Private Judgment, Individual Liberty, and the Role of the State

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Samuel Fleischacker’s *A Third Concept of Liberty: Judgment and Freedom in Kant and Adam Smith* has two central theses. First, there is a third concept of liberty, between Isaiah Berlin’s two concepts of “negative” and “positive,” which is superior to both as a guide for political policy. This third concept is the liberty of individual judgment, recommending that governmental communities structure themselves in ways that allow the greatest possible scope for individuals to exercise their natural human judgment. Second, this concept of liberty is what Kant was attempting to describe in certain central parts of his critical corpus, particularly in the *Critique of Judgment*, and it is what Adam Smith was striving to protect in his social philosophy, particularly in the *Wealth of Nations*. The second thesis is interesting and worthy of attention from both Kant and Smith scholars, though I am skeptical about parts of Fleischacker’s argument. The first thesis, however, faces significant difficulties, despite the fact that Fleischacker has many interesting things to say about human judgment and the important role it plays in living a truly happy life.

Fleischacker’s book repays close investigation, especially as it provides an intriguing new argument for a communitarian conception of the role of government. In this paper, then, I would like to examine the cogency of Fleischacker’s first, and principal, thesis, and hence the extent to which it can provide adequate ground for the general political program that he endorses. After a brief summary of Fleischacker’s conception of human judgment, I turn to his philosophical agenda. I begin by briefly addressing his argument that one of the chief ailments of contemporary America is the small amount of leisure time that most Americans enjoy and the deleterious effects Fleischacker believes this has. I then raise a series of issues, all of which concern Fleischacker’s argument that a flourishing, truly human life—the lynchpin of which, on his view, is opportunities for judgment—entails that the state must provide certain basic necessities for all its citizens. Finally, I close by suggesting that the central problem Fleischacker’s proposal faces is not unique to him: Kant and Smith, in whom Fleischacker finds sympathies with his own position, both face similar difficulties. I shall then suggest that my discussion locates a problem not only for the political programs of Kant, Smith, and Fleischacker, but also for political communitarianism generally insofar as it relies on arguments like those of Kant, Smith, or Fleischacker.
The “judgment” that Fleischacker argues is central to human flourishing is “a complex skill that draws on what we do in aesthetic interpretation, in sorting through empirical evidence, in making decisions in the common law, and in evaluating our ends for cogency and value” (8). Since it is a skill, it admits of degrees, and to employ it well requires practice. And although it involves applying rules to particular cases, there can be no finite set of a priori rules that will exhaustively determine what one should decide in every case (12–13). There will always be an element of indeterminacy—usually several such elements—that require interpretation of the cases at hand, of the relevant rules, and of how the rules should be applied to the cases. For these reasons, Fleischacker’s paradigmatic notion of judgment is the conclusion reached in a courtroom (10).

Fleischacker thinks that each of us develops his own “moral idiolect” (15), which provides standards by which he judges himself and others, based on the unique experiences each of us has had. These unique experiences give us unique local knowledge, incentives, and desires, which over time guide our development of a “personal picture of what human nature is like and what ends it is most appropriately suited for” (15). Although the experiences that inform one’s moral idiolect essentially involve interactions with others, it is nevertheless intensely personal because unique to each of us. Thus Fleischacker concludes that it is preeminently the manifestation of this unique moral idiolect in the series of one’s own moral judgments that constitutes “the most specific, most personal expression of [one’s] freedom” (15).

Two things follow, Fleischacker thinks, from his conception of human judgment. First, the activity of judging—what Fleischacker calls “phronetic activity,” after phronesis, the Aristotelian word for judgment (116 and passim)—is one of the most, perhaps the most, important single element in human flourishing, inasmuch as it is central to who each of us is. Second, given this importance, significant pains must be taken to create and protect a realm in which there are opportunities for each of us to exercise this skill of judging. Each of us must have, that is, the freedom to judge for himself: this is Fleischacker’s “third concept of liberty,” and insofar as it is the duty of government to protect proper liberty, Fleischacker argues that it must therefore protect our private judgment.

A number of things fall out from Fleischacker’s conception of what it is to be human, what it is to lead a flourishing human life, and the role that a person’s private judgment plays in such a life. In particular, he argues that a certain amount of leisure is required. The leisure is necessary because it allows one opportunity to deliberate, both about the loose rules of judging one has or employs and about the cases to which one applies them. Since deliberation is necessary for the development of judgment, at least some time must be had that is free from the otherwise pressing needs of life—which means people must have leisure time. Part of the evidence Fleischacker marshals in
support of the importance of free time comes from the facts that, on the one hand, people today have increasingly less of it, and, on the other hand, as would be predicted by Fleischacker’s argument, it seems that people’s ability to judge is weakening commensurably.

But here the argument stumbles, I think. Quite apart from the plausibility of Fleischacker’s Aristotelian claim that leisure is necessary for human flourishing (a claim with which I agree), Fleischacker’s argument “that government needs to ensure adequate leisure for its citizenry” (116, emphasis in original) stumbles because contemporary Americans arguably have more leisure time than any other Americans have ever had—and that level of leisure has resulted principally from technological innovations provided by the increasing prosperity markets have enabled, not by government action. Fleischacker thinks that Americans in fact have little leisure time, and to support his view he cites a study by Juliet B. Schor, *The Overworked American*,2 which argues that as time on the job has increased over the last twenty years leisure has dwindled. But Schor’s claims have been challenged by a number of more recent studies. For example, John P. Robinson and Geoffrey Godbey, in their study *Time for Life*, argue that in fact Americans are today working less than they did in 1965, having gained nearly a full hour of free time per day.3 Now it is true that many people use much of their free time to “work”—that is, to do things that are difficult or that supplement their income—but although Schor includes such activities in her “on the job” estimates, they should not be considered such because this is time people do not need to work to provide themselves the basic necessities of life. Indeed, people do not themselves consider it “work”; it is instead time they choose to “work” for other reasons, often because they simply like doing it. And even if they are earning income, they might nevertheless at the same time, to adopt Fleischacker’s language, be developing their phronesis.

Similarly, W. Michael Cox and Richard G. Alm have recently shown that technological advances have led to steadily falling prices of almost every commodity over the course of the previous century, enabling Americans to buy far more with far less; the result is that—despite the steadily growing slice of their incomes that federal, state, and local taxes have taken—they have to work much less to provide their basic necessities than they once did.4 For example, whereas a century ago it took an average worker 1 hour and 41 minutes of work to pay for a pair of stockings, today it requires only 18 minutes of work; in 1919 a half-gallon of milk cost 16 minutes of work for the average American, but in 1997 it cost only 7 minutes; the median-priced home in 1920 cost 7.8 hours of work per square foot, but in 1996 the cost was 5.5 hours.5 Because similar histories hold for almost all things people need, the implication is that Americans now have more time left to spend as they wish than they have ever had.6 Thus if Americans now have more leisure time than ever before and their level of overall material prosperity is higher than ever before, there seems less reason, and less justification, to call on the government to step in in an attempt to give citizens even more free time.

In his foreword to the Robinson and Godbey study, Robert D. Putnam says that their work shows that Americans’ free time comes “in tiny packets scattered across the workweek”;7 Fleischacker takes this to support his (and
Schor’s) argument that Americans do not have sufficient leisure (even if enough time for leisure) because it is not the kind of sustained, uninterrupted time Fleischacker thinks is necessary for true leisure. But this is to shift the argument away from a neutral concern for free time to a substantive concern for what people actually do with their time. For example, conservative estimates say that Americans spend approximately 30 hours per week watching television alone—which, at fully 65 days per year, is far more than the average of any other nation. One may not like what Americans do with their leisure time, as I am sure Fleischacker does not, but that does not mean it is not leisure time. Granting that Fleischacker is right that not enough of this free time is spent in a properly deliberative and phronesis-exercising way, the amount of time they have is now no longer at issue; what they do with it is. Thus if Fleischacker’s argument is really that Americans should be doing something else with their free time than what they are now doing, his position must be informed by a substantive judgment about what it is good for them to do, not by a neutral judgment that they do not have enough time in which to do it. It would not suffice, then, in answer to Fleischacker’s worries about leisure simply to pass a law mandating a certain amount of time off work, as Fleischacker suggests (238); rather, the law would have to specify how that time off work is spent—granting the state a considerably larger role in directing individuals’ lives than Fleischacker seems to suggest. This extended scope of state jurisdiction, however, seems prima facie incompatible with Fleischacker’s concern for protecting individuals’ liberty for private judgment.

III

This leads to the other issues I wanted to address, all of which concern Fleischacker’s argument that the state needs to provide the conditions necessary for developing proper phronesis. Fleischacker argues that his third concept of liberty is a middle way between the libertarian “negative” concept of liberty and the socialistic “positive” concept of liberty: it requires the government to provide citizens with basic necessities to free them for leading lives with ample opportunity for phronetic activity (thus respecting positive liberty); but it also requires the government to limit itself by not making all decisions for its citizens, in this way allowing scope for citizens’ phronesis to act (thus respecting negative liberty).

Let us assume that Fleischacker is right about the amount of leisure time Americans have and in holding that they have increasingly less time available to them for the quiet deliberation needed to cultivate phronesis. Let us also assume, to make the case clearer, that he is right to think that phronetic activity is an essential element of leading a flourishing human life—that without it no person can be truly happy, or, as Fleischacker frames it, have a life filled with “proper pleasures.” Fleischacker’s argument still suffers from this problem: his political conclusions do not follow.

At times Fleischacker seems to think that if he has shown that judgment is crucial and that certain circumstances (like leisure) are necessary to cultivate judgment, then it follows ipso facto that the state ought to look after
those circumstances. But that does not follow. Grant that I should exercise
more, or that we should all exercise more, or even that exercising more is
crucial to everyone’s overall well-being: it does not follow from any of that
that the government must take over the direction of everyone’s exercising. Or
grant Plato’s claim that what children read has considerable influence on the
kind of adults they become; grant even that what children read is of greater
influence on them than any other single factor: still it does not follow that the
state must therefore take over direction of what children read. Another argu-
ment is required to link the two. To be specific: one needs an argument to
show that what is crucial for human flourishing ends up requiring govern-
mental provision.

One would expect, then, that Fleischacker would have a persuasive argu-
ment on this point, but I do not think he does. Here is an example of how his
argument proceeds:

A minimal condition for participation in a sphere of phronetic activity,
especially if one’s work life lacks any interesting tasks, is that one have
the time to discover, and develop the skills for, such a sphere. It follows
that from the importance of judgment and its proper pleasures we can
resuscitate the old liberal idea that government needs to ensure adequate
leisure for its citizenry. (116, emphasis in original)

But it does not follow, I suggest. Fleischacker presumes the connection
without argument. Here is another example of the non sequitur:

More active [as opposed to passive] preferences use and therefore
develop our capacity for choice itself—for intelligent, which is to say
phronetic, choice. So the political powers that be must guarantee us sub-
stantial opportunities to satisfy these preferences because otherwise we
will lose our freedom. (118)

In discussing the sometimes unhappy role luck can play in our affairs,
Fleischacker writes:

As a society, we are obligated to put every resource we can muster into
preventing and overcoming the circumstances that make children unable
to grow up with good characters, and to provide insurance to adults
against events that “dislodge” them from so much as having control over
their own characters, from retaining the virtues that enable them to
handle and appreciate luck at all. (234)

Following Rawls, Fleischacker continues:

[I]t is not appropriate to let luck provide whatever it takes to insure that
people not get entrenched in starvation, in slavery, in illness or despair
sufficient to “corrupt . . . desire, expectation, and thought,” in miseries
sufficiently “crushing and prolonged” to break their self-command. The
material security to prevent such disintegration of virtue is the “guaran-
teed minimum" of political economists. This minimum we as a society must supply, must distribute to each, not expect each to earn for himself. (235)

Finally, Fleischacker concludes:

To hold each responsible for his or her own acts, to expect people to work for their own ends, we must provide them with the means that allow for responsibility: the means of health, leisure, and education by which they can judge intelligently of their lives and their conditions. (235)

As Fleischacker makes clear, when he says "we" must provide such things, he means the state must do it. But as these citations also make clear, Fleischacker gives no argument why the state must do such things, as opposed to anyone else or any other group. Why not families? Why not churches? Why not other voluntary organizations, especially given the fact that Fleischacker elsewhere extols the superior virtues of voluntary individual action over "organized" public action? It would seem that any of these might be called for, or perhaps all of them, depending on the circumstances. Indeed, depending on the circumstances of a particular case, perhaps what is called for is precisely no help from anyone. And why should we not expect individuals to provide this for themselves—especially given our concern for their having opportunities to develop their phronesis? In any case, what seems clear is that state action is neither the necessary nor the only possible implication of the importance of human phronesis, and hence there is a gap here in the argument.

One way Fleischacker tries to close this gap is by constructing an argument like the following. According to the liberal view beginning with Locke, the duty of government has been held to be to protect individuals' freedom. Since individuals' freedom consists in their making choices, it follows, thinks Fleischacker, that the government's duty is to protect their capacity to make choices. But because the capacity to make choices just is Fleischackerian judgment or phronesis, it follows from this, in turn, that on the liberal view the government's duty is to provide the conditions necessary to make this phronesis a reality in its citizens. Thus Fleischacker writes:

The liberty I am proposing, by contrast [to the libertarian conception], defines the sphere around the individual in terms of his or her ability to make judgments and act on them—an ability that is connected as much to the individual's access to resources she needs as to her actual ownership of particular resources—and therefore allows the "right to property" to be treated as but one rough estimation of the freedom the state must protect, rather than so closely identified with that freedom that restrictions on the use of property will always be illegitimate. (321, n. 24; emphasis in original)

But this argument does not quite work, I think, because it builds into the notion of protecting people's choices a substantially thicker conception of
“choice” than is at work in Locke or any other classical liberal. On the classical liberal view, a person who makes bad choices, occasionally or systematically, is still choosing; and unless he is coerced, he cannot claim not to be choosing freely. Fleischacker, by contrast, wishes to argue that a person whose choices are injudicious is not actually free, the argument being, apparently, that if he makes bad choices his phronesis is not operating properly, and an improperly operating phronesis disables a person’s freedom to choose. Thus it seems that Fleischacker’s state would in practice set out to create an environment for citizens that encourages them to make certain substantive judgments—which is quite far from the Lockean view that a government must protect people’s private property, regardless what they do on it. So the gap still needs to be bridged.

A second argument Fleischacker might intend to fill this gap is that without such institutions no society could survive, which therefore justifies governmental enforcement or provision of them. Perhaps Fleischacker intends to draw on Adam Smith’s argument in The Theory of Moral Sentiments that since justice is a requirement for any society, society is justified in enforcing it, coercively if necessary. But Smith’s argument, as he made quite clear, pertained only to what he called “justice,” which he conceived as the negative duty to respect others’ life, liberty, and possessions (TMS, 82–84). Fleischacker’s “judgment” is much more expansive than Smith’s “justice,” and hence could not rely on Smith’s argument. Indeed, Fleischacker’s argument for providing others with opportunities for phronetic activity might fall under the scope of what Smith called “beneficence,” which Smith said should not be enforced by the state (TMS, 86). Now it is true that in one place Smith suggests that there might be circumstances in which a civil magistrate should legislate beyond the scope of mere justice (TMS, 81, §8). This would not support Fleischacker’s argument, however, because Smith does not suggest that society could not otherwise survive. Moreover, recall that in book 5 of The Wealth of Nations Smith argued that the government ought to provide a number of things beyond the “justice” of TMS, but the argument there arises from Smith’s utilitarian concern that the market would not provide a few things that would nevertheless benefit everyone. In this vein Smith suggests that the government would have to provide things like canals, roads, and perhaps public schools (WN, 723–814). But no claim is made that society could not function without such things—just that people’s lives would be more convenient and that menial workers’ mental lives would be more cosmopolitan. In any case, it seems untrue that no society could survive unless Fleischackerian governmental institutions were in place. There have been many communities that have not had all the things Fleischacker goes on to argue are the necessary prerequisites for widespread phronetic activity—including universal state-provided education, universal state-provided health care, and universal state-guaranteed leisure time—and yet have not only survived but arguably flourished quite well (the United States, for example). That does not prove that such societies have been perfect, just that Fleischackerian institutions have not been necessary for their flourishing.

So we are left with an interesting claim that phronetic activity is crucial to human flourishing and truly “free” choice, and a conclusion that the state
must take action to provide for such activity: but we have no adequate argument linking the former to the latter.

IV

Let us now turn to the central part of Fleischacker’s political argument, which faces two important problems. First, in attempting to navigate a third, intermediate way between Berlin’s two concepts of liberty, Fleischacker ends up in fact coming much closer to one of Berlin’s concepts than he does to staking out a distinct third concept. When one looks at the list of specific things Fleischacker thinks the government will have to provide its citizens so that they will have opportunity for proper phronetic activity, it becomes clear that, despite the sympathies he repeatedly says he has for elements of “libertarian” and “laissez-faire” political thought, Fleischacker’s state is quite expansive—complete with many different agencies and departments, and plenary powers to tax and regulate.

The second, more substantial problem is that it seems inconsistent to want to extend private phronesis, on the one hand, but endorse an expansive state, on the other. This problem is not unique to Fleischacker, however; I address this in the next section of the paper. Now let us return to the first problem.

In order to allow for “the judgment that we need for truly free choices” (239), Fleischacker argues that the state must do all of the following: (1) provide “good information about the options among which one is choosing”; (2) provide “a thorough education in the skills of interpretation and the assessment of evidence,” including education in “the skills of aesthetic interpretation” and in applying “those skills to the decisions [citizens] need to make about running their own lives”; (3) provide “access to rich, clear, and clearly organized facts about products and jobs”; (4) and provide “centralized computer services open to everyone” where such information will be available (239). So far Fleischacker’s list is not very different from some of what federal, state, and local governments routinely do—or attempt to do—in America today. But Fleischacker is not finished. In order to alleviate problems he thinks a pure free market would lead to, the state must also ensure (5) that all citizens are raised “from childhood on with adequate nutrition, shelter, and health care”; (6) that they know “they would receive considerable aid in unemployment”; (7) that they know they “could take any job in the country because funds [are] available to transport them there”; (8) that they are “well trained in evaluating evidence and [have] easy access to a large amount of information about their opportunities”; and (9) that they have “sufficient leisure to reflect on their lives and alter them if necessary,” on the order of “six weeks a year, or a several-month sabbatical every few years” (238–40). (Duty (8) might be encompassed by some combination of (1–3); if so, we can eliminate it from Fleischacker’s list, allowing the other eight to remain. On the other hand, duties (6) and (7) require not just that the state notify citizens of services, but also that it provide them—which means we should perhaps increase our list.)

The government that could undertake to do all that is a large one—larger, it would seem, than what is in place in America today. Considering that
federal, state, and local governments in contemporary America consume more than one-third of America’s total gross national product, the government protecting Fleischacker’s “third,” “true” concept of freedom would, it seems, be considerably closer to the socialistic model than to any libertarian model. For it would require extensive state-supported educational programs, nationalized health care, nationalized information and transportation systems, and systematic national oversight of businesses’ vacation policies, benefits packages, retirement offerings, employment contracts, and working conditions. Moreover, the requirements to provide adequate overall conditions for all children would require extensive central planning. Among other things, all this state apparatus would have to be supported by heavy taxation, which would entail large-scale redistribution of wealth, and by an extensive information-gathering agency, which would entail the procurement of a great deal of detailed information about all citizens. 

Independently of whether one thinks Fleischacker’s state is a good one, it seems that it embodies a notion of “freedom” that is substantially closer to Berlin’s “positive” freedom than Fleischacker seems to think. Berlin’s notion of “positive” freedom is one that considers a person free insofar as he is not only not limited by the overt coercion of others but also not limited by contingent facts about himself or his circumstances. By thinking of a person as free only when he can fully realize all that he hopes and is able to be, this notion of freedom would ask the state to provide much more than the merely defensive protection from the invasion of others that the negative notion of freedom would ask. And this seems to be Fleischacker’s picture. The central notion in Fleischacker’s argument is human judgment, which, because of its importance, drives Fleischacker’s beliefs about what a state ought to do: it must free people from whatever obstacles stand between them and exercising their phronetic activity, which according to Fleischacker entails all the duties listed above. But this directive seems quite close to the directive to provide each person with the opportunity to become all he hopes and is able to—returning us to Berlin’s “positive” freedom. Thus rather than providing a distinct third concept of liberty, it seems Fleischacker has instead simply repackaged Berlin’s second concept in his new terms.

The question of whether having such an expansive, activist state—whatever we ultimately call the notion of “freedom” that it embodies—is a good idea cannot hide for long, however, and indeed it must be addressed, since the proper nature of the state is of central concern to Fleischacker himself. Fleischacker’s argument is hard to render consistent on this score. On the one hand, he extols the virtues of the person who judges for himself, insisting that a proper government must allow the widest scope possible for people to exercise their phronesis; on the other hand, however, he argues that the proper government is an expansive one that undertakes a great many tasks. Can he have it both ways?

It is not clear how. Consider what Fleischacker says about the importance of the freedom to judge, which entails freedom from governmental and other
third-party interference. One thing Fleischacker thinks recent democratic theorists have gotten right is the importance of autonomy and independence. “Still,” says Fleischacker, “in the end what matters is independence itself, not the mode of reaching it, and it is far from clear that participation in government is the only way to develop that quality” (248). Part of the reason for Fleischacker’s distrust of government here is the kind of people who are in government:

Arrogant, self-deluded, and otherwise morally incompetent people abound who participate well in communal government. Political activists, kibbutz leaders, school and church board members—anyone who has spent a significant amount of time with such people knows plenty who are shallow, ambitious, and vain, whose service to their cause or community is a means of self-promotion or, at best, a distraction from personal failings. (248–49)

Fleischacker concludes—tellingly—that it “is indeed quite possible that, in modern societies, we develop and exercise our communally oriented virtues better by ‘private’ than by ‘public’ activities” (249, emphasis in original). Fleischacker later argues, even more strongly:

We legislate most successfully for ourselves, we govern our own lives most fully, by controlling how we individually run our most important individual decisions, not by participating in group attempts to coordinate human actions—although, on some occasions, our individual self-legislation should and will take us to an endorsement of democratic politics. (251)

Those are not the words of a communitarian or socialist. Finally, Fleischacker writes: “It should be clear that the condition ‘not being coerced by anyone else’ [which I, Fleischacker, endorse] rules out any use of judgment to coerce others. So it is the government’s business, of course, to stop killing, theft, rape, assault, and the like: the whole libertarian program for government action is brought in by that condition” (325, n. 26).

This talk sounds suspiciously as though it is motivated by Berlin’s “negative” concept of freedom. But note well what sentence immediately succeeds the one I just quoted: “The point of my list of conditions is to go beyond the libertarian program” (325, n. 26, emphasis in original). That is the problem in a nutshell. The following sentence captures it perhaps even more clearly:

As soon as judgment is recognizably in place—the person has her basic biological needs met, has the experience and mental training to reflect on ends as well as means, and is not being coerced by anyone else—what one does with one’s judgment is none of any government’s business. (264)

That sentence expresses both of Fleischacker’s concerns—enabling judgment, on the one hand, and allowing scope for its practice, on the other—but it also
contains the seeds of the position’s undoing. For there is no way, I wish to suggest, that the state can do all the things Fleischacker has argued are necessary for making sure that “judgment is recognizably in place” in every citizen while simultaneously allowing for all citizens to use that judgment however they see fit. The state cannot, after all, produce the education, health care, food, transportation, information, etc., ex nihilo: it must, rather, provide them indirectly, by drawing on the labor, services, and money of others. And of course the labor, services, and money of others must be produced by the people themselves. Thus in calling for “the government” to provide these things for those who do not already have them, Fleischacker is actually calling on the government to make some people provide them for others. If the government taxes or demands the labor of some to provide for others, the former are to that extent no longer free to use their judgment as they see fit. The alternative—allowing people to provide such services to others as they privately judge proper—is precisely not what Fleischacker here argues for; he is rather arguing for whatever group of people is running the relevant branch of the government to override others’ judgments and make them pay or labor as it sees fit.

Given what Fleischacker has argued, one would expect to hear that such a state is in fact a bad one—destructive of human flourishing because destructive of human phronetic activity—and hence, on Fleischacker’s “thick” notion of what counts as choice, destructive of its own end of protecting individual liberty. If private judgment has the supreme importance Fleischacker argues it does, and if it necessarily depends upon the unique, local experiences of each individual (and I am inclined to agree with Fleischacker on both counts), then it would seem to follow that no third party—and certainly no remote government agency—would be justified in constructing its own conception of the good life and imposing on others to follow it. Fleischacker says, using Kantian terminology, that it is the free play of the deliberative faculties culminating in passing judgment that chiefly defines who we are and makes our lives worth living: remove or limit the opportunities for this and human life correspondingly suffers. To the extent that one person or one group substitutes its notion of the good life for that of others, then, to that same extent the others’ opportunities for phronetic activities are curtailed, leading, on Fleischacker’s argument, to a corresponding diminution of free choice and human flourishing. Thus it seems that Fleischacker’s own insistence on the importance of human judgment precludes him from judging from afar that Americans are not using their judgment well and thus disallows him from asking the state to correct their judgments as he judges proper.

Hence it seems that on Fleischacker’s own argument, he should condemn a Fleischackerian state as inconsistent with the goal of extending phronesis. More generally, it seems inconsistent to ask the state both to provide such an extensive list of services to its citizens and to give them a wide scope of private space in which to exercise their phronetic powers.

This is a knot. It can be highlighted, I think, by considering not only the ways in which Fleischacker’s state limits the phronetic activity of those it requires to provide services (i.e., by not allowing them the opportunity to
judge whether to provide the service, and if so how much, in what way, etc.), but by considering in what ways it limits the phronetic activities of the recipients of these services because they do not have the opportunity to make critical life decisions on their own. Indeed, depending on how extensive Fleischacker’s final list of tasks the government must do is, there may turn out to be embarrassingly little scope for people’s private phronetic skills. It seems they would not, for example, judge the structure or content of their own or their children’s education, which doctors to see or what medical treatments to pay for, or what information is important or proper or necessary to know; they might perhaps not have final say in what foods to eat, what exercises or sports or hobbies to engage in, or even whether or how many children to have. Any or all of these decisions might need to be decided by the state if it turns out that only certain options enable the judgment Fleischacker has argued that the state is required to foster.

If one finds it implausible to suggest that the last things mentioned would ever come under the scope of the Fleishackerian state’s authority, consider to what lengths government programs often go after they have been implemented. A critic of the 1990 Americans with Disabilities Act would have been laughed out of court had he suggested that it might lead to overweight people suing movie theaters and airlines for not providing seats big enough to compensate for the “disability” of being obese; yet we have seen such cases—and plaintiffs have won.24 When the U.S. Forest Service was founded in 1905 with the express mission to “improve and protect the forests” of America, it is safe to say that no one then dreamed that by 1991 the service would have constructed 360,000 miles of roads (eight times the length of the entire U.S. interstate highway system, making it the largest single road construction agency in the world), that its 1998 budget would total a staggering $1.85 billion, and that it would employ some 37,000 people.25 From 1960 to 2000, a time during which population in America increased roughly 52%, total spending on federal regulatory activity alone increased from $1.9 billion to $16 billion in constant 1992 dollars, a real increase of 740%; total federal regulatory agency staffing increased from 69,946 to 131,587 employees, an increase of 88%;26 and total pages in the Federal Register, in which all federal regulations are listed, increased from 12,792 to 73,379, an increase of 473%. The implication is that the seemingly inevitable drift of such government programs is to extend, not limit, their scope. Once agencies are created with the express but quite general purpose of making sure that all people have what is required for proper phronesis, I suggest that it is not possible to say with any certainty in advance what areas of life the agencies would consider outside their legitimate purview.

Is it unimaginable, for example, that one such agency might decide that a person’s nutrition is a critical factor affecting whether he is able to exercise his phronesis properly (a bad diet can incapacitate a person, after all)—and thus that it must specify what foods, supplements, etc., each person must eat, in what quantities, etc.? This is not too far from where the Food and Drug Administration now stands.27 Or might such an agency decide that parents within a certain range of income can only properly care for their children—and hence only properly provide the necessary environment for cultivating
phronesis in them—if they are limited to having, say, two children? These are all very real possibilities, I suggest, for a government that undertakes the responsibility of providing proper environments for its citizens’ children so that they grow up with the proper abilities as adults. Given numerous historical precedents, particularly in the twentieth century, it seems naïve to think that the state would voluntarily limit its authority to what the theorist antecedently believes would be appropriate.

One can perhaps see the problem in another way by asking this question: How will we know whether a person’s judgment is properly formed? It can happen, after all, that even with all the requisite Fleischackerian governmental agencies in place a person’s judgment still does not function properly to enable Fleischackerian “free” choices. It seems to me that there will hence be a strong tendency to judge a person’s judgment by the content of his judgments—that is, by what choices he actually makes. But in order for this to serve as a criterion for judging another’s judgment, we will—or, rather, the state will—have to be in possession of some prior notions about which choices or decisions are the right ones to make. This is the point at which, I suggest, governmental agents might begin to think they need, and have the vested authority, to manage even the areas of individuals’ lives that I mention above. And it is at this point that Fleischacker’s claim to be merely following the classical liberal lead in having the state neutrally protect individuals’ free choice breaks down.

Now, an indefinite encroachment of governmental decision making into areas otherwise left to individuals’ own phronesis is not a problem if one thinks that people’s choices should be circumscribed in certain areas or under certain circumstances so that they are less inclined or perhaps even unable to make bad choices. But that is not Fleischacker’s view—or, at least, it seems as though it should not be his view, given how central he thinks private, individual judgment is to leading a flourishing, happy life and his consequent argument that the state’s role is properly the protection of individual freedom to choose. It would seem in fact that a crucial part of taking the centrality of individual judgment seriously is allowing people to make bad or wrong choices and suffer the consequences, on the supposition that that is the way one learns. How else, after all, can one properly develop, adjust, and fine-tune one’s judgment—which is the means of improving it—if one does not have the opportunity to fail? If anything, it seems that if making mistakes is necessary for improving and developing one’s judgment, and if this judgment has the great importance Fleischacker thinks it does, what would follow is that the proper government is one closer to the “negative” than the “positive.” But although the former seems more in keeping with the spirit of this Fleischackerian concern for individual judgment, nevertheless the latter is the direction in which Fleischacker’s state seems inclined to go.

VI

Let me close by suggesting that both Kant and Smith, on whose positions Fleischacker draws to substantiate his own, face problems similar to those facing Fleischacker. Each of them wrestles in his own way with the problem
of reconciling the importance of individual autonomy with a felt need for government action.

Fleischacker’s conception of judgment is heavily informed by what he takes to be Kant’s notion of aesthetic judgment as set out in the Critique of Judgment. There, Fleischacker argues, Kant provides a rich conception of what it takes to judge beauty, which, because it combines the two features of quiet personal reflection and intercourse with others, can act as a model for proper moral judgment as well. Fleischacker’s treatment here is especially nuanced. He suggests that on Kant’s view what gives us pleasure in an aesthetic response is partly its discovery to us of “a subject matter that allows of significant discussion with others” (30); the free play of the faculties, which constitutes the aesthetic response, then, in turn, “exemplify” the “coincidence” of “two factors”: “enough agreement on a subject matter to make sharing our thoughts possible, while at the same time... enough disagreement about it to give us some interest in learning from or teaching others” (30). The free play between these two factors mirrors, Fleischacker argues, what takes place in conversations with others about beauty, which means that “not only does the play between the idiosyncratic and the universal, in conversations about beauty, parallel the play between a single subject’s imagination and understanding, not only does it flow continuously out of that play, but the two are, in kind if not in degree, indistinguishable” (31, emphasis in original).

This understanding of Kantian aesthetic judgment allows Fleischacker to address several problems that arise in theories of moral judgment. For example, Fleischacker can finesse the interpretation of moral judgment as a moral perception (à la John McDowell)30—which not only allows him to avoid the problem, as Fleischacker frames it, that “turning simply from rules to perceptions may block the room we need to correct our moral judgments, or be open to such correction from others” (33, emphasis in original), but also enables him to retain the moral realism he finds in Kant and himself finds attractive. More generally, it allows Fleischacker to see interpretation as an indispensable element not only of aesthetic judgment but also of moral judgment. An informed judgment will be “informed” only after it has been able to examine with sensitivity all the details of the case at hand, but knowing those details does not alone render the judgment. Indeed, a play of the faculties between the particulars of the case at hand and the general rules of judgment that one has developed over time still does not itself render the judgment: an indefinable, perhaps incommunicable element of interpretation must be present to produce an actual judgment.

Adam Smith must also have some similar notion of judgment in mind in the Theory of Moral Sentiments when he writes that the rules of justice are like the rules of grammar—“precise, accurate, and indispensable”—whereas the rules of virtue are like the rules of style—“loose, vague, and indeterminate” (TMS, 175–78). Indeed, Smith thinks that the rules of justice can be captured in just three rules, namely, the protections of life, liberty, and property (TMS, 84), whereas the rules of virtue present us rather with a “general idea of the perfection we ought to aim at, than afford us any certain and infallible directions for acquiring it” (TMS, 176). This is an attractive picture of virtue, I think, and it seems clear that there is an essential notion of judgment at work in it.
Fleischacker’s conception of judgment as containing an element of indeterminacy, of consulting general rules but not being exhaustively bound by them, of continually refining one’s general rules in light of new experiences, and, finally, of the needed intercourse with others to help inform and shape one’s development of judgment seems right on target in understanding Smithian judgment and, I think, seems quite plausible as an account of human judgment itself.

I have, however, two reservations to register. First, one possible difficulty that Fleischacker does not address is this apparent difference between Kant and Smith: for Kant the ultimate justification for judgments cannot lie in the empirical world itself, whereas for Smith it seems possible to understand the justification for judgments as a product solely of social interaction. It is disputed among Smith scholars whether Smith envisioned any transcendent justification of the moral judgments that the “impartial spectator” endorses, and whether his theory of moral judgment even needs such justification. I think the answer is “yes” to the former and “no” to the latter, but there is no scholarly consensus. On the other hand, there seems to be no similar debate among Kant scholars: however the details of the argument fit together, there seems a clear reliance in Kant on some kind of transcendent sanction.

The second, more important reservation is this: although Kant and Smith both seemed concerned about working out a notion of judgment, it is not clear to what extent either of them is able to reconcile his discussion of judgment and its requisite liberty with his political position—and hence it is not clear to what extent either can be relied upon to support Fleischacker’s ambitious political program. Fleischacker summarizes his use of Kant and Smith thus: “It becomes clear, that is, how a Kantian account of moral experience leads to the politics of Adam Smith: ordinary individuals must develop and live out their own faculties of judgment as much as possible by themselves” (86). I suggest, on the contrary, that the case of neither Kant nor Smith is so clear.

Kant, to begin, does not draw political implications from his conception of judgment in the Critique of Judgment—though, to be fair, that is not a political work. In those works of his that are explicitly political, however, Kant seems to present a conflicted position that mirrors the tensions I have argued are present in Fleischacker. In his 1784 essay “An Answer to the Question: ‘What Is Enlightenment?’” Kant gives what sounds simultaneously like an individualist manifesto and an indictment of a welfare state:

Laziness and cowardice are the reasons why such a large proportion of men, even when nature has long emancipated them from alien guidance (naturaliter maiores), nevertheless gladly remain immature for life. For the same reasons, it is all too easy for others to set themselves up as their guardians. It is so convenient to be immature! If I have a book to have understanding in place of me, and so on, I need not make any efforts at all. I need not think, so long as I can pay; others will soon enough take the tiresome job over for me. The guardians who have kindly taken upon themselves the work of supervision will soon see to it that by far the largest part of mankind (including the entire fair sex) should consider the step forward to maturity not only as difficult but also as highly danger-
inous. Having first infatuated their domesticated animals, and carefully prevented the docile creatures from daring to take a single step without the leading-strings to which they are tied, they next show them the danger which threatens them if they try to walk unaided. Now this danger is not in fact so very great, for they would certainly learn to walk eventually after a few falls. But an example of this kind is intimidating, and usually frightens them off from other attempts.33

Perhaps more pointedly, Kant writes this in his 1793 “On the Common Saying: ‘This May Be True in Theory, but It Does Not Apply in Practice’”:

Right is the restriction of each individual’s freedom so that it harmonises with the freedom of everyone else (in so far as this is possible within the terms of a general law). And public right is the distinctive quality of the external laws which make this constant harmony possible. Since every restriction of freedom through the arbitrary will of another party is termed coercion, it follows that a civil constitution is a relationship among free men who are subject to coercive laws, while they retain their freedom within the general union with their fellows.34

Kant’s insistence on the protection of a sphere of liberty for each individual to lead his life as he sees fit is moreover consistent with, and perhaps implied by, his argument in the Grounding for the Metaphysics of Morals that “persons” are “ends in themselves,” leading to this famous formulation of the categorical imperative: “Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”35

Despite this great concern for the rational autonomy and private judgment of individual persons, Kant nevertheless elsewhere argues that the state may override that autonomy and judgment when it deems necessary. For example, he writes in his “Conclusion” to “Theory and Practice,” “Thus if a people, under some existing legislation, were asked to make a judgement which in all probability would prejudice its happiness, what should it do? Should the people not oppose the measure? The only possible answer is that they can do nothing but obey.”36 He goes on to argue that “all resistance against the supreme legislative power, all incitement of the subjects to violent expressions of discontent, all defiance which breaks out into rebellion, is the greatest and most punishable crime in a commonwealth, for it destroys its very foundations. This prohibition is absolute.”37 In the Metaphysics of Morals he repeats his insistence that people have no right to revolt, even against a tyrannical state, adding that “[executing a tyrannical monarch] amounts to making the people, who owe their existence purely to the legislation of the sovereign, into rulers over the sovereign, thereby brazenly adopting violence as a deliberate principle and exalting it above the most sacred canons of right”;38 and he argues that the “supreme commander” of the state has the right to tax citizens to pay for poor-relief programs, hospitals, and even “church activities.”39 My argument here is the same as it was against Fleischacker: it is not clear how he can have it both ways—that is, it is not clear how Kant can champion the sovereignty of the individual and his rationally autonomous judg-
ment, while at the same time endorsing a state’s or state agent’s violating the private judgment of individuals or disallowing them to act on it. I believe this is a deep problem for Kant’s political position. I cannot undertake a complete defense of this claim here, however, so I will rest content with the claim that there is an apparent tension here that mirrors the tension in Fleischacker.

With Smith the issue is equally problematic. It initially seems less problematic because Smith explicitly carves out a duty of government in WN that seems to make room for Fleischacker’s activist state. Specifically, Smith argues in book 4 that the government has three principal duties:

first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain publick works and certain publick institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expence to any individual or small number of individuals, though it may frequently do much more than repay it to a great society. (687–88)

The first two of these duties fall under the scope of enforcing the “negative virtue” of justice, as Smith puts it in TMS, which he argues is necessary for any society at all (TMS, 82, 86). In both TMS and elsewhere in WN, however, Smith argues that the government is licensed only to enforce justice, and that anything it does beyond this negative protection would constitute an invasion of liberty (TMS, 84; WN, 687). This leaves us with a number of puzzles. First, it seems to follow from Smith’s position that the government should not embark on activities like those listed under the third duty above—despite the fact that Smith himself in WN suggests that it should. The things Smith goes on to list in WN as falling under the scope of this third duty are those institutions for “facilitating the commerce of the society, and those for promoting the instruction of the people” (723); under the former he considers things like roads, bridges, and canals (724–58), and under the latter public schooling (758–816). We need not go further here, however, other than to indicate that the first question to ask is thus whether Smith’s position is consistent here—and to point out that this question parallels the problem Fleischacker’s position faces.

The second question to ask is how Smith supports his position of government’s third duty. The problem is that Smith does not seem to base the political conclusions reached in WN on the notion of judgment developed or at work in TMS. What is at work in WN seems rather to be other concerns, and I am skeptical that Smith’s ultimate concern is fostering judgment. My skepticism rests on two considerations. First, Smith does not say anywhere in the passages in question that fostering judgment is his aim. For those things that conduce to commercial activity, his concern seems rather to be economic utility. Second, even in the case of education, although his discussion might be interpreted as ultimately driven by a concern for Fleischackerian judg-
ment, it need not be so interpreted. In his long discussion of public education—some sixty pages—he discusses the importance of judgment in only one paragraph (782); on the other hand, he more than once argues that what the masses truly need is merely the ability to “read, write, and account” (see, e.g., 764 and 785). Smith’s recommendation that government undertake to instill these qualities can easily be interpreted as motivated by the need only for heightened market efficiency: workers who cannot complete such tasks are less productive. Even Smith’s concern for judgment on 782 seems partly motivated by a similar, utilitarian concern, since he says that a person with poor judgment is “incapable of defending his country in war.” Although Smith also discusses in this passage the worker’s lacking “intellectual” and “social” virtues (his judgment is poor and he revels in debauchery when not working), we should note that this entire section of the book was introduced under the auspices of providing things beneficial to society, not necessarily to individuals. And nowhere else in WN’s one thousand pages does Smith seem to argue that the government must encourage proper phronesis.40

Thus the attempt to draw on Smith for support of his political program is just as problematic for Fleischacker as his attempt to draw on Kant. For Smith did not connect his political concerns to his other work in the way Fleischacker’s argument would have it, as the following considerations indicate: (1) Smith himself makes no such connection; (2) there is no mention in WN of the impartial spectator procedure or mutual sympathy of sentiments, the centerpieces of his theory of judgment in TMS; and (3), as suggested above, it seems possible to account for the great bulk of Smith’s concerns in WN in economic or utilitarian terms, which are not the terms at work in proper judgment according to TMS. Again, what we say about the ultimate coherence of Smith’s account—as was the case with Kant’s account—is one issue;41 but, more to the point here, it seems that not only can Smith offer little support for Fleischacker’s political program, but Smith’s position apparently suffers from the same problem Fleischacker’s does.

I believe we can draw the following general conclusion: Kant, Smith, and Fleischacker all face considerable problems trying to reconcile a concern for individual liberty with a faith in the state’s ability to take positive action to encourage good use of that liberty. I believe further that these problems are indicative of a central tension that threatens to defeat communitarian thinking generally, even if supported in Fleischacker’s novel manner by basing it on a plausible concern for private judgment. Defending that larger claim, however, is the task of another work. In any case, I hope that the discussions of Kant, Smith, and Fleischacker presented here suggest that calling on the state to take positive steps toward fostering individual judgment—as opposed to merely protecting the liberty of individuals to develop and exercise it on their own—introduces a means that is significantly, if not fatally, destructive of the desired end.

Notes

1Samuel Fleischacker, A Third Concept of Liberty: Judgment and Freedom in Kant and Adam Smith (Princeton, NJ: Princeton University Press, 1999). All not otherwise attributed
page numbers in parentheses refer to this work, as do not otherwise attributed page
and chapter references in the Notes.


5 See the summary of their data at (www.reason.com/9808/fe.cox.html).


8 Samuel Fleischacker, “Response to Comments on Third Concept of Liberty,” paper presented at the American Philosophical Association Eastern Division Meeting, 28 December 1999, manuscript, p. 6. I should note that despite what Fleischacker suggests, Robinson and Godbey explicitly say that their argument “differ[s] sharply from” Schor’s, who they repeatedly say is one of their chief targets; they say Schor’s argument is “questionable” and a “misunderstanding” of the data (Time for Life, 4), and they argue that her evidence is selective and incomplete, and “not supported by [all] the diary data” (50, emphasis in original).

9 See CBS’s summary of the statistics at (cbs.infoplease.com/ipea/A0772264.html). According to Nielsen Media Research, the television is on in an average American household 7 hours and 12 minutes per day (see (www.tvfa.org/stats.html)).

10 Fleischacker also argues that Americans have not been truly “free” in giving up their leisure time to activities like work and television viewing (117–18). In making this claim, he relies on a substantive or “thick” notion of free choice that is controversial. I address it in the next section.

11 See esp. chap. 5.

12 See, for example, 249.

13 See 116–18, 236–40, and passim.

14 See 287.

15 I return to this issue in section V.

16 See, for example, 150.


19 Fleischacker gives another list on 274–78 that is similar but not identical to the list I give here. Compare also 18–19.

20 I should point out that Fleischacker’s state is not just the current system of American government plus more agencies. Rather, Fleischacker would eliminate or reduce some of the current subsidies, like public support for space research and operas (see 276) and then add new ones of his own, like those listed in the text. Nevertheless it seems clear that the total size of Fleischacker’s state—whether measured by the size of its budget, by the number of its agencies or employees, or by the amount of its citizens’ lives under its control—would be larger than that in place in America today.

21 There seem, incidentally, to be striking similarities here between Fleischacker’s state and the agencies of Rawls’s ideal state (see John Rawls, A Theory of Justice [Cambridge: Harvard University Press, 1972], chap. 43), despite the fact that Fleischacker takes great pains elsewhere in his book to otherwise distinguish his vision from that of Rawls (see esp. chap. 9 and p. 325, n. 27).
Note, in this connection, that Fleischacker quite rightly realizes that the notion that there is a Hegelian state or a Rousseauian general will over and above the citizens or individual wills that make them up is “metaphysical hocus-pocus” (247). “The government” is just other people.

Indeed, in more than one place Fleischacker seems to concede as much. Note this passage, for example: “One may presuppose instead that no one else is more likely to be right [about what another truly wants], or that even if someone else were correctly to second-guess the subject, it is bound up with attaining what we truly want that we come to such realizations, and choose to act or not act on them, by ourselves” (259, emphasis in original). Fleischacker indicates that he accepts the second claim.

For a recent case, see “Woman Says Dairy Fired Her over Weight,” New York Times, February 18, 1999. Many businesses and government offices, such as the Disability Access Office of the City of San Antonio, Texas (see its website (www.ci.sat.tx.us/planning/disability/myths_facts/index.htm)), now officially consider obesity a “disability” under the Americans with Disabilities Act.


The Food and Drug Administration’s 1999 budget is $1.264 billion, and its own claimed oversight includes all foods and drinks consumed by human beings; all medicines, medications, and nutritional supplements legally taken epidermally, orally, anally, intravenously, or otherwise; and all devices, packages, or utensils for the administration of foodstuffs, medicines, medications, or supplements. See its budget and oversight summary at (www.fda.gov/bbs/topics/ANSWERS/ANS00847.html).

Here is an indication that Fleischacker is already using substantive criteria by which to judge others’ judgments: “A substantial amount of leisure is a condition for judicious choice, and the worker who makes do with two weeks of vacation in return for more consumer goods is no more rightfully considered free in making this choice than is the slave who has been in her condition so long that she ‘chooses’ to remain in slavery rather than face the risks of independence” (238). Fleischacker’s claim apparently is that we know that both the worker and slave are not freely choosing because they are making what we know—and they do not know—to be bad choices.

An argument for a totally private educational system is made partly on the grounds of respecting what might be called Fleischackerian judgment by Benjamin A. Rogge and Pierre F. Goodrich, “Position Paper: Education in a Free Society,” in Education in a Free Society, ed. Anne Husted Burleigh (Indianapolis, Ind.: Liberty Press, 1973), 55–93. Moreover, in his classic 1924 essay “On Doing the Right Thing” (reprinted in The State of the Union, ed. Charles H. Hamilton [Indianapolis, Ind.: Liberty Press, 1991], 317–25), Albert Jay Nock argues on behalf of an “anarchist and individualist” political position out of a concern for cultivating what again could be called Fleischackerian judgment. Finally, and most pertinent, several defenders of libertarian political positions have based their positions on some form of an Aristotelian notion of human flourishing, but Fleischacker seems totally unaware of this literature. Douglas B. Rasmussen and Douglas J. Den Uyl, for example, have recently argued in their Liberty and Nature: An Aristotelian Defense of Liberal Order (La Salle, Ill.: Open Court, 1991) that a concern for Aristotelian flourishing actually entails a libertarian minimalist state. Fleischacker surprisingly—and unaccountably—does not even cite, let alone examine, their argument.

See chap. 3.


For general discussion of Kant’s theory of aesthetic judgment that supports this claim, see Paul Guyer, Kant and the Claims of Taste (Cambridge: Harvard University Press,


34 Immanuel Kant, “On the Common Saying: ‘This May Be True in Theory, but It Does Not Apply in Practice’” in *Kant: Political Writings*, 73; emphasis in original. Some other pertinent passages: in the 1784 “Idea for a Universal History with a Cosmopolitan Purpose,” Kant writes, “Furthermore, civil freedom can no longer be so easily infringed without disadvantage to all trades and industries, and especially to commerce, in the event of which the state’s power in its external relations will also decline. But this freedom is gradually increasing. If the citizen is deterred from seeking his personal welfare in any way he chooses which is consistent with the freedom of others, the vitality of business in general and hence also the strength of the whole are held in check. For this reason, restrictions placed upon personal activities are increasingly relaxed, and general freedom of religion is granted. And thus, although folly and caprice creep in at times, enlightenment gradually arises” (ibid., 50–51; emphasis in original); in “Theory and Practice,” he writes, “[B]ut the public welfare which demands first consideration lies precisely in that legal constitution which guarantees everyone his freedom within the law, so that each remains free to seek his happiness in whatever way he thinks best, so long as he does not violate the lawful freedom and rights of his fellow subjects at large” (ibid., 80; emphasis in original); elsewhere in “Theory and Practice” he writes, “No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to pursue a similar end which can be reconciled with the freedom of everyone else within a workable general law” (ibid., 74); and in the *Metaphysics of Morals*, Kant writes, “Thus the universal law of right is as follows: let your external actions be such that the free application of your will can co-exist with the freedom of everyone in accordance with a universal law” (ibid., 133).


36 Kant, “Theory and Practice,” in *Kant: Political Writings*, 80.

37 Ibid., 81; emphasis in original.

38 Kant, *Metaphysics of Morals*, in *Kant: Political Writings*, 144–46; emphasis added.

39 Ibid., 149.

40 This is not to say that Smith does not use the words “judge,” “judgment,” etc., elsewhere in the book. Fleischacker (130) carefully catalogs the uses of the term in his chap. 6, reporting that, excluding contexts of courts and justice, Smith uses the terms forty times in WN.