



CSU
College of Law Library

2012

Constitutional Cases and the Four Cardinal Virtues

R. George Wright

Indiana University Robert H. McKinney School of Law

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Constitutional Law Commons](#), and the [Judges Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 Clev. St. L. Rev. 195 (2012)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol60/iss1/7>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

CONSTITUTIONAL CASES AND THE FOUR CARDINAL VIRTUES

R. GEORGE WRIGHT*

I.	INTRODUCTION	195
II.	THE VIRTUES AND JUDICIAL DECISION-MAKING: A FEW PRELIMINARIES	198
III.	CONSTITUTIONAL CASE LAW AND THE CARDINAL VIRTUES: SOME ILLUSTRATIONS	203
	A. <i>Courage and the Constitution</i>	203
	B. <i>Constitutional Temperance and Prudence in and Beyond the Courts</i>	207
	C. <i>Justice as a Personal Virtue: Constitutional Responses to Personal Injustice</i>	211
IV.	CONCLUSION: DO THE CARDINAL VIRTUES STILL MAKE A DIFFERENCE AT THE CONSTITUTIONAL LEVEL?	215
	A. <i>The Cardinal Virtues in Contemporary Context</i>	215
	B. <i>Practical Wisdom and Affirmative Action: A Concluding Case Example</i>	220

I. INTRODUCTION

In addressing constitutional cases, judges face no shortage of legal rules, tests, principles, doctrines, and policies upon which to draw.¹ In those cases, the challenge is assumed to be to identify and apply the most relevant such legal rules, tests, principles, doctrines, and policies. An accompanying judicial opinion tries to

* Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law.

¹ Merely for example, in the free speech area, a court might, depending upon the nature and circumstances of the case, consider some sort of “clear and present danger” test; a test for “true threats;” “hecklers’ vetos;” “fighting words” of several varieties; overbreadth; prior restraints; public and private figure libel; other sorts of “low value” speech, including speech involved in torts and crimes; numerous forms of commercial speech; obscenity and several different classifications of pornography; speech and symbolic conduct; allegedly indecent speech or conduct; various forms of hate speech and group defamation; a distinction between content-based and content-neutral regulations of speech; public forum doctrine; speech in various kinds of electoral contexts; speech in and out of public schools; public employee speech; freedom of association; and “compelled speech” in several contexts, almost all of the above with alternative analyses. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1029-1399 (6th ed. 2009).

articulate this process, partly to legitimize the outcome, partly to provide guidance, and perhaps partly for purposes of civic education and inspiration.²

All of this seems familiar and unobjectionable. Perhaps it is accurate as a description of what judges ordinarily do in constitutional cases. This Article, however, recommends a somewhat different approach to constitutional adjudication.³ Specifically, this Article recommends supplementing the above standard forms of constitutional adjudication with appropriate and legitimate⁴ attention to what are classically referred to as the Four Cardinal Virtues.⁵ These cardinal virtues are thought to include wisdom,⁶ especially practical wisdom or prudence in a broad sense; courage⁷ or fortitude; temperance⁸ or self-control and proper self-restraint;

² For classic discussions of judicial decision making, with some attention to constitutional law, see, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (Andrew L. Kaufman ed., Quid Pro Books 2010) (1921); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (rev. ed. 1962) (1949).

³ Much of the argument below would apply as well to a wide range of non-constitutional questions, but the scope of the discussion herein is limited, largely for the sake of sheer manageability.

⁴ This Article does not attempt to sort out proper from improper methods of constitutional interpretation. However, at a minimum, we do not approve of a constitutional outcome, or a judicial explanation for such an outcome, that is indefensible as a matter of constitutional law, even if there is both an intent to promote one or more of the cardinal virtues, and the cardinal virtues are in fact thereby promoted. This Article assumes, to begin with, merely that attending to one or more of the cardinal virtues can, at one stage or another, be a permissible consideration in important constitutional adjudication. The Article need not, and does not, endorse the idea of courts, or governments in general, adopting some controversial view of the role of the cardinal virtues in good lives, and seeking to coercively impose that favored view on the public. See *infra* notes 174-75 and accompanying text.

⁵ To the extent constitutional adjudication was to focus on virtues and vices, it could be described as 'aretaic.' For brief contemporary introductions to aretaic or virtue ethics in general, see, e.g., Julia Annas, *Virtue Ethics*, in *THE OXFORD HANDBOOK OF ETHICAL THEORY* ch. 18 (David Copp ed., 2007); Rosalind Hursthouse, *Virtue Ethics*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (rev. ed. 2007), available at <http://www.plato.stanford.edu/entries/ethics-virtue> (last visited February 20, 2011). For classic accounts of virtue ethics, and of the role of the four cardinal virtues in particular, see ARISTOTLE, *THE NICOMACHEAN ETHICS* (David Ross trans., 1925) (J.L. Ackrill & J.O. Urmson rev. trans., 1980) (Oxford World's Classics ed.) (~350 B.C.E.); MARCUS AURELIUS, *MEDITATIONS* (Martin Hammond trans., Penguin ed. 2006) (~172); Thomas Aquinas, *Treatise on the Virtues*, in *SUMMA THEOLOGICA I-II*, qq. 49-67 (John A. Oesterle trans., 1966) (Univ. of Notre Dame ed. 1984) (~1265-1274); PLATO, *THE REPUBLIC* pt. II, chs. XII, XIV; pt. IV, chs. XXXI-XXXII (Francis MacDonald Cornford trans., 1941) (Oxford Univ. Press ed. 1990) (~360 B.C.E.). For one contemporary treatment, see, e.g., JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* (Richard Winston et al. trans., 1966). It should be noted that the four cardinal virtues do not appear to raise any obvious establishment clause, free exercise, or equal protection problems.

⁶ See discussion *infra* Parts III-IV.

⁷ See discussion *infra* Parts III-IV.

⁸ See discussion *infra* Parts III-IV.

and the virtue of justice⁹ as the sustained personal disposition to give everyone what is due and proper.

For sheer manageability, our focus is on these four traditional cardinal virtues rather than more broadly on all of the many arguable virtues, whatever their importance.¹⁰ But in compensation, this Article discusses the cardinal virtues, or how they lack, at two levels. This Article thus discusses the cardinal virtues as displayed, or not displayed, by judges themselves. This Article crucially emphasizes the importance of the cardinal virtues as displayed, or not displayed, by broader groups of actors including the general public, partly in response to constitutional decisions.¹¹

This Article discusses the cardinal virtues in the context of various specific historical constitutional cases.¹² Collectively, the cases justify increased judicial attention to the cardinal virtues, as an important element of constitutional decision-making, without improperly distorting the process of adjudication.¹³

The judicial cases themselves, however, should not bear the entire burden of justifying a more significant role for the cardinal virtues in constitutional adjudication. The value of the cardinal virtues, collectively and individually, has frequently been discussed by philosophers and social critics.¹⁴ To help make the

⁹ See discussion *infra* Parts III-IV. The four cardinal virtues do not operate in isolation from one another; we shall note throughout some overlaps and relationships.

¹⁰ To try as well to account for the constitutional role of virtues—or at least arguable virtues—such as honesty and integrity; generosity; patience; humility; loyalty; compassion or caring (beyond the cardinal virtue of justice); benevolence; detachment; chastity; ambition or the lack thereof; punctuality; creativity; magnanimity; reliability; modesty; determination; curiosity; meekness or assertiveness; gentleness; adaptability; cleanliness; mercifulness (as tempering justice); and diligence, to name but a few possibilities, would obviously be beyond what is reasonably possible herein. For a well-researched compilation of a number of widely respected virtues, see CHRISTOPHER PETERSON & MARTIN E.P. SELIGMAN, *CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* (2004). For the broader contemporary debate over whether there really are any stable character traits, see J. M. Doris, *Persons, Situations, and Virtue Ethics*, 32 *NOÛS* 504 (1998); Gilbert Harman, *The Nonexistence of Character Traits*, 100 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 223 (2000). See also STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974). For more stable character-friendly views, see ROBERT M. ADAMS, *A THEORY OF VIRTUE: EXCELLENCE IS BEING FOR THE GOOD* 115-70 (2006); Joel J. Kupperman, *The Indispensability of Character*, 76 *PHIL.* 239 (2001); James Montmarquet, *Moral Character and Social Science Research*, 78 *PHIL.* 355 (2003).

¹¹ Groups might display any of the cardinal virtues to a greater or lesser degree in response to constitutional decisions in light of threats or rewards and incentives as affected by those decisions. A group might show increased self-control in response to a judicial decision that does not itself display exceptional self-control, or perhaps any other virtue. And a group might display greater self-control because a judicial decision displayed not that particular cardinal virtue, the way bravery might inspire bravery in others, but the virtue of wisdom with respect to the public's well-being. Thus judicial wisdom, or sound practical judgment, might increase the rewards of citizen self-control.

¹² See discussion *infra* Part III.

¹³ See *supra* note 4.

¹⁴ See *infra* Parts II, IV.

case for greater attention to the cardinal virtues in constitutional adjudication, this Article draws upon some highlights of that broader discussion with special attention to issues of great contemporary importance.¹⁵

To set the stage for discussing the judicial cases, though, it will be useful to have some very general initial sense of the possible roles, limits, and values of basic virtues and virtue theory in adjudication. It is to that initial stage-setting that this Article now turns.

II. THE VIRTUES AND JUDICIAL DECISION-MAKING: A FEW PRELIMINARIES

The influence of virtue theory within ethics and jurisprudence has not been constant over time. Some years ago, the philosopher Elizabeth Anscombe noted in particular that “[a]nyone who has read Aristotle’s [virtue] *Ethics* and has also read modern moral philosophy must have been struck by the great contrasts between them.”¹⁶ The extent to which theorists, judges, and the broader public think in terms of the cardinal virtues is subject to change over time. Merely for the sake of its suggestiveness, rather than to definitively prove anything in particular, consider a bit of casual research based on Google Labs data.¹⁷

Apparently, English-language book references to the four cardinal virtues have involved detectable trends over the past three hundred years. References to ‘courage’ over that time have been remarkably stable,¹⁸ and references to ‘temperance’ have also been stable, at lower rates.¹⁹ References to ‘wisdom’ appear to peak sharply in the period from 1800 to 1830, and then gradually decline until about 1940, at which point such references more or less stabilize.²⁰ The word (not necessarily in its ‘virtue’ sense) ‘justice’ roughly parallels the use of ‘wisdom,’ but at higher levels after 1800.²¹ Until 1800, ‘courage’ was more commonly referred to than ‘justice,’²² but the use of the word ‘justice’ (in whatever sense) spiked

¹⁵ See *supra* note 14 and accompanying text. While our focus will be primarily on the American constitutional context, basic concerns for cardinal virtues such as temperance, practical wisdom, and personal justice are arguably starting to become increasingly prominent elsewhere. See, e.g., ED HOWKER & SHIV MALIK, *JILTED GENERATION: HOW BRITAIN HAS BANKRUPTED ITS YOUTH* (2010); MAGGIE JACKSON, *DISTRACTED: THE EROSION OF ATTENTION AND THE COMING DARK AGE* (2009).

¹⁶ G.E.M. Anscombe, *Modern Moral Philosophy*, 33 *PHIL.* 1, 1 (1958), reprinted in *VIRTUE ETHICS* 26 (Roger Crisp & Michael Slote eds., 1997).

¹⁷ See *Ngram Viewer*, GOOGLE LABS BOOKS, <http://www.ngrams.googlelabs.com/graph?> (last visited Dec. 29, 2010) (on file with the author). The *Ngram Viewer* allows for a simultaneous search for and plotting of “justice, wisdom, courage, temperance” over various times periods. The user is incited to experiment, and to attempt to explain any detectable trends. See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.* Obviously, ‘justice’ may be used in a wide variety of senses, even within jurisprudence and ethics, with no direct reference to justice as a personal virtue.

²² See *id.*

dramatically around 1800²³ before gradually trending downward from 1830 to 1950, at which point references to ‘justice’ fluctuate or, of late, trend upward.²⁴ None of the four cardinal virtue words is as prominent in this database as it was in 1820.²⁵

It may well be that virtue ethics in general has been long-neglected,²⁶ but also the subject of a relatively recent revival.²⁷ Our focus is, however, not on any recent popularity of virtue ethics,²⁸ but on its possible contributions to constitutional jurisprudence in our day. And there is certainly reason to suspect that fully legitimate attention to the virtues—and to the four cardinal virtues in particular—could be of genuine value in resolving and justifying constitutional cases.

At a very general level, it is reasonable to argue that the virtues and good government reciprocally bring each other into clearer focus. Professor Ronald Dworkin, interpreting Aristotle’s classic virtue theory, makes this argument. Crucially, Professor Dworkin, following Aristotle, holds that “[w]e understand good government better by better understanding happiness *and the virtues, which good government fosters.*”²⁹

A broadly liberal form of government, including the judiciary, need not vainly seek to be neutral as among all basic forms of virtue and vice, including injustice, thoughtlessness, smugness, and narcissism, for example.³⁰ And if a broadly liberal government, including its judiciary in constitutional cases, may seek within limits to

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See, e.g.,* Michael Slote, *Virtue Ethics*, in *THE BLACKWELL GUIDE TO ETHICAL THEORY* 325 (Hugh LaFollette ed., 2000).

²⁷ *See id.* (tracing the revival of interest in virtue ethics to G.E.M. Anscombe, *supra* note 16).

²⁸ *See id.*

²⁹ RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 188 (2011) (emphasis added). Professor Dworkin then adds that the Aristotelian virtues are better understood by “asking which personal qualities make for good citizenship in the kind of state we assume to be good.” *Id.*

³⁰ For the possibility of a broadly liberal judiciary focused on a range of judicial virtues in a wide variety of cases, see Judith Resnik, *Reading Reinhardt: The Work of Constructing Legal Virtue (Exempla Iustitiae)*, 120 *YALE L.J.* 539, 568 (2010) (referring to judicial facticity, patience with nuance, thoroughness, preparedness, optimism, and concern for justice for all persons); Lawrence B. Solum, *Natural Justice*, 51 *AM. J. JURIS.* 65, 91-92 (2006). For discussion of thoughtlessness and smugness in particular as matters of character, see THOMAS HURKA, *VIRTUE, VICE, AND VALUE* 95 (2001).

contribute toward changing behaviors,³¹ then virtues and vices may to some degree³² be ultimately affected as well. Changes in behavior can lead to changes in values.³³

Should government, including a clearly limited and fallible judiciary, ever really consider matters of even the most elemental virtues and vices? Given the priority of individual liberty and autonomy, we may face problems involving³⁴ the cultivation of popular virtue and vice. With typical insightfulness, Alexis de Tocqueville noted one persistent such problem. Tocqueville noticed “[d]emocracy’s difficulty in conquering the passions and silencing momentary requirements in the interests of the future The people, surrounded by flatterers, find it hard to master themselves. Whenever anyone tries to accept a privation or a discomfort, even for an aim that reason approves, they always begin by refusing.”³⁵

Such a collective inability to endure modest short-term discomfort necessary for more important long-term goals might well indicate a deficiency of the relevant public virtue,³⁶ as well as a serious public policy problem calling for some sort of appropriate, prudent governmental response. Writing specifically of the problem of self-control in our own day, Daniel Akst sensibly concludes that “while we can do better, we can’t do it alone. Willpower by itself won’t get the job done without the

³¹ See, e.g., the behavioral changes required by the underlying statute and the constitutional decisions in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) (constitutionally upholding federal legislation prohibiting racial discrimination in public accommodations in interstate commerce).

³² For a broader discussion, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); *LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE* (David A. Schultz ed., 1998).

³³ One writer on virtues and vices reminds us that

This notion that gradually the inner man conforms to the outer . . . has been experimentally supported. As Albert Bandura . . . states: “If people behave in new ways, eventually their attitudes change in the direction of their actions. Indeed, numerous studies have shown that one of the most effective methods for altering attitudes and values is by producing a change in behavior.”

SOLOMON SCHIMMEL, *THE SEVEN DEADLY SINS* 109 (1997) (quoting ALBERT BANDURA, *AGGRESSION: A SOCIAL LEARNING ANALYSIS* 257 (1973)).

³⁴ This is not to suggest that problems of national character—or of virtue and vice—do not have one or more causes rooted in economics, hierarchy, cultural institutions, and other sources. Doubtless they do. But this does not show that national problems should always be judicially addressed at the deepest causal levels, and never as well at the level of changing individual or group behavior, or individual and group virtue and vice. See *supra* note 33.

³⁵ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 224 (J.P. Mayer, ed., George Lawrence, trans., 1969).

³⁶ *Id.* Tocqueville’s example involves only an initial, rather than a sustained, rejection of necessary sacrifice. Such a sustained rejection could indicate a greater deficiency of the relevant public virtue. There is no reason to suppose that from its founding until its historical conclusion, a political society can never vary in the degree to which it possesses or displays any of the cardinal virtues. Societies, as well as persons, can presumably grow, or diminish, over time in any of the cardinal virtues. Of course, societies may also merely appear to have grown or diminished in a virtue because their circumstances have become more or less trying in relevant respects.

help of institutions—a *sensible legal framework* and strong social connections.”³⁷ Akst then recognizes the possible role for constitutions in particular in legitimately discouraging some departures from basic public virtues.³⁸

One might still wonder, though, whether there can be any legitimate role for considering even basic virtues in constitutional cases. In any interesting and complex constitutional case, courts will typically have a range of rules, tests, principles, doctrines, and policies at their disposal,³⁹ and some of the tests will themselves allow for sensible and prudent judicial judgment and for flexibility in application and outcome.⁴⁰

The real answer to this question as to the role of virtue-thinking must depend partly on a sample of actual cases discussed briefly below,⁴¹ in the context of the four cardinal virtues, in themselves, and in social context.⁴² But we should consider the possibility that whatever their rigidity or flexibility, the various rules, tests, principles, doctrines, and policies themselves cannot always provide an unimprovable response and rationale in constitutional cases. Neither rules nor considerations of virtues will always be self-selecting or determinate in dictating constitutional outcomes and rationales.⁴³ But as we shall see, considerations of virtue, undertaken in accord with the cardinal virtue of prudence or practical wisdom,⁴⁴ may usefully supplement other elements of constitutional decision-making.

To open the door to judicial consideration of virtue, we can adapt a claim the philosopher John McDowell has made in discussing Aristotle’s virtue ethics: “Occasion by occasion, one knows what to do, if one does, not by applying universal principles but by being a certain kind of person: one who sees situations in a certain

³⁷ DANIEL AKST, *WE HAVE MET THE ENEMY: SELF-CONTROL IN AN AGE OF EXCESS* 14 (2011) (emphasis added).

³⁸ See *id.* at 243.

³⁹ See *supra* note 1 and accompanying text.

⁴⁰ Consider, for example, the three part Lemon test; the endorsement test; and the coercion test utilized by a chronically divided Supreme Court in Establishment Clause cases. See, e.g., the various opinions in *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

⁴¹ See discussion *infra* Parts III-IV.

⁴² See discussion *infra* Parts III-IV.

⁴³ Even if a rule is thought to be universalist or absolute within its proper scope, we must still decide, in part on the basis of prudence or practical wisdom, how to limit the proper scope and elements of the rule. We must still decide, for example, what counts as “speech” for free speech purposes. See, e.g., R. George Wright, *What Counts as ‘Speech’ in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010).

⁴⁴ For an emphasis on wisdom in a broad, inclusive, aspirational sense, but with a subordinate emphasis on a number of virtues that must be present in a reasonably stable, broadly liberal society, see ROBERT KANE, *ETHICS AND THE QUEST FOR WISDOM* 256 (2010) (citing in particular “honesty, respect, responsibility, fairness, trustworthiness, and caring” as virtues necessary for a healthy polity) (emphasis omitted).

distinctive way. And there is no dislodging . . . questions about the nature and . . . the acquisition of virtue.”⁴⁵

We need not make so ambitious a claim, though. Constitutional adjudicators can certainly pay primary attention to rules and the like; our interest is merely in a genuinely useful supplementary role for attention to the virtues. And the persons doing the “seeing”⁴⁶ of and through virtue include not just the judges, but broader groups as well, including the general public.

The less ambitious, but important, role for attention to the virtues in adjudication is more accurately captured by virtue ethicist Rosalind Hursthouse. Professor Hursthouse argues generally, but in a way we can adopt, that a certain amount of virtue and corresponding moral or practical wisdom (*phronesis*) might be required both to interpret the (moral or legal) rules and to determine which rule was most appropriately to be applied in a particular case.⁴⁷

Other views suggest that rules and principles constitute merely one side of the proverbial coin, with the virtues constituting the other side of the coin, and with a virtuous person being merely one who never violates the rules and principles.⁴⁸ We need not, however, so closely identify rules with virtues, any more than we should suggest that virtues should simply replace rules.

One way of distinguishing a useful role for the virtues might involve posing a hypothetical question. Let us suppose that we must entrust the well-being of a vulnerable person we care about, Minor, to one of two very similar adults, Nomos or Prudence. Nomos and Prudence as two persons have similar knowledge and experiences, equal intelligence, and they accept, with equal sincerity, identical moral rules, principles, doctrines, and policies.

We could stipulate to all this, and still have rational grounds for preferring to entrust Minor to the care of either Nomos or Prudence over the other. Differences between Nomos and Prudence in the relevant basic moral virtues, crucially, are not entirely ruled out by the above stipulations. Nomos, for example, might be well-intentioned, but, even in Nomos’ own eyes, lamentably “weak-willed,” or likely to give in to temptation. Prudence, let us suppose, in sharp contrast, has an established track record of somehow minimizing the personal appeal of temptation, or of success in resisting temptations when they arise.

In such a case, it would hardly be arbitrary of us to entrust Minor specifically to Prudence, rather than to Nomos, despite the many important respects, including the sincerely held principles, in which they are identical. To do the opposite, on the facts stipulated, would actually be irresponsible, and indeed unreasonable, on our part. And we can reach this preference for Prudence over Nomos even as we

⁴⁵ JOHN MCDOWELL, *Virtue and Reason*, in *ARISTOTLE’S ETHICS: CRITICAL ESSAYS* 120, 140 (Nancy Sherman ed., 1999). For a broader treatment of a related ‘particularism’ in ethics, see JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* (2004); *MORAL PARTICULARISM* (Brad Hooker & Margaret Olivia Little eds., 2001); R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 *HOFSTRA L. REV.* 195 (2009).

⁴⁶ See MCDOWELL, *supra* note 45, at 140.

⁴⁷ ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* 40 (1999).

⁴⁸ See DAMIEN KEOWN, *BUDDHIST ETHICS: A VERY SHORT INTRODUCTION* 12-13 (2005).

recognize that the virtues do not, individually or jointly, invariably point the virtuous decision-maker in some unique, single determinate direction.⁴⁹

We thus have, at a minimum, some initial grounds for a reasonable hope that proper attention to the virtues, and to the basic cardinal virtues in particular, may be of significant assistance in deciding, elaborating upon, and justifying constitutional decisions. But let us move on to critique a small sampling of the actual historical constitutional cases on that assumption, as a matter of further evidence.

III. CONSTITUTIONAL CASE LAW AND THE CARDINAL VIRTUES: SOME ILLUSTRATIONS

The cardinal virtues are, again, classically assumed to include courage, temperance or proper self-restraint, justice as a personal virtue, and perhaps most broadly and crucially, the virtue of practical wisdom.⁵⁰ We need not explore the extent to which any two or all of these virtues are linked, or even inseparable.⁵¹ Based on the few actual judicial examples we briefly consider below, however, it is reasonable to suppose that each of these virtues, especially practical wisdom, is often found in proximity to one or more of the others. A judicial decision displaying or promoting one often displays or promotes another. It is, however, also reasonable to imagine, based on our case selection, that a judicial decision displaying or promoting one basic vice may well display or promote the same or one or more other basic vices.

Most importantly, for our purposes, though, the cases below illustrate that in constitutional adjudication, the presence or absence of one or more cardinal virtues, in the judicial decision-maker or among some affected public, can be important in ways that are not fully captured by attention to rules, tests, principles, doctrines, or policies.

A. *Courage and the Constitution*

It is fair to say that freedom of speech law in particular focuses on rules and judicial tests.⁵² But it has been recognized that freedom of speech is also about the particular cardinal virtue of courage, or the lack thereof. The judicial rules and tests applied in free speech cases may affect the capacity of the public to resist a “chill” or to display personal and civic courage. Free speech jurisprudence may reflect the courage, or lack thereof, of both the public and the judiciary. In any event, free speech jurisprudence is in a practical sense interwoven with courage, or its lack, in

⁴⁹ Philosopher Christine Swanton points out not only that different particular virtues, by themselves, may point us in different directions, but that virtue ethics in general can hardly offer us a complete escape from problems of indeterminacy in decision-making. See CHRISTINE SWANTON, *VIRTUE ETHICS: A PLURALISTIC VIEW* 275, 291 (2003). Of course, an ethical or constitutional decision-maker who takes an interest in the virtues is hardly bound to consult only her character or conscience; such a decision-maker is, as a matter of the virtue of practical wisdom, bound to engage in consultation and dialogue on a proper basis. See *id.* at 295.

⁵⁰ See *supra* notes 5-9 and accompanying text.

⁵¹ The unity or lack of unity of all the cardinal virtues, in one sense or another, is an issue that we need not address. The realistic significance, in important constitutional contexts, of the cardinal virtues (and their opposites) is instead our primary concern.

⁵² See, e.g., the sampling referred to *supra* note 1.

important ways not reducible to the rules or tests themselves. But we should not invariably equate a judicial finding of constitutionally protected speech with a display of genuine judicial courage; this may vary with context.

The most widely celebrated linkage of free speech and the virtue of courage is that of Justice Brandeis, concurring in the case of *Whitney v. California*.⁵³ Justice Brandeis begins with the broad assertion that the constitutional Framers “believed liberty to [be] the secret of happiness *and courage to be the secret of liberty*.”⁵⁴ The meaning of the word “secret” may not be precisely clear. It may not be clear whether the meaning of “secret” in both instances above is intended to be the same. But Brandeis does briefly elaborate on speech itself and the problem of fear, or irrational fear, as the presumed opposite of the virtue of courage.

Justice Brandeis thus argues that by itself, “[f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”⁵⁵ Apart from instances in which the speech imminently threatens a serious harm,⁵⁶ supposedly harmful political speech should prompt us to address and rebut such speech on the merits. Our courage in legally permitting such speech is bolstered by our confidence in the relevance and power, over time, of counter-speech.⁵⁷

Thus on the Brandeis view, courage inspires protecting speech that some would regard as dangerous. This courage is directly displayed by the judges deciding the free speech cases in question. But over the long term, that judicial courage must be supported by some degree of courage, or admiration for courage, within elements of the broader public. The public’s own courage may have been reinforced, or partly inspired, by judicial courage. The necessary judicial and broader civic courage may actually sustain one another in a “virtuous circle.” And judicial and citizen courage in tolerating potentially dangerous speech may be strengthened and confirmed when the feared consequences of such speech do not come to pass.⁵⁸

This is certainly an important lesson on the relationships between constitutional free speech cases and the judicial and civic virtue of courage.⁵⁹ There are of course

⁵³ See *Whitney v. California*, 274 U.S. 357, 372, 375-76 (1927) (Brandeis, J., concurring), *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁵⁴ *Id.* at 375 (emphasis added).

⁵⁵ *Id.* at 376.

⁵⁶ See *id.*

⁵⁷ See *id.* at 377 (explicitly contrasting cowardice with the virtue of courage among the American Revolutionaries).

⁵⁸ Consider, e.g., the circumstances and consequences in the racially charged rhetoric case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Of course, some political speech cases are controversial for reasons best conceived in terms other than that of a public fear of future bad public consequences, and the courage or lack of courage to manage those fears. See, e.g., the military funeral protest case of *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

⁵⁹ For further discussion, see Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1569 (1999). From a slightly different angle, consider also Professor Blasi’s classic argument that free speech jurisprudence should be crafted with special attention to those eras in which the literal courage of our convictions, and our sense of security, is at its

some inherent practical limitations at work. The virtue of courage often depends, for example, upon the distinct cardinal virtue of practical wisdom or prudence.⁶⁰ And the real practical value of judicial courage over time may well depend upon the guiding virtue of judicial practical wisdom, as in a number of the classic civil rights and equal protection adjudications.⁶¹

More controversially, though, we should ask whether judicial courage in deciding and explaining free speech cases always tends to support the speaker. The twentieth century association between free speech and courage, especially in political dissent, wartime, and subversive advocacy cases,⁶² may inadvertently tend to actually inhibit courageous re-thinking in some free speech contexts.

Consider, for example, a case of repeated verbal condemnations of vulnerable adolescents in a public school setting that may not allow for voluntarily avoiding the perhaps targeted message. Suppose a court was to uphold such public school student expression as constitutionally protected speech. Would it be clear, in every such instance, that upholding free speech requires greater judicial courage than allowing its reasonable regulation based on a controversial willingness to carefully work through the relevant interests at stake, including those of the speakers, their future selves, the “targets,” other students, and the community and public at large?⁶³

In some free speech cases, judicial courage may potentially take more than one form, and discerning the most valuable form of judicial courage may require unusual practical wisdom. Consider as well the case of “animal cruelty speech” in general.⁶⁴ The more that upholding controversial speech is celebrated as courageous, at least in the relevant circles, the less real courage is required, paradoxically, to uphold such speech. On the other hand, professional courage among federal judges might be actually required to resist assimilating an animal cruelty video to protected speech, even where the free speech challenge focuses largely on over breadth grounds.⁶⁵

lowest ebb, and the impulse to suppress dissent is at its strongest. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

⁶⁰ Some uncontrolled fears are unreasonable, and might be diminished by the exercise of practical wisdom. The virtue of courage may be transformed into the vice of foolhardiness or rashness if one impulsively decides to run into a brick wall, rather than merely walk through a nearby door. On the other hand, one probably still displays real courage—if pointlessly, or even foolishly—if one’s lack of practical wisdom leads one to imagine that one is confronting serious danger when no such danger really exists.

⁶¹ For important examples of this combination, see generally JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS* (2003).

⁶² See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT TO THE WAR ON TERRORISM* (2004).

⁶³ For a useful starting point, see the various opinions in *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *reh’g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated*, 549 U.S. 262 (2007).

⁶⁴ See, in one particular context, *United States v. Stevens*, 130 U.S. 1577 (2010) (criminalizing commercial depictions of animal cruelty).

⁶⁵ See *id.*

The deepest and most valuable form of judicial courage in a range of free speech cases, however, might be of a different sort. Such courage might set aside the appeal of being thought courageous for championing free speech, and, with due judicial modesty and humility, ask whether any of the basic reasons⁶⁶ for constitutionally enshrining free speech in the first place are distinctively present in the case, even if upholding the speech would somehow seem generally libertarian or broad-minded.

Or consider, for example, the opportunity to display some form of judicial courage in some of the violent video game cases,⁶⁷ or in the commercial nude dancing cases.⁶⁸ In these and a variety of pornography cases,⁶⁹ a cynic might suggest that the number of the court's references to works of classic literature is sometimes proportional to the court's desire to verbally "distance" itself from the unseemly "expression" in question. Courts may cite a dozen classic works incorporating verbal depictions of violence. But having done so, they often do not then much reflect on whether the basic reasons for protecting speech⁷⁰ are really distinctly at stake in the case. In some cases, where the activity involved has little to do with meaningful speech, such reflection might require a kind of cognitive or professional courage.

More broadly, free speech cases, along with some of the classic civil rights and equal protection cases, even as decided by independent Article III federal judges,⁷¹ may thus hinge on forms of judicial courage and fortitude. We must, however, also remember that more judicial courage, even of the right kind, is not necessarily better. Judicial courage should be informed by, and occasionally tempered by, the cardinal virtue of judicial prudence or practical wisdom.⁷²

⁶⁶ See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* (1st ed. 1970); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (with the standard emphasis on the pursuit of social truth, autonomous self-realization, effective political democracy, and related concerns).

⁶⁷ See, e.g., Judge Posner's opinion in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001), and much more broadly, *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *aff'd sub nom.* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

⁶⁸ See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991). The plurality opinion virtually begins by declaring that respondent "Miller wishes to dance nude because she believes she would make more money doing so." *Id.* at 563. This of course fails to distinguish her purported speech, and its message or motivation, from virtually any purely commercial transaction itself.

⁶⁹ See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (virtual child pornography case).

⁷⁰ See *supra* notes 66, 68. Again, with respect to some general citizen audiences, little judicial courage would be required to uphold a particular regulation of, say, purely virtual child pornography. See *Ashcroft*, 535 U.S. at 235. But with respect to other audiences, a kind of courage and fortitude might be required if a court were to appear to lend aid and comfort to censorious groups by upholding a regulation of what is claimed to be 'speech' within the meaning of the first amendment.

⁷¹ For useful discussion of some complications of "judicial independence," see, for example Sanford Levinson, *Identifying "Independence,"* 86 B.U. L. REV. 1297, 1299 (2006); Pamela S. Karlan, *Judicial Independence*, 95 GEO. L.J. 1041, 1044 (2007).

⁷² See *supra* notes 60-61 and accompanying text.

Arguably, the classic constitutional example of the occasional need to balance the virtues of courage and practical wisdom is the Court's decision in *Ex Parte McCardle*.⁷³ In *McCardle*, the Court declined to decide on the merits⁷⁴ of a habeas corpus case that had been briefed and argued before the Court before Congress repealed the jurisdictional statute on which *McCardle* had relied,⁷⁵ while not also repealing an alternative jurisdictional ground.⁷⁶ Under the circumstances, including the impeachment of President Andrew Johnson by the Reconstruction Era Congress,⁷⁷ the Court's discretion might indeed have been the better part of valor. Or in our terms, any lack of valor on the Court's part might have been outweighed by the value of the Court's surviving, intact and unimpaired, to fight another day, in accordance with the virtue of prudence and practical wisdom.

B. Constitutional Temperance and Prudence in and Beyond the Courts

We have already referred to prudence or practical wisdom as guiding and limiting the virtue of courage.⁷⁸ While wisdom, and judicial wisdom in particular, occupy a position of special prominence, wisdom itself suggests that courts should often decline to second-guess the practical wisdom of congressional⁷⁹ or expert administrative agency⁸⁰ policy judgments. Here, we briefly consider the wisdom, or lack thereof, of judicial constitutional response to problems of temperance, or of reasonable self-control and self-restraint, on the part of actors beyond the courts.

It is difficult to deny that many important federal and state-level political decisions involve exercising, or failure to exercise, temperance in the sense of reasonable self-control, or appropriate self-restraint, as distinct from self-indulgence, self-absorption, or unreasonable discounting of the more distant future.⁸¹ The 'self'

⁷³ *Ex parte McCardle*, 74 U.S. 506 (1868).

⁷⁴ *Id.* at 514.

⁷⁵ *Id.*

⁷⁶ *Id.* (evidently referring to Section 14 of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81). For classic discussion, see William W. VanAlstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973). More broadly, see Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMP. L. 67, 80-84 (2009).

⁷⁷ See VanAlstyne, *supra* note 76.

⁷⁸ See *supra* notes 60-61 and accompanying text.

⁷⁹ *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003). The Court often disavows any re-writing of dubious congressional policy, in the belief that it "is not within our province to second-guess" the "wisdom of Congress' action." *Id.* See also *Harbison v. Bell*, 129 S. Ct. 1481, 1493-94 (2009); *Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009); *Clinton v. New York*, 524 U.S. 417, 447 (1998); *TVA v. Hill*, 437 U.S. 153, 194 (1978).

⁸⁰ This is the basic logic of the "second step" of the major case *Chevron, U.S.A., Inc., v. NRDC*, 467 U.S. 837, 843-45 (1984), in which a reviewing court is generally to defer to any reasonable and permissible agency interpretation of a statutory term, despite possible judicial reservations as to the wisdom of the agency's interpretation.

⁸¹ *Bowsher v. Synar*, 478 U.S. 714 (1986).

in self-indulgence may refer here to an individual person, or to groups at various levels.⁸²

Determining what counts as intemperate behavior may of course require the virtue of practical wisdom. Deciding whether to do anything about one's intemperance, and if so, precisely what, similarly may require practical wisdom. And the virtue of practical wisdom will likely be required as well of a court when constitutionally adjudicating another branch of government's attempts to address that branch's own intemperance.

Let us consider a judicial constitutional example. It is not difficult to see the Court's opinion in *Bowsher v. Synar*⁸³ as a response to Congress' recognizing its own intemperance in the context of federal budget deficit spending, borrowing, taxing, public indebtedness, and re-election.⁸⁴ In *Bowsher*, Congress had established a role for the Comptroller General in reducing annual federal budget deficits by sequestering appropriated funds, pursuant to statutory guidelines.⁸⁵ Though the Comptroller General was relatively well insulated from congressional removal,⁸⁶ the *Bowsher* majority found him to be an agent of Congress.⁸⁷ The majority then formalistically determined the Gramm-Rudman-Hollings statute to involve the execution of the law by an agent of Congress,⁸⁸ and therefore to be unconstitutional.⁸⁹

The Court in *Bowsher* thus found itself in the position of characterizing the Gramm-Rudman-Hollings statute as a classic⁹⁰ congressional "power-grab;" as an attempt by Congress to aggrandize its own authority at the expense of the executive

⁸² Thus while we might think of some individual person as self-indulgent or as heavily discounting the longer-term future, it is often much more helpful to think of particular groups, or an entire culture, in these terms. See *infra* Part III.

⁸³ *Bowsher*, 478 U.S. at 714.

⁸⁴ The statute in question was popularly known as Gramm-Rudman-Hollings, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified as amended variously in U.S.C. titles 2, 31 & 42). The idea of making a self-binding precommitment as a response to one's own perceived intemperance is discussed in JON ELSTER's, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36-111 (rev. ed. 1984). For application of the precommitment idea, in the face of predictably overwhelming future temptations to sacrifice the greater long-term well-being, see R. George Wright, *The Modern Separation of Powers: Would James Madison Have Untied Ulysses?*, 18 CUMB. L. REV. 69 (1987). For broader discussion, see, e.g., Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105 (1999).

⁸⁵ *Bowsher*, 478 U.S. at 717-18. Congressional intemperance, on one theory, had become serious enough to prompt a correspondingly serious attempt at reducing its consequences, but had not yet progressed to a point at which Congress was incapable of serious attempts at self-correction. In some cases, intemperance may even become so severe as to diminish the will for appropriate self-correction.

⁸⁶ *Bowsher*, 478 U.S. at 759, 765, 773 (White, J., dissenting).

⁸⁷ *Id.* at 726.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See, THE FEDERALIST NO. 51 at 251-52 (James Madison) (Terence Ball ed., 2003).

branch. And in a formalistic way, the logic of the Court majority, on its own terms, is faultless.

But in order to find the majority's logic more deeply convincing, we must ignore the realistic insulation of the Comptroller General from congressional dismissal.⁹¹ We must also ignore the realistic costs to Congress of dismissing the very actor Congress had designated to save itself from its own intemperate budgeting for short-term re-electability.⁹² Most fundamentally, we must fail to see the Gramm-Rudman-Hollings statue as an implicit admission of Congress' intemperate inability to restrain its own individual and collective impulses to spend improvidently.⁹³

The point is not that if the Gramm-Rudman-Hollings statute had been upheld, the federal deficit and indebtedness picture would today look substantially different. Rather, the point is that the *Bowsher* Court majority saw only a fragment of the overall picture, and ignored important elements of institutional virtue and vice on the part of Congress. In this respect, it is fair to ask whether the Court majority itself displayed much of the cardinal virtue of practical wisdom.

There are traces of some elements of the *Bowsher* majority as well in the subsequent Line Item Veto Act⁹⁴ case of *Clinton v. New York*.⁹⁵ *Clinton* involved a constitutional separation of powers challenge to the Act. The basic idea of the Act was to give the President some limited, overridable authority⁹⁶ to veto appropriations found by the President to increase the federal deficit while being inessential to the national interest.⁹⁷ The *Clinton* majority noted that the Act allowed for presidential veto of portions of bills, as opposed to entire bills, thus allowing the President to, in effect, amend a bill as well as to veto the bill.⁹⁸ On this basis, the majority held the Act unconstitutional as violative of the Presentment Clause.⁹⁹

The *Clinton* Court characterized the familiar constitutional veto mechanism as a "finely wrought" procedure.¹⁰⁰ If we place ourselves in the position of the

⁹¹ See *Bowsher*, 478 U.S. at 759, 765, 773 (White, J., dissenting).

⁹² See *supra* note 84 and accompanying text.

⁹³ See *supra* note 84 and accompanying text. For classic recognition of the general differences between short and long term personal and public interests, and the need for governmental institutions to bring these interests into alignment, see DAVID HUME, A TREATISE OF HUMAN NATURE bk. III, pt. II, sec. VII (L. A. Selby-Bigge & P. H. Nidditch eds. 1978) (1740). Much of books II and III in general are devoted to what Hume terms 'the passions,' and to a wide range of virtues and vices. *Id.* at bks. II, III.

⁹⁴ Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified at 2 U.S.C. §§ 691-692 (Supp. II 1997)).

⁹⁵ *Clinton v. New York*, 524 U.S. 417, 447 (1998). For general discussion, see Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988); Matthew Thomas Kline, *The Line Item Veto Case and the Separation of Powers*, 88 CAL. L. REV. 181 (2000).

⁹⁶ *Clinton*, 524 U.S. at 436-37.

⁹⁷ *Id.* at 436.

⁹⁸ *Id.* at 438.

⁹⁹ *Id.* at 421 (citing U.S. CONST. art I, § 7, cl. 2).

¹⁰⁰ *Id.* at 447.

constitutional Framers, there is indeed something unsettling about a presidential “veto” of merely “one provision in an Act that occupies 536 pages of the Statutes at Large.”¹⁰¹

The problem, though, is that the Framers might have been unsettled not only by vetoing sections of a bill, but by the presentation of 536 pages of richly diverse legislative material as merely one single bill, to be either vetoed as a whole or signed as a whole by the President. Depending upon matters of timing as well as content, a 536 page omnibus bill might be realistically unvetoable, independent of its merits, in whole or in part. One might well view the rise of massive, tome-like budget bills, to be vetoed or signed as a single unity, as the more dramatic shift in congressional-presidential relations. The Line Item Veto Act could, on this view, be considered as a consensual attempt to restore something closer to the separation of powers envisioned by the Framers.

But for our purposes, the most important question is not one of formalistic line-drawing, or even of the Framers’ expectations and intent. It is instead a question that incorporates those considerations, but that focuses as well on the cardinal virtues, including apparent institutional intemperance as in *Bowsher*,¹⁰² practical wisdom on the part of all three branches, and as should have been clear even in 1998, the crucial virtue of justice between generations.¹⁰³

Consider, in this regard, the opinion in the *Clinton* case of Justice Kennedy, concurring rather than dissenting.¹⁰⁴ While agreeing with the opinion for the Court, Justice Kennedy nonetheless begins his concurrence, startlingly, with these words: “A Nation cannot plunder its own treasury without putting its Constitution and its survival in peril. The statute before us, then, is of first importance, for it seems undeniable the Act will tend to restrain persistent excessive spending.”¹⁰⁵ Justice Kennedy thus appears, through his concurrence, to unfortunately hold open the possibility that contrary to frequent assertions,¹⁰⁶ the Constitution may indeed be a suicide pact.

Our point, though, is not to take sides on this issue, at least directly. Instead, it is to encourage proper reflection upon and recourse to the virtues of temperance, practical wisdom, and (intergenerational) justice to avoid having to interpret the Constitution as an instrument of societal destruction. Thus we do not recommend judicially or otherwise amending the Constitution for the sake of promoting the basic

¹⁰¹ *Id.* at 430.

¹⁰² See *supra* notes 81-83 and accompanying text.

¹⁰³ See, e.g., THE GENERATIONAL EQUITY DEBATE (John B. Williamson et al. eds., 1999). More recently, see, e.g., Janna Thompson, *Identity and Obligation in a Transgenerational Polity* in INTERGENERATIONAL JUSTICE (Axel Grosser & Lukas H. Meyer eds., 2009). As with other important public and constitutional issues, we make no claim that justice between generations is entirely reducible to matters of justice as a virtue, in the sense of an enduring disposition to give everyone their due. See discussion *supra* Part III and *infra* Part IV.

¹⁰⁴ *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

¹⁰⁵ *Id.*

¹⁰⁶ *Haig v. Agee*, 453 U.S. 280, 309-10 (1981) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); *Doe v. Boland*, 630 F.3d 491, 496 (6th Cir. 2011); *Edmond v. Goldsmith*, 183 F.3d 659, 663 (7th Cir. 1999).

virtues. We ask whether the Framers would have wanted the separation of powers doctrine to be interpreted to foster injustice between generations, gross continuing intemperance and improvidence in public budgeting, imprudence and lack of practical wisdom, and collective self-indulgence to the point of putting national survival “in peril.”¹⁰⁷ It is difficult to accept imperiling constitutional or national survival as a guide to the Framers’ intent, or as an element of any other defensible approach to interpreting the Constitution.

The results in *Bowsher* and in *Clinton* were not constitutionally inevitable, and could have been avoided, likely to the public well-being, by greater exercise of the cardinal virtues, including practical wisdom, and by greater judicial attention to the cardinal virtues in general. This is not to say that the Court in this respect deserves blame, that hindsight has not clarified these matters, or that the judicial exercise of practical wisdom is usually effortless and uncontroversial.

The point is rather that the effort to focus more meaningfully on the cardinal virtues is legitimate, worth making, and worth taking seriously. As the philosopher Robert Kane has observed, “[a] good deal of what is called ‘practical wisdom’ . . . is knowing enough about ourselves and about others and the world around us to aptly choose which experiments in living are likely to be fulfilling and which are not.”¹⁰⁸ Greater judicial efforts along these lines may be difficult, but are practically essential.¹⁰⁹

C. Justice as a Personal Virtue: Constitutional Responses to Personal Injustice

As a cardinal virtue, justice involves a sustained disposition to give to everyone neither more nor less than is due.¹¹⁰ As private actors, we can exhibit this virtue, or its opposite, perhaps with one degree or another of state involvement. Courts may find themselves assessing, at a constitutional level, alleged instances of the vice of injustice, again in a context of greater or lesser state involvement. The provisions of a will, for example, may reflect the judgment of a private party. But the drafting, execution, interpretation, and possible enforcement of a will, as officially determined to be valid or invalid, implicate the state to one degree or another.

To pursue this example, we start with the general principle of broad testamentary freedom in the disposition of property.¹¹¹ In particular, all else equal, “the right to make a testamentary disposition of property is fundamental, is most solemnly assured by law, and does not depend upon its judicious use.”¹¹² The most extreme

¹⁰⁷ *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring). This phrase is of course borrowed from Justice Kennedy’s own characterization of the situation. See *supra* note 106 and accompanying text.

¹⁰⁸ ROBERT KANE, *ETHICS AND THE QUEST FOR WISDOM* 84-85 (2010).

¹⁰⁹ For brief elaboration on what courts, and other actors, might do in this regard, see *infra* Part IV and note 171 and accompanying text.

¹¹⁰ See *supra* note 5.

¹¹¹ *Estate of Mowry*, 107 Cal. App. 4th 338, 342 (2003) (“[T]he paramount concern in the construction of wills is to ascertain and give effect to the intent of the testator, as far as possible.”) (“the freedom of testamentary disposition of property.”).

¹¹² *Estate of Della Sala*, 86 Cal. Rptr. 2d 569, 572 (Ct. App. 1999) (emphasis added). See also *Streight v. Estate of Streight*, 360 P.2d 304 (Or. 1961).

such formulations of testamentary freedom set aside considerations of gratitude, as well as of justice, and of the “natural and legitimate claims upon [the testator’s] bounty.”¹¹³ The law may thus give effect to “an unequal *and unjust* disposition of [the testator’s] property.”¹¹⁴

There are limits to such testamentary freedom. Consider, for example, the dissenting opinion in the famous case of *Riggs v. Palmer*,¹¹⁵ involving a legatee who killed the testator to prevent the revocation of the testator’s will. The dissenters appreciated that:

[m]odern jurisprudence, in recognizing the right of the individual, under more or less restrictions, to dispose of his property after his death, subjects it to legislative control, both as to extent and as to mode of exercise. Complete freedom of testamentary disposition of one’s property has not been and is not the universal rule.¹¹⁶

At a minimum, sufficiently strong considerations of law and public policy can place limitations on the otherwise broad freedom to dispose of property unwisely, ungratefully, or unjustly.¹¹⁷ Even the most fervent defenses of testamentary freedom recognize something like this limitation:

To wrest a man’s property from the person to whom he has given it, and to divert it to others from whom he has desired to withhold it, is a most violent injustice, amounting to nothing less than a post mortem robbery, which no court should sanction, unless thoroughly satisfied, either that *the dispositions of the will are reprobated by law*, or that the testator was legally incapable to make a will.¹¹⁸

Inescapably, among the underlying considerations in such cases must be the nature of any testamentary injustice, and the state’s perceived involvement in perhaps approving of or giving effect to that injustice. Not all injustice is equal in these respects.

A clear sense of the dynamics involved is conveyed in another context by Justice Thurgood Marshall, dissenting, in an important ‘state action’ case.¹¹⁹ Justice Marshall doubts that a heavily regulated utility’s granting only limited hearing rights to alleged non-paying customers involves no “state action.”¹²⁰ This is a case of the utility’s denying service on grounds of merely alleged non-payment. The majority finds no state action in such a case. But Justice Marshall then raises a hypothetical

¹¹³ *Streight*, 360 P.2d at 305.

¹¹⁴ *Estate of Sensenbrenner*, 278 N.W.2d 887, 897 (Wis. 1979) (emphasis added).

¹¹⁵ *Riggs v. Palmer* 22 N.E. 188 (N.Y. 1889). For a classic broad, jurisprudential discussion of this case, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14-45 (1978).

¹¹⁶ *Riggs*, 22 N.E. at 191 (Gray, J., dissenting).

¹¹⁷ See WILLIAM SHAKESPEARE, *KING LEAR*, act I for a classic disposition inter vivos.

¹¹⁸ *Succession of Willis*, 149 So. 2d 218, 220 (La. Ct. App. 1963) (emphasis added).

¹¹⁹ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 365, 373-74 (1974) (Marshall, J., dissenting).

¹²⁰ *Id.*

question: What if an equally regulated utility had adopted a policy denying utility service on the basis of race? Would the majority in that case still have found no state action?¹²¹

Justice Marshall understandably suspects that in the latter case, state action would indeed be found. The best explanation for any differences in the two case outcomes would, on our view, reflect the basic idea that the scope of ‘state action’ should generally reflect the scope of the state’s moral responsibilities, given its powers and limitations thereon.¹²² Not all initially private injustices are equal in gravity, or in broader cultural and historical meaning and import.¹²³ For some kinds of injustices, particularly those explicitly involving race, the state should more readily accept a significant share of responsibility.

On this basis, consider the Supreme Court’s legal reactions to the initially personal injustice, as we would now universally see it, resulting in the cases of *Evans v. Newton*¹²⁴ and *Evans v. Abney*.¹²⁵ Against the background of broad¹²⁶ but ultimately limited¹²⁷ testamentary freedom was the devise of a hundred acres of land, centrally located in Macon, Georgia.¹²⁸ The devised land was to serve as a public park solely for the use of white persons.¹²⁹

Under the will, the land was to be owned and controlled by the City of Macon,¹³⁰ thus establishing state action and triggering the Fourteenth Amendment’s prohibition of racially segregated public facilities.¹³¹ The majority in *Newton* recognized that the City’s maintaining the park for years, at first on the specified racially segregated basis, and then allowing, contrary to the will, for some non-segregated use, linked the City to the initially private racial injustice.¹³² The formal legal act of later

¹²¹ *Id.*

¹²² For discussion, see R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U.L. REV. 685, 686 (1989) (“[t]he courts should find . . . ‘state action’ when . . . the state can properly be said to bear responsibility, of the right kind and degree, for the underlying act . . .”).

¹²³ The analogy may be unpersuasive, but we would typically not say that B bears partial responsibility for stranger A’s continuing hangnail symptoms, even where A accosts B on the sidewalk, and B happens to have a hangnail trimmer on his person, whereas we might hold B partially responsible—in a causal, or moral, if not a legal sense—if B callously fails to rescue, at low cost and low risk, a drowning stranger child. Little depends, however, on the persuasiveness of this analogy.

¹²⁴ *Evans v. Newton*, 382 U.S. 296 (1966).

¹²⁵ *Evans v. Abney*, 396 U.S. 435 (1970).

¹²⁶ See *supra* notes 111-118 and accompanying text.

¹²⁷ See *supra* notes 111-118 and accompanying text.

¹²⁸ *Newton*, 382 U.S. at 297, 304.

¹²⁹ *Id.* at 297.

¹³⁰ *Id.*

¹³¹ See also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (a closer joint enterprise or “symbiosis” case of a private coffee shop on publicly owned land).

¹³² See *Newton*, 382 U.S. at 301.

substituting a private board of trustees for the governing public authority would not immediately transform the cultural meaning of the park, or dissipate the effects of prior state management and control.¹³³ The City would, realistically, continue to bear partial responsibility for initially private injustice.¹³⁴

In the succeeding closely related *Abney*¹³⁵ case, however, a different Court majority¹³⁶ more controversially drew the line of public responsibility for initially private injustice. The *Abney* Court found no denial of racial equal protection in a Georgia state court determination that because the testator's racially segregationist intent could no longer be carried out,¹³⁷ the trust provision failed¹³⁸ and the land reverted to the heirs of the testator,¹³⁹ as opposed to remaining as a racially desegregated public park.¹⁴⁰

Our point is not to dispute the testator's original segregationist intent, the centrality of that segregationist intent, or whether the testator's intent would have changed over time. Rather, it is that the state became complicitous in the testator's personal injustice when it chose to transform the now desegregated public park into privately owned property of the testator's heirs. The state was confronted with a choice between giving effect to the segregationist intent of the testator, or the testator's intent to provide a public park, insofar as that intent was consistent with basic norms of racial justice.¹⁴¹

Doubtless there is a sense in which Macon residents of every race suffered a loss, to one degree or another, when the now desegregated public park was returned, as private property, to the testator's heirs. But the state-imposed outcomes, and the resulting harms, were evidently not equally borne among the races. Some persons might resentfully conclude that had the case not been brought, white residents could still have benefitted from the park. Such resentment might, on this logic, have been focused on racial minorities.¹⁴²

More directly, though, the state's decision to prioritize the racially segregationist element of the testator's intent regarding public facilities over the intent to provide a park for Macon residents officially legitimizes an injustice. The state decision in effect re-stigmatizes local members of a race deemed by the testator to be

¹³³ *See id.*

¹³⁴ *See generally* Wright, *supra* note 122.

¹³⁵ *Evans v. Abney*, 396 U.S. 435 (1970).

¹³⁶ *Id.* at 436 (Justice Black, who had dissented in *Newton* wrote the majority opinion in *Abney*).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 437.

¹⁴¹ *Id.* at 445.

¹⁴² Of course, such an alleged injury might be deemed too speculative or uncertain to support legal standing. *See Allen v. Wright*, 468 U.S. 737, 757-58 (1984). *But see* Salazar v. Buono, 130 S. Ct. 1803 (2010); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *United States v. SCRAP*, 412 U.S. 669 (1973).

unqualified to associate with whites in public parks. While the racial¹⁴³ rationale underlying the will may well have been quite broad, the local African-Americans residing in Macon, Georgia bore most of the inevitable racial stigma. That stigma was, as a constitutionally cognizable injury,¹⁴⁴ thus felt locally rather than nationally.¹⁴⁵ The state's reconstruction and in a sense re-enactment and effectuating of the original racial discrimination should have been recognized as establishing partial state responsibility, state action, and ultimately a violation of the equal protection clause.¹⁴⁶ The majority in *Abney* could thus have done substantially better in constitutionally responding to an initially personal expression of the vice of injustice.

IV. CONCLUSION: DO THE CARDINAL VIRTUES STILL MAKE A DIFFERENCE AT THE CONSTITUTIONAL LEVEL?

A. The Cardinal Virtues in Contemporary Context

Historically, the prominence of the cardinal virtues across cultural lines has been substantial. The cardinal virtues are emphasized in the ancient Jewish tradition,¹⁴⁷ in Plato,¹⁴⁸ Aristotle,¹⁴⁹ various Stoics,¹⁵⁰ Thomas Aquinas,¹⁵¹ and as we have seen throughout, by a number of modern writers, in and out of fashion.

¹⁴³ The Court's opinions do not refer to any comparable, purportedly separate but equal bequest to non-whites.

¹⁴⁴ See *Allen*, 468 U.S. at 755 (citing *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)).

¹⁴⁵ Thus distinguishing *Allen*, 468 U.S. at 755-756. These cases also raise no federal separation of power issues.

¹⁴⁶ See *Abney*, 396 U.S. at 450, 453-54 (Brennan, J., dissenting). See Matthew Harding, *Some Arguments Against Discriminatory Gifts and Trusts*, 31 OXFORD J. LEGAL STUD. 1, 18-19 (2011) (approvingly quoting Joseph Raz to the effect that "autonomy is valuable only if it is exercised in pursuit of the good."). For a broader discussion, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 381 (1986)).

¹⁴⁷ See generally *Book of Wisdom* 8:7; Kaufman, Kohler & S. Schulman, *Cardinal Virtues*, in JEWISH ENCYCLOPEDIA, www.jewishencyclopedia.com/articles/4030-cardinal-virtues (last visited Jan. 30, 2012) (the "fruits of wisdom" as "temperance and prudence, justice and fortitude").

¹⁴⁸ See generally, PLATO, *THE REPUBLIC* 119-29, 139-42, 280-89 (Francis M. Cornford, ed., Oxford Univ. Press ed. 1990) (1941) (on virtues in the polis; virtues in the individual; and virtues and vices under democracy); RAYMOND J. DEVETTERE, *INTRODUCTION TO VIRTUE ETHICS: INSIGHTS OF THE ANCIENT GREEKS* 95-96 (2002); David Carr, *The Cardinal Virtues and Plato's Moral Psychology*, 38 PHIL. Q. 186 (1988). See also DWORKIN, *supra* note 29 (Plato "offers conceptions of bravery, temperance, wisdom, and justice that show each of these to be distinct from the others . . . but to be interdependent nevertheless, so that the definition of each virtue incorporates an appeal to the value of other virtues."); MARK J. LUTZ, *SOCRATES' EDUCATION TO VIRTUE: LEARNING TO LOVE THE NOBLE* (1998).

¹⁴⁹ See generally ARISTOTLE, *THE NICOMACHEAN ETHICS* 39-40, 65, 75, 78, 111, 114, 143, 147 (David Ross trans., J.L. Ackrill & J.O. Urmson rev. trans., Oxford Univ. Press 1980) (1925) (introducing and characterizing each of the cardinal virtues); DEVETTERE, *supra* note 148. Devettere notes that for Aristotle, political leaders, explicitly including judges, "need the virtue of prudence to discern what laws will advance the human good in their society." *Id.* at 122 (citing ARISTOTLE, *supra* at 147). See also ALASDAIR MACINTYRE, *AFTER VIRTUE: A*

The cardinal virtues remain irreplaceable by any sort of institutional arrangements. Courage and fortitude, for example, admittedly can be exhibited by persons in the service of good causes or evil while retaining its appeal as a virtue.¹⁵² But courage remains realistically indispensable. As the contemporary philosopher Rebecca Konyndyk DeYoung observes, “[c]ourage enables us [to] be faithful to other people and our commitments when the going gets rough and so enables the loving, trusting, and secure human relationships that are essential to a good human life.”¹⁵³ Or as Immanuel Kant more sternly argues, “[t]here are duties . . . to which [preserving one’s] life is much inferior, and in order to fulfill them we must evince no cowardice in regard to our life.”¹⁵⁴

Or consider the virtue of justice. Justice as a personal virtue again “renders to each one what is due, neither more nor less.”¹⁵⁵ An unjust desire for more than one’s share, or, classically, *pleonexia*,¹⁵⁶ may for a time work for persons, classes, or nations. But it is also possible that, in the words of Dr. King, “the arc of the moral universe is long but it bends towards justice.”¹⁵⁷ In any event, not even those Federalists most enthused about structural checks and balances would have minimized the importance of the virtue of justice. As James Madison himself

STUDY IN MORAL THEORY 153 (2d ed. 1984) (Aristotle’s virtue of *phronesis* as knowing “how to exercise judgment in particular cases”); Sarah Broadie, *Aristotle and Contemporary Ethics*, in THE BLACKWELL GUIDE TO ARISTOTLE’S NICOMACHEAN ETHICS 342 (Richard Kraut ed., 2006); JIYUAN YU, THE ETHICS OF CONFUCIUS AND ARISTOTLE (2007).

¹⁵⁰ See generally CICERO, ON OBLIGATIONS 7-8 (P.G. Walsh trans., 2000) (44 B.C.E.) (formulating the four cardinal virtues); SENECA, LETTERS FROM A STOIC: EPISTULAE MORALES AD LUCILIUM 87 (Robin Campbell trans., 1969) (~64 A.D.) (implicitly endorsing the cardinal virtues); MARCUS AURELIUS, MEDITATIONS bks. II-IX, XII (Martin Hammond trans., 2006) (~172 A.D.) (discussing each of the cardinal virtues). See, e.g., MARCUS AURELIUS, *supra* at bk. V, 39 (characterizing as “true goods” “wisdom . . . self-control, justice, courage”). See also LAWRENCE BECKER, A NEW STOICISM (1999).

¹⁵¹ See SIR GAWAIN AND THE GREEN KNIGHT 76-77 (Burton Raffel trans., Signet Classics ed. 1970) for a slightly later picture of the chivalric virtues. See generally THOMAS AQUINAS, TREATISE ON THE VIRTUES 108-14 (John A. Oesterle trans., Univ. of Notre Dame Press ed., 1984) (1966) (listing the cardinal virtues in qq. 61, art. 2, *respondeo*, at 110).

¹⁵² See MACINTYRE, *supra* note 149, at 179-80 (convincingly illustrating that morally misguided or morally otherwise evil persons who consistently display the apparent virtue of “courage” may need moral re-training regarding their other substantive moral beliefs, but are not thought to require, as well, re-training specifically in courage).

¹⁵³ REBECCA KONYNDYK DEYOUNG, GLITTERING VICES: A NEW LOOK AT THE SEVEN DEADLY SINS AND THEIR REMEDIES 14 (2009).

¹⁵⁴ IMMANUEL KANT, LECTURES ON ETHICS 150 (Peter Heath trans., Cambridge Univ. Press 2001) (1784).

¹⁵⁵ AQUINAS, *supra* note 151, at 134.

¹⁵⁶ Classically, we can think of the rule of the powerful described by Thrasymachus in PLATO, *supra* note 148; or of the institution of chattel slavery.

¹⁵⁷ Arthur Howe, *The Arc of the Universe Is Long But It Bends Towards Justice*, SALON (Jan. 19, 2009, 2:12 AM) http://open.salon.com/blog/arthur_howe/2009/01/18/the_arc_of_the_universe_is_long_but_it_bends_towards_justice.

argued, “[t]o suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”¹⁵⁸

But for our purposes, justice as a virtue is linked with, and dependent upon, each of the other cardinal virtues. And in our own era, the relationship between self-discipline or temperance and both practical wisdom and justice in particular lies at the center of some of the most crucial public policy problems, including financial conflicts of interest among generations.

A fundamental part of a crucial public policy problem, stated in virtue terms, is that in recent decades, “among people in the mainstream United States, strengths of temperance are infrequently endorsed and seldom praised,”¹⁵⁹ with ‘prudence’ as well being occasionally minimized or disparaged.¹⁶⁰ The historical recognition of the importance of temperance, self-restraint, and related virtues has been long-standing and broad-based.¹⁶¹ Even in the modern era, the value of the temperance-related virtues has not gone entirely unrecognized.¹⁶² But of late, the idea of self-control as a virtue has faced indifference, hostility, and intense competition.

In several recent studies, for example, Professor Jean M. Twenge has contrasted self-control with the widely emphasized idea of self-esteem. The virtue of self-control turns out to be a much better predictor than (high or low) self-esteem of

¹⁵⁸ James Madison, Virginia Ratifying Convention, in *THE PAPERS OF JOHN ADAMS* (William T. Hutchinson et al. eds., 1977), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s36.html>.

¹⁵⁹ PETERSON & SELIGMAN, *supra* note 10, at 431. See also *Ngram Viewer*, *supra* notes 17-25.

¹⁶⁰ See PETERSON & SELIGMAN, *supra* note 10, at 438. The authors note that “[t]he absence of prudence is marked not by spontaneity or zest but by *recklessness, foolishness, thoughtlessness, and irresponsibility*.” *Id.* at 439.

¹⁶¹ See, e.g., *THE DHAMMAPADA* (Thomas Byron trans., 1980), available at <http://thebigview.com/buddhism/dhammapada.html> (emphasizing temperance and moderation); *THE UPANISHADS: BREATH OF THE ETERNAL* (Swami Prabhavananda & Frederick Manchester trans., 1947) (in particular consider the endorsements of temperance and self-control found in the Katha Upanishad 14, 19; the Taaittiriya Upanishad 53, 54) (referring to “self-denial and the practice of austerity . . . poise and self-control”), and the Brihadaranyaka Upanishad 80, 112 (“[t]he storm cloud thunders: . . . Be self-controlled!”); MICHAEL PAKALUK, *ARISTOTLE’S NICOMACHEAN ETHICS: AN INTRODUCTION* 233-34 (2005) (Aristotle on the concept of *akrasia*, as a character trait, as something like lack of self-control or lack of self-discipline, in the sense of weakness of the will, as opposed to a sort of heedless self-indulgence as one’s adopted standard); JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* 168 (John Williamson Adamson ed., 2007) (1698).

¹⁶² See, e.g., DANIEL AKST, *WE HAVE MET THE ENEMY: SELF-CONTROL IN AN AGE OF EXCESS* (2011); ANDRE COMTE-SPONVILLE, *A SMALL TREATISE ON THE GREAT VIRTUES* 39 (Catherine Temerson trans., 2001) (1996) (“[t]emperance is that moderation which allows us to be masters of our pleasure instead of becoming its slaves”); C.E.M. JOAD, *DECADENCE: A PHILOSOPHICAL INQUIRY* 125 (1949) (“generally speaking, the most valuable experiences come only to those who have been willing to undergo the ordeal of a certain period of boredom and to subject themselves to a certain degree of restraint”). See also BENJAMIN R. BARBER, *CONSUMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE* (2007); JACQUES BARZUN, *FROM DAWN TO DECADENCE: 500 YEARS OF CULTURAL LIFE: 1500 TO THE PRESENT DAY* 778 (2000) (on the broader effects of modern advertising).

important outcomes. Professor Twenge concludes that “[s]elf-control, or the ability to persevere and keep going, is a much better predictor of life outcomes than self-esteem. Children high in self-control make better grades and finish more years of education, and they’re less likely to use drugs. . . . Self-control predicts all of those things researchers had hoped self-esteem would, but hasn’t.”¹⁶³

The importance of the virtue of temperance, or its absence, may extend beyond the familiar indicators of basic prosperity or its lack thereof. Sigmund Freud raised the stakes considerably. Freud classically, if controversially, argued that

[u]nder the influence of the ego’s instinct of self-preservation, the pleasure principle is replaced by the *reality principle*. This latter principle does not abandon the intention of ultimately obtaining pleasure, but it nevertheless demands and carries into effect the postponement of satisfaction, the abandonment of a number of possibilities of gaining satisfaction and the temporary toleration of unpleasure as a step on the long indirect road to pleasure.¹⁶⁴

Thus temperance, in the form of the collective willingness to defer gratification, is said to be ultimately a matter of collective “self-preservation.”¹⁶⁵ If there is any ambiguity, Freud removes it by opining that “[t]he pleasure principle [or lack of temperance] seems actually to serve the death instincts.”¹⁶⁶ At least on Freud’s theory, then, collective temperance may be ultimately not a matter of lifestyle, but of cultural life and death.¹⁶⁷

The need to collectively exhibit the virtue, as well, of practical wisdom or broad prudence should also be clear. While practical wisdom is related to each of the preceding virtues, there is a sense in which we can think about practical wisdom in its own right. Practical wisdom is not primarily a matter of motives, gestures, intentions, or symbolism apart from direct and indirect consequences.¹⁶⁸ John Stuart Mill defines the term, while linking it to temperance, as “a correct foresight of consequences, a just estimation of their importance to the object in view, and repression of any unreflecting impulse at variance with the deliberate purpose.”¹⁶⁹

¹⁶³ JEAN M. TWENGE, *GENERATION ME* 67 (2006). See also *id.* at 225; Jean M. Twenge et al., *Egos Inflating Over Time: A Cross-Temporal Meta-Analysis of the Narcissistic Personality Inventory*, 76 J. PERSONALITY 875 (2008); JEAN M. TWENGE & W. KEITH CAMPBELL, *THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT* (2009).

¹⁶⁴ SIGMUND FREUD, *BEYOND THE PLEASURE PRINCIPLE* 7 (James Strachey trans., 1961) (1920).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 77.

¹⁶⁷ See BRYAN WARD-PERKINS, *THE FALL OF ROME AND THE END OF CIVILIZATION* 183 (2005) for the possibility of civilizational self-destruction. For a less dramatic possibility, see DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 21-74 (1976).

¹⁶⁸ See COMTE-SPONVILLE, *supra* note 162, at 31, 35 (although practical wisdom in the service of improper goals may be thought of as mere ‘shrewdness’). See generally Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894 (1936).

¹⁶⁹ DALE E. MILLER, J.S. MILL 82 (2010) (quoting John Stuart Mill). See also PETERSON & SELIGMAN, *supra* note 10, at 478 (“[p]rudent individuals show a farsighted and deliberative

A number of Supreme Court cases are thought to embody not just an admirable deployment of tests and rules, but the virtue of wisdom. It is likely a sense of the Court's broad and long-range perspective, along with the Court's ability to discount fears of possible short-term consequences that lead some to credit the Court with practical wisdom in the "steel seizure" separation of powers case *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁷⁰ Practical wisdom requires such perspective; an understanding of persons and their interest, motivations, and capacities, and of the world and its workings. In part, this requires the practically wise person, or court, to resist a variety of cognitive and other forms of bias.¹⁷¹

Most broadly, and particularly in deciding important constitutional cases,

Wisdom requires an experience-based knowledge of the world (including, especially, the world of human nature). It requires . . . the ability to . . . discern the most important aspects of the acquired knowledge, knowing what to use and what to discard, almost on a case-by-case basis (put another way, it requires knowing when to follow rules but also when the usual rules no longer apply).¹⁷²

In some important constitutional cases, the competing legal rules, tests, legal principles, and legal doctrines can only carry the court so far. In such cases, courts should, within the bounds of what is constitutionally legitimate, accept responsibility to exercise a form of practical wisdom that is not reducible to the application of competing constitutional tests.¹⁷³ Without arrogantly assuming the role of Platonic Guardians,¹⁷⁴ or otherwise violating their oaths and judicial role obligations,¹⁷⁵ the courts should be alert to the possibility of supplementing the usual constitutional test

concern for the consequences of their actions and decisions [and] successfully resist impulses and other choices that satisfy shorter term goals at the expense of longer term ones . . .").

¹⁷⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁷¹ See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998); DANIEL HARDMAN, JUDGMENT AND DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES (2009); HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 566, 569 (Derek J. Koehler & Nigel Harvey eds., 2004) (2007 ed.) ((in particular, "hindsight bias . . . plays a pervasive role in the legal system") and ("[j]udges . . . seem unable to evaluate statistical evidence properly") *Id.* at 571.).

¹⁷² STEPHEN S. HALL, WISDOM: FROM PHILOSOPHY TO NEUROSCIENCE 17-18 (2010).

¹⁷³ See *supra* notes 44-49 and accompanying text.

¹⁷⁴ *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting) ("the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense'"). This remark seems to assume, controversially, that the result in *Plyler* could not be reached on any legitimate constitutional grounds. Admittedly quite fallible judicial attempts to pursue wisdom may, instead, lead the courts to think more creatively, or more soundly, about constitutionally permissible outcomes and rationales.

¹⁷⁵ *Id.*

manipulations with a constitutionally legitimate, and humbly exercised, concern for practical wisdom.

B. Practical Wisdom and Affirmative Action: A Concluding Case Example

Practical wisdom in constitutional adjudication will often be as much about the rationale or the justification of a constitutional decision as about the outcome itself. Let us briefly consider one final constitutional example. In racial affirmative action equal protection cases, the standard paradigm calls upon the Court to adopt a particular level of scrutiny—typically, strict scrutiny.¹⁷⁶ From there, the Court then typically seeks to determine the presence or absence of some particular compelling governmental interest,¹⁷⁷ as well as whether the program at issue should be deemed narrowly tailored¹⁷⁸ in promoting, to whatever degree is required,¹⁷⁹ and by whatever level of proof may be required,¹⁸⁰ the particular government interest on which the Court chooses to focus attention.

There may be cases in which focusing on some single governmental interest and declaring that interest to be compelling may be the practically wise course. But in the case of racial affirmative action and equal protection, emphasizing any single interest and pronouncing it to be compelling on its own, as opposed to acknowledging the range of relevant government interests, seems artificial, simplistic, and less than fully persuasive.¹⁸¹ Nevertheless, in the higher education affirmative action cases of *Gratz*¹⁸² and *Grutter*,¹⁸³ the Court majority famously emphasized the asserted educational benefits of diversity as by itself a compelling, and thus sufficient, government interest.¹⁸⁴ The *Grutter* majority indeed recognized that more than one kind of benefit might flow from diversity.¹⁸⁵ And the *Grutter* majority also acknowledged other possible justifications for affirmative action in higher education, including addressing if not remedying¹⁸⁶ past racial discrimination,

¹⁷⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ On questions of the degree to which competing government programs might promote the particular government interest in question—or some closely related interest—as well as the persuasiveness of the evidence required on any of these issues, the courts have hesitated to adopt uniform rules, thereby opening the door not only for the possible exercise of judicial practical wisdom, but for arbitrariness, politicization, and unconscious bias as well.

¹⁸⁰ *Id.*

¹⁸¹ Admittedly, in the racial affirmative action case, just establishing a majority behind any particular approach could be said to simplify and clarify the law.

¹⁸² *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁸³ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁸⁴ *Id.* at 328. In this narrow focus, the Court followed the lead of the University's own argument. *See id.* at 327-28. *See also Gratz*, 539 U.S. at 268.

¹⁸⁵ *See Grutter*, 539 U.S. at 329-32.

¹⁸⁶ *See id.* at 328.

as well as the distinct values of public university autonomy and institutional academic freedom.¹⁸⁷

But in emphasizing diversity, in and of itself, as compelling,¹⁸⁸ and then subjecting the diversity rationale, alone, to a narrow-tailoring inquiry,¹⁸⁹ the *Grutter* majority opted for an artificial and unrealistic attempt at simplicity, at the expense of a likely practically wiser approach. Most serious reflections on affirmative action are more multi-dimensional, more pluralistic, more holistic, and thus more genuinely encompassing and responsive to more concerns of more persons.

The Court in *Grutter* did go some distance in this direction,¹⁹⁰ but ultimately underplayed public interests in “remediation, compensation, corrective and distributive justice, broad utilitarianism, anti-subordination, integrationism and community preference, and the value of free and expert academic judgment.”¹⁹¹ Any given person might weigh each of these various considerations differently. For some persons, perhaps no single one of these interests would rise to the level of being truly compelling. But that is precisely the point. Often, under realistic complex circumstances, no single interest or reason by itself may seem genuinely compelling. But a number of distinct interests, pointing in the same general direction, may jointly seem compelling when properly combined in a “cumulative case.”¹⁹²

Simply put, there are decisions that are best justified not on the basis of any single consideration, in isolation, but on the basis of an accumulation of more or less separate, distinguishable considerations. It is, for example, only on the basis of a complex cumulative case that some persons might best be able to justify attending college, attending some particular college, marrying a particular person, or accepting a particular job offer. More generally, judges who, like the proverbial fox, “know many little things,” and who adopt a flexible, eclectic, multi-factor approach to a problem often do better than judges, who, like the proverbial hedgehog, “know one big thing” and seek to apply their inflexible template whenever possible.¹⁹³

The proverbial wisdom of the fox, more often borne out in practice,¹⁹⁴ may thus normally call for a more pluralistic approach than the Supreme Court adopted in *Grutter* and *Gratz*.¹⁹⁵ A more intellectually inclusive approach thus might well have been practically wiser.¹⁹⁶ And in general, the judicial exercise of the virtue of

¹⁸⁷ See *id.* at 328-29.

¹⁸⁸ See *id.* at 328.

¹⁸⁹ See *id.* at 333-35.

¹⁹⁰ See *id.* at 328-29.

¹⁹¹ R. George Wright, *Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action*, 23 PACE L. REV. 1, 32 (2002).

¹⁹² See generally *id.*; J.C. Thomas, *Cumulative Case Arguments for Religious Belief*, 21 SOPHIA 37 (1982).

¹⁹³ See PHILIP E. TETLOCK, EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW? 20-21 (2005) (adopting the distinction from ISAIAH BERLIN, THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY (1993)).

¹⁹⁴ See TETLOCK, *supra* note 193, at 67-120.

¹⁹⁵ See *supra* notes 182-190 and accompanying text.

practical wisdom, even at the cost of adjusting some established constitutional judicial tests,¹⁹⁷ is itself of compelling importance.

¹⁹⁶ It is doubtlessly true that a multi-factor or “cumulative case” approach to justification in *Grutter* and *Gratz* would have made the traditional narrow tailoring inquiry even more problematic. We cannot easily tell whether a policy is narrowly tailored to promote a combination of multiple goals. But we should hardly be expected to revolutionize how we make and justify some important decisions so that our revised, cruder justifications can be more readily scrutinized by a judicially created “narrow tailoring” inquiry. As matters stand, the narrow tailoring inquiry, in affirmative action cases and in other constitutional contexts, often involves a certain arbitrariness. See Wright, *supra* note 191, at 35-38; R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167 (1997) for further discussion.

¹⁹⁷ See Wright, *supra* note 196.