October 2017

Moral Issues and the Virtuous Judge: Reflections on the Nomination and Confirmation of Supreme Court Justices

Robert J. Araujo, S.J.
“Love Virtue, you who are judges on earth . . . .”

INTRODUCTION

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue [of abortion] before us today. That, I regret, may be exactly where the choice between the two worlds [i.e., between the right to have an abortion and the state's regulation of abortion] will be made.  

The nature of any society therefore is not to be deciphered from its laws alone, but from those understood as an index of its conflicts.
While each of these quotations originates from a different source, both are united in their dealing with law, the societies governed by such laws, and the people involved with the creation and interpretation of these laws. Particularly, both statements establish the foundation for the issues of this Article: Who are our judges? What is their role? Is it their role to resolve conflict in our society? When we address these questions, we often face an implicit issue: What are the criteria for selecting judicial candidates?

In the United States, the officials responsible for selecting judges—chief executives, legislatures, and the electorate—are often guided by a variety of factors, many of which have political overtones. However, while the last two decades of judicial selection at the national level have primarily focused on political considerations, questions raising moral considerations have surfaced more and more. For example, during the late 1960s and early 1970s, moral issues concerning questionable financial dealings, memberships in discriminatory clubs and organizations, and conflicts of interest were instrumental in the critique and defeat of the nominations of Justice Abe Fortas for Chief Justice, and federal Judges Clement Haynsworth and Harrold Carswell for Associate Justices of the United States Supreme Court.

Beginning with the nomination to the Supreme Court of Judge Sandra Day O'Connor, a good deal of the moral focus has shifted to issues such as privacy and autonomy, abortion rights, and discrimination against certain classes of persons. Indeed, perhaps the major issue surrounding recent Supreme Court nominations concerns the right to privacy which emerged from the 1973 abortion decision of Roe v. Wade. Justice Blackmun's statement which begins this Article forecasts that

---


5 See Alfonso Narvaez, Clement Haynsworth Dies At 77: Lost Struggle For High Court Seat, N.Y. TIMES, Nov. 23, 1989, at D21; see also Mitchell McConnell, Haynsworth and Carswell: A New Senate Standard of Excellence, 59 Ky. L.J. 7, 7 (1970). Senator McConnell, then a staff member to Senator Cook, offered thoughts and suggestions about "a meaningful standard by which the Senate might judge future Supreme Court nominees." Id.

6 See Bruce Lambert, G. Harrold Carswell Is Dead At 72: Was Rejected For Supreme Court, N.Y. TIMES, Aug. 1, 1992, at 11; see generally JOHN FRANK, CLEMENT HAYNSWORTH, THE SENATE AND THE SUPREME COURT (1991); Hearings Before the Committee on the Judiciary, United States Senate, on Nomination Of George Harrold Carswell, Of Florida, To Be Associate Justice Of The Supreme Court Of The United States, 91st Cong., 2d Sess. (1970) [hereinafter Carswell Hearings].


8 410 U.S. 113 (1973).
the divisive abortion issue could well affect the selection, nomination, and confirmation of federal judicial candidates in the future. Accordingly, interest groups can be expected to lobby the President and the Senate, pressuring those screening potential judicial nominees to ascertain the sympathies and attitudes of candidates toward specific issues such as abortion, affirmative action, and criminal-versus-victim's rights. With the election of Bill Clinton as President and the vacancy of over one hundred federal judgeships which President Clinton will be asked to fill,\(^9\) issues are raised regarding the criteria for evaluating and selecting judicial candidates and the role politics and morality will play in the process.

The primary focus of this Article is to suggest additional judicial selection criteria for identifying those judges who will competently address difficult moral issues. It is submitted that it is both proper and necessary to examine a judicial candidate's qualities to determine whether he or she will become a virtuous judge. Part I of this Article formulates the issue of the selection of judicial candidates by briefly identifying the general criteria which have been traditionally used. In addition, Part I notes that, since 1981, one Senator has continuously employed virtue-like criteria that both complement and transcend traditional criteria. Part II identifies these "transcendent" qualities and demonstrates how they raise the criteria of virtues that relate to the execution of judicial functions. This section will also explain the virtues and their prospective roles in the exercise of judicial functions. In addition, Part II briefly examines the history of the virtuous person in public life. Part III refocuses this examination by analyzing the forces which have affected the nominations for vacancies on the United States Supreme Court since the beginning of the Reagan Administration. This Article focuses on Supreme Court nominations because they have produced the more fully documented cases of how judicial candidates have been evaluated. In particular, a review of the confirmation process surrounding Judge Robert Bork's nomination to the Supreme Court will illustrate that the confirmation process has not always dealt with criteria that transcend political considerations.

Finally, Part IV elaborates on how the virtues of justice, prudence, courage, and wisdom can provide judges with the tools they need to better evaluate and decide the difficult cases which flood the federal courts today. This analysis focuses on the case of *Grove City College v. Bell*\(^{10}\) which involved the application of Title IX of the 1972 Education Amendments to institutions of higher education that receive federal funds.

---


I. Framing the Issue: Criteria for Judicial Selection

Observers of the process of selecting federal judges have assumed correctly that Presidents often select judicial candidates based on political considerations, as well as general ideological compatibility with their own views. The reality that judicial selection is simultaneously a political and ideological process can be viewed in the fact that both the executive and legislative branches exercise authority in filling vacancies. Although the power to nominate is vested with the President, the Senate's power to confirm the candidate after giving its advice and consent counterbalances the presidential authority.

A. Historical Approach

Although some nominations, notably the 1987 candidacy of Judge Bork, have been distinguished by strong disagreement which surfaced between the President and the Senate, most nominees have been given senatorial consent without much, if any, debate. In fact, it was not until the nomination of Harlan Fiske Stone in 1925 that the Senate first called a Supreme Court nominee before the Judiciary Committee to answer specific questions. Moreover, only with the 1955 nomination of John Marshall Harlan did the Senate begin to require that a nominee appear before the Judiciary Committee to discuss his views on substantive legal issues. Initially, these brief hearings served as a reminder to the executive branch that the Senate has a constitutional role to execute in the appointment of federal judges.

B. Approach Taken During the Late 1960s and 1970s

By 1968, however, a change emerged in which the Senate pursued a more vigorous role in the confirmation process of Thurgood Marshall as

---

12 U.S. Const., art II, § 2. See generally David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 Yale L. J. 1491 (1992) (encouraging Democratic Senate to forego posture of deference in face of so many conservative nominations). The authors argue that this deference "creates serious risks from the standpoint of checks and balances" and urge that the Senate "insist on its constitutional prerogatives." Id. at 1520; see also Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L. J. 657, 657 (1971) (proposing it is duty of Senator to vote against nominee whose views are bad for country); Charles McC. Mathias, Jr., Advice and Consent: The Role of the United States Senate in the Judicial Selection Process, 54 U. Chi. L. Rev. 200 (1987).
14 Id. at 119.
MORAL ISSUES AND THE VIRTUOUS JUDGE

an Associate Justice and Associate Justice Abe Fortas as Chief Justice of the United States. In the case of Abe Fortas' nomination, some senators resisted the typically automatic approval of elevating an Associate Justice to the position of Chief Justice without vigorously exercising their constitutional power. During Justice Fortas' hearing, questions surfaced about his receipt of a $20,000 grant from a family foundation, one of whose members had been indicted for stock manipulation.

While President Nixon's subsequent nomination of Justice Warren Burger for Chief Justice was not considered controversial and, thus, moved quickly through the confirmation process, his nominations of Clement Haynsworth and Harrold Carswell stumbled on major ethical considerations involving the stock ownership of Judge Haynsworth and the racial attitudes of Judge Carswell. After the latter two nominations failed, President Nixon nominated Harry Blackmun, a distinguished but little-known Circuit Court Judge, to occupy the seat that neither Judges Haynsworth nor Carswell could fill. In 1971, President Nixon nominated Lewis Powell, a distinguished practitioner and former president of the American Bar Association, to fill another vacancy. Both Blackmun's and Powell's nominations were subdued events that gave little opportunity for substantive senatorial debate.

The confirmation process surrounding President Ford's noncontroversial nomination of Judge John Paul Stevens also moved through the Senate with little difficulty; however, post-Watergate concerns led the Senate to spend considerable time questioning Judge Stevens about issues such as discrimination, capital punishment, wiretapping, amendments to the United States Constitution, and criminal procedure.

C. Approach Taken During the 1980s

The presidency of Jimmy Carter passed without any opportunity to nominate and confirm a Supreme Court Justice. However, the resignation of Justice Potter Stewart in 1981 provided President Reagan with an opportunity to nominate a new member of the Supreme Court. It was during this historic nomination process of the first woman Justice, Judge Sandra Day O'Connor, that the Senate began to identify and regularly articulate a variety of criteria for the selection of judicial candidates for the Supreme Court. During Judge O'Connor's nomination hearings, members of the Senate Judiciary Committee offered opening statements for the first time and listed their own criteria for confirmation. In the

15 See id. at 120.
16 See Greenhouse, supra note 4, at A1.
17 See Narvaez, supra note 5, at D21.
18 See Lambert, supra note 6, at 11.
19 Ross, supra note 13, at 121.
past, the committee chair simply called the nomination hearings to order, and the nominee's home state Congressional delegation and the Attorney General introduced the nominee.20

1. Traditional Considerations Concerning a Nominee's Qualifications

Typically, senatorial considerations concerning the qualifications of nominees to the Supreme Court involved three principal areas: first, the personal attributes of intellectual capacity, competence, and temperament;21 second, the candidate's moral and ethical stature; and third, the nominee's adherence to upholding the laws and Constitution of the United States and honoring judicial precedent.22 These three major areas have been utilized in the subsequent nominations of Justice William Rehnquist for Chief Justice, and Judges Scalia, Kennedy, and Souter for Associate Justices. However, major emphasis was also building on the question of the right to privacy, especially in the realm of abortion.23 While these criteria played a role in the nomination of Judge Robert Bork to Associate Justice, questions about constitutional ideology and whether Judge Bork was a part of mainstream jurisprudence became both relevant and critical to the senatorial debate during his unsuccessful bid to join the Court.24

20 See, e.g., Hearings Before the Committee on the Judiciary, United States Senate, on Nomination of Harry A. Blackmun, of Minnesota, To Be Associate Justice of The Supreme Court of the United States, 91st Cong., 2d Sess. 1-5 (1970) [hereinafter Blackmun Hearings]. But see, O'Connor Hearings, supra note 7, at 1-31.

21 See, e.g., O'Connor Hearings, supra note 7, at 3 (Senator Biden on intellectual capacity, temperament, competence, moral character, freedom from conflicts of interest, ability to uphold the laws of the U.S.); id. at 14 (Senator Leahy on fairness); id. at 23 (Senator Grassley on compassion). These attributes can be termed the nominee's "judicial manner."

22 Id. at 3.

23 Ross, supra note 13, at 135. See, e.g., O'Connor Hearings, supra note 7, at 28 (Senator Denton drawing attention to divisiveness and significance of abortion issue); Hearings Before the Committee on the Judiciary, United States Senate, on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of The United States, 99th Cong., 2d Sess. 573-604, 787-816, 914-15, 949-50 (1986) [hereinafter Rehnquist Hearings]; Hearing Before the Committee on the Judiciary, United States Senate, on the Nomination of Anthony M. Kennedy to be Associate Justice of The Supreme Court of The United States, 100th Cong., 1st Sess. 432-55, 1084-97 (1987) [hereinafter Kennedy Hearings]; Hearing Before the Committee on the Judiciary, United States Senate, on the Nomination of David H. Souter to be Associate Justice of The Supreme Court Of The United States, 101st Cong., 2d Sess. 362-414, 665-607, 667-713 (1990) [hereinafter Souter Hearings].

2. Senator Thurmond's Considerations Concerning a Nominee's Qualifications

Since 1981, Senator Strom Thurmond has consistently offered a somewhat different set of criteria for nominees to the nation's highest court. At the nomination hearings of Judge Sandra Day O'Connor, Senator Thurmond introduced the theme of the virtues—or lack thereof—of candidates. While his views about general qualifications overlap with other senators, he has also demonstrated concern about a nominee's virtues.

When members of the Judiciary Committee first offered criteria relating to a Supreme Court nominee's qualifications in 1981, Senator Thurmond suggested a number of such criteria for the selection of "an outstanding jurist." Some of the concepts he relied upon have long been associated with human virtues. Senator Thurmond argued that a judge, and therefore a judicial candidate, must possess the courage and fortitude needed to "stand firm and render decisions based not on personal beliefs but, instead, in accordance with the Constitution and the will of the people as expressed in the laws of Congress." Moreover, he has suggested that judicial candidates should possess the requisite quality of "compassion which tempers with mercy the judgment of the criminal, yet recognizes the sorrow and suffering of the victim; compassion for the individual but also compassion for society in its quest for the overriding goal of equal justice under law."

The Senator's list is not a complete discourse on virtuous criteria. Nevertheless, his language is neither alien nor unrelated to the other virtuous qualities which will be evaluated in the context of criteria for judicial selection. The virtue criteria used to evaluate a judicial candidate are, when taken as a coherent package, vital to the consideration of judicial qualifications.

25 See O'Connor Hearings, supra note 7, at 2, where Senator Thurmond's list of qualifications overlap with other senators on selection criteria: a person of integrity (one who is fair, honest, and incorruptible); a person learned in the law; a person who possesses the necessary temperament and demeanor; and a person respectful of American legal and political institutions and the Constitution.

26 See O'Connor Hearings, supra note 7, at 2; Rehnquist Hearings, supra note 23, at 1; Hearings Before the Committee On The Judiciary, United States Senate, on the Nomination Of Robert H. Bork to be Associate Justice Of The Supreme Court of The United States, 100th Cong., 1st Sess. 29 (1987) [hereinafter Bork Hearings]; Kennedy Hearings, supra note 23, at 30, 35; Souter Hearings, supra note 23, at 13 (Senator Thurmond's addresses on virtue criteria).

27 See O'Connor Hearings, supra note 7, at 1.

28 Id. at 2.

29 Id.
II. THE CRITERIA OF VIRTUES

A. The Nature of Virtues

Alasdair MacIntyre defined virtue as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving such goods." MacIntyre's predecessor, Thomas Aquinas, saw virtue as "a good quality of the mind" by which people live righteously. In the context of the ethical system which is generated by human virtues, MacIntyre's definition of virtue raises three principal questions about human beings and human nature: Who are we? Is there some future goal regarding "good" toward which we strive or ought to strive? If so, what is the method or practice by which we get there? If the function of ethics is to guide us—including judges—toward right action, an ethics based on virtue engages us as moral agents who are seeking to make ourselves better moral agents in the future. At the heart of the future of the moral agent is a goal, a *telos*. Because individual humans are also social beings whose existence is grounded in relationships with others, the concept of the *telos* helps the judicial candidate better understand the second question advanced by MacIntyre by placing it into a communal setting where judges must deliberate upon a case and reach a decision that will reconcile conflicts between two or more members of the community.

Joseph Kotva points out that, for some individuals, the kind of person each of us is molds the kind of moral questions we face. His obser-

30 MacIntyre, supra note 3, at 191. By a "practice," MacIntyre means "any coherent and complex form of socially established cooperative human activity . . . which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended." Id. at 187.


33 Id. at 116.

34 See MacIntyre, supra note 3, at 203. MacIntyre explains that "there is a telos which transcends the limited goods of practices by constituting the good of a whole human life, the good of a human life conceived as a unity." Id.; see also Keenan, Virtue Ethics, supra note 32, at 120, 123; Joseph Kotva, An Appeal For A Christian Virtue Ethic, 67 Thought 158, 159 (1992). As James Keenan stresses, "[o]nly in virtue ethics is a telos constitutive of method; no other ethical system can make that claim." Keenan, supra note 32, at 123.


36 Kotva, supra note 34, at 159. As this author further suggests, "the means cannot be separated from the end because the means are central to the end. A telos which embodies
vation and conclusion suggests that the practice of virtue ethics acknowledges the sense of "otherness;" that is, in making moral decisions about who we are, what our goal is, and what means we use to get there, we necessarily think of other individuals as we work toward the goal. The practice of virtue ethics, in short, is based on a sense of community and on an awareness of a relationship with others.

Mary Ann Glendon recognized and addressed this awareness in the context of the abortion rights argument which emerged from Roe v. Wade and which has been advanced by Justice Blackmun's statement cited at the beginning of this Article. While the rhetoric of the majority opinion in Roe focused on the individual, that is, the attending physician or the pregnant woman, and the individual's right to privacy, Glendon expresses her concern that the interests of the other—that the concerns of the community most involved with pregnancy and the legality and morality of abortion—are ignored. She addresses this concern by stating that "[t]he voice we hear in the Supreme Court's abortion narrative—presenting us with the image of the pregnant woman as distinct from the father of the unborn child . . . and insulated from society . . . is . . . distinctively American . . . in its lonely individualism and libertarianism."

Since much of the discussion in American jurisprudence focuses on the individual and his or her rights and liberties, especially the right to privacy, it is suggested that reliance on virtues and virtue ethics may help us understand that the individual is not an autonomous being, but a member of a community. Furthermore, acknowledgment of this fact is important in the exercise of judicial duties. After all, judges are often asked to resolve conflict between people when they are called upon by litigants to render justice by adjudicating the disagreement. Consequently, judges are concerned about individuals who live in a community, not individuals who live in isolation from one another. Yes, individuals have rights, including rights regarding privacy. But this is not the only right with which judges are or can be concerned.

The tension that can emerge between individuals or between an individual and the rest of his or her community has been considered in the historical study of virtues and the virtuous person. Plato was an early commentator who raised the issue of virtue and its relationship to justice. For Plato, justice was the fundamental component of society, the

---

37 See supra note 1 and accompanying text.
38 See 410 U.S. at 152-56.
“necessary conduct in everything from beginning to end.”40 Above all else, justice, as a virtue, was the guarantor of other virtues like temperance, courage, and wisdom.41

Aristotle saw justice as the “complete virtue” in the context of a person being in right relation with his or her neighbor.42 In refining his thought about justice as the greatest of virtues, Aristotle concluded that people who are true friends43 have no need for justice because their friendship is the truest form of justice.44

In a contemporary fashion, Mary Ann Glendon has reaffirmed Aristotle’s position. She points out that the tendency to make rights and privacy absolute in the American culture have minimized the significance of fraternity.45 Glendon argues that,

in its relentless individualism, [American rights talk] fosters a climate that is inhospitable to society’s losers, and that systematically disadvantages caretakers and dependents, young and old. In its neglect of civil society, it undermines the principal seedbeds of civic and personal virtue. In its insularity, it shuts out potentially important aids to the process of self-correcting learning. All of these traits promote mere assertion over reason-giving.46

As previously mentioned, Aquinas saw virtue as the good quality of the mind which facilitates people living righteously. He also acknowledged that the virtue of justice is a good habit in which each person perpetually renders to the other person that which is due.47 In short, from Plato to Aquinas, the virtue of justice is practiced by human beings in a community setting. It is not understood as something which is good or proper for the individual alone; rather, it manifests itself in a good relationship or true friendship. Justice as a virtue manifests itself in the midst of people who are in relationships with one another; it does not exist in the vacuum of persons who are isolated from one another. Essentially, the virtue of justice depends on community; its prerequisite is

41 Id at 433C.
42 Aristotle, The Nicomachean Ethics, bk. E, ch. 3, 80, ch. 3, 1129, b27 (N. Kretzmann et al. eds.).
43 Id. at bk. VIII, 143, ch. 3, 1156a.
44 Id. at bk. VIII, 140, ch. 1, 1155a.
45 Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 47-48 (1991) [hereinafter Rights Talk]. Christopher Mooney has similarly commented on this theme in the context of the law and legal profession. He argues that the law’s “privatizing impulse has tended to become dominant and it no longer conceives its primary mission to be the responsible exercise of public virtue.” Christopher Mooney, S.J., Public Virtue: Law and the Social Character of Religion at xi (1986).
46 Mooney, supra note 45, at 14.
two or more people who acknowledge one another's existence where each honors the other person's right to co-exist, and where each expects his or her own right to exist to be honored by the other.

The goal, then, of the virtue of justice is to achieve multiple levels of reciprocity throughout society in which people render to one another those concerns which they have for themselves. The virtuous person, who becomes the virtuous judge and who will have the duty to render justice, can see this readily.

Within the privacy rights rhetoric of Roe, the kind of justice which emerges has lost a good deal of its community-oriented goal. The resulting language about "justice" is narrowly focused on addressing exclusively individual, not community, concerns. Mary Ann Glendon points out that the social, communal, and teleological components of duties that are the correlatives of rights are not discussed in this environment. She correctly argues that these components are essential to dealing justly with the urgent matter of abortion which has, in the American context, been cloaked with the absolute rights of privacy, individual autonomy, and isolation. To balance the excessive and narrow focus on the rights which emerge from the principle of autonomy, Glendon draws attention to the importance of understanding the needs of all the parties involved (the pregnant woman, the fetus, and the community) in order to reach the just end concerning the rights and responsibilities associated with human reproduction.

If we try to ascertain the just goal of society and its members, a virtuous solution to interpersonal conflict begins to emerge. In response to legal controversies that work their way into courts, justice-as-virtue avoids the problem of "winner-take-all" that characterizes much of the process of litigation over which judges preside. But, as a practical matter, how do we move toward the goal of justice as virtuous people? This is where the virtue of prudence becomes relevant.

If the virtue of justice prescribes the just goal or end, then prudence is the means to that end. A fundamental approach to obtain such means was suggested by Senator Thurmond when he raised the topic of compassion. Senator Thurmond recommended improvements in social structures that will display greater charity toward both individuals and society at large. Senator Thurmond may have unknowingly taken his cue from Aquinas who acknowledged the virtue of prudence which di-

48 See RIGHTS TALK, supra note 45, at 14, 45, 47, 171-72.
49 ABORTION, supra note 39, at 38.
50 Kotva, supra note 34, at 166.
51 See, e.g., O'Connor Hearings, supra note 7, at 2 (Senator Thurmond discussing the virtue of compassion); see Benjamin Zipursky, DeShaney And The Jurisprudence Of Compassion, 65 N.Y.U. L. Rev. 1101, 1134-57 (1990).
52 O'Connor Hearings, supra note 7, at 2.
rects people so that they relate their own good to the good of others—the common good.\textsuperscript{53} Plato's discussion of the virtue of temperance parallels Aquinas' prudence: it is the virtue which brings harmony into society by promoting "concord" among all the elements of the community so that they coexist harmoniously.\textsuperscript{54}

For Aristotle, the understanding of human virtue concentrated on a state of character, concerned with choice, lying in a mean—the mean relative to us, determined by a rational principle, and by that principle as determined by a man of practical wisdom. Now, it is a mean between two vices, that which depends on excess and that which depends on defect; and, again, it is a mean because the vices respectively fall short of or exceed what is right in both passions and actions, while virtue both finds and chooses that which is intermediate.\textsuperscript{55}

The concern about virtue raises considerations which every member of the political society can reflect upon and adopt regardless of personal beliefs surrounding the judicial nomination. Even the most politically motivated person could likely take comfort knowing that a judge practices the virtue of compassion or temperance. Compassion and temperance provide an atmosphere which helps reassure that each litigant's concerns will be carefully evaluated. The virtue of compassion sets the stage for another virtue raised by Senator Thurmond—courage.

Courage is the virtue that enables us to meet the challenge of harm or danger when we attempt to take action based on the care and concern we have for individuals and communities.\textsuperscript{56} The exercise of this virtue takes place when judges, in controversial cases, face risks and threats.\textsuperscript{57}

Underlying the virtues of justice, prudence, and courage, is the virtue of wisdom. Wisdom provides the insight, the sagacity by which we come to understand who we are and where we ought to be. In the realm of judges and justices whose duty it is to reconcile differences by often making difficult decisions in the process, wisdom enlightens the jurist to the variety and subtlety of issues and facts in each case. Cultivation of this virtue can open the mind as well as the heart to matters which the person not relying on the virtue of wisdom may miss. It parallels prudence, and works in tandem with it. In a virtue-ethics approach to many of today's difficult legal issues, wisdom guides us in our quest for understanding who we are as individuals and as members of society, and what we want to become. In an American culture that is strongly character-

\textsuperscript{53} \textit{Aquinas, supra} note 31, at 100-02, question 50, art. 2.
\textsuperscript{54} \textit{Plato, supra} note 40, at bk. IV, 432.
\textsuperscript{55} \textit{Aristotle, supra} note 42, at bk. II, ch. 6, 1107\textsuperscript{a}.
\textsuperscript{56} \textit{MacIntyre, supra} note 3, at 192.
\textsuperscript{57} \textit{Id.} at 123. MacIntyre equates courageousness with reliability. \textit{Id.}
ized by “individual autonomy and isolation,” the focus of our individual and community attention on who we are can be blurred. Wisdom helps remove the blur that otherwise inhibits the ability to identify not only who we are now but also what we want to be in the future. When wisdom infects our consciousness, our knowledge of ourselves becomes more secure and more certain. When our self-knowledge grows, the vision of who we want to become both as individuals and as communities will become all the more clear. When our knowledge of who we want to become is better defined, our “moral idealism [can] be found and maintained.”

B. Why Virtue?

The virtuous judge is concerned about acting ethically and morally in his or her attempt to bring peaceful resolution of disputes among citizens. The judge can also profit from the experience other professions have had in situating virtue within their professions. Members of the medical profession have addressed how virtues and virtue-based ethics can contribute to the betterment of health providers, patients, and society. The words of Edmund Pellegrino, M.D., offer insight which can provide lawyers, some of whom will be future judges, and some of whom will participate in the selection of judges, with wise counsel worth taking to heart:

[V]irtue-based ethic is inherently elitist, in the best sense, because its adherents demand more of themselves than the prevailing morality. It calls forth that extra measure of dedication that has made the best physicians in every era exemplars of what the human spirit can achieve. No matter to what depths a society may fall, virtuous persons will always be the beacons that light the way back to moral sensitivity; virtuous physicians [and judges] are the beacons that show the way back to moral credibility for the whole profession.

Pellegrino points to the dedication that makes a person the best in his or her profession not only on a technical level for a specific patient, but also on the level of doing better for the entire community which the professional serves. This extra measure of dedication might consequently help the legal professional intensify the effort to achieve the goal of giving justice through the reconciliation of conflict and the promotion of “concord” or harmony.

Pellegrino’s concept of the virtuous physician may have already affected those concerned about the virtuous judge or the virtuous judicial

59 Keenan, supra note 32, at 123.
candidate. For example, Senator Thurmond has been consistent with his virtue-like qualifications since 1981. Moreover, several of his colleagues have used virtue language in describing the qualifications for judicial nominees. With regard to justice, at the O'Connor nomination hearings in 1981, Senator Howell Heflin argued that a judge must possess "an abiding love of justice" because jurists are "custodians of justice." Hefflin, himself a former state supreme court judge, viewed justice as "the great cement of a civilized society" in which, rather than being pitted against one another, people are brought "together as a people, and as a Nation." As he concluded his opening remarks at the O'Connor confirmation hearing, Heflin reminded those present about the advice of Judge Learned Hand which may constitute one of the great commandments of civil law: "Thou shalt not ration justice.

In his opening remarks at the hearing for Judge Robert Bork's nomination to the Supreme Court, Senator Edward Kennedy suggested that the special quality that empowers a judge to "render justice" is a synthesis of fairness, impartiality, open-mindedness, and a temperament that no bias or prejudice can call home. Senator Dennis DeConcini pointed out that a judge who is called upon to issue justice must do so in order that not only the "haves," but the "have-nots" are afforded the protection of the law and the opportunity for their interests to be heard and judged upon fairly.

But to do justice, to render good decisions, to be, as Pellegrino suggests, an "exemplar of what the human spirit can achieve," a judge must cultivate the virtue of wisdom. Wisdom enables the judge to discern what is at stake, to understand more clearly the concerns of those for whom a case means so much. At the nomination of Associate Justice Rehnquist to become Chief Justice, Senator Heflin touched upon the virtue of wisdom by quoting Cicero: "He saw life clearly and he saw it whole." In the realm of the judicial selection process in late twentieth century America, the counsel of Cicero could well mean that a virtuous judge cannot be satisfied with having some command of the case and the parties whose vital interests are involved. Not only must the wise judge have the capacity and the will to see the case, the law, and the parties clearly and with an open mind, he must also view these concepts as they apply to the history of the law, the building of judicial precedent, and the

---

61 See O'Conner Hearings, supra note 7, at 2.
62 Id. at 26.
63 Id. at 27.
64 Id.
65 Bork Hearings, supra note 26, at 33.
67 Rehnquist Hearings, supra note 23, at 34.
evolution of the law as a coherent means of reconciling conflict for both today and the future.

Attributes often cited as those needed by good judges to reconcile differences and to resolve conflict are patience, intelligence, integrity, fairness, and open-mindedness. These attributes relate to the virtues that facilitate attaining the just goal. Through personal patience, attentiveness, open-mindedness, self-restraint, seeking the truth, and integrity that avoids even the slightest suspicion of prejudice for or against any specific party, a judge is apt to see not only a way, but a better way to resolve a case, reconcile conflict, and seek the just end.

In some cases, pressure from the media, lawyers, and even judicial colleagues, may restrain the virtuous judge from acting virtuously. The virtue of courage keeps the open-minded judge from being swayed or prejudiced by any pressure that could promote deviation from seeking the just end. Courage, quite simply, is the virtue which steels the person to meet the challenges that endanger or threaten the judge who must survive the tide of strong public sentiment in order to protect those who need protection. In order to achieve or at least seek justice, there can be instances when a judge may have to point out that his colleagues and, perhaps, even the nation are wrong. Precedent for this virtue extends back to the Ancient Near East in which the “governing elite had a very special responsibility for the lower fringes of society.”

Examples of judges having the courage to stand apart from the majority of their colleagues, as well as the majority of strong, popular sentiment, are Justices McLean and Curtis who dissented in the antebellum case of *Dred Scott v. Sanford*—a case that declared that black persons were not to

---

68 Id. at 3, 29, 69; Bork Hearings, supra note 26, at 92; Souter Hearings, supra note 23, at 25-26, 32, 42.

69 See MacIntyre, supra note 3, at 191.

We hold courage to be a virtue because the care and concern for individuals, communities and causes which is so crucial to so much in practices requires the existence of such a virtue. If someone says that he cares for some individual, community or cause, but is unwilling to risk harm or danger on his, her or its own behalf, he puts in question the genuineness of his care and concern. Courage, the capacity to risk harm or danger to oneself, has its role in human life because of this connection with care and concern.

Id.

In a small footnote which frequently eclipses the legal significance of the case in which it appeared, the United States Supreme Court provided one arena in which a judge may have to have courage to go against the tide to protect the unpopular, the minority, or the outcast. As the Court said in 1938, a “more searching judicial inquiry” may be needed to protect “discrete and insular minorities.” United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).


be considered “citizens” for purposes of constitutional protection. Another example of judicial courage was the first Justice Harlan who, in *Plessy v. Ferguson*,\(^72\) disagreed that the “separate but equal” doctrine was constitutional. More recently, Justices Murphy, Roberts, and Jackson dissented in the Japanese-American internment cases which were commonplace during World War II.\(^73\)

Since 1981, some members of the Senate Judiciary Committee have developed and maintained a tradition of commenting on a variety of criteria for the selection of judicial nominees, especially those who are selected to fill vacancies on the nation's highest court. However, criteria that mandate that a judge be a compassionate person who is scholarly, patient, open-minded, and diligent do not always receive the attention they merit in ascertaining a candidate’s fitness for a vacant judicial post. There are times when the politics surrounding the nomination can do much to promote the candidate whose virtues are unknown or defeat the candidates whose virtues are recognized.

III. POLITICS AND VIRTUE: THE MIXTURE OF OIL AND WATER

This section focuses on a few of the political episodes which, in some cases, slowed the confirmation process and, in others such as Judge Bork’s, defeated the candidacy. It is not designed to comment on the correctness or error of the role of politics in making judicial appointments. Rather, this section illustrates that when political considerations are unduly emphasized, the important personal qualifications of the candidate, particularly those which focus on virtues, can be overshadowed.

In 1981, political opponents of Judge O’Connor came forward to criticize her abortion stand while she was a member of the Arizona legislature.\(^74\) Similarly, political groups critical of Justice Rehnquist\(^75\) and Judge Souter\(^76\) were able to steer the Senate Judiciary committee away from personal qualifications and toward political and ideological views.\(^77\) However, these excursions into the realm of political views which were or

\(^{74}\) *O'Connor Hearings*, supra, note 7, at 280-83, 368-74, 396 (representatives of the National Right to Life Committee offered testimony opposing O’Connor’s confirmation).
\(^{77}\) See Erwin Chemerinsky, *Ideology, Judicial Selection and Judicial Ethics*, 2 Geo. J. L. ETHICS 643, 646 (1989) (proposing that evaluation of judicial candidates “should include consideration of ideology” by asking nominees questions on views concerning judicial precedents in specific cases).
might be in disfavor with some interest group did not prohibit the confir-
mations of Rehnquist, O'Connor, or Souter.

However, political considerations were given much greater promi-
nence in the nomination of Judge Bork to the Supreme Court. Ulti-
mately, after 6511 pages of hearing testimony, reports, printed state-
ments, and other materials, the Senate Judiciary Committee in a tally of
nine to five voted against Judge Bork.\textsuperscript{78} With his integrity intact, his
temperament and demeanor unquestioned, his intelligence above re-
proach, Judge Bork was largely denied confirmation because the major-
ity of the Judiciary Committee, and subsequently fifty-eight members of
the Senate, concluded that his judicial philosophy ran counter to funda-
mental rights and liberties protected by the Constitution.\textsuperscript{79}

One important commentary on the undoing of the Bork nomination
comes from Bruce Ackerman, a distinguished professor of law at Yale
University. Professor Ackerman has contributed to the understanding of
how legal and political forces can combine to defeat a nomination.\textsuperscript{80} Ack-
erman comments that,

\begin{quote}
when judged by normal personal and professional criteria, Robert
Bork is among the best qualified candidates for the Supreme Court of
this or any other era. Few nominees in our history compare with him
in the range of their professional accomplishments . . . Few compare
in the seriousness of their lifelong engagement with the fundamental
questions of constitutional law. Of course, Bork's answers to these
questions are controversial. But who can be surprised by that? Even
those, like myself, who disagree with Bork both can and should admire
the way he has woven theory and practice, reason and passion, into a
pattern that expresses so eloquently our deepest hopes for a life in the
law. The Republic needs more people like Robert Bork. It is a tragedy
that the Republic should repay him for his decades of service by pub-
licly humiliating him.\textsuperscript{81}
\end{quote}

Professor Ackerman raises the relevance of virtue in the context of
the Bork nomination when he proffers that confirmation was denied due
to public perception of President Reagan's political aspirations, rather
than Judge Bork's stance on controversial moral issues.\textsuperscript{82}

\textsuperscript{78} \textit{See Bork Hearings, supra} note 26, at 2.
\textsuperscript{79} \textit{Id.} at 6-65, 96-99 (Senate Judiciary Committee majority report concludes that Judge
Bork was not within mainstream American judicial philosophy).
\textsuperscript{80} \textit{See BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE} (1980).
\textsuperscript{81} Bruce A. Ackerman, \textit{Transformative Appointments}, 101 \textit{Harv. L. Rev.} 1164 (1988)
[hereinafter Ackerman, \textit{Transformative Appointments}]. The author further suggests that
"Bork's remarkable virtues crystallized the question of transformative appointments . . .
[he] did not owe his nomination to his sex, race, religion, national origin, or regional roots
. . . [but] to the power of his mind, the vigor of his ideas, and his demonstrated capacity to
act on his convictions in moments of crisis." \textit{Id.} at 1170.
\textsuperscript{82} \textit{Id.} at 1165. Professor Ackerman stated that,
Mindful that philosophical differences distinguish the legal views of Robert Bork and Bruce Ackerman, one might agree with Professor Ackerman that some nominees (and perhaps members of the Senate who confirm or defeat judicial nominations) who live "most of their adult lives in politics" are accustomed "to dealing in sweeping (if vague) pronouncements. In the American political scheme, where the ability to compromise is essential to the passage of legislation, personal morality, virtue, and integrity often become anecdotal afterthoughts, rather than the primary focus, of legislators. As Judge Abner Mikva of the United States Court of Appeals for the District of Columbia Circuit has indicated, the Senate as a political body is "not comfortable" with questions of morality and allegations of moral "wrongdoing."

Professor Ackerman's commentary about the Bork affair acknowledges that the nominee was a man of integrity, keen intelligence, and virtue, whose opportunity to sit on the nation's highest court was frustrated by political concerns reflecting interests vital to several national constituencies and interest groups. The role of politics in the confirmation process is indirectly mandated by the United States Constitution, and, in a more practical sense, is essential to maintaining our representational institutions in classic tragedy, Bork's undoing was the product of his greatest virtues. When his moment came to walk the center of the constitutional stage, these virtues could no longer be interpreted simply as testimony to his distinguished service. Instead, the nation's constitutional history endowed them with a dramatically different meaning: Bork's superqualification came to symbolize Ronald Reagan's aspiration to rival Franklin Roosevelt's success in revolutionizing constitutional law by means of transformative appointments to the Supreme Court.

Id. at 1168.


Abner J. Mikva, How Should We Select Judges In A Free Society?, 16 S. ILL. U. L.J. 547, 550 (1992). Prior to his appointment to the federal bench during the Carter administration, Judge Mikva served as a member of Congress, and before that, as a member of the Illinois State Legislature. Consequently, Judge Mikva can argue with an additional degree of conviction that political bodies such as the Senate cannot be comfortable with morals charges and related misconduct because "to many of its members have had to respond to some such attack during their political lives to find any joy in reviewing similar charges when made against a presidential nominee." Id.

See David Stewart, Appointing Strangers, 77 A.B.A. J. 50 (Nov. 1991) (noting Bork was perceived as the "militant embodiment of the conservative political agenda").

See U.S. Const. art. II, § 2, cl. 2. The President "shall have power, by and with the advice and consent of the Senate, to . . . nominate . . . judges of the Supreme Court." Id. (emphasis added).
MORAL ISSUES AND THE VIRTUOUS JUDGE

tative form of government. Professor Ackerman and others, however, have suggested that its role be limited. Political and social philosophies are relevant and legitimate avenues of investigation—to a reasonable point. Ascertainng other information can also help unearth and assess a nominee's record both in prior decisions, if he currently sits on the bench, or in academic articles and speeches. After all, a nominee's record may be readily scrutinized by investigating the "paper trail," which indicates how he or she has confronted and resolved certain issues in prior rulings. But past actions may not be an accurate barometer for determining what the nominee may do in the future if appointed to judicial office. While the record may satisfactorily indicate who the nominee is, it does not necessarily suggest where the nominee's future decisions and judicial philosophy will go. It should be just as beneficial to evalu-


89 See Ackerman, Transformative Appointments, supra note 81, at 1164-65; Irving R. Kaufman, Keeping Politics out of the Court, N.Y. TIMES, Dec. 9, 1984, § 3 (Magazine), at 72 (citing potential danger of public belief that judiciary is a "third and powerful political branch of government"). Judge Kaufman expressed concern over the President's attempt to politicize the judiciary. Id. He cautioned against the selection of candidates based on their propensity to decide, in a certain way, the issues of "abortion, school prayer, capital punish-


90 See Mikva, supra note 85, at 556. Judge Mikva suggests, "It would indeed be unfortunate if we exclude from the process [of judicial selection] those very people who have thought about and expressed themselves about the important issues of our time." Id. See also Stephen Carter, The Confirmation Mess, 101 HARV. L. REV. 1185, 1185-98 (1988); Sheldon Goldman, Judicial Selection and the Qualities that Make a "Good" Judge, 462 THE ANNALS OF THE AM. ACAD. OF POL. & SOUND SCI. 112, 115 (A. Leo Levin & Russell R. Wheeler eds., 1982).

91 While this method provides a means of deciphering a judge's past record, however, it may not be the most suitable tool for assisting the Senate in its task of confirmation. See Carter, supra note 90, at 1189-95.

92 The predictability of how a nominee will perform on the bench once confirmed can often be an uncertain enterprise. See Stewart, supra note 86. The appointees of neither Theodore Roosevelt (Oliver Wendell Holmes, Jr.) nor Franklin Roosevelt (Felix Frankfurter) exhibited the type of judicial inclinations for which they were nominated. Id. Once appointed to the bench, however, judges can be surprising. When President Eisenhower was asked if he had made any decisions which he later regretted, he reportedly answered, "Two, and
ate and predict the nominee's judicial future by assessing his attributes that concern the virtues of justice, prudence, courage, and wisdom.\(^{93}\) Just as the virtue of temperance can restrain or caution a judge or judicial candidate from advancing into a legal foray without prudently considering the case beforehand, so too can those nominating and confirming judges rely upon this virtue in the exercise of their official duties.\(^{94}\) As Judge Mikva argued,

[t]he litmus test, then, of a good appointment and confirmation procedure is restraint. There ought to be executive restraint—while the President is entitled to appoint people he likes and respects, he ought not exact or expect any pledge of fealty to the Chief . . . . There ought to be senatorial restraint too. The senators may have legitimate curiosity about a nominee's views on the hot issues of the day. But they ought to limit their questions to general philosophical views, as opposed to asking "How would you rule on Roe v. Wade?" Satisfying a senator's curiosity or some of the senator's activist constituents is not the way to enhance judicial independence.\(^{95}\)

The virtuous judge could, in some cases, reach the same decision as other judges do. However, the virtuous judge might also decide the case differently. Though the primary function of the American court system is the resolution of cases and controversies, this is not the exclusive role of the judicial branch of government. The virtuous judge strives to be a more discerning individual by assessing what the case is, where it should go, and how best to reach the just end.\(^{96}\)

---

\(^{93}\) See Goldman, \textit{supra} note 90. Professor Goldman identifies eight qualities associated with the "good judge": neutrality as to the parties in litigation, fair-mindedness, being well versed in the law, ability to think and write logically and lucidly, personal integrity, good physical and mental health, judicial temperament, and ability to handle judicial power sensibly. \textit{Id.} at 113-14.


\(^{95}\) Mikva, \textit{supra} note 85, at 555-56.

\(^{96}\) See \textit{e.g.}, George Kannar, \textit{Strenuous Virtues, Virtuous Lives: The Social Vision Of Antonin Scalia}, 12 Cardozo L. Rev. 1845, 1867 (1991) (suggesting direction in which virtuous judge proceeds can vary from transcending social and political contexts of day to immersing one's self in them). Kannar indicates that "the type of 'virtue' that ultimately distinguishes the extraordinary player from the ordinary highly skilled professional is not this technical legal 'talent' . . . . The vision that makes the difference, then, is of the type we call 'peripheral': a sense not just of what you personally believe or value, or of how to execute the standard moves, but a deeper, more intuitive and more complex 'sense of where you are.'" \textit{Id.}
MORAL ISSUES AND THE VIRTUOUS JUDGE

IV. REFLECTIONS ON THE VIRTUOUS JUDGE

If the goal of justice is the "just end," how do judges get there? The case of *Grove City College v. Bell* will supply a factual context in which we can reflect on how the virtuous judge might approach assessing who we are, where we want to go, and how we get there.

Grove City College is a small, sectarian school in Pennsylvania that took careful steps to preserve its independence from government influence by avoiding applications for and acceptance of state and federal financial assistance. The college practiced its general policy by refusing to participate in government-sponsored student financial aid programs. However, many of the students of this coeducational college applied directly to the federal government for several types of federal grants to help defray their expenses at the school.

In 1972, Congress enacted the Education Amendments Act (the "Act"). Title IX of the Act contained provisions to prevent and prohibit gender discrimination at educational institutions which receive federal financial assistance. During the summer recess of 1977, the Department of Health, Education and Welfare ("HEW") concluded that the college was a "recipient" of federal financial assistance because its students used federal grants to pay tuition and other bills associated with enrollment at the college. Subsequently, HEW ordered the college to execute and return an "Assurance of Compliance" form which each institutional recipient of federal funds was required to complete.

The school received the order but refused to comply, arguing that it was not a recipient of federal funds and, therefore, not obliged to do as HEW requested. Subsequently, HEW began a compliance proceeding against the school to determine whether the HEW requirements had ad-

---

98 Grove City College v. Bell, 687 F.2d 684, 701 n.29 (3d Cir. 1982).
99 Id. "For over a century, the College has steadfastly maintained a strict independence from government funding, holding that the ideals embodied in its educational philosophy draw their essence from the practice of institutional self-sufficiency and autonomy." Id.
102 See 20 U.S.C. § 1681(a). Section 1681(a) states, in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Id.
103 Grove City College v. Harris, 500 F. Supp. at 255.
104 Id. The relevant portion of this form stated that the recipient would "[c]omply, to the extent applicable to it, with Title IX . . . and all requirements . . . [so that] no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any education programs or activity for which the Applicant receives or benefits from federal financial assistance." 687 F.2d at 705-06.
105 500 F. Supp. at 255.
equately been met. The facts obtained by the administrative law judge assigned to hear the administrative case found that “[t]here was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX.”

Despite this finding, the judge concluded that he was obliged to follow the Department’s regulations mandating termination of the financial grants received by the Grove City College students.

Shortly after this determination was made, two male and two female students of Grove City College sued HEW seeking: (1) an order declaring void the termination of federal grants; (2) an injunction preventing HEW from requiring the college to file an “Assurance of Compliance” in order to preserve eligibility for federal funding; and (3) a declaration that the anti-sex discrimination regulations were unconstitutional with respect to the college. Although the federal district court found the school to be a “recipient” of government financial aid, it prevented the termination of the grants to the students “unless and until there is a specific finding of sex discrimination.” The court properly noted that “both male and female students... will be irreparably harmed by losing their financial aid... in a case where there is absolutely no evidence of sex discrimination.”

It is submitted that the model virtuous judge would recognize how vital the absence of evidence of discrimination is to adjudicating a case like Grove City College. The district court judge demonstrated elements essential to this model when he stated that, a fortiori, it “should be apparent to men and women of reason that Congress did not intend to deprive students of their financial educational benefits where there is no evidence or even an accusation of sex discrimination at the College in question as is the case at bar.”

It is more difficult to see evidence of the virtuous judge in the subsequent appeal before the Third Circuit. The Court of Appeals disagreed with the lower court and held that the government was authorized by Title IX to terminate the benefits received by the students. It is suggested that the judge who adopts virtue in the exercise of his duty would concentrate more on ascertaining whether discrimination was

---

106 Id. Not one student was named as a respondent despite the fact “over three hundred of them had a direct interest in the outcome of th[e] hearing.” Id.
107 Id. at 255.
108 See id. at 256.
109 687 F.2d at 689.
110 500 F. Supp. at 270.
111 Id. (emphasis supplied).
112 Id. at 272.
113 687 F.2d 684 (3d Cir. 1982).
114 Id. at 704-05.
present on than whether a piece of paper (the execution of which could be self-serving) was properly filed with the government. Consequently, the virtuous judge would seek to effect a result whereby both male and female students would receive federal funds and no student was denied funding on gender-based grounds.\(^1\)

The review by the Supreme Court\(^2\) did not result in the college's vindication.\(^3\) In a separate concurring opinion, however, Justice Powell demonstrated elements of virtuous conduct, stating:

I . . . write briefly to record my view that this case is an unedifying example of overzealousness on the part of the Federal Government . . . . One would have thought that the Department, confronted as it is with cases of national importance that involve actual discrimination, would have respected the independence and admirable record of this college. But common sense and good judgment failed to prevail. The Department chose to litigate . . . despite the College's record as an institution that had operated to date in full accordance with the letter and spirit of Title IX.\(^4\)

Should the virtuous judge have been more concerned with facts crucial about the absence of gender discrimination? Should the virtuous jurist have been more understanding of the broad underlying substantive purpose of Title IX to eradicate gender discrimination in educational institutions? Should the virtuous judge have been more discerning that a school could be in compliance with Title IX even though it did not complete a form, whereas a school that fills out the compliance document and submits it to the government stating that Title IX has been observed could in reality practice gender discrimination? What, in essence, would a virtuous judge have done differently than was done in Grove City College?

I begin addressing these questions with the three general issues upon which virtue ethics focus. I restate these issues so they conform to the particulars of virtue with which a judge would be concerned: What kind of people are the parties and the judge in this case and what do their interests mean for them and the rest of society? What is it that the parties and judge desire and how do these wishes for legal relief relate to the interests of both the parties and the community at large which will

---

\(^1\) See, e.g., 500 F. Supp. at 259.


\(^3\) See id. at 574. "Recipients must provide assurance only that 'each education program or activity operated by . . . [them] and to which this part applies' will be operated in compliance with this part." Id. (quoting 34 C.F.R. § 106.4 (1983)). "The regulations apply . . . 'to every recipient and to each education program or activity operated by such recipient which receives or benefits from federal financial assistance.'" Id. (quoting 34 C.F.R. § 106.11 (1983).

\(^4\) 465 U.S. at 576-78. (Powell, J., concurring).
be affected by the legal precedent established by the court’s decision? What does the virtuous judge consider in order to reach a just decision? The judge’s reliance on and practice of the virtues of justice, prudence, temperance (or restraint), compassion, and wisdom will help him or her address these three basic issues.

The judge recognizes that the judicial role in any case is to render a decision that resolves the conflict based on the law as it applies to each case. The judge’s role and responsibilities call for a synthesis of fact-finding, interpretation of judicial precedent and applicable statutes, and the application of precedents and statutes to each case. In a situation similar to the facts of Grove City College, the virtuous judge acknowledges that Title IX contains a broad purpose of ensuring that educational institutions that receive financial assistance from the government do not discriminate against anyone on the basis of gender. In order to implement this policy, the judge is empowered to uphold any administrative determination withdrawing federal funds from any person or institution who discriminates against anyone because of that person’s gender.

These considerations help us determine “who the parties are” and “who the judge is” at the outset of the legal proceedings.

The just end toward which the virtuous judge is inclined, then, begins with determining whether or not a person was prejudicially treated because of gender—because he or she was excluded from participation in, denied the benefits of, or subjected to discriminatory treatment under an educational program or activity receiving federal funds. The judge’s conduct during the course of proceedings is molded by the mission of reaching this end. The virtue of justice, in short, aids the judge in recognizing that the execution of judicial duties entails working toward this goal of the just result. The result is shaped by the public policy designed to protect people from improper discrimination because they happen to be male or female. Inherent in this goal is the understanding that individuals should be treated fairly without consideration given to their sex. While there could well be cases in which a person’s gender may be a valid criterion for making a decision about eligibility to participate in a particular program, there is no justification warranting the use of this criterion in federally funded educational programs or activities.

---

119 See supra note 102 and accompanying text.
120 See supra note 108.
123 For cases involving issues similar to Grove City College, see generally North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982) (Title IX intended to ban employment discrimination in federally-funded education programs); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (preliminary injunction requiring university to reinstate women’s sports teams upheld); Pfeiffer by Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) (opera-
MORAL ISSUES AND THE VIRTUOUS JUDGE

But how does the virtuous judge attain this goal that is determined by the virtue of justice? If justice is the goal, the virtue of prudence can be relied upon to reach that goal by providing the means to act justly.\textsuperscript{124} One of the questions associated with an ethics based on virtue is, “How do we arrive at the result we seek?” The answer to this question requires patient attentiveness essential to examining the facts of the case and hearing the concerns of the parties involved. In Grove City College, the government was legitimately concerned about funding education programs or activities that discriminated against individuals on account of their gender. The prudent judge would strive to understand fully this and related concerns. By the same token, the prudent judge would also be equally attentive to the position and actions of the educational institution that ultimately received the benefit of the federal money. In Grove City College, the virtuous judge would have taken steps to determine if any of the students were prejudiced or discriminated against by being denied federal funds on account of their gender.

Prudence relies on the ability to distinguish between different sets of values that can promote or defeat the attainment of the just end. Recently Judge Leon Higginbotham, Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit, reminded us that bad judges were not accountable for the “separate but equal” rule of Plessy v. Ferguson\textsuperscript{125} but, rather, “the wrong values” which “poisoned this society for decades.”\textsuperscript{126} Prudence guides the action for investigating, realistically, the values that determine the policies of the institution: Did the college promote programs geared to only one gender? The prudent judge’s search might reveal that some educational institutions have indeed discriminated against certain classes of people by excluding them from particular activities.\textsuperscript{127} The prudent judge is concerned about the identity of the students who directly received the grants from the government. Was there a fair representation of both sexes at the institution? Was there an equal distribution of grants between students of both genders? Answers to each of these questions would be vital to the prudent

\textsuperscript{124} See supra note 93 and accompanying text.
\textsuperscript{125} See supra note 72 and accompanying text.
\textsuperscript{127} See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (concluding racially discriminatory policies of university would deny school benefit of tax exempt status). See also supra note 110.
judge in deciding whether to uphold or reverse the government's unilateral decision to terminate the grants.

Allied with the virtue of prudence is the virtue of wisdom. In a case like Grove City College, the virtue of wisdom fortifies the judge with the sagacity to understand the goal of effectively addressing discrimination. Wisdom helps the judge discern whether or not individuals have been discriminated against. Wisdom also clarifies the vital distinction between failure to submit a form128 and the operations which unlawfully favor one class of students over another on the basis of gender. Reinhold Niebuhr once said that "[t]he most perfect justice cannot be established if the moral imagination of the individual does not seek to comprehend the needs and interests of his fellows."129 Wisdom activates the moral imagination which can better see what facts constitute the "most perfect justice."

Like most individuals in public life, judges are open to criticism for the actions they pursue and the decisions they make. History shows that judges who follow morally correct instincts and arrive at unpopular conclusions can suffer.130 Verbal castigation, as well as physical threat, can be directed toward judges. The virtue of courage helps steel the judge against unwarranted criticism, and perhaps even against threat of bodily harm by reinforcing the practice of the other virtues, and by helping the judge meet harm or danger while working toward a just end. In Grove City College, courage could assist the virtuous judge in deflecting criticism which advocates special causes or displays of animosity to the notion of equality and nondiscrimination.

The aforementioned list of qualities for the virtuous judge may not be comprehensive. It does, however, give us some further understanding and greater insight on valid and valuable qualities from which the guarantors of fairness and justice in the United States can profit. Furthermore, those individuals having a role in the appointment of judges could do well by adapting and practicing these virtues in their own participation in the selection and confirmation of judicial candidates.131

128 See supra note 105 and accompanying text.
130 See INGO MULLER, HITLER'S JUSTICE 196 (1991). It is contended that very few principled judges in the Third Reich were willing to take a stand against the injustices of the Nazi regime. Id. See also generally ABA SUBCOMMITTEE ON UNJUST CRITICISM OF THE BENCH, UNJUST CRITICISM OF JUDGES (1986) (acknowledging unfair attacks on judiciary and proposing responses).
131 See Kaufman, supra note 89, at 86. Judge Kaufman urges nomination to the high court of "a paragon of virtue, an intellectual Titan and an administrative wizard—or, in the words of Justice Holmes, a 'combination of Justinian, Jesus Christ and John Marshall.'" Id.
CONCLUSION

Recently, Judge Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit suggested that a lawyer has a duty not only to serve his or her clients but also to serve the public good. Judge Edwards further concluded that these two duties are not mutually exclusive. Borrowing from Judge Edwards, it is suggested that a judge also serves two constituencies. He has a duty to bring justice to both parties as well as to society at large. Again, as Judge Edwards indicates, these responsibilities are not mutually exclusive. In adjudicating a case and resolving a conflict between parties, a judge also establishes a precedent or makes an interpretation that has an important effect on future cases and on the contemporaneous legal culture consisting of lawyers and other judges. Such judges and practitioners may consider the virtuous judge’s decision and incorporate it into their own work.

In this day, when difficult issues such as affirmative action, abortion, and race relations join many other important questions before the courts, judges are faced with the challenging tasks of resolving conflicts and rendering decisions. The difficulties in meeting these challenges become sharpened upon the realization that neither party may be entirely deserving of a judgment in its favor. The morally correct result may not be dispositive of the controversy. In cases involving abortion, affirmative action, or reverse discrimination, interest groups and individuals may assert political pressure on the judiciary for results that would be desirable to them. More and more, constituencies representing a variety of interests pressure those making decisions about the appointment of judges to solicit not only views but sometimes specific commitments on how a prospective judge or justice may decide or vote on certain kinds of cases involving these volatile issues.

Stephen Carter has offered some wise and prudent counsel in this regard which I believe reinforces the proposal that a good judge (and, therefore, a good judicial candidate) should not be ascertained on the basis of what kinds of legal theories he or she espouses, or how he or she may decide a case. Carter argues that it is better to know what kind of person the judge or judicial candidate is so that anyone seeking justice, fairness, equality, compassion, and understanding will be treated with courtesy and respect. If this treatment can be extended to all litigants

133 Id.
134 See generally Carter, supra note 90, at 1196-1201 (interests of democracy not advanced by confirming judges who reflect current moral norms).
135 Id. at 1199.
and counsel appearing before the court, they can take comfort knowing
that their interests and concerns will be heard and considered fairly and
evenly. Carter identifies two bases why we should know “what sort of
person the nominee happens to be”:

First, the nominee ought to be a person for whom moral choices occa-
sion deep and sustained reflection. Second, the nominee ought, in the
judgment of the Senate, to be an individual whose personal moral de-
cisions seem generally sound. In moments of crisis, we call upon the
Court for a statement of law and, more often than most theorists care
to admit, we receive instruction in practical morality instead. At such
times, what matters most is not what sort of legal philosophers sit on
the Court, but what sort of moral philosophers sit there . . . . The back-
ground moral vision and the capacity for moral reflection are perhaps
the most important aspects of the judicial personality, and it is for
these that the Senate, which enjoys the political space to reflect on the
fundamental values of the nation, ought to be searching.136

A thoughtful appraisal of a nominee’s character and virtues can tell
a good deal about what sort of judge the nominee will be. It cannot tell
us how a judge will decide certain cases, nor should it. If those partici-
pating in, or otherwise influencing, the selection and appointment pro-
cess want to predict the kinds of decisions a judicial candidate will make,
neither justice, nor the parties, nor our national community will be well
served. If judges are not guided by achieving just ends but rather by
attaining predictable political goals, then the aims of justice are compro-
mised. The virtues of justice, prudence, courage, and wisdom reveal lit-
tle about how a judge will decide a specific case. Nevertheless, they are
indictative of the kind of person he is and how best to arrive at a just
solution for individuals as well as the public good.

And that is as it should be.

136 Id.