is a character-based approach to judicial selection *feasible*? In particular, is it *politically feasible*?⁵³ It might be argued that the *political ideology* genie is already out of the bottle. Once the process of judicial selection has become politicized, the argument might go, it will be difficult to move back to a character-based approach to judicial selection. Once Presidents and Senators have begun to battle for the selection of realist judges who share their political ideologies, what could make them forgo this political strategy? Isn't the hope for a return to character as the basis for judicial selection *pie in the sky*?

The answer to the feasibility question is beyond the scope of this paper, which is already too long for its occasion. But I can gesture towards an answer by recalling a point that we have already made. We have already seen how Presidents and Senators who aim at selecting realist judges who share their political ideologies might end-up compromising on formalist judges. Unless one party (or ideological faction) controls both the Presidency and a super-majority of the Senate, either party can block judicial selection. Compromise will be necessary to avoid stalemate, and formalist judges are likely to be in the set upon which the acceptability frontiers of the left and right overlap.

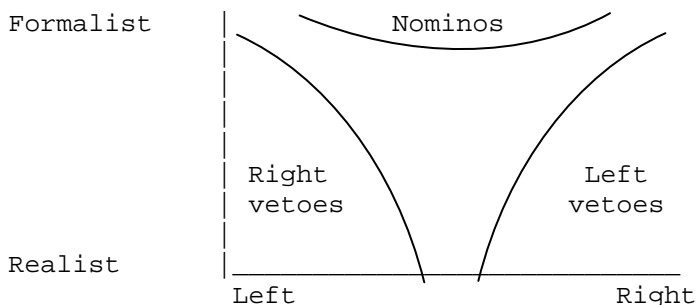
If we return to our two-dimensional model of judicial selection, we can plot the position of judges who are *nominos*. On the formalist/ideology axis a *nominos* will score be close to the *formalist* endpoint of the scale. On the left/right axis, a *nominos* will be within the range of political opinion that is consistent with the basic social norms of the society. The best representation of this requirement would place the *nominos* judge away from the extremes of left and right that would imply a rejection of those norms that have general social acceptance. This picture is represented by Figure Seven.

⁵² See Michael Gerhardt, *The Confirmation Mystery*, *supra* note 46, at 424-25.

⁵³ See generally Lawrence B. Solum, *Legal Theory Lexicon 011: Second Best*, at http://legaltheorylexicon.blogspot.com/2003_11_01_legaltheorylexicon_archive.html#106961201321647437 (visited on March 23, 2004) (discussing feasibility).

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Figure Seven: The Nominos on the Two Dimensional Model



Insofar as the issue of feasibility is concerned, the crucial point is that candidates who are nominos are likely to be in the confirmation space, where neither left nor right would veto the candidate.

VI. CONCLUSION

I doubt these brief remarks will convince anyone who believes that judges should be selected on the basis of political ideology. Rather, I hope to have convinced you that the case for character-based selection of judges *could* be right, even if one accepts that political actors ought to seek to advance their political ideologies through the law. My aim is the very modest one of showing that there can be reasonable disagreement about the question whether ideology or character should be the primary criterion for judicial selection.

Let me end by observing an ironic feature of the argument that I have made. It is the fact of ideological struggle that makes nonideological judging necessary to realize the rule of law. It is the strife between opposing political ideologies that necessitates a neutral forum in which the rules that contain the struggle can be enforced. It is precisely because political ideology is so important that judges should be selected for their possession of the virtue of justice—the disposition to decide on the basis of the rules laid down rather than on the basis of their political preferences.