

HEINONLINE

Citation: 38 Wake Forest L. Rev. 793 2003

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Wed Jul 25 13:54:40 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0043-003X](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0043-003X)



VANDERBILT
UNIVERSITY

DiscoverArchive

Retrieved from DiscoverArchive,
Vanderbilt University's Institutional Repository

This work was originally published as Suzanna Sherry, Judges of
Character, 38 Wake Forest L. Rev. 793 2003.

JUDGES OF CHARACTER

*Suzanna Sherry**

I. INTRODUCTION

For forty years, legal academics have been lost in a wilderness born of the countermajoritarian difficulty. Despite a two-century pedigree, we are still arguing about the legitimacy of judicial review and asking whether it is a curse or a blessing. Many of our most prominent constitutional scholars are mired in attempts to constrain judicial review so as to reconcile it with their idealized vision of a constitutional regime grounded in pure majoritarianism. None has succeeded.

The few scholars who have attempted to move beyond the countermajoritarian difficulty face a different problem. As one scholar has argued, “[i]t takes a theory to beat a theory.”¹ Without a theory of constitutional interpretation—whether grounded in majoritarianism or in some other value—there arises the fear that judicial review is, as the legal realists supposed, merely the ad hoc implementation of the judges’ own values. Theories of constitutional interpretation are supposed to constrain judicial discretion and ensure that the rule of law will prevail over the rules of men. Unfortunately, no constitutional theory proposed so far is either an accurate description of how judicial review works in practice or a useful prescription for constraining judges. The theories provide, at best, a partial window into the American judicial soul.

The task for post-countermajoritarians, then, is to provide an attractive normative and descriptive picture of successful judicial review. For those of us who are legal pragmatists, this means providing a positive description of how pragmatist judges do or ought to judge. This Article is meant to be a first step in that direction. Judicial review as an institution may be a blessing, but

* Cal Turner Professor of Law and Leadership, Vanderbilt University. I thank Lisa Bressman, Paul Edelman, Daniel Farber, John Goldberg, and the participants in the Wake Forest Symposium, *Judicial Review: Curse or Blessing? Or Both?*, for helpful comments on earlier drafts. Carolyn Seugling provided excellent research assistance.

1. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 617 (1999).

particular instances of judicial review can be less salutary. I try here to identify conditions that make it more or less likely that the exercise of judicial review will be beneficial. The key, I believe, is a very old-fashioned notion: judicial character.

II. CHARACTER AND JUDGMENT

Ironically, Alexander Bickel, who in many ways inspired the late twentieth-century concern about the legitimacy of judicial review, would likely be at least amused—and perhaps appalled—by much of the last four decades of constitutional scholarship. Bickel firmly aligned himself with what he called the “Whig” tradition of Edmund Burke. That tradition valued existing institutions, eschewing radical change in favor of incremental movement toward unfulfilled aspirations: “We do well to remain attached to institutions that are often the products more of accident than of design, or that no longer answer to their original plans, but that challenge our resilience and inventiveness in bending old arrangements to present purposes with no outward change.”² Despite his coinage of the “counter-majoritarian” terminology, then, his work on judicial review was designed more to preserve the practice from what were at the time very real political threats than to deny its legitimacy.³

In addition to their use of Bickel’s terminology to support arguments he might not have agreed with, the majoritarian scholars who trace their roots to Bickel are missing the most valuable parts of his philosophy. For Bickel provided more than the nomenclature and modern reinvigoration of the debate over judicial review, and more than a Whiggish caution against radical restructuring of existing institutions. He also, as Anthony Kronman has so eloquently argued, provided a philosophy of judging that can, even

2. ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 3 (1971); see also ALEXANDER M. BICKEL, *Constitutionalism and the Political Process*, in THE MORALITY OF CONSENT 3, 11-25 (1975).

3. For a similar description of Bickel as defending (rather than attacking) judicial review, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 159 (2002). For an argument that political threats animated Bickel’s philosophy of prudence, see Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1229-32 (2002). Bickel, of course, was not alone in urging caution in the face of political threats. Walter Murphy suggested that judges needed courage—but he meant the courage to pursue the prudent course, “even when it means risking some political dangers and enduring bitter criticism from contemporaries as well as from historians for refusing to risk other dangers.” WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 210 (1964).

now, help us to move beyond the counter-majoritarian difficulty. Kronman describes Bickel's "philosophy of prudence" as both "an intellectual capacity and a temperamental disposition."⁴ Prudence, or practical wisdom, in turn depends on what Kronman himself later labeled "traits of character": those habits of mind and spirit that allow an individual to make judgments where intellect runs out.⁵

Life is full of choices, and the life of the law is no exception. American constitutional jurisprudence in particular seems pervaded by opposing dualities that cannot be fully resolved. The Constitution itself provides for both majority rule and minority rights, creating the counter-majoritarian dilemma. When judges must resolve particular cases in the face of this dilemma, judicial review gives rise to what Bickel identified as the "Lincolnian tension" between principle and consent.⁶ In interpreting the Constitution over time, judges must also navigate between fidelity to the past and the needs and values of the present, between the general and the particular, and between the abstract and the concrete. As if that were not enough, individual clauses of the Constitution create tensions of their own: between liberty and equality, between religious exercise and religious establishment, and between governmental powers and accountability.

Many constitutional scholars—and some judges—try to resolve these tensions by ignoring, de-emphasizing, or outright rejecting one half of the dichotomy. Majoritarians allow majority rule to trump rights,⁷ moral philosophers privilege rights and principles over majoritarianism and consent,⁸ originalists neglect the present in favor of the past.⁹ And critical legal scholars, recognizing these inherent tensions (as well as others) as part of a "fundamental

4. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567, 1569 (1985).

5. Anthony Kronman, *Practical Wisdom and Professional Character*, in *PHILOSOPHY AND LAW* 203, 208 (Jules Coleman & Ellen Frankel Paul eds., 1987) [hereinafter Kronman, *Practical Wisdom*]; see also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 53-108 (1993). Another nice description of character—and why it is important for judges—may be found in Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 *B.U. L. REV.* 747, 762-63 (1992).

6. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 65-72 (1962).

7. Examples include Akhil Amar and Bruce Ackerman. For further discussion, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 75-121 (2002).

8. The most prominent scholars of this type are Ronald Dworkin and Richard Epstein. For elaboration, see *id.* at 55-74, 122-39.

9. Frank Easterbrook, Robert Bork, and Antonin Scalia are among those who often favor originalist approaches. For further discussion, see *id.* at 10-54.

contradiction,” see them as a fatal flaw and therefore as a reason to abandon objectivity and the rule of law in favor of pure political adjudication.¹⁰

Even the post-majoritarians who focus on judicial techniques, as, for example, Cass Sunstein does, get caught in the problem of dualities. Sunstein is right to notice that judicial minimalism can foster both democracy and the beneficial use of judicial review (thus moving beyond the counter-majoritarian dilemma). But, as he also notes, “the minimalist path *usually*—*not always, but usually*—makes a good deal of sense” in certain circumstances.¹¹ “Maximalist” invalidations, he argues, should be avoided “*unless* there is a good argument for invalidation on democratic grounds, or unless the Court has considerable confidence in its judgment.”¹² The rub lies in his justifiable refusal to adopt an absolutist stance. If minimalism is only a presumption, how are judges to know when to depart from it? Sometimes what Sunstein calls a wide and deep, or maximalist, decision is warranted, as with *Brown v. Board of Education*¹³ or *Loving v. Virginia*.¹⁴ And one conspicuously minimalist opinion, written a year after Sunstein’s book was published, has drawn fire from none other than Sunstein himself. Discussing *Bush v. Gore*,¹⁵ notorious for both its narrowness¹⁶ and its shallowness,¹⁷ Sunstein noted that “the majority’s opinion has some of the most severe vices of judicial minimalism.”¹⁸

I do not mean to single out Sunstein. Indeed, he is one of a few prominent constitutional scholars who have left the narrow path marked out by the debate over the counter-majoritarian dilemma, and sought instead to specify guidelines for the exercise of judicial review.¹⁹ But his thoughtful—and to a large extent useful—

10. For a critique of the post-modern abandonment of objectivity and the rule of law, see DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

11. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 5 (1999) (emphasis added).

12. *Id.* at 30 (emphasis added).

13. 347 U.S. 483 (1954).

14. 388 U.S. 1 (1967).

15. 531 U.S. 98 (2000).

16. In noting that “[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities,” *id.* at 109, the Court made clear that the equal protection arguments were a ticket for one train only.

17. As many other scholars have noted, the equal protection reasoning does not support the remedy, and the remedy-supportive reasoning of the concurrence did not command a majority. See the articles cited *infra* note 46.

18. Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 767 (2001).

19. For a critique of other prominent scholars as overly constrained by the

guidelines nevertheless founder on the same shoals that any constitutional *theory* does: if it is to be practical, it has to have nuances and exceptions, and if it has nuances and exceptions, then it cannot satisfactorily account for every possible case. In other words, the devil is in the details—specifically, in the practice: knowing when the theory applies and when it does not. And that is where judges, judgment, and judicial character come in.

Purportedly simple techniques and intricate theories of interpretation may dazzle temporarily, but ultimately they cannot disguise the need to make choices among conflicting and often incommensurate values. Intellectual ability and abstract reason may help us identify the values and the conflicts, and give us some insight into the consequences of our choices, but cannot alone lead us to sound results. Only good judgment can mediate between constitutional dualities. As Walter Murphy pointed out long ago, “[n]o method can reduce the art of judgment, whether legal, political, or ethical, to an IBM punch-card system.”²⁰ Whether one calls it prudence, practical wisdom, practical reason,²¹ pragmatism,²² or situation-sense,²³ in the end it comes down to an exercise of judgment. That, after all, is why we call them judges.

But judges, like all of us, can judge poorly or well. Here is where Bickel’s “temperamental disposition” and Kronman’s “traits of character” can help. Judges—like any person officially entrusted with making decisions that affect others—should exhibit certain character traits, such as honesty, impartiality, and integrity.²⁴ The wise exercise of the power of judicial review, however, requires more. It is my purpose in this Article to sketch briefly two of the most important of these additional character traits: humility and

counter-majoritarian dilemma, see FARBER & SHERRY, *supra* note 7, at 1-6.

20. MURPHY, *supra* note 3, at 208. Ironically, Murphy’s insight has outlasted computer punch-cards.

21. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 77-80 (1990); Steven J. Burton, *Law As Practical Reason*, 62 S. CAL. L. REV. 747, 747-50 (1989).

22. See, e.g., Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 163-65 (1995).

23. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121 (1960).

24. For descriptions of judicial character as including these types of traits, see, for example, STEVEN J. BURTON, *JUDGING IN GOOD FAITH* 163-65 (1992); Kronman, *Practical Wisdom*, *supra* note 5, at 220-21; Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735, 1751-52 (1988). For a description of “integrity” similar to Kronman’s “practical wisdom,” see Catharine Pierce Wells, *Pragmatism, Honesty, and Integrity*, in *INTEGRITY AND CONSCIENCE* 270, 291-93 (Ian Shapiro & Robert Adams eds., 1998).

courage.

Note that in discussing the necessary character traits of good judges, I am indifferent to *personal* character: it is *judicial* temperament that matters.²⁵ Because I am focusing on judicial character, moreover, “courage” takes on a more limited meaning than it might in other contexts. Judges rarely face the sort of physical threat that most often separates the courageous from the cowardly.²⁶ Nevertheless, courage—in the sense of confronting one’s fears and acting despite them—has a role to play in judging. A good judge, because she is humble about her own role and abilities, is especially likely to fear being wrong. In the face of such a fear, it is easier not to act than to act: sins of omission never seem as frightening when the alternative is to take a bold step that might be mistaken. Thus, judicial courage entails acting despite the uncertainty, born of humility, about the correctness of one’s actions.²⁷

Finally, a caveat: I do not mean to suggest that humility and courage are the only character traits relevant to good judging, nor that character alone defines the good judge. Judges also need empathy, imagination, candor, and self-awareness, among other traits.²⁸ Moreover, it is certainly possible to imagine a judge who is simultaneously humble and courageous . . . and utterly, undeniably wrong on the merits. Good character is but one of many restraints on judicial error.²⁹ Nor will a focus on character save us from the necessity of making—and evaluating—hard decisions about value choices. Character is not a substitute for judgment, but merely facilitates it.

25. While it may be more usual for personal and judicial character to align, it is not necessary. Holmes and Frankfurter, for example, both of whom are known for their humility about the judicial role, were hardly humble personally. Cardozo, on the other hand, might be seen as a courageous judge but a rather timid individual.

26. For a fuller description of this general sort of courage, see WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* (2000).

27. I mean to distinguish this fear of error from a different type of fear that some have recently attributed to federal judges, especially Supreme Court Justices: fear of public opinion. Lawrence Solum calls this “civic cowardice.” See Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 *METAPHILOSOPHY* 178, 183 (2003). I have also recently heard some conservatives attribute the Supreme Court’s failure to fully adopt their platform to a fear of offending the Washington elites.

28. For an elaboration of some of these traits—and how Justice Cardozo, in particular, exhibited them—see John C.P. Goldberg, *The Life of the Law*, 51 *STAN. L. REV.* 1419, 1456-61 (1999).

29. In future work, I plan to examine some of the other restraints, including legal training, judging as craft, precedent, the necessity of persuading other judges, and the requirement of writing an opinion to support a holding.

III. HUMILITY AND ARROGANCE

The proposition that judges should be humble rather than arrogant hardly needs stating. The need for judicial humility was most famously recognized by Learned Hand, who described “the spirit of liberty” as “the spirit which is not too sure that it is right.”³⁰ Felix Frankfurter similarly urged on judges “humility and an understanding of . . . their own inadequacy in dealing with” the broad range of problems they confront.³¹ Stephen Breyer has recently reiterated Hand’s caution, suggesting that judges should “consider the constitutionality of statutes with a certain modesty.”³² Scholars have also frequently called for judicial humility.³³ One scholar has specifically linked humility with the exercise of Kronman’s practical wisdom, arguing that humility helps to “synthesize or mediate . . . competing claims” similar to the dualities I described earlier.³⁴

My contribution to this tradition is a pragmatic one: I want to illustrate the need for judicial humility by showing how its absence produces bad constitutional decisions. I focus on two Supreme Court decisions, a century-and-a-half apart, that exhibit a particularly seductive type of judicial arrogance.

Arrogance, of course, comes in many forms. The most common judicial variant is, as Hand, Frankfurter, and Breyer recognized, a misleading certitude in the correctness of one’s own decisions. This type of arrogance is perhaps an occupational hazard for judges, whose decisions, even when they are not infallible, are often final.³⁵ It may be exacerbated by the recent tendency to accept judicial supremacy unquestioningly.³⁶ Several aspects of our judicial system moderate its pernicious effect, however. First, it is such a well-known danger that conscientious judges—like those quoted earlier—work hard to combat it in themselves. Second, the hierarchical

30. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (Irving Dilliard ed., 3d ed. 1960).

31. Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 905 (1953); see also Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 312-13 (1955) (praising Justice Roberts for his “humility engendered by consciousness of limitations”).

32. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 250 (2002).

33. See, e.g., Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1034-35 (1996); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1372 (1997); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1749 (1995).

34. Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 157 (1998).

35. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

36. See Tushnet, *supra* note 3, at 1230.

nature of the federal courts means that all federal judges (with only nine exceptions) face the possibility of reversal by a higher court, tempering their temptation to consider themselves infallible. The common law method, which encourages a simultaneously respectful but open-minded attitude toward precedent, tends to rein in the most radically arrogant.³⁷ Finally, the existence of multi-member courts appointed over time reduces the tendency toward arrogance by producing differences of opinion: It is more difficult to maintain absolute faith in one's own beliefs in the face of equal but opposite certitude by one's respected colleagues. Self-aggrandizing arrogance is, therefore, not as dangerous in practice as it might appear in theory.

A more dangerous manifestation of judicial arrogance, however, stems not from too much self-esteem, but from a kind of selfless devotion to the public good. The most troubling lack of humility comes from the judge who takes it upon himself to save a nation in crisis. Two of the greatest misuses of the power of judicial review stem, at least in part, from this sort of arrogance: *Dred Scott v. Sandford*³⁸ and *Bush v. Gore*.³⁹ While history has yet to judge the latter case as it has the former, the cases have much in common. Arguably driven by a desire to avert a constitutional crisis, a divided Court in each case produced a result that was both controversial and inadequately supported by precedent or reasoning.⁴⁰

It is almost an article of faith in American jurisprudence that the decision in *Dred Scott* was flawed as well as disastrous, exemplifying "judicial review at its worst."⁴¹ The analytical

37. It is therefore no surprise that judges who express radical views in their scholarship often do not implement those views in their judicial decisions. See FARBER & SHERRY, *supra* note 7, at 29-54 (discussing Scalia); Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1410-11 (2000); Tushnet, *supra* note 5, at 752.

38. 60 U.S. (19 How.) 393 (1857).

39. 531 U.S. 98 (2000).

40. For some other comparisons between the two cases, see Stephen Holmes, *Afterword: Can A Coin-Toss Election Trigger a Constitutional Earthquake?*, in THE UNFINISHED ELECTION OF 2000, at 235, 235-50 (Jack N. Rakove ed., 2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001); Neal Kumar Katyal, *Politics Over Principle*, WASH. POST, Dec. 14, 2000, at A35, available at 2000 WL 29921407. One difference between the two cases is the magnitude of the "constitutional crisis": As Keith Whittington has aptly noted, the election of 2000 simply does not qualify as a constitutional crisis. Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2093 (2002).

41. MALCOLM M. FEELEY & SAMUEL KRISLOV, CONSTITUTIONAL LAW 34 (2d ed. 1990); see also ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 41 (1970) (a "ghastly error"); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 28 (1990) ("the worst constitutional decision of the nineteenth century"); DAVID P. CURRIE, THE

weakness of the majority and concurring opinions in *Bush v. Gore* is more contested, but even the decision's supporters tend to be lukewarm in their endorsements. Michael McConnell gives it "two-and-a-half cheers," and criticizes the Court's halting of the recount.⁴² Richard Epstein roundly criticizes both the rationale and the remedy of the majority opinion, finding only the reasoning of the three-Justice concurrence sound.⁴³ Richard Posner calls the result "rough justice," and can only conclude that "it *may* have been legal justice as well."⁴⁴ Posner and John Yoo defend the decision primarily for its success in averting a constitutional crisis.⁴⁵ Most academic commentary has been highly critical.⁴⁶ Almost no one defends the reasoning of the two lead opinions. It is thus fair to characterize *Bush v. Gore* as not one of judicial review's most

CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 264 (1985) ("bad policy," "bad judicial politics," and "bad law"); GARY J. JACOBSON, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION 44 (1986) ("the most odious action ever taken by a branch of the federal government"); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 94 (1960) ("the most disastrous opinion the Supreme Court has ever issued"); Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 41 (1993) ("the worst atrocity in the Supreme Court's history").

42. Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657, 659-60 (2001).

43. Richard A. Epstein, "In such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613, 614 (2001).

44. Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 60 (2001) (emphasis added).

45. RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 4 (2001); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 776 (2001).

46. For a sampling of the voluminous criticism, see, for example, ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); HOWARD GILLMAN, THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION (2001); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Elizabeth Garrett, *Institutional Lessons from the 2000 Presidential Election*, 29 FLA. ST. U. L. REV. 975 (2001); Holmes, *supra* note 40; Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001); Pamela S. Karlan, *Equal Protection: Bush v. Gore and the Making of a Precedent*, in THE UNFINISHED ELECTION OF 2000, *supra* note 40, at 159, 159-96; Larry D. Kramer, *The Supreme Court in Politics*, in THE UNFINISHED ELECTION OF 2000, *supra* note 40, at 105, 105-52; Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Sunstein, *supra* note 18; Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, FED. LAW., Mar./Apr. 2001, at 27.

shining moments.

For purposes of this Article, however, the weakness of the opinions in *Dred Scott* and *Bush v. Gore* is less important than the motivation behind the decisions. In both cases, the Court acted—at least in part—out of a genuine sense of responsibility for the fate of the nation. As Robert McCloskey described the context of *Dred Scott*: “The nation was in deadly jeopardy. It would be tragic for the Court to withhold its hand, if that hand might save the Union.”⁴⁷ Don Fehrenbacher, the pre-eminent *Dred Scott* scholar, talks about “the Court’s own sense of strategic responsibility in the American constitutional system” and describes the case as “[Chief Justice] Taney’s attempt to end the slavery controversy by judicial fiat.”⁴⁸

The motives for the Supreme Court’s intervention in the 2000 presidential election are murkier, but the most plausible explanation attributes to the Justices in the majority the same sense of obligation toward the nation’s constitutional well-being. Justice O’Connor’s majority opinion speaks of the Court’s “unsought responsibility.”⁴⁹ Justice Breyer, in dissent, attributes to his brethren an intent “to bring this agonizingly long election process to a definitive conclusion.”⁵⁰ Defenders of the decision describe the Court’s motivation similarly. Yoo argues that “the Supreme Court believed that it could finally bring an end to the destructive partisan struggle over the presidential election.”⁵¹ Posner suggests that “without the Court’s intervention the deadlock would have mushroomed into a genuine crisis,”⁵² and defends the Court’s willingness to act even at the risk of endangering its own legitimacy: “Judges unwilling to sacrifice some of their prestige for the greater good of the nation might be thought selfish.”⁵³

This sort of institutional arrogance does not necessarily depend on certitude. Sometimes it springs instead from a belief that, regardless of the “right” answer, the judiciary is the only branch that can supply a practical solution. The *Dred Scott* Court tried—unsuccessfully—to prevent the nation from being torn apart by the political stalemate on slavery. The *Bush v. Gore* Court turned out to be more successful (although no less arrogant) in its belief that an

47. MCCLOSKEY, *supra* note 41, at 93.

48. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 209, 573 (1978).

49. *Bush v. Gore*, 531 U.S. 98, 111 (2000).

50. *Id.* at 158 (Breyer, J., dissenting).

51. Yoo, *supra* note 45, at 789. For similar sentiments, see, for example, RONALD A. CASS, THE RULE OF LAW IN AMERICA 91-97 (2001); Charles Fried & Ronald Dworkin, Editorial, “A Badly Flawed Election”: An Exchange, N.Y. REV. BOOKS, Feb. 22, 2001, at 8, 8.

52. POSNER, *supra* note 45, at 161.

53. *Id.* at 162. Similar sentiments by other commentators are described in Jesse H. Choper, *Why The Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 353-55 (2001).

immediate judicial solution was more conducive to constitutional stability than a drawn-out political battle, even if both would have ended in the election of George W. Bush. Note that the lack of humility that characterizes this type of institutional arrogance rests more on a belief in judicial omnipotence than on any notion of judicial supremacy, although a judicial solution is unlikely to succeed in the absence of popular acceptance of judicial supremacy.

Institutional arrogance is both more alluring and more difficult to guard against than the garden-variety delusion of infallibility. As Posner's comment demonstrates, this type of arrogance masquerades as selflessness or heroism, verging on martyrdom. The Court is asking not what judges can do for themselves, but what they can do for their country. This seems, superficially, to be a beneficial character trait, not a dangerous one; judges—and the public—are less likely to be vigilant in cabining it. And, of course, there is a disarming kernel of truth in the attitude of institutional arrogance: In cases from *McCulloch*⁵⁴ to *Brown*⁵⁵ to the *Nixon*⁵⁶ tapes case, the Supreme Court's intervention was necessary to combat the paralysis of, or resolve a conflict between, the political branches.⁵⁷ The civil rights movement would have been severely handicapped—if not stillborn—but for the courageous acts of lower court judges.⁵⁸

This last insight—that institutional judicial arrogance has its advantages—leads to a second, and perhaps more important, point. While judges must guard against arrogance, they should also be wary of the opposite flaw: timidity.

IV. COURAGE AND TIMIDITY

While many have urged judicial humility, fewer have focused on judicial courage. Bickel himself emphasized the caution that comes with prudence more than the action that comes with courage.⁵⁹ This has led some modern scholars to reject Bickel as intolerably conservative.⁶⁰ Whether or not this is an accurate reading of Bickel,

54. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

55. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

56. *United States v. Nixon*, 418 U.S. 683 (1974).

57. The certainty of a national crisis and the inability of other actors to avert it are two factors that Ward Farnsworth identifies as relevant to the question whether the Court should, on the basis of pragmatic considerations, act "lawlessly" (that is, beyond its jurisdiction). Ward Farnsworth, "To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness, 86 MINN. L. REV. 227, 229, 245-48 (2001). He concludes that *Bush v. Gore* fails this pragmatist test. *Id.* at 229.

58. See JACK BASS, UNLIKELY HEROES (1981).

59. See BICKEL, *supra* note 6.

60. Gerald Gunther was the first scholar—and perhaps the most sophisticated—but not the last, to criticize Bickel on these grounds. See Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle*

it is wrongheaded insofar as it demands a choice between humility and courage rather than an attempt to accommodate both.

A few pragmatist scholars have recognized the need for accommodation: Kronman argues that a prudent judge needs what he calls “deliberative imagination.”⁶¹ Richard Posner describes good judgment as “some ineffable compound of caution, detachment, and imagination.”⁶² Although each of these scholars means something slightly different, both recognize that a necessary part of good judgment (or practical wisdom) is an ability to know when it is more appropriate to act than to abstain from acting.

A few scholars and judges have similarly recognized that too much humility can prevent judges from acting when they ought to. Describing Hand’s humility, for example, Ronald Dworkin says that it stemmed from “a *disabling uncertainty* that he—or anyone else—could discover which convictions were true.”⁶³ Steven Burton, in defending and defining law as practical reason, eloquently notes that “[t]he life of the law has not been logic or experience: it has been imagination and courage in action.”⁶⁴ Judge John Noonan praises Marshall, Brandeis, Holmes, and Cardozo for their “fortitude,” quoting Brandeis on “the virtues . . . of truth, of courage, of willingness to risk positions, of the willingness to risk criticisms, of the willingness to risk the misunderstandings that so often come when people do the heroic thing.”⁶⁵ At least three Justices on the current Supreme Court similarly recognize the potentially disabling effects of self-doubt: “Liberty finds no refuge in a jurisprudence of doubt.”⁶⁶

In general, however, the vices of humility are less well-known than its virtues. And the character trait that counters the vices of too much humility and inclines one toward acting—even in the face of self-doubt—is courage; its opposite is timidity.

The widespread recognition of the need for humility makes it

and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964). For a more elaborate argument about Bickel’s lack of followers, see Kronman, *supra* note 4, at 1571-73.

61. KRONMAN, *supra* note 5, at 325-28.

62. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 854 (1988).

63. RONALD DWORBIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 342 (1996) (emphasis added). Dworkin himself suffers from no such uncertainty. And Hand, despite his purported disability, could be courageous on occasion. See *Masses Publ’g Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917).

64. Burton, *supra* note 21, at 792.

65. The Honorable John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119, 1130-32 (1987) (quoting ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* 281 (1956)).

66. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844 (1992).

especially important to stress the need for judicial courage. The problem is that one common response to humility and doubt is to privilege humility: to urge a system of pure self-restraint rather than attempt to live with both humility and courage. The modern turn toward grand theory in constitutional law typifies this reaction. The scholars (and a few judges) who urge courts to tether themselves to a single method of interpretation—whether originalism, textualism, intra-textualism, or constitutional dualism—are, in effect, privileging humility over courage.⁶⁷ Afraid that judges might make mistakes, they seek refuge in a constraining methodology designed to produce right answers without the exercise of judgment. As I have argued elsewhere, this mechanical certitude is an impossible goal: no theory applies itself, and there is always room for judgment and discretion.⁶⁸

But responding to humility with timidity is not only self-defeating, it is also pernicious. Some of the most successful instances of judicial review have been acts of courage, and a cowardly failure to act can be as damaging as arrogance. I have already mentioned briefly a few of the cases in which courageous judges stepped into the breach and accomplished much good; readers can undoubtedly provide additional examples. Here I want to focus instead on the dangers of timidity. I hope that in doing so, I will both demonstrate the need for judicial courage and show how it balances humility.

Three very different examples may serve to illustrate the harms that can arise when judges are too diffident. First, judges who are overly awed by the political branches, and overly humble about their own role, may allow shameful events to occur or continue. In 1937, after a momentous struggle over the role of the judiciary in our constitutional democracy, a Court acutely aware of its own shortcomings vowed eternal humility. That vow produced many good decisions, but it also produced two reminiscent of *Dred Scott*: in the early 1940s, the Supreme Court decided *Hirabayashi v. United States*⁶⁹ and *Korematsu v. United States*,⁷⁰ approving racially-based curfews and relocation orders. *Korematsu* has been called “a case that has come to live in infamy,”⁷¹ and “one of the Court’s most

67. For descriptions, scholarly adherents, and critiques of some of these methods of interpretation, see FARBER & SHERRY, *supra* note 10. For a more generalized example of a scholar whose vision of judging accommodates humility but not courage, see MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 169-70 (1994).

68. FARBER & SHERRY, *supra* note 10, at 3-14.

69. 320 U.S. 81 (1943).

70. 323 U.S. 214 (1944).

71. KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 631 n.4 (14th ed. 2001).

embarrassing moments.”⁷² The two cases are also an example of a Court with an overly humble attitude towards its own role:

Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.⁷³

The dissenting opinions in *Korematsu*, which history has vindicated, achieved a better balance between humility and courage. Justice Murphy, after noting that judgments of military necessity “ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation,”⁷⁴ nevertheless found the relocation order unconstitutional.⁷⁵ Justice Jackson—who ten years later would describe so humbly the Court’s fallibility—struck a similar balance, voting to invalidate the relocation order despite his recognition that “[i]n the very nature of things military decisions are not susceptible of intelligent judicial appraisal.”⁷⁶ Jackson also recognized the peculiar dangers of a *court* unwilling to stand up for principle: “[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself.”⁷⁷

Korematsu thus illustrates that judicial humility is not always a good thing. Note that in this it differs from another infamous discrimination case, *Plessy v. Ferguson*.⁷⁸ In *Plessy*, the Court failed to invalidate racially discriminatory laws in large part because the Justices shared the underlying belief in the appropriateness of racial segregation.⁷⁹ In *Korematsu*, while judicial racism may have played some minor part in the decision, the Court’s humble deference to the military and the political branches was much more apparent.⁸⁰ Only the dissenters were courageous enough to risk

72. David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 343 (1994).

73. *Hirabayashi*, 320 U.S. at 93.

74. *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting).

75. *Id.* at 233-35.

76. *Id.* at 245 (Jackson, J., dissenting).

77. *Id.* at 245-46.

78. 163 U.S. 537 (1896).

79. See, e.g., Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 319-20 (1998).

80. Historian (and lawyer) Peter Irons concludes that the military orders culminating in internment “resulted from racism, war hysteria, and the failure of leadership at the highest levels of government,” but that the legal cases simply “reflected the failure of the legal system.” PETER IRONS, *JUSTICE AT WAR*

being mistaken. (That the risk seems small in hindsight does not diminish their courage.)

The case of *Poe v. Ullman*⁸¹ provides a different sort of illustration of the dangers of responding to humility with timidity. *Poe*, decided four years before *Griswold v. Connecticut*,⁸² refused to reach the merits of a challenge to the constitutionality of Connecticut's ban on the sale or use of contraceptives.⁸³

In *Poe*, the majority drew on a long tradition of justiciability, described by Justice Frankfurter as flowing from the "restricted" role of the federal courts.⁸⁴ These rules operated to cabin the judicial tendency toward arrogance. But in this case, the caution was misplaced. Justice Harlan's eloquent dissent tore to shreds the majority's reasoning, and demonstrated its misuse of precedent. And Harlan offers another example of courage in the face of doubt. Like Jackson before him, Harlan recognized that the Court should "exercise limited and sharply restrained judgment," and should "hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among [the] various views" on the morality of contraceptives.⁸⁵ Nevertheless, Harlan thought the Court was required not only to confront the merits of the case but to invalidate the Connecticut statute on constitutional grounds.⁸⁶ History has vindicated Harlan as well. Not only did the Supreme Court ultimately invalidate the Connecticut statute in *Griswold*, but *Griswold* itself—when separated from its extension in *Roe v. Wade*⁸⁷—has become so enshrined in the American pantheon of rightly-decided cases that Robert Bork's nomination foundered in large part on his rejection of it.⁸⁸

Poe differs from *Korematsu* in two respects. It is not as bad, symbolically, as *Korematsu*—pace Gunther—because in *Poe* the

365 (1983). His discussion of the Supreme Court's treatment of the cases does not indicate that racial prejudice played much role in the decisions. *See id.* at 227-50, 319-45. And his overarching conclusion is that political actors and government lawyers lied to the courts, eliminating any hope that they might reach correct results. *See, e.g., id.* at viii ("Never before has evidence emerged that shows a deliberate campaign to present tainted records to the Supreme Court.").

81. 367 U.S. 497 (1961).

82. 381 U.S. 479 (1965).

83. *Poe*, 367 U.S. at 507-09.

84. *Id.* at 503.

85. *Id.* at 544, 547 (Harlan, J., dissenting).

86. *Id.* at 553-54.

87. 410 U.S. 113 (1973).

88. Michael Klarman includes *Griswold* in his list of cases in which the Supreme Court's decision reflected national majority views and suppressed "outlier state practices." Michael J. Klarman, *Rethinking the History of American Freedom (Review Essay of Eric Foner, The Story of American Freedom (1998))*, 42 WM. & MARY L. REV. 265, 279 (2000).

Court refused to act at all rather than giving its imprimatur to unconstitutional government action.⁸⁹ But the Court's timidity in *Poe* is worse than *Korematsu* in another respect. In *Korematsu*, the lapse of time and the change of the fortunes of war meant that the relocation and internment programs were ending even as the Court validated them; aside from its symbolic or expressive effect, then, the decision in *Korematsu* affected relatively few people. *Korematsu* did not, ultimately, perpetuate an ongoing constitutional violation. But during the four year gap between the Court's abdication in *Poe* and its decision in *Griswold*, birth control remained unavailable to poor women in Connecticut and other states.⁹⁰ We have no way of knowing how many women died—of childbirth, of suicide born of desperation, or of illegal abortions—or how many unwanted children were born during those four years. Those deaths and births are all the more painful because the Supreme Court ultimately found the statute unconstitutional. That *Korematsu* has never been formally reversed—or completely repudiated—by the Supreme Court may be a blot on our history, but it means that the Court's timidity was not merely the postponement of the inevitable. (Indeed, I would not be at all surprised if *Korematsu* ends up being cited with approval by the Supreme Court some time during the current war on terrorism.) *Poe*, by contrast, was a futile effort to stave off the need to act courageously.⁹¹

My third example involves an ongoing Supreme Court effort to postpone deciding a difficult constitutional question. The first constitutional challenge to affirmative action in educational institutions reached the Supreme Court in 1973.⁹² The Court ducked the issue then, and for the last thirty years has refused to

89. The interplay between Bickel and Gunther on this case provides an interesting sidelight. Gunther reads Bickel's "passive virtues" as counseling inaction in cases such as *Poe*, and then criticizes Bickel for not supporting the Court's clever use of those same virtues. Gunther, *supra* note 60, at 18. Perhaps, however, Gunther—like many of Bickel's readers—has overestimated Bickel's emphasis on judicial caution, wrongly concluding that Bickel finds no room for judicial courage.

90. The effect is made worse if one considers that the Supreme Court first refused to confront the merits of the Connecticut birth control statute almost twenty years before *Poe*. In *Tileston v. Ullman*, 318 U.S. 44, 46 (1943), the Court rejected a constitutional challenge to the law on standing grounds.

91. One could make the same argument about *Naim v. Naim*, 350 U.S. 985 (1956), dismissing an appeal that challenged Virginia's anti-miscegenation laws, which the Court struck down eleven years later in *Loving v. Virginia*, 388 U.S. 1 (1967). Bickel, of course, famously defended *Naim*, as he did the result in *Poe*. See BICKEL, *supra* note 6, at 174.

92. *DeFunis v. Odegaard*, 416 U.S. 312, 348 (1974) (finding the challenge moot, on somewhat weak reasoning exposed by the dissent).

provide a definitive answer to a question that continues to divide Americans.⁹³ The Court's only discussion on the merits, in *Regents of the University of California v. Bakke*,⁹⁴ produced such a quagmire that lower courts cannot even agree on what the case stands for.⁹⁵ The Court has since steadfastly denied certiorari in all cases raising questions about educational affirmative action.⁹⁶ Regardless of one's views on the merits, the current uncertainty increases friction and resentment on both sides and encourages litigation. The situation also discourages both sides from focusing on additional or alternative remedies for the poor performance of African-Americans on the standardized tests used in college admissions. A definitive ruling on the constitutionality of affirmative action (and, if constitutional, its legal contours) would allow us to move on.

The history of anti-abortion laws provides an illuminating contrast to affirmative action. With the change in personnel in the 1980s came a change in the Court's ideological outlook. The reach of *Roe v. Wade* was incrementally narrowed, leading opponents to believe that it might soon be overruled. During this period, then, the constitutional status of anti-abortion laws was uncertain, similar to the state of affirmative action today. In response, state legislatures enacted a steady stream of restrictions on abortion, moving increasingly closer to outright bans—and resulting in almost constant litigation. For a time the Court wavered, upholding many

93. One of my colleagues has recently argued that affirmative action is increasing racial tension, and specifically that it is a “wedge” issue that allows white supremacist groups to attract young, moderate whites who would not otherwise join such organizations. CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION* 336-37 (2002).

94. 438 U.S. 265 (1978).

95. Compare the majority and dissenting opinions in *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002).

96. *See, e.g.*, *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1191 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 133 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 700-01 (4th Cir. 1999), *cert. denied*, 529 U.S. 1050 (2000); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1067 (9th Cir. 1999), *cert. denied*, 531 U.S. 877 (2000); *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). As this Article goes to press, the Supreme Court has granted certiorari in a pair of cases challenging affirmative action at the University of Michigan. *See Grutter*, 288 F.3d 732; *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001), *cert. granted*, 123 S. Ct. 617 (2002). It is always risky to predict Supreme Court decisions, but I do not believe that the Court's decision will offer much guidance. The Court is unlikely to produce a majority opinion, and at least one of the Justices in the majority will end up concurring on narrow and unhelpful grounds. In short, the case is likely to produce more, rather than less, litigation.

of the restrictions without overruling *Roe*. But the courageous decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹⁷ made clear that the core of *Roe*—although not its broadest implications—was still good law, and put an end to legislative flirtation with unconstitutionality. Subsequent state restrictions on abortion were much narrower, and the enactment of new anti-abortion laws slowed to a trickle. Both sides have since moved on. Proponents of choice have turned to state courts and state constitutions for protection where *Casey* left off, and opponents have turned to methods other than legislation to discourage abortion. Had the Court in *Casey* instead overruled *Roe*, that course, too, would have provided a clear answer and allowed both sides to focus on more effective strategies than constant litigation.

The affirmative action and abortion situations illustrate an important point about judicial courage. In both cases, my critique focuses not on the result but on the mere need for a clear decision. What if the Court had reached (or did or would reach) the wrong result? It is exactly that possibility that makes the Court's action in *Casey* courageous and the Court's inaction in the affirmative action context overly timid. Judicial courage entails acting in the face of justifiable humility, and risking the very real possibility of making a mistake.

V. CONCLUSION

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

In the end, humility and courage are like other constitutional dualities: there is no mechanical device that can mediate between them. But judges who are inclined *both* to doubt themselves *and* to risk being wrong are more likely to reach a happy medium than are judges who are too strongly inclined toward arrogance or timidity. I can point to no better example of the happy amalgam of courage and

97. 505 U.S. 833, 845-46 (1992).

humility than Justice Jackson's concurrence in *McGrath v. Kristensen*.⁹⁸ Having concluded in 1940, when he was Attorney General, that the Selective Service Act allowed the United States to draft visiting foreigners who, for reasons beyond their control, were temporarily unable to return home, Jackson faced exactly the same question in 1950 as a Justice. Joining the Court's opinion holding that the Act did *not* apply to such foreign nationals, he concurred to explain the inconsistency:

Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court." . . . If there are other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all.⁹⁹

His courage in 1940 and his humility (and courage in admitting error) in 1950, as well as his openness to persuasion, exemplify the character traits of a good judge.

Justice Jackson is not alone. Justice Blackmun displayed the same combination of courage and humility—albeit without Jackson's humor—when, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁰⁰ he provided the fifth vote to overrule an earlier case in which he had joined the majority. Justice Stevens was persuaded to change his views on affirmative action,¹⁰¹ and Justices Black and Douglas rethought the constitutionality of requiring students to salute the flag.¹⁰² Chief Justice Rehnquist, having once believed that *Miranda v. Arizona*¹⁰³ was not a constitutionally-based decision, later changed his mind and voted to invalidate Congress' attempt to overrule it.¹⁰⁴ Willingness to change one's mind—to be persuaded—is one hallmark of a judge who is both humble and courageous.

98. 340 U.S. 162 (1950).

99. *Id.* at 178 (Jackson, J., concurring) (citations and some ellipses omitted).

100. 469 U.S. 528 (1985), *overruling* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

101. *Compare* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 (1978) (Stevens, J., concurring in part and dissenting in part), *with* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting).

102. *Compare* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *with* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling* *Minersville*, 310 U.S. 586.

103. 384 U.S. 436 (1966).

104. *Dickerson v. United States*, 530 U.S. 428, 440-41 (2000). Justice Rehnquist's earlier views may be found in *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) and *New York v. Quarles*, 467 U.S. 649, 654 (1984).

How we identify other such judges I leave for another day, noting only that there are no mechanical tests for good judgment.¹⁰⁵ As former Attorney General Nicholas Katzenbach told the Senate Judiciary Committee deliberating on the nomination of Robert Bork to the United States Supreme Court, "Were I in your position . . . the central question I would be asking is this. Is Judge Bork a man of judgment? Not intellect, not reasoning, not lawyering skills, not ideology, not philosophy—simply, judgment. Is he a wise person?"¹⁰⁶

However daunting the task may seem, in the end, describing (and finding) individuals well-suited to the task of judging is likely to prove more useful than seeking artificial mechanisms to constrain poor judgment, or debating once again whether modern American judicial review is a curse or a blessing.

105. Other scholars have described Justices Benjamin Cardozo and Louis Brandeis in terms that resonate with my thesis. See Goldberg, *supra* note 28, at 1419-24 (Cardozo); Farber, *supra* note 22, at 163-65, 186-90 (Brandeis); Noonan, *supra* note 65, at 1130-31 (both). Mark Tushnet has suggested that we can identify virtuous judges by the integrity of their narratives. Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 258 (1992).

106. Anthony Lewis, *Abroad At Home; Question of Judgment*, N.Y. TIMES, Sept. 27, 1987, at D23.