NOTE

AN ALTERNATIVE TO CONSTRAINING JUDGES WITH CONSTITUTIONAL THEORIES: THE INTERNAL GOODS APPROACH

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Concerns about judges using their own personal moral beliefs in deciding cases, the difficulty in weighing competing moral principles in America's liberal and pluralist society, and concerns about judges reaching an opinion under only the guise of principled reasoning all motivate constitutional theories that "constrain" judges. Under a "constraint approach," constitutional theories try to limit the appropriate set of outcomes a judge may reach, the appropriate justifications judges may use in reaching a decision, or both. By drawing on the works of Alasdair MacIntyre and Ronald Dworkin, this Note introduces an alternative solution to resolving those problems—the "internal goods approach." Under the internal goods approach, success in judging is measured by the extent to which judges prioritize "internal goods." Purposefully described at a high level of generality, a judge prioritizing internal goods engages in legal reasoning and examines and applies principles required by the institutional nature of law when confronted with difficult cases. A critical requirement for this approach to respond to the aforementioned concerns motivating constraint is that a judge exercises judicial virtues. This Note argues that not only does the constraint approach not resolve these concerns, but that the internal goods approach better resolves them. And rather than merely criticizing an outcome as "activist," the internal goods approach provides a more meaningful basis upon which to evaluate constitutional theories by evaluating their account of the internal

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goods. This Note also provides a detailed account of judicial virtues which serve as a concrete and practical basis for evaluating judges.

INTRODUCTION

In *Washington v. Glucksberg*, the United States Supreme Court considered whether "Washington's prohibition against 'caus[ing]' or 'aid[ing]' a suicide offends the Fourteenth Amendment to the United States Constitution."[1] The Court, in reaching its conclusion that it does not,[2] outlined a framework for answering that question. This framework requires a "'careful description' of the asserted fundamental liberty interest"[3] and also considers whether the asserted rights are "objectively['] 'deeply rooted in this Nation's history and tradition.'"[4]

The *Glucksberg* majority characterized this methodology as "restrained."[5] Importantly, the constraining nature of this methodology was described as an advantage. By constraining judges to examine only deeply rooted traditions and history, the methodology "rein[s] in" the judge's "subjective elements," and judges can avoid the "complex

[1] 521 U.S. 702, 705–06 (1997) (alterations in original).
[2] Id. at 706.
[3] Id. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).
[4] Id. at 720–21 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
[5] Id. at 721.

balancing of competing interests in every case."[6] This interest in constraint is not limited to *Glucksberg*; rather, it represents a core focus of judges,[7] academics,[8] and the public.[9]

This Note is motivated by the question of whether the interest in constraint the *Glucksberg* Court had is justified: Should judges care about the constraining nature of methodologies? Particularly, this Note analyzes this question in the context of constitutional adjudication, an area where an interest in constraint is particularly of interest.[10]

Consider a very simple example. Suppose there are two theories for interpreting the Constitution: Theory *A* says that the Constitution will always be interpreted against the plaintiff's interest, and Theory *B* says that the Constitution will always be interpreted against the defendant's interest. Loosely speaking, these theories will be equally constraining. We, of course, intuitively have an understanding that neither Theory *A* nor *B* is an attractive interpretive theory. But in this understanding, we appeal to standards other than the degree of constraint allowed by the theories. This simple example implicates a rich area of legal philosophy and has practical implications for how judges approach constitutional decision-making. Importantly, it raises questions about whether a less constrained Theory *C* can be better than a more constrained constitutional theory.

Part I of this Note critically surveys different definitions of constraint and judicial activism introduced in legal scholarship. In doing so, it should provide clarity to the rest of the arguments. I argue that constraint should

[6] Id. at 722.

[7] See, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 3 (1971).

[8] Craig Green, An Intellectual History of Judicial Activism, 58 Emory L.J. 1195, 1197 n.1 (2009) ("[T]he terms 'judicial activist' and 'judicial activism' appeared in 3,815 law review articles during the 1990s and in 1,817 more articles between 2000 and 2004.").

[9] Corey Rayburn Yung, Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts, 105 Nw. U. L. Rev. 1, 2 n.1 (2011) ("Between May 26, 2009, the day then-Judge Sotomayor was nominated to join the Court, and May 29, 2009, LexisNexis indicates there were 309 items using the term 'judicial activism' or variations thereof in articles about then-Judge Sotomayor.").

[10] Limiting the scope of analysis to constitutional questions also greatly simplifies it. Some issues specific to statutory interpretation, such as the presumption against extraterritoriality, are only tangential to the issue of judicial constraint. And other tools of statutory interpretation, like deference to administrative agencies' interpretations, involve other complex issues outside the scope of this Note. While these canons of interpretation may implicate constitutional questions, this Note is concerned more generally with the sorts of issues raised by cases like *Glucksberg*.

not be understood as judges merely limiting judicial review, at least in the context of this Note. Rather, to implicate a more substantive area of controversy, the degree of judicial review should be just one part of the definition of constraint. Further, the question about how much constraint should matter is distinct from the debate between standard-like and rule-like approaches. A rule-like approach can still confer discretion to a judge,[11] indicating that we cannot simply say that the degree to which a constitutional theory constrains a judge is a determination of how rule-like the theory is. The most helpful way to understand "constraint" is by understanding that a constraint can be justification-oriented, results-oriented, or both.

Likewise, Part II of this Note explores the different justifications for constraining judges. I begin by looking at the desire to avoid moral judgments in reaching a decision in a particular case. There are two distinct concerns here. First, there is good reason to constrain judges from imposing their own personal moral beliefs on decisions in disregard for constitutional principles. Second, there may be good reasons to prevent judges from having to weigh competing moral principles when deciding cases given the difficulty of resolving those moral debates. I will also introduce, by way of example of instrumentalist judges, the concern that judges can be motivated by reaching an outcome that they personally desire under the guise of principled reasoning. By identifying these concerns, we can ask whether constraint imposed by a constitutional theory is in fact a good means to resolve them.

Part III of this Note introduces an alternative to the constraint model for guiding judging. Drawing on the works of Professors Ronald Dworkin and Alasdair MacIntyre, I argue that judging itself can be conceptualized as a "practice" with "external goods" and "internal goods." While I later describe what these concepts mean in more detail, an introduction here is helpful. Judging as a practice means that judges can evaluate their success at judging based on internal institutional standards, or in MacIntyre's words, internal goods. MacIntyre's chess analogy provides a helpful introduction to the definition of internal goods.[12] Consider a child playing chess who does not particularly enjoy it, but whose teacher rewards them with candy for playing. That child certainly values chess, as they get candy for playing. But, given their recent entry into the world of chess

[11] See infra Section I.C.

[12] This example comes from Alasdair MacIntyre, After Virtue: A Study in Moral Theory 188–89 (Univ. of Notre Dame Press 3d ed. 2007) (1981).

and the fact that they are motivated by the candy, the child has no appreciation for flawlessly pulling off a particular chess strategy or gaining a greater understanding of chess strategy. Here, an external good of chess is the candy reward because while the child can get candy from playing chess, they can also get candy from their violin teacher or their parents. An internal good of the game of chess—flawlessly pulling off a particular chess strategy, for example—is different, as one cannot obtain that from anything other than playing chess.

This Note argues that, like chess, judging is a practice with internal and external goods relevant to the context of judging. I purposefully define these internal goods loosely and describe broadly how a judge may practically implement these standards. Throughout the rest of this Note, I refer to this alternative model as the "internal goods approach," in contrast to the "constraint approach."[13] Unlike Ronald Dworkin's related account, I introduce an account of virtue ethics and relate it to the practice of judging. Virtue ethics, a concept that is inherently linked to "practices" according to Alasdair MacIntyre, has been an area of great interest to legal scholars. The discussion of virtues not only provides a complete theoretical account to the internal goods approach, but it also introduces concrete and practical ways for judges to implement the internal goods approach. By introducing the internal goods approach, I hope to contribute a useful theoretical model for understanding the act of judging to the field of legal scholarship.[14]

Part IV of this Note then compares these two approaches and concludes that the internal goods approach is superior to the constraint approach based on the concerns I outline in Part II. The first set of arguments deals with the constraint approach alone. The constraint approach does not minimize the concerns outlined earlier because difficult normative and moral questions are necessary for both deciding between theories of

[13] The constraint approach simply tells judges to conform all their decision-making to the constraint imposed by their constitutional theory. For an example, see the discussion of originalism in Section I.B, *infra*.

[14] Scholars have applied MacIntyre's ideas of practices and internal goods to different contexts. See, e.g., Mark Retter, Internal Goods to Legal Practice: Reclaiming Fuller with MacIntyre, 4 U. Coll. London J.L. & Juris. 1, 8–10 (2015) (discussing MacIntyre in the context of Professor Lon L. Fuller's attack on legal positivism). See generally Howard Lesnick, The Practice of Teaching, the Practice of Law: What Does It Mean to Practice Responsibly?, 29 Pace L. Rev. 29 (2008) (introducing MacIntyre's concepts to lawyering and legal education); Matthew Sinnicks, Practices, Governance, and Politics: Applying MacIntyre's Ethics to Business, 24 Bus. Ethics Q. 229 (2014) (questioning whether MacIntyre's work can be applied to corporate governance).

constraint and justifying the constraint itself. Further, at least in some cases, relying on the constraint approach could lead judges astray by failing to consider the institutional rights described in Part III. While both the internal goods and the constraint approaches still face the problem of dealing with difficult and highly contestable moral debates, the internal goods approach minimizes this concern. This is true even though there is only a "thin account" of the internal goods of judging.[15]

In justifying these conclusions, I begin by walking through how a judge following the internal goods approach decides a difficult case. The decision-making process a judge engages in following this approach demonstrates the benefits of introducing the ideas of practices, internal goods, and virtues. The internal goods approach provides a more meaningful way to evaluate judging than relying on constraint alone. Importantly, even though the process of ascertaining the internal goods of judging is contestable and difficult, the virtues provide a sort of procedural check to ensure that judges are properly engaging in this inquiry. Finally, the internal goods approach better accounts for instrumentalist judging concerns than the constraint approach does.

I. WHAT IS CONSTRAINT?

This Note asks whether a judge should consider the degree to which a constitutional theory constrains them as a determinative factor in deciding between theories. Legal scholars, however, have defined constraint in a variety of ways,[16] making this question unclear. To clarify this discussion, this Part looks at how constraint is defined in legal scholarship and chooses a definition of constraint that would be most useful for the judge asking the central question mentioned above.

[15] Describing the internal goods approach as a "thin account" means that the internal goods approach can apply to judges irrespective of the substantive details of their constitutional theory. For example, a judge may think that post-ratification practices are particularly probative of the meaning of constitutional provisions while another judge disagrees. A "thin account" of internal goods means that both judges can operate under the internal goods approach even though they disagree substantively about certain aspects of how to interpret the Constitution. Cf. Lawrence B. Solum, Virtue Jurisprudence: A Virtue-Centred Theory of Judging, 34 Metaphilosophy 178, 183 (2003) [hereinafter Solum, Virtue Jurisprudence] (using the term "thin" in a similar manner).

[16] See, e.g., Thomas W. Merrill, Originalism, Stare Decisis and the Promotion of Judicial Restraint, 22 Const. Comment. 271, 274–75 (2005) (defining constraint in terms of predictability); Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism," 92 Calif. L. Rev. 1441, 1443–44 (2004) (surveying definitions of judicial activism).

At the outset, finding a "useful definition" of constraint should eliminate self-serving definitions of constraint. One could define "constraint" as "consistency with original methods originalism." But that makes arguments about which interpretive theory imposes the most restraint circular.[17] By defining constraint in that way, nothing inherent to original methods originalism results in constraint. Instead, the constraint results simply from judges following original methods originalism. So, under this definition, the degree of constraint a constitutional theory imposes will be unhelpful to judges choosing *between* different constitutional theories. The rest of this Part considers more sophisticated definitions of constraint.

A. The Scope of Judicial Review

Judicial "activism" and "restraint," like the idea of constraint, touch on the question of how much discretion and power courts should have.[18] This raises the question: Is it useful to define constraint as the reluctance of judges to strike down arguably constitutional decisions made by the legislature or other elected officials?[19] This Section argues that this definition of constraint, "the judicial review definition," is not a useful one.

The degree of activism that a judge can exhibit can vary across the same interpretive theory. For example, originalism is compatible with both a strong institutional role of the court[20] and a weak institutional role.[21] Originalist Thayerianism is an example of an originalist theory that gives the courts a particularly weak institutional role. Originalist Thayerianism tells judges that they are restricted only to the semantic content of the constitutional text, which may only be expanded upon by

[17] Merrill, supra note 16, at 274.

[18] See, e.g., Ernest A. Young, Judicial Activism and Conservative Politics, 73 U. Colo. L. Rev. 1139, 1145 (2002) ("Judge Posner has defined judicial activism as a court's failure to defer to decisions made by the political branches of the federal government or to the decisions of state governments."); Lawrence B. Solum, Construction and Constraint: Discussion of *Living Originalism*, 7 Jerusalem Rev. Legal Stud. 17, 31 (2013) [hereinafter Solum, Construction and Constraint] (discussing originalist Thayerianism).

[19] See Kmiec, supra note 16, at 1464 (evaluating similar definitions of constraint).

[20] See, e.g., Michael Stokes Paulsen, The Intrinsically Corrupting Influence of Precedent, 22 Const. Comment. 289, 289–91 (2005) (describing the tension between stare decisis and originalism); Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 560–61 (2006) (arguing that originalism has been used for political aims).

[21] Solum, Construction and Constraint, supra note 18, at 31.

"obvious and uncontested" contextual information.[22] If that does not provide the answer, then the judge "shall defer to the constitutional constructions of the political branches or the states."[23] A judge subscribing to originalist Thayerianism faced with the Taxing Clause,[24] for example, would first determine the original linguistic meaning of the provision. But if it is still unclear whether a given tax is within that meaning of "Taxes, Duties, Imposts and Excises," the judge should not consider nonobvious contextual information—such as how courts around the Founding Era applied the Taxing Clause—but should instead defer to Congress's interpretation.

This example suggests that the difference between the strong and weak judicial roles of courts is based on the level of confidence we require judges to have in their decisions. Two originalists can consider the same sources and engage in the same interpretive reasoning but may use differing exercises of judicial review and levels of "judicial activism" resulting from the level-of-confidence requirements.

So, the judicial review definition of constraint means that we can vary the degree of constraint a theory provides by simply adjusting the degree of confidence we require of judges. But this indicates that the judicial review definition is not useful for the present question. An originalist who subscribes to originalism due to its constraining capabilities should prefer a "living-constitutionalist Thayerianism" to run-of-the-mill originalism, according to the judicial review definition of constraint.

This hardly seems like a realistic position anyone would take. Mostly this is because originalist academic scholars tend to focus on the normative justifications for originalism in addition to the justification that originalism constrains judges.[25] Descriptively speaking, the fact that originalism and living-constitutionalist Thayerianism result in two wholly different outcomes and rely on two wholly different normative theories matters to judges and scholars. So, in using constraint to decide between constitutional theories, the judicial review definition does not work.

[22] Id.

[23] Id.

[24] U.S. Const. art. I, § 8, cl. 1.

[25] See, e.g., John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution, 98 Geo. L.J. 1693, 1695 (2010) (describing normative justifications for originalism); see also infra Section IV.A (arguing that normative justifications for constitutional theories are both descriptively and conceptually important).

More importantly, the judicial review definition of constraint "depends on the speaker's understanding of the Constitution."[26] The judicial review definition says that judges are acting in an unconstrained manner when they engage in judicial review of decisions that are "arguably constitutional."[27] Thus, to tell whether a judge is acting in an unconstrained manner according to this definition, we necessarily need to know whether the actions at issue are "arguably constitutional."

However, an originalist may view a given action as arguably constitutional whereas a living constitutionalist may view the same action as arguably unconstitutional, indicating the difficulty with this definition. This follows from the fact that the judicial review definition operates as a level-of-confidence requirement: the judge first assesses the constitutionality of the action *and then* determines their level of confidence in that assessment. This approach makes comparing the degree of constraint between originalists and living constitutionalists very difficult; because both define constitutional meaning differently at the first step, they will accuse each other of being activists under this definition.

B. Results- and Justification-Oriented Constraints

In contrast to the judicial review definition, helpful definitions of constraint that I will use going forward are the notions of a "results-oriented constraint" and a "justification-oriented constraint."[28] These definitions avoid the problems outlined above and more precisely capture the way the term "constraint" is used in legal scholarship.

First, the definition of a "results-oriented constraint." If a judge interprets a provision to mean *X* according to an interpretive theory, the results-oriented constraint means that we can tell whether the judge erred in interpreting the provision to mean *X*.[29] For example, if the original meaning of the First Amendment protected flag burning, then an originalist judge is acting unconstrained in this manner if they declare a

[26] Kmiec, supra note 16, at 1466.

[27] Id. at 1464.

[28] See William Baude, Originalism as a Constraint on Judges, 84 U. Chi. L. Rev. 2213, 2220–28 (2017). Professor Baude uses the terms "external constraint" and "internal constraint" to explain this definition of constraint. Id. This Note instead uses the terms "results-oriented constraint" and "justification-oriented constraint" respectively to avoid confusion with the distinct ideas of "internal goods" and "external goods."

[29] Id. at 2220.

law prohibiting flag burning unconstitutional. In sum, the results-oriented constraint means that we can check to see whether the judge followed their interpretive theory by seeing whether the result the judge reached is a permissible one.

If an interpretive theory imposes a "justification-oriented constraint," then the theory tells the judge what methods to apply in interpreting a provision.[30] To take a simple example, judges are constrained in this manner when they decide to never consider the height of the litigants in reaching their decision. Originalism imposes a greater degree of justification-oriented constraint than living constitutionalism when it tells judges to only consider the original meaning of the Constitution. Living constitutionalists, however, are free to consider the original meaning of the Constitution as well as post-ratification practices.

C. Formalism as Constraint

The difference between rules and standards may also be thought to inform the definition of constraint.[31] A judge applying "formalistic" reasoning means that they rely solely on applying existing legal rules to determine legal controversies.[32] So, the question becomes, when asking whether the degree of constraint is a good criterion for choosing a constitutional theory, are we really asking whether a judge ought to be a formalist or not?

This question is not the proper one to ask because constraint is different from formalism, and scholars should distinguish between the two. Rule-like approaches do not always result in a constitutional theory that can be applied mechanically or reduce discretion.[33] This may follow from the difficulty of recognizing which rules apply to a given fact pattern or the difficulty in evaluating the facts of the case using a rule. While formalism itself does not invariably result in reducing the judgment a judge must

[30] Id. at 2223–25.

[31] See generally Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989) (comparing formalist decision-making with discretion).

[32] See Christopher J. Peters, Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication, *in* General Principles of Law—The Role of the Judiciary 23, 24 (Laura Pineschi ed., 2015) (Ius Gentium: Comparative Perspectives on Law and Justice Ser. No. 46); Frederick Schauer, Formalism, 97 Yale L.J. 509, 537 (1988).

[33] Schauer, supra note 32, at 523; Lawrence B. Solum, The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights, 9 U. Pa. J. Const. L. 155, 175 (2006) [hereinafter Solum, Supreme Court in Bondage] ("The application of rules to particular situations necessarily involves practical judgment . . . .").

exercise, the stronger a results-oriented constraint is, the less judgment a judge can exercise. A justification-oriented constraint would also avoid the difficulty of deciding which rules to apply by narrowing down ex ante the appropriate set of rules a judge may apply.[34] Further, a rule itself also can confer "discretionary authority to the relevant legal actor,"[35] indicating that there is not a clear distinction between constraint and formalism. All of this taken together means that formalism does not require that there be a "right answer" in every case, so formalism is distinct from results- and justification-oriented constraint.[36]

Put differently, there can be differences in the degree of constraint provided by rule-like constitutional theories. So, it is unhelpful to lump all rule-like approaches in the category of "constrained interpretive theories" and lump all standard-like approaches in the category of "unconstrained interpretive theories." Instead, the relative merits of rule-like or standard-like decision-making should be understood as a separate question from the merits of constraint.

Going forward, this Note talks about constraint in terms of results-oriented and justification-oriented constraint instead of defining constraint as the degree to which a judge is willing to exercise judicial review or how rule-like a constitutional theory is. As a result, the definition of constraint is more meaningful when considering the degree of constraint as a method to choose between constitutional theories.

II. THE CASE FOR CONSTRAINT

While the previous Part clarified the scope of the underlying question of this Note and defined some important terms, this Part explains the motivation behind that underlying question. Two main concerns underlie the reason so many scholars and judges care about constraint: a concern about judges relying on moral judgments and a concern about instrumentalist reasoning. I conclude that these are serious issues and are relevant for evaluating constitutional theories.

[34] Cf. Schauer, supra note 32, at 547 ("More likely, formalism ought to be seen as a tool to be used in some parts of the legal system and not in others.").

[35] Solum, Supreme Court in Bondage, supra note 33, at 174.

[36] Id.

A. Constraint to Limit Moral Judgments

The first serious concern motivating constraint is its ability to limit a judge's moral decision-making. This concern partly comes from the nature of American political culture. Given the importance of liberal philosophical and political thought in American legal institutions, there is a strong sense of individualism and belief in the right of each person to determine their own conception of morality.[37] But, by engaging in moral reasoning, a judge disregards the liberal foundation of American society. For example, a judge faced with the Eighth Amendment's vague language can impose a moral view on society by deciding what a "cruel and unusual punishment[]" is.[38] That judge legitimizes the moral arguments used to reach their determination by saying that they count more than a different set of moral considerations. Similar concerns motivated Professor Mark Tushnet to conclude that constitutional theories "must provide rules that both guide and constrain judicial discretion."[39]

Apart from considering group-level decisions about what is moral, a judge may rely on their own private and self-interested moral beliefs. A judge, motivated by their own moral beliefs, may rely on those beliefs to uphold a law drawing a distinction between people based on race even though it ought not to be constitutional.[40] Liberalism's concern about countermajoritarianism is particularly acute when a judge's private moral judgments are given the effect of law in complete disregard for society's judgment on the issue.

An even more fundamental problem of moral judgments is the state of moral disagreements in modern American society. Alasdair MacIntyre argues that moral debates in post-Enlightenment liberal societies are

[37] See H. Jefferson Powell, The Moral Tradition of American Constitutionalism: A Theological Interpretation 53–60 (1993) (giving a similar understanding of liberalism as rooted in Enlightenment thought); Sanford Levinson, Constitutional Faith 61 (rev. ed. 2011) ("The most influential accounts of political liberalism all tend to emphasize the required 'neutrality' of the state toward the various ways that people choose to live their lives or, as it is sometimes phrased, 'express themselves.' ").

[38] U.S. Const. amend. VIII; Laurence Claus, Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?, 31 Harv. J.L. & Pub. Pol'y 35, 38–39 (2008) (outlining senses in which judges may engage in moral inquiry into the meaning of "cruel and unusual punishments").

[39] Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 112 (1988); see also Powell, supra note 37, at 236 (characterizing Mark Tushnet's argument as concluding "that a constitutional theory is successful *only* if it constrains judicial decision making").

[40] See, e.g., Loving v. Virginia, 388 U.S. 1, 10 (1967).

characterized by "conceptual incommensurability."[41] Incommensurability means that conflicting moral arguments may both be logically valid, but there is "no rational way" to compare the different premises.[42] For example, people may have opposing accounts for the morality of stricter gun control measures. Each of these arguments may be logically sound in that their conclusions logically follow from their premises and their premises are valid. But because they begin from incommensurable premises, the judge has no way to rationally evaluate the arguments. This situation raises one important reason for judges limiting themselves from considering moral arguments.

Faced with these concerns, judges may turn to constraint to avoid the problems of normative debates that philosophers and legal scholars have recognized.[43] Viewed one way, constraint prevents the judges from injecting their own moral preferences into judging a particular case. A justification-oriented constraint may tell judges not to consult moral arguments in reaching a decision. Moreover, a results-oriented constraint can resolve this concern. The stronger the standard to determine whether a judge has reached a "correct" outcome, the less room the judge has to consider murky moral debates.

An important consequence of this, and one central to this Note's question, is that judges may argue that constraint provides a neutral standard to evaluate interpretive theories. Instead of asking which constitutional theory is normatively better justified—presenting the conceptual incommensurability problem—judges may look at the degree of constraint the theories impose. They could rationally decide between Theory *C* and Theory *D* by finding out which theory provides more constraint. The argument is that if moral decision-making by judges is viewed as a bad thing, it is perfectly rational to choose the constitutional theory that involves less moral decision-making.

[41] See MacIntyre, supra note 12, at 8.

[42] Id.

[43] See, e.g., id. at 6–11; Levinson, supra note 37, at 72 ("What explains our contemporary uncertainty (some would say 'crisis') in regard to the Constitution is the assertion of fundamentally different values within the political realm. . . . One person's notion of justice is often perceived as manifest tyranny by someone else."); Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551, 593 (1985); Martin H. Redish & Matthew B. Arnould, Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative, 64 Fla. L. Rev. 1485, 1509 (2012).

The arguments above demonstrate a strong reason for why judges making moral decisions can become problematic. In particular, it is hard to say that there is a "right" outcome using moral reasoning given the fractured state of moral discourse in America. But can the degree of constraint afforded by a constitutional theory avoid these problems? Eventually this Note argues that constraint cannot provide a solution to this issue, but that there is a different solution to this problem through the internal goods approach.

B. Constraint to Limit Results-Oriented Judges

Another serious concern motivating constraint is "results-oriented" or "instrumentalist" decision-making. People motivated by this concern argue that under an unconstrained constitutional theory, judges would first ask what outcomes would result from applying the theory. Then, because the constraint is weak and multiple outcomes and methods of justification are permitted, the judge chooses the decision they think is "better."[44]

Why is this form of decision-making problematic? After all, hard cases may arise where serious constitutional theories do not readily prescribe the correct answer. Instrumentalist decision-making can be viewed as problematic because judges may consult impermissible standards for choosing the decision they think is "better." A judge may look to their own moral beliefs, reflecting the concerns outlined above. Or a judge may consider the "better" outcome as the one that results in better policy, a form of decision-making often criticized because courts lack the institutional capacity to make those judgments.[45] Possibly, a judge's choice of the "better" outcome depends on the judge's political ideology, raising concerns about the legal system becoming purely an exercise of power.[46] More fundamentally, instrumentalist decision-making may be

[44] See Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 562 (1999) ("[A]nyone who knows in advance what would count as 'good' results can test substantive theories by their capacity to support her preferred pattern of decisions."); Kmiec, supra note 16, at 1476.

[45] See, e.g., Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 329 (2002) (discussing a rationale for courts deferring to the political branches).

[46] Richard A. Posner, The Meaning of Judicial Self-Restraint, 59 Ind. L.J. 1, 8 (1983) ("'Result-oriented' . . . should mean decision according to personal or partisan considerations generally agreed to be illegitimate.").

viewed as a judge "incorrectly" applying the law because they are relying on an "ulterior motive" to reach their desired outcome.[47]

One difficulty with remedying this problem is that in close cases, it is hard to tell whether the judge "incorrectly" applied their constitutional theory.[48] To remedy this, a results-oriented constraint would seek to limit the scope of proper outcomes to give less room for a judge to interject their own beliefs. By limiting a judge to a limited or single set of appropriate outcomes, an external observer could readily tell whether the judge made the correct decision.

Or a justification-oriented constraint may attempt to prevent judges from using these illicit considerations when deciding a case. For example, under an unconstrained theory, judges may rely primarily on the perceived "equities" at stake in the case rather than a concrete set of rules or principles, resulting in a highly "malleable" approach.[49] A justification-oriented constraint would try to reduce this flexibility by preventing judges from considering the individual equities of cases. In general, this constraint tries to make "hard cases" into "easy cases" to limit a judge's ability to interject their own beliefs about the proper outcome.

In sum, there are two main concerns motivating constraint: the desire to limit the use of moral arguments in judging and the concern that judges will misapply the law to achieve their desired outcomes. In response, judges may look to constitutional theories imposing results-oriented and justification-oriented constraints to avoid those problems. Taking these concerns to be serious, the rest of this Note asks whether there is an alternative to constraint for dealing with these problems and whether constraint actually resolves these problems.

III. THE INTERNAL GOODS APPROACH

This Part describes the "internal goods approach" as an alternative to judges relying on constraint. There are two main components of the

[47] Kmiec, supra note 16, at 1476 ("In other words, a decision is 'activist' only when (a) the judge has an ulterior motive for making the ruling; and (b) the decision departs from some 'baseline' of correctness.").

[48] See, e.g., Baude, supra note 28, at 2215. Professor Baude argues that the shift to considering the original public meaning of the Constitution means that originalism is "less likely to supply broad external constraints." Id. at 2221. For example, given legitimate disagreements about the proper level of generality with which to read constitutional text, it can therefore be hard to determine whether a judge "incorrectly" applied originalism. Id.

[49] Richard A. Posner, The Role of the Judge in the Twenty-First Century, 86 B.U. L. Rev. 1049, 1059 (2006).

internal goods approach. The first Section introduces the idea of "practices" along with "internal goods" and "external goods." The second Section introduces the idea of virtues. These concepts are not limited to the legal context, but this Part explains their meaning in the legal context and the value of these terms for understanding judging. In the broader perspective of this Note, I argue that the "internal goods approach" better resolves the concerns outlined previously.

A. Judging as a Practice

Legal scholars often describe the legal system and the act of judging as "practices" or "games."[50] Similarly, this Note provides a detailed account of what it means for something to be a "practice" and that describing judging as a practice is both accurate and helpful. Particularly, this Note argues that judging is a "practice" as defined by Alasdair MacIntyre.[51] This requires looking at terms and concepts introduced by MacIntyre and others and then mapping those ideas onto the act of judging. At the outset, it is helpful to understand the purpose of arguing that judging is a practice. Describing judging as a practice provides a theoretical framework for understanding and evaluating the things judges do, whether it be through the opinions they issue or the constitutional theories to which they subscribe. When judges do these things, they may have many different goals in mind, and this practice-framework helps categorize and compare those goals.

If describing an activity as a practice is meant to provide a framework to better understand that activity, the first step in showing that judging is a practice is to show that judging is a complex social activity. Otherwise, it would be unnecessary and clunky to describe judging as a practice. As MacIntyre puts it, the first step is to argue that judging is more like the game of football than the act of throwing a football with skill.[52] Unlike the skill of throwing a football well, it makes sense to discuss the game of football as a practice because it involves a hierarchy of goods, a historical understanding of excellence, and an account of virtues—all key concepts for practices.

[50] See, e.g., Powell, supra note 37, at 36; Richard A. Posner, How Judges Think 91 (2008); Ronald Dworkin, Taking Rights Seriously 101–05 (1978).

[51] MacIntyre, supra note 12, at 187.

[52] Id.

At first blush, the idea that judging is a complex activity seems obvious given the great deal of legal scholarship related to how judges ought to rule on cases. But to make this claim more explicit, note that judging is a cooperative social activity in several ways. Judging involves a relationship between lawyers and judges where judges interact with lawyers by responding to their arguments in written opinions. And it is intuitive that a judge will be more responsive to a lawyer's arguments if the lawyer makes arguments that the judge is receptive to. Justice Scalia would not be receptive to a lawyer's arguments relying solely on the legislative history of a statute.[53] More broadly, judges interact with litigants and the public at large. The enforcement of legal decisions means that judges resolve disputes amongst litigants, and, in return, the litigants respect the decision even if it is inconsistent with their interests.[54] Beyond the litigants in the dispute, the public more generally takes an interest in the Constitution and how it ought to be interpreted.[55]

The next step in showing that judging should be viewed as a practice is to show that judging involves both internal goods and external goods. In doing so, the definition of these terms is critical. The goods internal to a practice are those that can only be achieved by engaging in that practice.[56] Goods external to a practice, by contrast, are those that are achieved only incidentally to engaging in a practice—goods that, while you can achieve by engaging in a practice, you can also achieve elsewhere.[57]

What does this dichotomy between internal and external goods mean in the context of judging? Recall the chess analogy introduced above.[58] For the child rewarded with candy for playing chess, there is both the

[53] See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy.").

[54] See, e.g., MacIntyre, supra note 12, at 253 ("[O]ne function of the Supreme Court must be to keep the peace between rival social groups adhering to rival and incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications."); Solum, Supreme Court in Bondage, supra note 33, at 181 ("We need law because private judgments about how disputes ought to be resolved will inevitably be in conflict."); Retter, supra note 14, at 5.

[55] See Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 314–15 (2001) (discussing the public's interest in the meaning of the Constitution and subsequent legal developments in the context of sex discrimination).

[56] MacIntyre, supra note 12, at 188–89.

[57] Id. at 188.

[58] See supra note 12 and accompanying text.

external good of receiving the candy from their teacher for playing chess and the internal good of flawlessly pulling off a particular chess strategy. The child can receive the candy without playing chess—from their violin teacher or parents—while they can only achieve a deep appreciation for chess strategy by playing chess. Likewise, for judges, there are some goods that a judge can achieve only by participating in the practice of judging. While this Note does not seek to provide an exhaustive account of the internal and external goods of judging, I will outline a few fundamental concepts.

The first internal standard of excellence is that the judge's decision must be based on a "legal" argument rather than, for example, relying purely on economic or moral reasoning. A judge evaluating the constitutionality of affirmative action does not begin by explaining John Rawls's concept of justice; rather, they "reason through the discussion of purposes, structures, traditions, conventions, precedents, and so forth."[59] Descriptively and normatively speaking, arguments based on text and precedent matter in the legal context while purely philosophical arguments do not. Because entering "into a practice" requires one "to accept the authority . . . of the best standards realized so far," accepting that one will use legal argumentation is necessary to engage in the practice of judging.[60]

Further, engaging in legal argumentation is an internal good rather than an external good. A journalist, an academic, and a lawyer may all argue about whether the use of affirmative action is justified, but the arguments that each will make are distinct. While many people can make "good" arguments about the justifications of affirmative action, only the people using the modalities of legal argumentation can make a "good" argument for purposes of judging.

A second and more interesting internal good of judging is the standards people use to evaluate legal decisions. When we say that a particular legal decision is "good" or "bad," we refer to a variety of criteria. These are principles that enable one to evaluate a legal decision or constitutional

[59] Jack M. Balkin, History, Rights, and the Moral Reading, 96 B.U. L. Rev. 1425, 1440 (2016); see also Philip Bobbitt, Constitutional Fate: Theory of the Constitution 3–8 (1982) (describing the different arguments made in cases dealing with constitutional issues).

[60] MacIntyre, supra note 12, at 190.

theory as a legal matter rather than one purely based on economic or moral justification.[61]

What are these criteria? At the broadest level of generality, we may consult principles like justice, fairness, or the rule of law to determine whether a legal decision is good or not. Moving down a level of generality, scholars describe more concrete principles to evaluate legal action.[62] For example, an interpretation of the Constitution may be "bad" to the extent it is inconsistent with one's understanding of what the text means. Or an interpretation of the Fourth Amendment may be good if it properly balances the degree of intrusion into privacy against governmental interests in law enforcement.[63] Using the language of internal goods, interpreting the text accurately or balancing interests properly are both internal goods of judging.

To understand how judges should determine the internal goods of judging, Ronald Dworkin's idea of institutional rights from his "Rights Thesis" is very helpful.[64] Consider again the game of chess. For chess, "institutional rights are fixed by constitutive and regulative rules that belong distinctly to the game, or to a particular tournament"—if the opponent's king is in check and there is no possible escape, then the player has an institutional right to be awarded a point.[65] In this situation chess does not seem like a helpful analogy for understanding what institutional rights are or what they mean in the context of judging because the rules regarding whether there is a checkmate are clear and do not result in difficult cases.

So, consider the following rule introduced to chess: "if one player 'unreasonably' annoys the other in the course of play," the "referee shall declare a game forfeit."[66] According to Dworkin, to apply the unclear standard of "unreasonably annoys," the referee considers the nature of chess as a game and subsequently narrows down an understanding of chess as an institution.[67] Chess's rules, history, and socially accepted practices demonstrate that chess is an intellectual activity, so

[61] Cf. Retter, supra note 14, at 17–18 (distinguishing "what is good *qua* legal subject" from "what is good *qua* individual").

[62] See, e.g., Fallon, supra note 44, at 549–50 (describing other concrete principles for judges to consider).

[63] See, e.g., Terry v. Ohio, 392 U.S. 1, 14–15 (1968).

[64] Dworkin, supra note 50, at 101–05.

[65] Id. at 101.

[66] Id. at 102.

[67] Id. at 102–03.

"unreasonably annoys" must relate to one's interference with this intellectual nature. The referee, relying on their judgment developed through refereeing other games, will continue to ask narrowing questions about the institutional nature of chess. This allows them to produce a concrete understanding of chess's institutional nature and thereby adjudicate this unclear rule.[68] In the legal context, a judge can similarly understand and operationalize the internal goods by asking similar narrowing questions about the principles of law.

So, under the internal goods approach, what should a judge do when facing a difficult case like *Washington v. Glucksberg*? Because the judge is engaged in a practice, they are evaluated by their ability to promote the internal goods of judging.[69] Looking back to the first internal good outlined, this means the judge knows they are not evaluating the physical strength of the litigants because that is simply not a legal argument. Rather, they must consult standard legal arguments like text, precedent, and so forth. Looking to the second internal good outlined, the judge should engage in the line of questioning described above to understand the institutional nature of judging. The open-ended nature of this second internal good accounts for different outcomes. For example, a judge may find that the legal system as an institution should only give effect to this nation's most deeply held moral convictions, so the *Glucksberg* framework should be applied, while another judge may reach a different conclusion.[70] Even though this internal good is unclear and contestable, the respective judges will still strive to conform their own reasoning to

[68] Id. at 104.

[69] Intuitively, this approach makes sense because the judge is acting as a judge rather than as an economist or philosopher. Because there are different standards internal to these roles, to be a good judge means that one achieves the standards internal to judging. This approach also follows from MacIntyre's precise account of practices. See MacIntyre, supra note 12, at 187 ("By a 'practice' I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence *which are appropriate to, and partially definitive of, that form of activity*, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended." (emphasis added)).

[70] While focusing on tradition is constraining in one sense, the justification for the reliance on tradition under the internal goods approach does not primarily rely on the value of constraint. Instead, judges would rely on tradition as a rational method to provide just or moral results. See, e.g., Steven D. Smith, De-Moralized: *Glucksberg* in the Malaise, 106 Mich. L. Rev. 1571, 1590 (2008) ("[T]radition or convention may be slightly more faithful (if often confusing or confused) carriers of our genuine moral convictions than academic reasoning.").

the higher-level goal of giving effect only to this nation's most deeply held moral convictions.[71]

One objection to this account is that this vague description of the internal goods of judging as a practice is not useful. The argument is that because the account of internal goods is so open-ended, it provides little substantive guidance to a judge. The response is twofold. First, in hard cases, determining the internal goods of the practice is in fact a difficult and open-ended question, one which could lead judges to reach different outcomes. However, as this Note explains at length in the next Section, the idea of virtues (which are closely related to practices) makes this task manageable.[72]

The second response is that there exist certain "fixed points" in constitutional law representing authoritative judgments about the concrete meaning of the internal goods of judging; many constitutional theorists regard the decision of *Brown v. Board of Education* as a fixed point, holding that constitutional theories must be able to justify the result of *Brown*.[73] Using the language of practices, accounting for *Brown* is an accepted authoritative statement on the best way to particularly define the internal goods of judging. And acceptance of these best judgments is essential to participate in a practice.[74] So, a judge who seeks to provide details to internal goods must engage in the difficult task of evaluating the institutional rights of judging. But, importantly, viewing judging as a practice means that the determination of those rights necessarily must be in accordance with the various fixed points in constitutional theory.

B. The Importance of Virtues to the Practice of Judging

Viewing judging as a practice is incomplete without considering the virtues of judging. In MacIntyre's concept of practices, virtues are defined as the qualities necessary to achieve the internal goods of a practice.[75]

[71] Dworkin, supra note 50, at 102.

[72] See infra Section IV.B.

[73] 347 U.S. 483 (1954); see, e.g., David A. Strauss, Do We Have a Living Constitution?, 59 Drake L. Rev. 973, 973 (2011); David A. Strauss, What Is Constitutional Theory?, 87 Calif. L. Rev. 581, 583 (1999) (discussing other fixed points). According to Professor Strauss, another example of a fixed point is the text of the 1789 Constitution, meaning a judge cannot simply "pay no attention to the text of the 1789 Constitution . . . for essentially all members of our legal culture [think] that the Constitution counts for something." Id. at 586.

[74] See MacIntyre, supra note 12, at 190 ("To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them.").

[75] Id. at 191.

Unlike other forms of scholarship dealing with virtue ethics, this Note considers only the virtues that are "necessary to sustain any practice."[76] So, this account discusses the virtues that are "necessary for reliably good judging given *any* plausible normative theory of judicial decision."[77] A discussion of virtues at this level of generality is useful and takes inspiration from MacIntyre's discussion of virtues as applied to practices generally. He argues that the virtues of justice, courage, and honesty are essential to sustain all practices because they are necessary to resist the tempting and corrupting forces of external goods.[78] Similarly, this Section explains those virtues in the context of judging and justifies their necessity to the internal goods approach.

To start with, what does MacIntyre's account of "the corrupting forces of external goods" look like in the context of judging?[79] The internal goods approach, as described in the previous Section, means that the judge seeks to prioritize internal goods of judging over external goods. For example, an external good of judging is maximizing expediency. Maximizing expediency is corrupting because a judge need not engage in legal analysis to reach an expedient outcome but can instead simply engage in wholesale judicial legislation to reach the outcome the judge wants.[80] In abstract terms, by prioritizing external goods over internal goods, a judge fails to engage in the practice of judging.

So, external goods are "corrupting" because their pursuit distracts judges from the pursuit of internal goods. This abstract account of judging matches the ordinary understanding of judicial activism. A judge may be motivated primarily by the policy consequences of a dispute and therefore ignore or misapply the legal issues to reach the preferred outcome. By doing so, the judge is prioritizing external goods and does not achieve

[76] Powell, supra note 37, at 37. Many other legal scholars have introduced virtues into questions of jurisprudence. See, e.g., Solum, Virtue Jurisprudence, supra note 15, at 198–99; Lee J. Strang, Originalism and the Aristotelian Tradition: Virtue's Home in Originalism, 80 Fordham L. Rev. 1997, 1998–2001 (2012).

[77] Solum, Virtue Jurisprudence, supra note 15, at 183 (emphasis added).

[78] MacIntyre, supra note 12, at 191.

[79] This response is partly motivated by Professor Kent Greenawalt's criticism of Dworkin's theory. Kent Greenawalt, Policy, Rights, and Judicial Decision, 11 Ga. L. Rev. 991, 1036 (1977) (arguing that Dworkin's theory provides "a means for shielding activist judges from the charge of usurpation"). In MacIntyre's terms, Greenawalt's criticism appears to be raising the concern over the corrupting force of external goods.

[80] MacIntyre, supra note 12, at 188 (discussing this idea in the context of the chess analogy).

excellence according to the internal goods of judging, hence the term "corrupting."[81]

As noted before, the open-ended nature of the internal goods approach may initially be seen as particularly susceptible to criticisms in that it allows for judicial activism. However, the virtues of justice, courage, and honesty seek to solve this issue by preventing the corrupting influence of external goods. So, even if one is uncomfortable with the flexibility of the internal goods approach, the virtues provide a concrete set of rules to maintain its integrity.

The first way in which virtues maintain the integrity of the internal goods approach is that they facilitate the social cooperation necessary for judging. While MacIntyre and other scholars discuss this point more abstractly,[82] a more interesting idea for this Note is how virtues make the internal goods approach of judging workable. As mentioned before, practically speaking, a judge does not start from scratch when determining the internal goods of judging. Instead, the judge will partly rely on respected authorities that have given substance to the internal goods—the "fixed points" of the law.[83] While these authorities "are not themselves immune from criticism,"[84] a judge's willingness to trust the judgments of others "presupposes fairness and truthfulness in those judgments."[85] Intuitively, this makes sense, as people do not typically trust liars. So, the value of relying on the accounts of internal goods of others is diminished when they are mischaracterizing legal issues or making arguments in bad faith. For judges to progress in the cooperative activity of understanding the internal goods, honesty is an important virtue.

[81] See, e.g., Brian Z. Tamanaha, The Tension Between Legal Instrumentalism and the Rule of Law, 33 Syracuse J. Int'l L. & Com. 131, 150 (2005) ("A system committed to an instrumental view of law, however, would have the judge ignore or manipulate the legal rules and come to the designated outcome, notwithstanding the dictates of the legal rules."). But the internal goods approach does not require a formalist approach to judging. A judge relying on principles or standards in reaching a decision is not engaging in instrumentalist reasoning so long as those principles or standards are related to the institution of law. See Dworkin, supra note 50, at 102 (describing a chess official who must rely on the character of the game of chess to apply an outcome instead of the official's "background convictions").

[82] Powell, supra note 37, at 36–37 (explaining MacIntyre's conception of the virtues); see also MacIntyre, supra note 12, at 193 (discussing the necessity of virtues for social practices to flourish).

[83] See supra notes 73–74 and accompanying text.

[84] MacIntyre, supra note 12, at 190.

[85] Id. at 193.

Further, the virtues of honesty and courage respond to the instrumentalist concerns raised above. An honest judge cannot pass off a purely instrumentalist decision as being in accordance with the institutional rights to which litigants are entitled. Likewise, courage—the balance between cowardice and rashness[86]—indicates that a judge will prioritize engaging in legal arguments even when it would be unpopular with the public generally.[87] A judge lacking courage may rely on reasoning more popular with the public to avoid criticism or obtain favor for future judicial appointments. Further, if we are particularly concerned with a judge warping a malleable constitutional theory to achieve a certain end, courage is especially important. Hard cases call into question how genuinely the judge cares about their interpretive theory because the difficulty of the case makes it harder to tell from an external perspective whether the judge correctly applied their theory. By exhibiting courage, the judge is willing "to risk harm or danger" to themselves and, therefore, will be more likely to genuinely apply their constitutional theory.[88]

Finally, MacIntyre argues that the virtue of justice is required for practices to flourish. Justice is a particularly tricky virtue to define,[89] but a useful starting point is that justice is the "disposition to fairness."[90] To put a finer point on what justice is, I will describe two situations where the internal goods approach can be applied in an unfair manner. From this, two general senses in which a judge can exercise justice emerge.

Thinking back to the chess analogy for institutional rights, remember that the idea of institutional rights allows us to say that the chess player is due a point for putting their opponent in checkmate. Not awarding the point is simply unfair. Similarly, for the internal goods approach, the virtue of justice requires judges to consider the nature of their institution and make decisions based on rights as determined by the institution.[91]

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[86] See, e.g., Solum, Virtue Jurisprudence, supra note 15, at 190.

[87] See, e.g., id. ("The courageous judge is willing to risk career and reputation for the ends of justice.").

[88] MacIntyre, supra note 12, at 192; see also Suzanna Sherry, Judges of Character, 38 Wake Forest L. Rev. 793, 805–07 (2003) (describing how a lack of courage by the Supreme Court, exemplified by "an overly humble attitude towards its own role," influenced the infamous case *Korematsu v. United States*).

[89] See, e.g., MacIntyre, supra note 12, at 244–55 (explaining the incommensurability between Robert Nozick's and John Rawls's rival concepts of justice).

[90] Solum, Virtue Jurisprudence, supra note 15, at 196; see id. at 196–98 (providing a similar account of the virtue of justice for judges).

[91] Id. at 197 (describing a similar concept of "judicial integrity").

When does a judge fail to consider the nature of their institution? Consider a judge who relies only on the notion that the courts should defer to the legislature as their specific account of the internal goods.[92] Even though deference may be an important part of the internal goods of judging, a judge who only considers the importance of deference and applies that principle mechanically is acting unfairly. This is because there are other serious competing values at stake for the judicial system, such as its ability to command the moral respect of American society[93] or a desire to update the Constitution to be in accordance with moral judgments of today's society.[94] Even if a judge ultimately ends up giving the most weight to principles of deference, fairness requires the judge to consider the potential tradeoffs.

To put the point more generally, a judge exercising the virtue of justice analyzes the conflicting accounts of internal goods by trying to organize them in a way that upholds the general notion of institutional rights of judging.[95] So, the internal goods approach along with the virtues requires a judge to confront the conflicting values implicated by a case and "how they relate to each other in light of a general conception of the ends of the law."[96] By requiring deliberation on the conflicting specifications of the internal goods, the virtue of justice serves as a procedural check on judges who would otherwise use hard cases to pass off their own moral beliefs.[97] In sum, while the virtue of justice does not by itself resolve the difficulty of defining internal goods, it ensures that judges really engage in that difficult question. This engagement lessens the chance that judges use the internal goods approach as a subterfuge for their own personal idea of what is moral.[98]

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[92] Cf. Griswold v. Connecticut, 381 U.S. 479, 511–13 (1965) (Black, J., dissenting) (indicating a similar concern).

[93] See Levinson, supra note 37, at 68 (arguing that there is at least some degree of desire to have the legal system command society's moral respect).

[94] See, e.g., Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

[95] Amalia Amaya, Reasoning in Character: Virtue, Legal Argumentation, and Judicial Ethics, Ethical Theory & Moral Prac., Oct. 16, 2023, § 2.5, https://doi.org/10.1007/s10677-023-10414-z [https://perma.cc/2EKS-LXXJ] ("More specifically, the virtuous legal decision-maker reasons about the conflicting values by searching for their best specification.").

[96] Id.

[97] Cf. Greenawalt, supra note 79, at 1036 (arguing that judges can hide behind Dworkin's institutional rights theory in response to allegations of judicial activism). The virtue of honesty described earlier also plays an important role in checking this negative consequence.

[98] For a related idea of forcing deliberation to encourage better outcomes, see Lon L. Fuller, The Morality of Law 159 (rev. ed. 1969) ("Even if a man is answerable only to his own

The second situation where injustice may arise is when a judge ignores the particulars of the situation. For example, a judge may believe that they have already reached an adequate account of the internal goods of judging and will apply that understanding uncritically to future situations. But an uncritical application of internal goods may yield "absurd or unjust" results.[99] So, to avoid those unfair results, justice requires a sort of humility: the judge must recognize that they may have gotten their account of the internal goods wrong in the past when they encounter reasons suggesting an alternate account is preferable.[100]

Professor Lawrence B. Solum dealt with a related concept in his description of the difficulty of developing a general and comprehensive rule that accounts for the "infinite variety and complexity of particular fact situations."[101] The possibility of novel situations that prompt reconsideration of one's constitutional theory exemplifies a core difference between the internal goods and the constraint approaches. The constraint approach yields a comprehensive rule: a judge ought not to reach outcome *X* even if the normative consequences in a particular case are undesirable. This may seem particularly unfair, given that the constraint approach necessarily evaluates normative implications with the decision of choosing the constraint.[102]

This does not mean that the internal goods approach disapproves of rules or is in constant flux. Instead, a common understanding of virtues is that they represent the mean between two extremes.[103] Because rule of law considerations and stability are important to some extent for the institutional nature of law,[104] a judge could rely on a rule-like approach for deciding cases under the internal goods approach. For example, a judge following the internal goods approach can decide that they should

conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts.").

[99] Amaya, supra note 95, § 2.1.

[100] For legal scholarship discussing the phenomenon where the existence of novel situations triggers the discovery of principles that exist but are not yet realized, see, e.g., Hadley Arkes, Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law 23 (2010).

[101] Solum, Virtue Jurisprudence, supra note 15, at 206.

[102] See infra Section IV.A.

[103] See MacIntyre, supra note 12, at 154 (describing the Aristotelian understanding of virtues as lying between two extremes). For example, courage lies between cowardice and rashness. Solum, Virtue Jurisprudence, supra note 15, at 190.

[104] Amaya, supra note 95, § 2.1 ("It is important to notice that a virtue theory of legal reasoning does not, however, collapse into particularism, as rules play important roles within the theory . . . .").

assign little weight to modern society's moral judgments. While this gives a rule-like nature to this hypothetical judge's approach, it differs from the constraint approach in the degree of humility the judge should have in their decision. The virtue of justice requires the judge to recognize that they may have been wrong in guiding their approach with tradition and may need to update their analysis of the internal goods for future cases.[105]

In sum, while the virtues of honesty, courage, and justice may seem obvious, they serve a very important role in the internal goods approach. The virtues ensure that the internal goods approach can be operationalized by facilitating reliance on authoritative judgments on the internal goods of judging. Further, the virtues prevent the corrupting nature of external goods and respond to criticisms that the internal goods approach encourages judicial activism.

One criticism of this Section may be that it just uses the virtues to fiat away the problems of the internal goods approach.[106] In other words, by calling a judge virtuous, the problems of the internal goods approach magically go away. But exercising that degree of virtue is highly impractical or impossible. The difficulty of exercising virtues may be true. However, the goal of the internal goods approach is to provide an aspirational solution to the problems that constraint seeks to resolve. And even though the perfect exercise of the virtues is difficult, even imperfect exercises of virtues can guide judges to avoid the problems the constraint approach tries to solve.

IV. THE CASE AGAINST CONSTRAINT

The previous Parts of this Note described more carefully what judicial constraint is, the concerns motivating the desire to constrain judges, and an alternative to the constraint approach. This Part argues that the

[105] See, e.g., Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1326 (2006) ("Alternatively, a person might believe that the original understanding of constitutional language establishes aspirations to which the polity should strive to adhere, but subject to reasonable exceptions when the costs of adherence would prove too high.").

[106] Note that the same has been argued regarding constraint. See Peter J. Smith, How Different Are Originalism and Non-Originalism?, 62 Hastings L.J. 707, 731–33, 733 n.150 (2011) (discussing new originalism's failure to constrain judges); Posner, supra note 49, at 1059 (discussing constitutional theories in general as being malleable and open to the same criticisms); see also Lawrence B. Solum, The Aretaic Turn in Constitutional Theory, 70 Brook. L. Rev. 475, 524–25 (2004) [hereinafter Solum, Aretaic Turn] (arguing that judges must exercise virtues to faithfully implement even simple interpretive methodologies).

motivations behind the constraint approach described in Part II favor the internal goods approach. First, the constraint approach does not resolve these concerns, as normative judgments—something that the constraint approach seeks to avoid—are required even in the constraint approach. Second, the internal goods approach, especially with the inclusion of the virtues, can resolve those previously mentioned concerns. Finally, the internal goods approach has many advantages over the constraint approach as it provides conceptual clarity to evaluating constitutional theories and works especially well to prevent instrumentalist judging.

A. The Necessity of Normative Judgments

Whether it be out of concern that a judge will rely on their own self-interested understandings of morality or the difficulty of resolving moral debates, the constraint approach tries to prevent normative judgments from entering judging. The constraint approach, however, fails at this goal. The choice of a constitutional theory itself necessarily involves normative decisions. Similarly, even a constraining constitutional theory results in certain "substantive consequences" that judges must grapple with.[107]

Consider the types of substantive justifications that are often given for choosing a constrained constitutional theory over an unconstrained one. Constraint may be normatively justified based on an understanding of the countermajoritarian problem[108] or the importance of predictability and stability.[109] Choosing a constitutional theory based on one of these concerns necessarily results in the incommensurability problem, as judges need to weigh the moral justifications behind countermajoritarianism against other concerns. Even if a judge avoids making normative judgments in adjudicating an individual case by choosing a highly constraining theory, their decision to choose a constraint in the first place

[107] Fallon, supra note 44, at 566 ("[T]he more tightly a theory purports to cabin judgment, the easier it often will be to identify a theory's substantive consequences.").

[108] See, e.g., Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 Iowa L. Rev. 1287, 1290–91 (2004) (describing the countermajoritarian problem).

[109] See, e.g., Michel Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 S. Cal. L. Rev. 1307, 1326–27 (2001) (discussing the importance of predictability for the legitimacy of legal regimes); Jonathan R. Macey, Originalism as an "Ism," 19 Harv. J.L. & Pub. Pol'y 301, 307 (1996). By limiting a judge to either certain results or certain justifications, constraint can create a degree of predictability and stability in the law.

involves normative judgments. In this way, the constraint approach fails to avoid the difficulty of moral debates.

The account above of how a judge chooses a constitutional theory is open to the counterarguments that issues like the countermajoritarian problem are not necessarily the issues judges consider or that these normative judgments are insubstantial. The response is that judges still grapple with the normative consequences of their constitutional theory when adjudicating individual cases due to the binding authority of constraint that proponents of constraint must assume. Proponents of constraint presuppose that there is a right to receive an outcome based on this constraint. Otherwise, there would be no force given to their constraint. Put more abstractly, if a judge holds herself out to be constrained to reach decision *X* but instead reaches *Y*, then the judge engaged in bad legal reasoning according to their constitutional theory.

So, a theory of constraint, if binding, involves an evaluation between the decision the constraint requires and a decision the constraint rules out. Recall the *Washington v. Glucksberg* majority's framework for determining fundamental rights under the Fourteenth Amendment.[110] When a judge applies and gives force to this framework, they are necessarily precluded from finding that the Fourteenth Amendment protects a right to assisted suicide.[111] By compelling such a decision, the judge is implicitly preferring the normative justifications behind their theory over a theory that reaches a different conclusion. So, even for a theory that purports to leave the "debate about the morality . . . of physician-assisted suicide" to the legislature, the theory is still making a normative call about the court's role in society.[112]

The normative issues that necessarily arise when a judge chooses and applies a constitutional theory are not trivial. As noted above, it seems plainly reductive for a judge to consider only the degree of constraint a constitutional theory offers when deciding between various theories.[113] It seems reductive because relying solely on constraint ignores how people ordinarily discuss constitutional theories. Judges or scholars do not care

[110] See supra notes 1–6 and accompanying text.

[111] Washington v. Glucksberg, 521 U.S. 702, 719–36 (1997).

[112] Id. at 735; see also Erwin Chemerinsky, Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters, 54 Okla. L. Rev. 1, 3 (2001) ("There are no such things as 'neutral' principles. Whether to uphold segregation or require desegregation, whether to allow or prohibit enforcement of racially restrictive covenants, inescapably involves the Justices making value choices.").

[113] This example was noted in Part I, *supra*.

only about the degree of constraint when evaluating a constitutional theory. Rather, constitutional theorists should be concerned with justifying their constitutional theory and the resulting exercises of judicial power.[114] That justification should require providing an account of the normative and moral implications of their theory. Failure to do so means that "one can no longer assume that law is worthy of respect," and the judge will therefore fail at justifying their theory.[115]

Apart from justifying a constitutional theory, considering the moral issues and purposes of constitutional theories is conceptually important for understanding and evaluating theories. While Professor Lon L. Fuller had a different focus in *The Morality of Law*, he recognized the importance of considering the ultimate purpose, or telos, of law.[116] For example, an understanding of the telos of a constitutional theory may be that theories should result in very clear rules and predictable outcomes. For Fuller, failure to consider the telos of constitutional theories results in people "los[ing] wholly any standard for defining legality."[117] Without an overarching purpose to the law, people could not compare competing constitutional theories because they would lack a shared evaluative criterion to compare them. But, taking the example from above, an understanding that theories should be highly predictable provides a metric to compare the *Glucksberg* framework to defining fundamental rights with the approach the Court took in *Obergefell v. Hodges*.[118]

Importantly, an unstated assumption of this argument is that it presupposes a non-positivist jurisprudential theory. A positivist, instead of justifying their constitutional theory on normative grounds, will "assert that their position fairly expresses what the law simply is, and claim that in light of the 'lawfulness' of their approach, they need offer no further normative justification."[119] This Note considers only non-positivist judges because it is concerned with the justifications for constraint. A

[114] Fallon, supra note 44, at 548–49.

[115] Levinson, supra note 37, at 74.

[116] Fuller, supra note 98, at 145–51. Fuller argues this even though he recognizes the concern in legal scholarship about being too idealistic about the practice of law, especially when discussing some higher purpose of law. See, e.g., id. at 146. For another discussion of idealistic accounts of judging, see Paul Horwitz, Judicial Character (and Does It Matter), 26 Const. Comment. 97, 130–31 (2009) (discussing and criticizing Professor H. Jefferson Powell's idealism).

[117] Fuller, supra note 98, at 147.

[118] 576 U.S. 644, 664 (2015) (describing the open-ended approach to defining fundamental rights).

[119] Fallon, supra note 44, at 548–49 (footnote omitted).

judge caring about the ability of a constitutional theory to limit moral decision-making will not be a positivist. For a positivist, a more constrained Theory *X* is not preferable to a less constrained Theory *Y* because Theory *X* involves fewer moral decisions. Instead, a positivist would argue that Theory *X* is preferable because it is the law.

The result of the arguments made in this Part so far is that the constraint approach cannot avoid considering moral judgments. Descriptively speaking, people commonly consider the normative considerations of constitutional theories. Further, those considerations are important both for justifying a particular theory and for evaluating various theories. While the above arguments apply to both the constraint and the internal goods approaches, the next Section compares the two.

B. The Internal Goods Alternative

This Section compares the internal goods approach with the constraint approach by asking how good they are at resolving the concerns about moral decision-making and instrumentalist judging. To compare the two approaches, first consider how the internal goods approach would be operationalized. The internal goods approach tells judges not to consider primarily the degree of constraint in choosing a constitutional theory, but instead to value the degree to which the theory succeeds according to the internal goods of judging. Importantly, this is flexible and incorporates the virtues—for example, a judge may reconsider their theory's account of the internal goods if they face a difficult case prompting that reconsideration.

To put the point more concretely and to summarize the points made so far, suppose a judge comes across a difficult case—a case where the determination of a correct answer is difficult and contested.[120] How does a judge following the internal goods approach resolve this case? As mentioned in Part III, because the judge understands judging as a practice, they will be motivated to make their decision comport with the internal goods of judging. Therefore, this judge will apply well-accepted methods of legal argumentation like arguments from precedent, text, and history. Further, this judge will try to determine with more specificity the internal goods by asking what the institutional rights of the parties are. However, because this judge is considering a hard case, this step may be difficult

[120] See, e.g., Greenawalt, supra note 79, at 1039 (discussing a situation where a difficult case may arise in the context of Dworkin's institutional rights).

and result in highly contestable conclusions even though they are exercising the virtues and consulting well-accepted ideas about the institutional rights of the parties. It is at this point that the constraint approach diverges and criticizes the internal goods approach for the reasons outlined in Part II. The constraint approach seeks to avoid this contestable step and instead imposes a correct outcome (a results-oriented constraint) or a correct method of reasoning on the judge (a justification-oriented constraint).

In the worst-case scenario from the perspective of the internal goods approach, the constraint approach ignores people's institutional rights. Highly constraining constitutional theories such as ruling for the plaintiff every time or even originalist Thayerianism seem wholly inconsistent with most reasonable understandings of the internal goods of judging. As long as there is some value in ensuring that litigants receive a decision respecting their institutional rights, the constraint approach is defective. This is true, even if the internal goods are contestable and unclear, for two reasons. First, as mentioned above, there are "fixed points" of judging representing well-accepted understandings of internal goods with which many highly constraining constitutional theories are inconsistent. Second, the virtues help judges make better determinations of the internal goods, meaning that a finding of internal goods is not hopelessly contestable.

As argued in the previous Section, the constraint approach cannot avoid considering moral judgments. Normative concerns necessarily arise during the decision to choose a constraint and apply it. Further, a judge following the constraint approach may even consider normative issues that are like institutional rights. But at this point, the constraint approach will not have succeeded in achieving its goal of avoiding moral decision-making.

Taking score for each approach now, in the worst-case scenario where the constraint approach ignores the internal goods, the internal goods approach is preferable. But in the more realistic scenario, because both approaches require judges to consider moral arguments, they both face the problem of dealing with difficult, highly contestable moral debates and the issue of instrumentalist reasoning. However, the differences between the approaches mean that the internal goods approach mitigates these concerns and has additional advantages over the constraint approach.

The first argument is that the internal goods approach provides analytical clarity to evaluate constitutional theories. The evaluative metric

for the constraint approach is constraint itself. Reasoning apart from the one imposed by the justification-oriented constraint or a decision outside of the scope of the results-oriented constraint is "activist" and therefore bad. This creates a problem when people want to compare theories using different constraints. When comparing an originalist methodology with a living constitutionalist methodology, the "better" theory depends entirely on what constraint one choses. So, there is no way for judges to meaningfully speak to each other—they will just accuse each other of being activists. This point is certainly descriptively accurate considering the vast emphasis on calling judges activist[121] while ignoring the moral justifications actually used in reaching those methodologies.[122]

This stalemate indicates that constraint alone cannot provide a rational basis for how to decide between constitutional theories—the central question this Note set out to answer. Further, there are significant practical costs to this stalemate, as an outsider deciding between constitutional theories will just see people accusing each other of being activist.[123] Finally, this point motivates the concerns mentioned above that Fuller had about losing the ability to have a shared understanding of how the law should operate.[124]

The internal goods approach avoids this stalemate by providing a shared evaluative metric for constitutional theories: the internal goods themselves. Simply, the internal goods approach means that "[a] bad application of law can be identified by reference to these standards."[125] Judges can be rationally criticized for their specification of the internal goods or their application of the internal goods to a particular set of facts. And this is a shared evaluative metric because judges engaged in the practice of judging share a goal of properly assigning the institutional rights to litigants.

[121] See supra notes 7–9.

[122] See supra Section III.A.

[123] For practices, however, the shared goal of achieving the internal goods of the practice allows for more meaningful evaluation of people's actions. See Retter, supra note 14, at 13 ("The conduct and motivations of a participant can be held accountable by other participants through the giving and receiving of reasons for action. We can ask other participants why they acted in the way that they did, and hold the reasons that they give accountable to the shared standards of the practice if they are committed to being a cooperative participant." (footnote omitted)).

[124] See supra note 116.

[125] Retter, supra note 14, at 18.

The internal goods approach also resolves the problem of instrumentalist judging. Philosophers have recognized the importance of telos in understanding people's actions, arguing that "shorter-term intentions . . . can only be made[] intelligible by reference to some longer-term intentions."[126] In the context of judging, absent an account of the internal goods, we cannot tell whether the first judge is trying to do their best at judging or instead giving effect to their own personal moral beliefs. Further, understanding the purposes of constitutional theory helps us understand the development of law.[127]

The second argument in favor of the internal goods approach focuses on the virtues, which are not part of the constraint approach. To start with, the virtues of honesty and justice squarely respond to the instrumentalist reasoning concern.[128] More fundamentally, the role of virtues means that the problem of difficult or unresolvable moral debates is not as serious in the internal goods approach as compared to the constraint approach.

The internal goods are stated at a high level of generality and are certainly contestable, but this does not mean that the internal goods approach cannot be operationalized or provide a shared evaluative metric for constitutional theories. Instead, the virtues act as a procedural limitation on judges by ensuring that they are in fact considering and doing their best at answering the difficult questions about the internal goods. Because the virtues function as procedural checks, the difficulty of moral debates is less of a problem in the internal goods approach, assuming at least some progress over time.

Further on this point, the central role virtues play in the internal goods approach emphasizes the importance of judges' decision-making processes in clarifying the internal goods. While the actual outcome of a judge's constitutional theory may be contestable, people can evaluate judges by focusing on whether they exhibit the virtues of judging. In other words, the virtues present a less contestable option to evaluate judges.

[126] MacIntyre, supra note 12, at 207–08.

[127] Id. (discussing how an understanding of a person's "longer-term intentions" is necessary to adequately understand what they are doing). Professor Powell used a narrative description of the tradition of American law to respond to contemporary constitutional theories. Powell, supra note 37, at 9–10.

[128] See supra Section III.B.

Practically, this means that the importance of judicial character and virtue should be given greater focus.[129]

A critic may argue that the internal goods approach does not differ meaningfully from the constraint approach. After all, identifying justifications for a constraint could involve evaluating normative issues like the internal goods. But an important difference between the two is that the normative issues considered in deciding on a constraint are not necessarily internal goods but may instead be external goods. A constitutional theory may be justified on the grounds that it achieves expedient policymaking. Expedient policymaking, however, is an external good because legislators also seek to maximize expedient policymaking, so this good "is never to be had *only* by engaging in some particular kind of practice."[130]

The difference between internal and external goods is especially important for the instrumentalist judging concern. Suppose that a judge relies on normative concerns not rooted in the internal goods. For example, a judge may want to rely on the constraining function of tradition to secure their politically conservative values.[131] The results of this theory may well coincide in many cases with those of another judge who decided on a methodology based on the internal goods approach.

However, the judge guided by external goods may encounter a subsequent case where the constraint does not yield the result they like. In other words, as applied to this particular case, the constraint does not achieve a politically conservative result, but a less constrained constitutional theory would. The judge rationally should fail to abide by their prior constraint and instead adopt a looser constraint to achieve their desired conservative values.[132] But this results in instrumentalist judging, a problem that the constraint approach was supposed to resolve. In contrast, judges motivated by the internal goods would not act the same way because internal goods are motivating their methodology rather than

[129] Solum, Aretaic Turn, supra note 106, at 478 ("The process of judicial selection should prioritize the nomination and confirmation of individuals who possess the judicial virtues . . . .").

[130] MacIntyre, supra note 12, at 188.

[131] Like expedient policymaking, securing conservative political values is an external good because one can achieve this by legislating as well as judging. See id.

[132] Retter, supra note 14, at 13 ("When a participant's motivation for engaging in a practice fixates on external goods, the binding authority of institutional rules, and the officials and institutions applying those rules, will have primary significance for orientating their action in the practice.").

external goods. As MacIntyre argues, engaging in the internal goods of a practice relies on a different source of motivation, one where "allegiance to the joint enterprise secures commitment to the virtues of a good practitioner and to the mutual standards of the practice."[133] This hearkens back to the example of the child playing chess: the prioritization of external goods does not provide motivation for the child to faithfully engage in the practice.

CONCLUSION

Embracing an internal goods approach to judging is certainly aspirational, as it requires judges to strive to exercise certain judicial virtues in order to minimize the costs motivating constraint. Further, the internal goods approach to judging is described at a much higher level of generality than the constraint approach is. However, this does not mean the internal goods approach is too unclear to be applied; instead, it is a useful approach to understanding judging.

To recap, the internal goods approach works by having judges prioritize the internal goods. This Note outlines two significant internal goods of judging. First, judges must decide constitutional issues using *legal* arguments such as precedent, structures, and purposes, rather than using purely moral or economic reasoning. Second, judges must examine and specify the principles and standards required by the institutional nature of law. Even though the internal goods of judging are very broadly stated, this concept is not without limits. Judges do not start from scratch in evaluating the internal goods of judging. Rather, by entering into the practice of judging, they accept authoritative judgments about the concrete meaning of the internal goods of judging.

More importantly, the exercise of judicial virtues both serves as an important limitation on the internal goods approach and clearly shows how the internal goods approach differs from the constraint approach. Apart from honesty and courage, an important judicial virtue is that judges should confront the conflicting values implicated in making a decision and, if necessary, update their understanding of the internal goods of judging based on the particulars of a case. In contrast with the constraint approach, where a value judgment is invariably imposed on a judge, the internal goods approach asks judges to attempt to accommodate and weigh the varying specifications of internal goods. Further, by

[133] Id.

engaging in this act of accommodation and weighing, judges are less likely to improperly rely on their own moral beliefs.

The first important result of this account of judging is that it furthers legal philosophy by showing a rich connection between Dworkin's idea of institutional rights and MacIntyre's account of practices. This Note argues Dworkin's idea of institutional rights can fairly be described as part of MacIntyre's understanding of a practice. As a result, Dworkin's theory is made richer by considering MacIntyre's concepts of virtues and practices.

A second important conclusion is that the internal goods approach provides a useful conceptual framework for understanding the advantages and disadvantages of constraint. Even if a judge or scholar implicitly consults the fundamental institutional goods of the legal system in coming to a constraint, focusing merely on the degree of constraint misses very important issues. Rather than looking to the degree of constraint provided by a theory, the internal goods approach tells us to consider which constitutional theory understands the internal goods of judging best. So, rather than merely criticizing an outcome as "activist," we can instead question and evaluate a judge's account of the internal goods.

Further, this Note argues that the internal goods approach is preferable to the constraint approach. In doing so, this Note looks at the fundamental issues the constraint approach is set out to resolve: the concern about judges imposing their own moral beliefs, the difficulty in weighing competing moral principles, and the concern about judges reaching an opinion under only the guise of principled reasoning. I argue not only that the constraint approach does not resolve these issues, but that the internal goods approach better resolves these issues through the exercise of virtues and the focus on internal rather than external goods.

Finally, one helpful way to understand the difference between the internal goods approach and the constraint approach is as the difference between applying a rule-like approach and an individualized and particularized approach. This can be understood as an issue of trust: constraint tells us that we should impose a rule-like approach because we do not think judges operate best by engaging in normative arguments when adjudicating cases. The non-comprehensive account of the judicial virtues in this Note is meant to touch on that issue and provide a practical solution. Instead of merely imposing a constraint on judges as a solution, the internal goods approach tells us to focus on whether judges do in fact exercise virtues. If they do, then the internal goods approach tells us to be

less suspicious of judges coming to their own conclusions about the internal goods of judging.