# Constitutional Humility: The Contested Meaning of a Judicial Virtue

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**ABSTRACT**

References to the "humility" and "hubris" of judges are common in American political and constitutional discourse, but neither public nor scholarly commentators have developed an adequate theoretical framework for what humility means in the context of constitutional jurisprudence. In this article, we first draw out the common themes and tensions among conceptions of judicial humility by providing an extensive review of scholarly treatments of humility as a judicial virtue. Second, we develop a theoretical account of constitutional humility that delineates two interrelated dimensions: "epistemological humility," an inward-looking, self-referential dimension; and "institutional humility," an outward-looking, other-directed dimension. We argue that these dimensions work together to provide a complete account of constitutional humility. Finally, we conclude by highlighting how this conception of constitutional humility can improve our judicial practice and public discourse.

The power of the judiciary has been situated uneasily within American constitutionalism ever since the delegates to the Constitutional Convention met in Philadelphia in 1787. On the one hand, the judiciary is understood as playing an important role in upholding the principles of limited government, the separation

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of powers, the rule of law, and the protection of rights. On the other hand, there are concerns that the use of judicial power will infringe on the American people's ability to govern themselves through democratic processes and their elected officials. As a result, American political and constitutional thought has frequently focused on the peculiar nature of judicial power and how it ought to be exercised. Considerations of how judges should exercise their authority often regard questions about how they should treat specific areas of the law or how they should interpret the Constitution, either generally or with respect to certain constitutional provisions. However, it regularly extends beyond these questions to a consideration of the character traits, dispositions, temperament, or virtues of a good judge. Underlying these considerations is a conviction that something internal to judges, beyond institutional constraints and external checks, is necessary in order for the judicial role to be performed well. Within that context, the virtue of humility, alongside its corresponding vice, hubris, has been a common reference point by which to measure the propriety of judicial behavior.

Appeals to judicial humility are not narrowly confined to a particular historical period, nor are they restricted to one partisan or ideological approach to constitutional jurisprudence.[1] Critiquing the judicial excesses of the Lochner era, Wallace Mendelson praised Justice Oliver Wendell Holmes for a distinctive humility, in refusing to impose his private opinions as law, that was part of the "bedrock foundation" of his jurisprudence and the constitutive feature of his "genius" (Mendelson 1952, 347, 359; see also Rodell 1951, 624). Justice Felix Frankfurter was known for championing humility, a "humility of function" where judges conceive of their role "as merely the translator of another's command."[2] Scholars often point to Judge Learned Hand as a proponent of judicial humility, as well as someone who opposed the hubris that implies that we should be ruled by a "bevy of Platonic Guardians" (Hartnett 2006, 1744).[3]

Since the latter half of the twentieth century, judicial humility has grown more frequently associated with originalism and conservative calls for judicial restraint. Justice William Brennan, however, rejected originalists' claim to humility, without denying the legitimacy of evaluating a jurisprudential approach by that virtue, when he asserted that originalism was nothing more than "arrogance cloaked as humility" (1986, 4). Today analysts of the US Supreme Court continue

1. Caron and Gely (2004, 83; see also Caron and Gely 2003) make the case that judicial humility should not be viewed as the exclusive purview of either the Left or the Right. See also Stuntz (2003, 1745), as well as Thro (2010, 737–38), quoting J. Harvie Wilkinson III.

2. See Griffith (2011, 166, quoting Frankfurter); see also Sherry (2003, 799) and Gerhardt (2007, 26).

3. Discussing the limited comparative competence of judges, Hartnett writes, "Nor to my mind has anyone answered Judge Learned Hand's lament that it would be most 'irksome to be ruled by a bevy of Platonic Guardians,' even if one did know how to choose them."

to employ the concepts of humility and hubris to assess the actions of the Court from various perspectives. Thus, one applauds Chief Justice John Roberts's humility in declining to undermine the Affordable Care Act in *King v. Burwell* (Weissmann 2015), and another chastises the "arrogance" of Justice Anthony Kennedy for believing that the Court can "shape the destiny of the country" (Rosen 2007b).[4]

During the hearings for Supreme Court nominees, commentators, senators, and the nominees themselves invoke humility as a criterion for determining one's suitability for the office.[5] For example, Roberts described his aspiration to be the judicial equivalent of an umpire, calling balls and strikes but not batting or pitching, in explaining how a good justice must possess a "certain humility."[6] Supporters of Samuel Alito pointed to his humility repeatedly in the course of his confirmation hearings.[7] During the hearings for Sonia Sotomayor, New York senator Charles Schumer insisted that Sotomayor's humility was unquestionable: "If the number one standard that conservatives use and apply is judicial modesty and humility . . . they should vote for Judge Sotomayor unanimously."[8] Elena Kagan argued that her submission to precedent is a product of the humility that judges ought to exhibit toward their predecessors: "[The doctrine of precedent] is also a doctrine of humility. It says that even if a particular Justice might think that a particular result is wrong, that that Justice actually should say to herself, 'Maybe I am wrong,' and maybe the greater wisdom is the one that has been built up through the years by many judges in many cases."[9]

Beyond their confirmation hearings, justices also invoke the standard of humility (and its corresponding vice, hubris) in defending—or, perhaps more often, critiquing—the reasoning of the Court in concrete cases. For example, in *Shelby County v. Holder* (2013), in which the Court declared Section 4 of the Voting

4. Other examples include McConnell (1997b), Epps (2013), Rainey (2013), Beutler (2014), Liptak (2018), and Pearcey (2018).

5. In public discourse on Supreme Court nominees, consider the following examples from the five most recent nominees: On Elena Kagan, see Davis (2010). On Merrick Garland, see Gerstein (2016) and Tribe (2016). On Neil Gorsuch, see Garnett (2017), Kendall and Bravin (2017), Savage (2017), and Weber (2017). On Brett Kavanaugh, see Lopez (2018) and Pitlyk (2018). On Amy Coney Barrett, see Braceras (2020), Rauh-Bieri and Gheibi (2020), and Snead (2020).

6. Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States, 109th Cong. 1 (2005).

7. Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States, 109th Cong. 2 (2006).

8. Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States, 111th Cong. 1 (2009).

9. The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States, 111th Cong. 2 (2010).

Rights Act of 1965 unconstitutional, Justice Ruth Bader Ginsburg wrote in dissent, "Hubris is a fit word for today's demolition of the [Voting Rights Act]."[10] Just two years later, she would find herself, in the majority, on the receiving end of a series of similar critiques. In *Obergefell v. Hodges* (2015), in which the Court struck down state laws defining marriage as between a man and a woman, Roberts, Alito, and Justice Antonin Scalia each chastised the majority for lacking humility (or exhibiting hubris).[11] Roberts claimed that the majority's decision "omits even a pretense of humility," and he worried aloud about the legitimacy of the Court if it abandons humility. Scalia added that "what really astounds is the hubris reflected in today's judicial Putsch," and Alito cautioned that the project of promoting judicial humility would be hampered by the Court's disregard for it: "A lesson that some will take from today's decision is that preaching about . . . the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means."[12]

The rhetorical purpose of such invocations of humility and hubris is clear: they serve straightforwardly as proxies for approval or disapproval of a judicial nominee, decision, or opinion. Consequently, it may be tempting to conclude that the usage of humility and hubris in this context is nothing more than rhetoric. Many scholars note the rhetorical character of pleas for "judicial restraint" and condemnations of "judicial activism."[13] As with restraint and activism, uses of humility and hubris may be pretextual or loaded. Yet while this may often be the case, the ubiquitous and diverse invocations of these concepts suggest that they play an important role in our evaluations of judges and their decisions. While we may debate the meaning of humility and hubris, the very fact that we do so suggests that all sides see judicial humility as good and hubris as bad for our political life and constitutional culture, notwithstanding their often ambiguous, ideological, and rhetorical invocations.

10. Shelby County v. Holder, 570 U.S. ___ (2013).

11. Obergefell v. Hodges, 576 U.S. ___ (2015). Justice Clarence Thomas was the sole dissenter who did not make this charge explicit in his own opinion, though he joined the three other dissents that did so.

12. Appeals to judicial humility may also be found in cases where justices otherwise aligned in terms of their judicial philosophy disagree. In *Bostock v. Clayton County*, for instance, Justice Gorsuch argued that the Court's decision flowed from the virtue of judicial humility. In dissent, Justice Alito responded that "the Court makes the jaw-dropping statement that its decision today exemplifies 'judicial humility.' . . . If today's decision is humble, it is sobering to imagine what the Court might do if it decided to be bold." Bostock v. Clayton County, 590 U.S. ___ (2020).

13. For example, Wright argues that "judicial activism and judicial restraint are terms whose meanings metamorphosize with each commentator" (1987, 489). Similarly, Gerhardt observes that the meanings of the terms "restraint" and "activism" "depend on the political authorities who control 'the central interests' at stake in constitutional adjudication at a given moment in our history" (2002, 644). See also Shane (1988).

In this article, we develop a theoretical account of what humility is in the context of constitutional jurisprudence, why it is an important virtue for judges, and what it entails for the judicial role. Scholarship has engaged with these questions to some extent, as we demonstrate in the next section, but existing scholarly treatments lack adequate theoretical development of humility as a judicial virtue, particularly in the context of constitutional jurisprudence in the United States. Moreover, the current scholarship presents competing views of judicial humility that are in tension. If we wish to move beyond the invocation of humility and hubris as mere shorthand for praise or criticism in our public and legal discourse, a more developed theoretical account of constitutional humility in the American judicial context is necessary.[14]

This article makes several contributions to our understanding of humility as a virtue for constitutional jurisprudence.[15] First, we provide the most extensive review of the literature on humility in the context of constitutional jurisprudence, drawing out both the tensions and common themes among those accounts. Second, we develop a theoretical framework for constitutional humility that elaborates two interrelated dimensions: an inward-looking, self-referential dimension that we call "epistemological humility," and an outward-looking, other-directed dimension that we call "institutional humility." We also demonstrate how these two dimensions balance each other, providing a limiting principle missing in other accounts of judicial humility. Finally, we conclude by highlighting several ways in which an improved conception of constitutional humility can contribute to judicial practice and our public discourse.

## COMPETING CONCEPTIONS OF HUMILITY

While the concept of judicial humility has been a common feature of our public discourse on constitutional jurisprudence, it has received a limited amount of focused scholarly attention.[16] More than 20 years ago, Brett Scharffs remarked that "the literature about judges and judging does not contain much serious consideration of humility as an important character trait" (1998, 185; see also 157–58). Much more recently, Amalia Amaya similarly observed, "What

14. Our purpose in offering a more rigorous and thus useful conception of judicial humility parallels Canon's (1983) attempt to do the same for "judicial activism."

15. We are particularly interested in judicial humility as it relates to the US Supreme Court and its justices' role as the most authoritative constitutional actors within the judiciary. Thus, though much of what we discuss will relate to judges at all levels, we do not specifically discuss its applications for lower courts. For similar reasons, we focus on the Court's constitutional interpretation, as well as statutory interpretation that has constitutional implications.

16. In addition, much of the scholarly debate to date has taken place in legal journals, without sufficient contributions from American political thought and political theory.

seems surprising is not so much that humility should be considered a very valuable trait for judges to have as that it should have received so little attention in the growing literature on the judicial virtues" (2018, 97). Michael Nava advanced an even stronger claim: "My research has revealed that virtually no one has given any extended consideration to whether these [humility and humanity] are even desirable qualities in a judge. On the other hand, there is an almost subterranean current in discussions of what makes a good judge that acknowledges the significance of these interrelated virtues to the task of judging, and it often comes from judges themselves" (2008, 175–76). Even when the importance of humility is explicitly acknowledged by scholars, it is rarely explored or theoretically developed. In these cases, though humility may be important to the authors' arguments, it is not a central part of their analyses.

While some scholars have dedicated more serious attention to the concept of judicial humility, the existing literature reveals the need for further theoretical development, particularly of humility as a specifically *constitutional* virtue; it also evinces the need for adjudication of the competing conceptions of humility that have been presented. We may divide these conceptions into the two broad categories of humility as a virtue of deference and restraint, on the one hand, and humility as a virtue of moderation, on the other.

## HUMILITY AS A VIRTUE OF DEFERENCE AND RESTRAINT

Most commonly, humility in the judicial context is conceptualized as the virtue or character trait that conduces to deference and restraint. In Michael Gerhardt's article "Constitutional Humility," for example, the term "humility" receives only six mentions, while "deference" and "restraint" appear 10 and 29 times, respectively (Gerhardt 2007).[17] For Gerhardt, humility is tightly linked to—even synonymous with—the principles of deference and restraint.[18] Jeffrey Rosen draws out this identification of humility with deference and restraint by defining the concept as "a willingness to defer to legislatures in the face of constitutional uncertainty" (2007a, 10).[19] Similarly, Paul Caron and Rafael Gely explain that humility "evinces an appreciation that judges and lawyers hold no monopoly on wisdom and that institutions other than courts may be better positioned in certain situations to resolve a particular issue"; that is to

17. Gerhardt also frequently refers to judicial "modesty," often used synonymously with humility, deference, and restraint. For examples of judicial modesty used in a way synonymous or even interchangeable with judicial humility, see Graber (2007) and Garnett (2010).

18. Similarly, Kmiec (2007, 496) sees humility at the center of what he terms the "Restraint Revolution" of the Roberts Court.

19. Note that one's conception of "constitutional uncertainty" leaves a great deal to be fleshed out about this definition.

say, humility reflects an appreciation for the merits of deference and restraint (Caron and Gely 2004, 82–83).[20]

This conception of humility, we will argue, has some merit, for constitutional humility does call for a measure of deference and restraint on the part of judges, often flowing from the fact, as proponents of this view emphasize, that a judge's knowledge is limited and fallible. However, this conception is problematic, insofar as it threatens to define the judicial role in predominantly negative, passive terms and may thus interfere with fulfilling the active and constitutionally mandated role of judges. It is implicit or acknowledged in some accounts of humility understood as deference and restraint that justices need, under certain conditions, to actively exercise their power of judicial review. However, these accounts do not develop a theoretical framework that explains the limits of deference and how the definition of humility relates to both negative and positive judicial duties.

If humility counsels deference and restraint, judges must recognize that they have the opportunity to defer to a variety of authorities and actors within the American constitutional system. Moreover, it is not always possible to defer to each of these authorities and actors simultaneously. This complexity of humility forms the basis for some of the different emphases found within this broad category. First, some stress that humility entails that judges should defer to the people, to democratic processes, and to the more democratic branches of government (see, e.g., Mendelson 1952; Caron and Gely 2004; Rosen 2007a; Myers 2015). In practice, some justices defer to particular democratic institutions more than others, or they defer with respect to certain constitutional questions more than others.[21] Second, others argue that humility impresses upon judges the importance of hewing closely to precedent (Strauss 2010; Gentithes 2012). A third conception of humility as deference or restraint emphasizes that judges should subordinate their personal judgments and predilections

20. Other proponents of humility as deference to democratic processes include Mendelson (1952) and Myers (2015). The language of fallibility and lacking a "monopoly on truth" is a common way of describing the grounding of judicial humility. Gewirtz describes "a judge's feeling of humility" as "an internalized sense that he is not the sole repository of constitutional truth, an attitude of restraint that is an aspect of temperament" (1996, 1034–35). To the same end, Griffith (2011, 168) and others refer to Judge Learned Hand's quotation of Oliver Cromwell: "I beseech ye in the bowels of Christ, think ye may be mistaken." See also Rodell (1951, 624).

21. For example, Gerhardt writes that Justice Stephen Breyer "does not explain in his book or his opinions why he defers more to Congress than to the States. Nor does he explain why or how his support for *Lawrence v. Texas*, for *Roe v. Wade*, and for apparently expanding *Roe* in *Stenberg v. Carhart* can be reconciled in a principled fashion with his notion of judicial modesty" (2007, 36–37).

to the true meaning of the Constitution, regardless of whether their understanding of that meaning generally engenders deference to precedents or political actors (McLeod 2017).[22] Finally, still others point out that humility demands respect for a variety of authorities, which may admittedly conflict with one another (McConnell 1997a, 1292).[23]

Here we encounter a difficulty in arguments that humility, as a judicial virtue, necessitates deference and restraint. On the one hand, scholars who argue that humble judges should defer to particular authorities—whether that be to democratic processes and institutions, to precedent, or to the Constitution itself—rarely articulate the case for why humility entails that a particular manifestation of deference should prevail over others; on the other hand, scholars who admit the multifaceted implications of deference often pass over the question of how to approach the competing claims of humility as deference. As Michael McConnell puts it, these conflicting claims are "what makes hard cases hard" (1997a, 1292). While we agree, we believe that a more developed conception of constitutional humility can aid a judge in the decision-making process by providing guidance on how they might distinguish between competing objects of a judge's humility.

Much scholarly discussion has concerned the proper understanding of deference and restraint, but that discussion has been largely severed from work that stresses the virtue of humility. To argue in favor of a particular understanding of deference or restraint is not the same as arguing that such an understanding embodies the best conception of humility as a judicial virtue. The existing accounts of humility as deference do not adequately make that connection. Moreover, consideration of the second major theme in the literature, humility as a "mean," further highlights the insufficiency of judicial humility as simply equivalent to deference.

## HUMILITY AS A VIRTUE OF MODERATION

A small but significant strand of scholarship expresses dissatisfaction with the prevailing view of humility as a virtue of deference and restraint. For these scholars, this view threatens to generate a defective understanding of judicial duty. Benjamin Berger writes that this conception of humility induces judges to be "as small as [they] can be," whereas a proper understanding of humility would

22. Lessig (1997, 1372) employs the helpful metaphor of a translator for this conception of humility. Humble translators refuse "to make the text a better text."

23. The multiplicity of the objects of a judge's humility is also implicit in Lund and McGinnis (2004). However, Lund and McGinnis do not invoke the concept of humility at all, instead focusing on a critique of hubris.

encourage judges to "[take up] an appropriate amount of space" (2018, 574; see also 587, 591). Scholars of this view concede that humility involves an awareness of one's various limitations, but they caution against an excessive emphasis on those limitations. Humility, they counter, should be seen as a mean, a virtue that promotes a moderate or balanced position that prevents judges from perceiving their role as either too expansive or too diminutive.[24]

The various scholars who fall within this category characterize that middle ground in different ways. For Nava, humility does not lead to the conclusion that judges should do less. A humble person, he says, is a "teachable" one, with "a knowledge of the limitations of one's experience coupled with an openness to the experiences of others as a way of exceeding those limitations" (Nava 2008, 179). In pursuit of a humbler judiciary, Nava recommends diversifying its membership; he suggests that the judiciary should be "[recast] as a branch of representative government in which the values and life perspectives of the entire community are acknowledged and respected in the ways by which judicial results are reached" (194). Nava argues that a humble judiciary must be more diverse and thus more representative, rather than more deferential.

In contrast to humility defined as a predisposition to defer, Berger describes it as an "awareness of one's role and position in respect of power and a willingness to accept the burdens of responsibility that flow from this" (2018, 574). Counterintuitively, he argues that an exaggerated commitment to deference may itself be egotistical, because "both [arrogance and diffidence] flow from placing the self too much at the centre of things—one resulting in the elevation of the self above others, the other in the negation of responsibility toward them." One might defer too much as a self-absorbed escape from one's obligations to others. In contrast, a proper sense of humility stems from "one's appropriate position and role in a web of relationships with others."

Amaya is critical of the "self-abasing" nature of exaggerating the limits of judges' knowledge and intellectual capacities (2018, 99–100). She contends that "humility requires openness to the ideas of others and acknowledgment of one's fallibility rather than straightforward deference to the ideas of others."[25] Amaya

24. Scholars who espouse this view include Scharffs (1998, 161–63, 165–66, 184), Stuntz (2003, 1745), Nava (2008, 178), Amaya (2018, 103), and Berger (2018, 574, 583, 587, 590–93). Thro's (2007, 492, 511, 514; 2010, 721–23, 735, 738) conception of humility shares a lot of common ground with those who emphasize deference and restraint, but he emphasizes how humility may be compatible with bold assertions of judicial power. To preserve a more active, assertive role for judges, Sherry (2003, 805) pairs judicial humility with judicial courage. For Sherry, humility is about limits, and courage is about the limits of humility.

25. Amaya (2018, 99) is critical of deference more broadly and questions whether it can be considered a judicial virtue at all. While humility "imposes some constraints on the process of deliberation" because judges must recognize the limits of their intellectual abilities, such knowledge "does not dictate the result of such deliberation."

also critiques the inward-looking, self-referential nature of this understanding of humility, and she asserts that proponents of this view make a "rhetorical use" of it to "[lend] support to one particular interpretation . . . of the judicial function." Like Berger, she contends that we should conceive of judicial humility in a "social-relational" way—oriented around how we see ourselves in relation to others, rather than how we see ourselves in relation to our own merits and demerits. From that starting point, she makes the case for a fraternal conception of humility that stresses judges' equality with their fellow human beings.

This countertrend in the literature helpfully draws out some of the problematic aspects of accounts that simply equate humility with some form of deference. However, these alternative conceptions fall short in providing a compelling understanding of judicial humility, for they largely overlook the *particular* institutional context within which a judge operates, which determines the "space" judges should occupy.[26] With respect to constitutional jurisprudence, it is especially noteworthy that very little, if any, consideration is given to the question of how a judge's institutional embeddedness within a particular constitutional system shapes the meaning of humility for that judge. Clearly, these scholars seek to speak to a broader judicial context than one confined to American constitutional jurisprudence. But, as we argue below, constitutional virtues are context-sensitive, and the particular constitutional system in which judges find themselves is an essential element of that context. Thus, any attempt to speak in general terms about "judicial humility," without reference to a specific constitutional setting, necessarily results in an incomplete account.

In sum, while we may glean much from the existing scholarship on humility in the judicial context, that scholarship stands in need of supplementation in two primary respects: First, the various approaches, taken separately or together, do not develop an adequate theoretical framework for understanding the meaning of humility for judges. Second, they do not situate and explain

26. Amaya (2018) presents an egalitarian conception of judicial humility without any discussion of the constitutional system of the United States or how egalitarian ideas should inform constitutional or statutory interpretation. She maintains that arguments in favor of deference must rely on institutional arguments, not epistemic ones, but she does not consider whether there might be such a thing as institutional humility, as we will argue. Berger (2018) is primarily interested in criminal justice and Canadian constitutionalism, but his discussion of judicial humility is framed in terms of broader applicability, citing those interested in the application of humility to US constitutional law. Nava (2008) casts humility primarily in relationship to judges' and litigants' lived experiences, rather than to the former's constitutional task. Thro (2010) is concerned with the constitutional context of a humble judge but does not develop a theoretical framework for conceiving of humility as a constitutional virtue. Scharffs (1998, 187) briefly mentions "constitutions" as one of several sources of authority that a humble judge will be more willing to recognize and respect than a prideful judge, but he does not discuss how the constitutional context shapes the meaning of humility for a judge.

those theories sufficiently within the context of American constitutionalism. With these considerations in mind, we are prepared to develop a framework of humility as a constitutional virtue for judges that addresses these concerns.

## HUMILITY AS A CONSTITUTIONAL VIRTUE

Our first task must be to explicate the nature of humility as a constitutional virtue for judges. To begin, we can establish what judicial humility is not. Judicial humility is not dispositive: it does not "decide" cases, nor is it a "bright-line rule" judges can apply that leads to specific outcomes.[27] This is due to humility's nature as a virtue: it is not a rule, standard, or decision but an aspect of character that shapes the way we approach rules, standards, and decisions. Thus, we argue that it should be conceived as a disposition or manner of thinking appropriate to a specific constitutional context. While this means that humility's rightful application will frequently be contestable, a clearer understanding of judicial humility can helpfully shape the way judicial decision-making is approached.

Because we seek to understand constitutional humility, a full conception must account for the combination of "humility" (which, understood as a virtue, pertains to the excellence of an individual) and "constitutional" (which refers to the particular excellence of a given role or responsibility). To encompass these two ideas, we argue that constitutional humility must entail a certain disposition both toward oneself and toward others. Put another way, constitutional humility concerns both how one thinks and how one acts in a particular context. To understand what we mean by these dispositions, we can turn to parallel concepts in Aristotelian virtue generally and the Christian virtue of humility more specifically.[28] While we cannot enter into a full discussion of either Aristotelian ethics or Christian theology here, this long tradition of virtue ethics sheds light on the nature of a judicial virtue, including the importance of self-knowledge and the relational or institutional context of a virtue.

For Aristotle, virtue, as "the excellence specific to human beings as human beings," is particularistic and context based.[29] Thus, Aristotle says, the same

27. A number of scholars have noted that humility, as a character trait or virtue, does not provide definitive guidance for concrete cases. See, e.g., McConnell (1997a, 1292), Scharffs (1998, 192n166), Sherry (2003, 798), Caron and Gely (2004, 106), and Berger (2018, 592).

28. We recognize, as Scharffs (1998) does, that we are limited in our use of Aristotle to develop an understanding of the virtue of constitutional humility, not only, of course, because Aristotle is not writing with American constitutionalism as a reference point but also because Aristotle does not rank humility among his list of virtues. However, that does not prevent his general framework for the nature of virtue from being helpful here.

29. We owe this concise formulation to Bartlett and Collins's introduction to Aristotle (2011, x).

action, in the same situation, may exhibit a vice of excess or deficiency for one person while embodying the mean of virtue for another. The virtue is not determined simply by the action, the situation, or the intention, but by the characteristics of the particular actor in that situation (Aristotle 2011, 1106a33–1106b7; see also 1120b5–12; 1122a23–27). To act virtuously, therefore, requires one to have some degree of knowledge about oneself. Similarly, when we say that constitutional humility involves a certain disposition toward oneself, we mean that it requires judges to possess—and act in accordance with—some degree of knowledge about their own capacities and limitations.

In his *Politics*, Aristotle draws a distinction between the virtue of a human being simply and the virtue of a politically defined role. The virtue of one's role, according to Aristotle, is determined by the welfare of the greater whole of which that role is a part. For that reason, the virtue of the good citizen varies by regime, because, by definition, the good citizen is one who acts in a way supportive of that citizen's regime. Moreover, the virtue of a particular citizen is defined not just by the regime but by the role that they play within that regime (Aristotle 2013, 1276b20–36). In this vein, we posit that constitutional humility involves a certain disposition toward others—or, put differently, a disposition concerning one's relationship to others, as part of a particular political community, a certain constitutional order.[30] A proper understanding of constitutional humility would be incomplete if it were to fail to account for judges' constitutional context: their relationships to other constitutional actors and to the Constitution itself.

Moving specifically to the virtue of humility, Aquinas, well known for relating Aristotelianism to the Christian tradition, further brings out how humility may be conceived as a disposition both toward oneself and toward others. There are clearly limitations to the analogy that may be drawn between the theological virtue of humility within the Christian tradition and constitutional humility; Aquinas, in fact, says that humility "regards chiefly the subjection of man to God," in contrast to "virtues as directed to civic life" (*Summa Theologiae* 2–2, q. 161, a. 1).[31] Yet the intellectual lineage of humility in the Christian tradition gives us cause to expect that constitutional humility may bear

30. Thus, a judge's personal humility—their humility as a human being—may be relevant to their constitutional humility. However, this is not necessarily or simply the case. Commentators often collapse these distinct notions of humility in assessing the admirable qualities of a judge. Rosen (2007a), on the other hand, juxtaposes personal humility to judicial humility, finding both to be important character traits for judges. While our conception of "epistemological humility" shares common ground with Rosen's "personal humility," we identify epistemological and institutional humility as two dimensions of what it means to be humble as a judge in the constitutional context.

31. For citations from Aquinas's *Summa Theologiae*, see https://aquinas.cc/la/en/~ST.I.

an analogous resemblance to its theological forerunner. As a disposition toward oneself, Christian humility entails a recognition of the finitude and the fallenness of human beings generally and of oneself especially. Aquinas notes that "knowledge of one's own deficiency belongs to humility" and refers to a humble man "considering his own failings" (*Summa Theologiae* 2–2, q. 161, a. 2). As a disposition toward others, not only does Christian humility require a submissive orientation of the Christian to the ultimate authority of God, but it also calls for respect and concern for other human beings, both generally and in their specific social or political capacities. As Aquinas puts it, humility "regards chiefly the subjection of man to God, for Whose sake he humbles himself by subjecting himself to others" (*Summa Theologiae* 2–2, q. 161, a. 1). Humility, he explains elsewhere, "makes a man a good subject to ordinances of all kinds and in all matters," although it does not require someone to subject themselves to all others in all things (*Summa Theologiae* 2–2, q. 161, a. 5).

In an analogous way, constitutional humility contains both outward and inward dimensions and is rooted in the nature of a constitution and its constitutional actors. As a disposition toward oneself, constitutional humility entails a recognition of one's own limitations—particularly the limitations of one's ability to gain knowledge. As a disposition toward others, it signifies respect for the legitimacy of other constitutional authorities (e.g., Congress, the executive branch, state governments, democratic majorities, past generations of democratic majorities and supermajorities, the Constitution's framers). This respect is derivative of judges' most fundamental commitment—to the Constitution, the very source of judicial authority, with its delegation of limited power. In other words, constitutional humility derives from a recognition of the source and distribution of ruling authority within a given constitutional system.

## THE COMPATIBILITY OF HUMILITY WITH THE JUDICIAL ROLE

Since this conception of constitutional humility stresses self-limitation on behalf of judges, it is essential to understand its moderate nature and how it is compatible with the judicial role. Constitutional humility is not the opposite pole of judicial hubris, though it is rightly contrasted with hubris. Regarding judicial knowledge, hubris refers to the vice of judges who act on an excessive confidence in their knowledge, who believe they possess more knowledge than they really do. In this respect, humility is not the inverse of hubris, which would entail that humble judges should exhibit an excessive self-doubt in their knowledge and should act as though they know less than they do. Likewise, with respect to the judicial role, hubris characterizes judges who seek to play a role that is larger or more influential than is appropriate for their institutional position. In

that sense, humility is not the inverse that necessitates one to play a more diminutive role than they have been institutionally assigned. Such an understanding would define humility in terms of the affirmation of something false (in the case of judges' knowledge) and the failure to fulfill the duties of one's institutional role. We do not think these qualify as the criteria of a judicial virtue.

Instead, humility should be conceived as a mean between judicial hubris and judicial servility.[32] While the dangers of hubris are obvious, the dangers of servility are also clear. If a justice's awareness of his or her own limitations were extended to an extreme, the result would be skepticism of all constitutional interpretation, judicial review, or the activity of judging generally. Likewise, if respect for other constitutional authorities in American life were inflated, a timid deference would keep justices from fulfilling their constitutional duty. Humility is thus properly contrasted with both hubris and servility. Constitutional humility cannot exist within a vacuum, disconnected from the Constitution and the principles it establishes: the rule of law, limited government, liberty, the protection of rights, the separation of powers, and so on. These are the purposes for which the judiciary exists. Thus, we concur with those scholars who insist that humility is a virtue of moderation, but we would emphasize that the Constitution gives content to our understanding of wherein that mean lies.

Although we understand humility as a moderate virtue, one may posit that, even given its moderation, the nature of humility is still antithetical to the nature of judging. The act of judging requires one to be confident, clear, and decisive. Humility, on the other hand, urges caution and self-doubt, which could result in hesitation, ambiguity, and indecision. While we recognize that aspects of constitutional humility do lend themselves toward a kind of hesitation, insofar as epistemological humility requires one to question what one knows and institutional humility urges caution to avoid moving beyond one's role, as to the decisive nature of judging, Chief Justice John Marshall famously declared in *Marbury v. Madison* (1803) that "it is emphatically the province and duty of the judicial department to say what the law is."[33] Saying what the law is requires a kind of clarity and finality, for one has to "apply the rule to particular cases" and "expound and interpret" the law. Further, he notes, "If two laws conflict with each other, the courts must decide on the operation of each." However, properly understood, constitutional humility fosters a healthy synthesis of both caution and decisiveness. Because, as we shall explore further, the dimension of institutional humility insists that a judge's ultimate duty of

32. Nava (2008, 178) also highlights the distinction between humility and servility, and Berger (2018, 592; see also 574) stresses that humility should not be viewed simply as "a counterpoint to arrogance."

33. Marbury v. Madison, 5 U.S. 137 (1803).

humility is to the Constitution itself, a judge's efforts at humility must be conducted within the responsibilities the Constitution sets forth. Thus, within the activity of saying "what the law is" and clearly applying it to case and controversy, judges who exhibit constitutional humility will question the extent of their knowledge and respect their place in the constitutional order. Understood in this way, constitutional humility avoids the drawbacks of both judicial arrogance, on the one hand, and the failure to fulfill one's judicial duty, on the other, making for better decisions and a more respected judiciary.

Additionally, one might ask, especially given our emphasis on constitutional context, whether our conception of constitutional humility fits with the framers' constitutional design and conception of the judicial role. First, it is worth noting that the concept of institutional virtue is key to the framers' constitutional design generally and to the judiciary in particular. The framers sought to design both selection mechanisms and institutional structures that would ensure that officeholders exhibited the desired virtues of their offices. With respect to the judiciary, Madison notes in *Federalist* no. 51 that, "peculiar qualifications being essential in the members [of the judiciary], the primary consideration ought to be to select that mode of choice which best secures these qualifications" (Hamilton et al. 2001, 268; see also *Federalist* no. 76). On that point, Hamilton advocates tenures of good behavior in part to ensure the availability of competent judges of good character, "who unite the requisite integrity with the requisite knowledge" (Hamilton et al. 2001, 407).[34] Hamilton's case for judicial independence, more generally, rests on the premise that it will foster traits such as legal competence, integrity, and fidelity to the Constitution, which are characteristics of judges playing their institutional role well.[35]

In *Federalist* no. 81, Hamilton argues that the judiciary is institutionally constrained, resulting "from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by

34. The need for legal expertise is also a reason why the legislature should not serve as the ultimate court of appeal. On this point, see *Federalist* no. 81 (Hamilton et al. 2001, 419).

35. Beyond the judiciary, there are numerous other examples of the framers' emphasis on producing institutional virtues through selection mechanisms and institutional incentives in *The Federalist*. For example, on members of the House, see *Federalist* no. 53 (on biennial terms and the institutional virtue of legislative competence), *Federalist* nos. 55 and 58 (on the size of the legislature and the institutional virtue of deliberation), and *Federalist* no. 57 (on elections, electoral districts, and the institutional virtue of sympathy with the people). On the Senate, see *Federalist* nos. 62 and 63 (on the qualifications, selection, duration, and number of senators and the institutional virtues desired of members of the Senate) and *Federalist* no. 64 (on the character and selection of senators and presidents). On the presidency, see *Federalist* no. 68 (on the Electoral College and the character traits of executives) and *Federalist* no. 70 (on the "ingredients" for the institutional virtue of executive energy, discussed at length in this and subsequent essays).

force," such that we might conclude that judicial humility is an unnecessary virtue for judges to exhibit (Hamilton et al. 2001, 420). Famously, he claims in *Federalist* no. 78 that the judiciary is the "least dangerous" and "weakest" branch, with "neither force nor will, but merely judgment" (Hamilton et al. 2001, 402). However, not everyone during the founding era was persuaded by this perspective that the power of the judiciary was unproblematic. The Anti-Federalist writer Brutus, for instance, argued in his fifteenth essay that judges under the Constitution would have both the power and the motive to aggrandize themselves: "There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself" (Zuckert and Webb 2009, 258; see also Brutus's eleventh essay). Even Madison, Hamilton's Federalist coauthor, expressed concern about how the nature of the judicial power rendered the judiciary "paramount in fact to the Legislature" (1999, 417).

As the judiciary has increased in influence over time, this feature of American constitutionalism has led some to advocate the implementation of institutional changes, particular understandings of the scope of judicial authority (e.g., departmentalism), or the promotion of jurisprudential tests, approaches, or virtues. Judicial humility is one such institutional virtue that has been advocated in response to the troubling aspects of judicial review. The case for this virtue rests on the premise that the character or disposition of judges has a significant impact on the functioning of the constitutional system and that the success of the system should not rest on institutional constraints or external checks on the judiciary alone.

It may appear as though a call for judicial humility is in conflict with the founders' constitutional framework, which depends on the dynamic of ambition countering ambition, whereby, in the formulation of *Federalist* no. 51, "the interest of the man" is "connected with the constitutional rights of the place" (Hamilton et al. 2001, 268). We think there may be a tension between the founders' view and the common understanding of judicial humility, which Amaya describes as "self-abasing" (2018, 99) and Berger summarizes as urging judges to be "as small as [they] can be" (Berger 2018, 574). But that is not true of the conception of humility that we are developing here, which considers humility to be a moderate virtue between hubris and servility, and which prompts judges to act on their legal knowledge and to exercise the constitutional authority that they do possess.

Understood in this fashion, the concept of judicial humility goes beyond the founders' thought, insofar as they did not emphasize it as a judicial virtue, but neither is it incompatible with their thinking. Rather, it is in keeping with their

aspiration to secure the institutional virtues requisite for good, constitutional government and to have judges faithfully interpret and apply the Constitution. Thus, a proper understanding of humility is compatible with the ambition to defend one's constitutional authority against encroachments, while encouraging members of the judiciary not to encroach upon the other branches. In the following sections, we further explicate the meaning and significance of the epistemological and institutional dimensions of this judicial virtue.

## EPISTEMOLOGICAL HUMILITY

In the previous section, we defined humility as a disposition toward both oneself and others. We call the inward dimension *epistemological humility* and the outward dimension *institutional humility*. While the two dimensions interact, and it is important to recognize the ways in which they inform one another, they are most clearly understood by distinguishing them. Epistemological humility refers to an awareness of limitations regarding one's ability to acquire knowledge. We can see examples of the spirit of epistemological humility in the formation of the US Constitution, in Benjamin Franklin's plea at the Constitutional Convention to "doubt a little of [one's] own infallibility" (1937, 641–43), and in Madison's reminder in *Federalist* no. 37 that men "ought not to assume an infallibility in rejudging the fallible opinions of others" (Hamilton et al. 2001, 180). Regarding constitutional jurisprudence, Holmes made the case for epistemological humility by drawing a distinction between "certitude" and "certainty." "Certitude is not the test of certainty," Holmes said. "We have been cocksure of many things that were not so" (quoted in Mendelson 1952, 347). Hand's definition of the "spirit of liberty" concisely captures epistemological humility in a similar way, as "the spirit which is not too sure that it is right" (quoted in Sherry 2003, 799).

This principle of epistemological humility is fitting for any person in any context, but it is especially important for judges in a constitutional system like that of the United States, where one's judgments affect the rights of individuals, the right of the people to govern themselves, and the manner in which the government is permitted to pursue the aspirations contained within the preamble of the US Constitution. In other words, epistemological humility is essential for judges within a constitutional system because a judge's opinions take on the coercive power of law. For this reason, the importance of epistemological humility for constitutional jurisprudence is heightened over the importance of epistemological humility for the average citizen. As we will explicate in the next section, this is one respect in which institutional humility enhances a judge's commitment to epistemological humility.

Beyond their institutional power, there are other reasons why judges should exhibit epistemological humility. First, every judge faces the temptation, consciously

or otherwise, to rationalize their preferred outcomes as fidelity to the Constitution or to the relevant statute(s). Justice Joseph Story once remarked that "it is astonishing how easily men satisfy themselves that the Constitution is exactly what they wish it to be," and Justice Louis Brandeis cautioned that "we must be ever on our guard, lest we erect our prejudices into legal principles" (Story quoted in Newmyer 1986, 358; Brandeis quoted in Gerhardt 2007, 28). That this is precisely what judges often do has been a long-standing accusation of the judiciary made by scholars, political leaders, and even judges themselves. Epistemological humility counsels one to be wary of conflating preferences with legal principles.

As an individual with political principles, policy preferences, philosophical and religious beliefs, and a unique set of experiences, a judge is similar to other citizens. The judge is different only in being granted special institutional authority with respect to legal adjudication. While it is often difficult to disentangle entirely constitutional questions from political, philosophical, historical, and social-scientific considerations, it is nevertheless important for judges to remind themselves that their legal expertise does not convey a corresponding expertise in public policy, philosophy, social science, or history. In addition, even if an individual judge has the credentials to claim such an expertise, the judicial branch has not been charged with any special authority to make determinations on the grounds of these other forms of expertise.[36] Judges should recognize that (in most cases) they lack this expertise and, moreover, that the judicial context is rarely conducive to rigorous philosophical, scientific, or historical inquiry. Thus, when it is necessary to engage with social-scientific or historical evidence, such as when these are presented as evidence in a case, a humble judge will do so cautiously and self-consciously.

Given these limitations of the judiciary, epistemological humility is acutely warranted in a few contexts. First, when judges are considering whether to overturn a precedent, epistemological humility advises caution, because overruling a precedent is an act of replacing prior justices' considered judgments with one's own.[37] As a matter of degree, epistemological humility would set an even higher standard for overturning a long-standing line of precedents, insofar as fidelity to

37. Griffith succinctly summarizes this pairing of epistemological and institutional concerns: "I have far less confidence that we can answer the 'intractable, controversial, and profound questions of political morality' that Professor Dworkin encourages us to address. Leaving aside the issue of whether judges are competent to answer those questions for society, the Constitution clearly does not intend for judges to make those types of controversial decisions" (2011, 167).

38. McLeod's (2017) argument that Justice Thomas's disregard for precedent is a humble approach neglects this point that *stare decisis* is a manifestation of epistemological humility. However, in a similar way to McCleod, we will argue that institutional humility does entail that the Constitution ought to be the fundamental object of a judge's humility.

precedent in such cases builds on others' knowledge and wisdom instead of making a claim for the self-sufficiency of one's own.[38] For similar reasons, if a precedent should not be overturned, neither should it be dismissed, diminished, or manipulated in relevant cases.[39] As we explain below, the institutional dimension of humility necessarily limits this reliance on precedent, but its epistemological dimension nevertheless favors a strong presumption of precedential authority.

Second, epistemological humility indicates that caution and introspection are particularly called for when, for instance, a justice is casting the decisive vote in a 5–4 decision. In these cases, a single person's judgment has the opportunity to shape the constitutional and political life of the nation. This does not mean that a justice ought to abstain in such cases (which results in simply upholding the lower court's decision), or that a justice only may vote to uphold statutes or government actions under such circumstances. Yet such a split among the justices reinforces that each justice should approach decisions with epistemological humility.[40]

Third, when judges have the opportunity to choose between a narrower and a more sweeping decision, epistemological humility urges narrower opinions, insofar as the influence of the judges' fallible reasoning in a given case is restricted. In this way, judges may also increase the likelihood that they remain within the confines of their competence.[41]

38. On this point, see Strauss (2010, 41). Criticizing Chief Justice Roberts's appeal to epistemological humility (in which he cites Edmund Burke) in *June Medical Services LLC v. Russo*, Vermeule (2020) points out that, on the grounds of epistemological humility, any individual precedent should be rather weak, for it is not the accumulation of wisdom over time by many judges through many decisions, but the judgment of a few individuals at a single moment in history. Vermeule writes, "From a Burkean standpoint, it is breathtaking epistemological arrogance to think that one or two Justices, deciding at a single time under conditions of sharply limited information, should be able to determine the permanent course of the law."

39. Gentithes (2012, esp. 853–60) argues that a humble reliance on precedent and incremental extensions of the logical implications of precedents are parts of the judicial effort to strike "the proper balance between social ideals and social cohesion," to maintain a "carefully-attuned equilibrium between principle and practicality" (819, 822). While we agree that binding oneself to precedent is humbler than making freewheeling judgments, Gentithes's conception of what humility entails for precedent conflicts with our conception of epistemological humility because it rests on the premise that judges have the expertise to strike this balance. It also runs against our conception of institutional humility because it suggests that judges have the institutional authority to do so.

40. Some have argued that 5–4 decisions are so problematic that the Supreme Court's decision rules should be amended, either by the Court or by Congress, so that a 6–3 vote is required to strike down a federal law. See, e.g., Shugerman (2003). While such a voting rule would not be incompatible with epistemological humility, it is not required by it. Epistemological humility, as a virtue, encourages judges to be circumspect about such decisions without institutionally prohibiting them, recognizing that they may sometimes be necessary.

41. Hartnett (2006), for example, argues that the Supreme Court should favor as-applied over facial challenges to the constitutionality of statutes. See also Thro (2010, 728–29).

It should be noted that, in many cases, these factors interact. Justices may encounter a situation where they have the opportunity (1) to cast the decisive vote (2) that overturns a long line of precedents (3) in a sweeping decision. Because constitutional humility is not dispositive, such a ruling is not necessarily incompatible with this judicial virtue. The conditions of the case may align in such a way as to make that decision the most appropriate outworking of judicial responsibility. That determination by a judge is contingent on the particular facts of the case, combined with the implications of institutional humility, which we discuss below. However, under such a combination of factors, epistemological humility would issue the strongest presumption of caution.

Some might worry that such a presumption of caution would lead, in practice, to a failure of judges to fulfill their duty. For instance, many significant Supreme Court decisions, especially in recent history, have involved 5–4 votes in which laws were struck down, precedents were overturned, and/or consequential constitutional doctrines were established. If one posits that at least some of these cases were correctly decided, it is worthwhile to consider whether an enhanced commitment to epistemological humility would have produced different results. To the extent that judges are meant to exert their authority despite countervailing pressures of public opinion, self-confidence may seem more conducive to proper judicial activity than an emphasis on the limits and fallibility of judges' knowledge. Thus, one could argue that it would be preferable for judges to think of themselves as a class set apart from (and above) all others in terms of the knowledge that they possess. For instance, in *Democracy in America*, Alexis de Tocqueville describes the legal class in the United States as akin to being members of a legal priesthood or aristocracy, "the lone interpreter[s] of an occult science" (2000, 254–56).[42]

We acknowledge that a deep-seated commitment to epistemological humility may sometimes induce judges to refrain from ruling on the basis of knowledge that they do, in fact, possess; it thus involves potential trade-offs in judicial behavior. Nevertheless, epistemological humility is a virtue for judges precisely because it prods judges to be attentive to the possibility of errant judgments, and because it counteracts the tendency toward temerity that their elevated status might foster. Moreover, it is crucial to distinguish epistemological humility, as we have described it, from the implications of epistemic skepticism, especially since some prominent treatments of judicial humility associate it with skepticism.[43] To be compatible with the judicial role, the virtue of humility must be understood in

42. The more one concedes to Tocqueville's analysis of the tyranny of thought in democratic societies, the more compelling this argument would appear to be.

43. Mendelson (1952), e.g., links humility and skepticism in his account of the jurisprudence of Justice Holmes, while Gerhardt (2007, 29) describes Judge Hand as "the quintessential skeptic on the bench."

a way that is consistent with judges' pretensions to some knowledge and their willingness to impose their judgments over others' with the coercive authority of law. Epistemological humility disposes judges to take seriously the limits of the knowledge they possess, the difficulty in attaining knowledge, and their capacity for error, but it does not require them to refrain from judgment altogether—and institutional humility, as we will contend, does not permit them to do so.[44] Epistemological humility presses judges to remain within the confines of their legal expertise, but it does not deny that they do, in fact, have legal expertise that ordinary citizens and other governmental officials do not. For judges to deny that they have this expertise would be a false form of humility resulting in judicial servility. The consequences of such a denial would be akin to legislators refusing to pass any law because they cannot know that it will contribute to the general welfare, or executives declining to enforce any statute because they cannot be certain of its proper application. In short, it is the abdication of judicial responsibility and thus cannot be constitutive of a definition of judicial virtue.[45]

Understood in this way, epistemological humility, informed by institutional humility, does not conflict with the judicial duty to settle matters of law through definitive judgments. However, epistemological humility does condition the fulfillment of this duty with circumspection. It does not preclude judges from arriving at and delivering judgments, but it shapes the manner by which judges reach those judgments. On this conception, epistemological humility acknowledges that judges must be willing to exercise their authority, but it is a disposition oriented toward alleviating some of the negative consequences that follow from judges erring in their reasoning or straying from their expertise.

## INSTITUTIONAL HUMILITY

Institutional humility encompasses the virtue's outward orientation, locating judges in relation to the Constitution, in relation to their fellow constitutional actors, and within the constitutional order created by the people through the Constitution. Humility gains significance not only from who judges are in terms of their abilities and limitations (epistemological humility) but also from their specific context and the role they play in relation to others. This is the dimension of humility that, for instance, Justice Frankfurter invokes when he refers to a "humility of function" and that Chief Justice Roberts refers to by alluding to the "certain humility" of an umpire who realizes that his role is not

44. Amaya (2018, 99) emphasizes that humility does not commit one to skepticism regarding all knowledge.

45. Thro (2010, 722) also points out that humility must not be understood in a way that would lead to the abdication of judicial duty.

to be a player in the game. In this way, we agree with Amaya that humility is best understood as relational, rather than primarily or exclusively as self-referential. Thus, when we say a justice ought to be humble, we are not speaking of humility in personal interactions; rather, we are referring to what or who specifically merits a humble disposition in the constitutional context.

This outward, relational, and institutional aspect of humility is implicit in some of the scholarly commentary on humility, but it has been left largely undeveloped, as we have shown.[46] Those who have dwelt on a judge's relationship to others, such as Berger and Amaya, have not focused on particular institutional considerations. Yet the institutional dimension is crucial, not only for a more complete understanding of judicial humility but also for understanding the scope, nature, and limits of how epistemological humility should manifest for a judge.

Institutional humility and epistemological humility work in tandem: while epistemological humility urges caution in decision-making owing to judges' epistemological limitations, institutional humility urges caution owing to judges' responsibility to avoid claiming an outsized role in the constitutional order, thereby unconstitutionally restricting the authority allocated to other constitutional actors, improperly interfering with the people's self-governance, and distorting the order as a whole. On the other hand, whereas epistemological humility, considered in isolation, might incline judges to err on the side of refraining from judgment altogether, judges' institutional mandate forestalls epistemological humility from falling into unconstitutional deference or subservience. In short, institutional humility captures an additional motivating force, beyond epistemological humility, for judges to act cautiously, while also constituting a limiting principle for epistemological humility by mandating action within the judicial sphere. To employ Berger's terms, it provides the proper boundaries of the "space" judges should occupy (Berger 2018, 574).

Here it is important to recognize how the vices of judicial hubris and judicial servility counterintuitively share some common ground. In a given case, a judge may decline to exercise power because that is what the Constitution requires.

46. Scharffs (1998, 187), like us, recognizes an important relationship between humility and sources of authority, such as the Constitution: "Judges who are humble will understand that their authority and legitimacy are closely tied to their obligation to interpret and follow the relevant authoritative materials and institutions." He continues, "When authoritative texts or precedents are on point, a humble judge will be more inclined to follow those authorities, while a less humble judge will be more inclined to find some ground, strained or not, to distinguish the present case in order to implement her own vision of what is right." While we agree, our concept of institutional humility goes a step further: while humility does lead to respect for constitutional authority, constitutional authority also shapes what judicial humility means in the first place.

This, we argue below, is a manifestation of institutional humility. Alternatively, by declining to exercise judicial power, judges could instead exhibit something akin to hubris, if they do so because of commitments to extraconstitutional political, philosophical, moral, or legal principles. Even if this reasoning results in judges choosing not to exert their authority, it still constitutes a sort of aggrandizement of the judicial role, insofar as judges act on their judgment of what is best for the political community, rather than of what the Constitution demands. Institutional humility places the burden on judges to reconcile all of their decisions, including deferential ones, with the meaning of the Constitution and the nature of their constitutional role.

As we have already noted, institutional humility necessarily relies on an understanding of the institution to which it refers. While "humility" simply may be applied in any context, institutional humility is, by definition, humility in a particular institutional setting: the judiciary as defined by the Constitution. We recognize that any interpretation of the Constitution's meaning is grounded on certain premises regarding democratic authority, the rule of law, the separation of powers, and constitutional interpretation, the answers to which are matters of constitutional theory.[47] If, for example, one accepts Ronald Dworkin's (1996) "moral reading" theory of the Constitution, including its insistence that judges ought to interpret "principle-like" clauses according to their best understandings (regardless of the conceptions of those principles originally held by a given clause's authors), then one could define as institutionally humble judicial decisions that diligently apply it. Conversely, if one accepts an "originalist" theory of constitutional meaning such as Michael McConnell's (1997a), one would see a Dworkinian decision as an abuse of judicial power and therefore a manifestation of institutional hubris. As these examples manifest, the more detailed one's theory of the meaning of the Constitution and the institutions it creates, the more fully one can define what institutional humility looks like in practice. However, the more detailed one's theory of constitutional meaning, the more likely it is to be contested. Because we cannot begin to elaborate and defend a particular theory of the Constitution in this article, we have tried to limit ourselves to general and generally accepted principles that the Constitution's text itself seems to establish.

The Constitution creates the judicial role amid a series of vertical and horizontal relationships. Atop the hierarchy stand "We the People" who "ordain and establish this Constitution" (preamble). As the ultimate source of political power, the people exercise their authority via a written constitution, which they

47. By "constitutional theory," we mean ideas regarding the philosophical underpinnings of a constitutional order and the implications of these for the meaning and nature of constitutional structures and/or texts.

make the "supreme Law of the Land" (Art. VI). The supreme law establishes the judiciary, including the Supreme Court, to serve its constitutional ends: to exercise the "judicial Power [which extends] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority" (Art. III). Finally, all judicial officers are constitutionally mandated to bind themselves "by Oath or Affirmation, to support this Constitution" (Art. VI). Thus, the judiciary exists, finds its purpose, and derives its power from the Constitution. From this constitutional context, it follows that the object that most merits a judge's humble disposition is the Constitution itself.

One could argue that, because the Constitution is an instrument of "We the People," the source of judicial authority and the ultimate object deserving of judicial humility would be found in some conception of the popular will. Were this the case, a humble judge would cede controversial constitutional questions to the general public, as manifested either through the people's elected officials or, more directly, through assessments of public opinion. Yet if the Constitution is the manifestation of popular will, then "the People" have bound judges directly to the Constitution and only indirectly to themselves. As Hamilton argues in *Federalist* no. 78, the judiciary was "designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law" (Hamilton et al. 2001, 404). Hamilton goes on to explain that this does not imply judicial supremacy, but only "that the power of the people is superior to both [the judiciary and the legislature]." If "the People" wish to alter their supreme law, they compel themselves to do so in a specific way in Article V, requiring much more than popular majorities. "Until the people have, by some solemn and authoritative act, annulled or changed the established form," Hamilton continues, "it is binding upon themselves collectively, as well as individually: and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act" (Hamilton et al. 2001, 406).

In addition to the vertical relationships of people, supreme law, and judges, the Constitution creates horizontal relationships between the judiciary and other constitutional actors, such as the president and Congress. These actors are "horizontal" to the judiciary, in that they share the same source for their constitutional purpose and authority and likewise take a constitutionally mandated oath or affirmation to support the Constitution, making it that which most deserves their humble disposition as well. As Madison observes in his second *Helvidius* essay, it is legitimate and to be expected for the different branches of the government to hold and to act upon competing understandings of their respective

constitutional powers (Madison 2007, 68–69). Because all constitutional actors receive their purpose and authority from the Constitution, judicial humility toward the Constitution necessarily requires some degree of humility vis-à-vis the other offices the Constitution creates.

Judicial humility, as it manifests in terms of these horizontal relationships, does not mean that a judge must assume that the actions of these other governmental actors are constitutional. Nor does it mean that a judge must treat the constitutional interpretations of those actors, made in defense of their actions, as functionally equal to the judge's own interpretations. In *Federalist* no. 78, Hamilton premises his argument for judicial review on the fact that the popularly accountable branches of the government cannot be relied on to stay within their constitutional bounds. Nevertheless, institutional humility suggests that, when determining whether to overrule the constitutional judgments of other governmental actors, judges must always remain mindful of occupying the appropriate "space" within the constitutional order created by the people. A mistake by the Court—rendering void an executive action, congressional statute, or state law that is, in fact, within the confines of the Constitution—amounts to the judiciary taking up too much space, restricting the constitutional space of other constitutional actors, and producing an order, as a result, that is something qualitatively different from the constitutional order created by the people. Here it becomes clear how epistemological humility (the awareness of one's proneness to error) coalesces with institutional humility (the awareness of one's limited place in the constitutional order) to foster an attitude of caution in overturning the decisions of other constitutional actors.

However, the nature of these vertical and horizontal institutional relationships also creates a hierarchical difference between a judge's humility due to the Constitution and that due to other constitutional actors. Clearly, because the reason for judges' humility in relation to other actors results from their relationship to the Constitution itself, the Constitution takes precedence. When a judge arrives at the conclusion that a governmental action is unconstitutional in a judicially cognizable way, the refusal to strike down that action would be another distortion of the constitutional order. If a judge has overcome the caution deriving from the combination of epistemological and institutional humility, a refusal to interfere with other constitutional actors is not an implication of constitutional humility. Judges are not permitted to be smaller than the Constitution creates them to be any more than they are permitted to aggrandize their role. Both constitutional errors result in a constitutional system functioning differently than how the people created it to operate. If institutional humility requires, most fundamentally, humility toward the Constitution, that means that humility toward other constitutional actors cannot justify a failure to enforce constitutional provisions.

But to fully appreciate why the Constitution—more than any other object—is most deserving of a judge's humble disposition, we must understand how this obligation of humility originates. The function and excellence of a constitutional system, particularly one established by "reflection and choice" rather than "accident and force," require constitutional actors to play their duly assigned roles (Hamilton et al. 2001, 1). In this sense, the judge's role is analogous to that of a soldier, one who has a very specific and delineated institutional role. For the military to work properly, each role needs to be played exactly and within the proper institutional limits. Obedience to one's superior is rightly expected, for the good of the institution and, most importantly, for the goods the institution protects. As such, soldiers have a duty to obey their commanding officers, and obedience to superiors becomes a key institutional virtue for the military.

Similarly, a properly functioning executive, judiciary, and legislature are all fundamental to the success of the American constitutional system.[48] The Constitution, as supreme law, is the means by which each branch's roles, powers, and limitations are assigned, setting the "space" each must occupy. Thus, humble judges fulfill their constitutionally mandated role by recognizing and respecting the responsibilities, as well as the limitations, that they have been institutionally assigned. Without the authority granted by the Constitution, the judge does not exist as a judge. Once judges take on the duties of a constitutionally established judicial office, their activity is rightly defined, committed to, and shaped by the Constitution. This fact is highlighted by contemplating its opposite: to be an arrogant judge surely includes flouting one's duty, expanding and abusing one's powers, and using one's office for self-aggrandizement. The Constitution is most deserving of a judge's humility because acting otherwise would undermine the stability and proper functioning of the constitutional order, and upholding that order is the function of an institutional virtue.

However, we recognize that, ultimately, the moral horizon of institutional humility is necessarily limited to the context of the particular constitutional order. Being a "good *citoyen*" during the Reign of Terror may have been good for the success of the *République* but not good as such, in any sense of universal moral obligation. Institutional humility is limited to the good of the regime and is, in this sense, a contingent foundation for moral obligation. Institutional humility only creates an objective moral duty if the regime itself is good in some objective sense, only if the constitutional order is legitimate in its foundations, processes, and ends. Yet while the moral weight of institutional humility ultimately (and theoretically) relies on the Constitution's goodness, we can presume that judges accept the legitimacy of the Constitution when they take an oath that they "will support and defend the Constitution of the United States

48. See, e.g., *Federalist* no. 47 (Hamilton et al. 2001, 249).

against all enemies, foreign and domestic; that [they] will bear true faith and allegiance to the same; [and] that [they] take this obligation freely, without any mental reservation or purpose of evasion."[49] At the very least, we can say that if we accept the basic philosophical premises of the American constitutional order, then we must consider judges to be under an obligation of institutional humility.

## CONCLUSION: THE CONTRIBUTIONS OF CONSTITUTIONAL HUMILITY

The distinctive conception of constitutional humility that we have developed in this article can contribute to both our constitutional practice and our public discourse in at least three ways. First, an improved conception of constitutional humility—one that accounts for both epistemological and institutional humility—has the potential to better guide judges as they deliberate and make decisions. For judges who are sincerely committed to practicing humility, the distinct categories of institutional and epistemological humility can play important roles in deliberation and decision-making by acting as intellectual checkboxes, ensuring that their commitment to one aspect of humility does not compromise the other and thus undermine the purpose of constitutional humility. For example, as we discussed previously, other judicial virtues like "restraint" or "deference" often suffer from framing the judicial role in principally negative terms, focusing on either the limits of judicial knowledge (epistemological humility) or the relative importance of some other constitutional actor (such as Congress). A well-intentioned judge unconscious of both dimensions of humility may adopt something like James Bradley Thayer's "Doctrine of the Clear Mistake," by which a law should only be ruled unconstitutional "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question" (Thayer 1893, 144). Doing so could result from either focusing solely on epistemological humility (uncertainty about one's ability to make a right decision) or a truncated conception of institutional humility (considering horizontal relationships while disregarding vertical ones). By contrast, judges attentive to both dimensions of humility would ensure not only that they remained within their intellectual capacities but also that they considered their constitutionally mandated role of interpreting laws in light of the supreme law, the Constitution, "deferring" or "restraining" themselves according to the Constitution's guidance. Judges cognizant of both dimensions

49. See https://www.supremecourt.gov. An oath is required by Art. VI and the text established by law in 5 U.S.C. § 3331.

of constitutional humility will be able to evaluate their decisions in light of each and thus better fulfill their judicial function.

Second, this conception of constitutional humility has the potential to elevate our discourse on the merits or deficiencies of judicial decisions, by more clearly defining what is at issue. As our introductory survey evinces, all kinds of commentators—from judges and scholars to senators and pundits—employ "humility" and "hubris" to praise or blame judges and their decisions. Such commentators can bring clarity to their critiques by considering the aspect of constitutional humility on which they believe the judge has erred: was a decision hubristic because the judge went beyond their epistemological capacities, because he or she failed to sufficiently recognize their institutional limitations, or both? Did they account for the Constitution's horizontal and vertical relationships and the obligations those create? With these considerations in mind, one could appreciate Chief Justice Roberts's humility in *National Federation of Independent Business v. Sebelius* for what appeared to be his deference to the legislature in accepting the Affordable Care Act's "individual mandate" as a tax under the Constitution's Taxing and Spending Clause (acknowledging the Constitution's horizontal relationships and the humble disposition these relationships deserve), while at the same time raising the question of whether he focused too much on the humility due to Congress and thus minimized his ultimate duty of humility to the Constitution itself. Similarly, from the perspective of institutional humility, one could praise Justice Thomas's concurring opinion in *Gamble v. United States* (2019), in which he rejects the Court's customary approach to precedent because it "does not comport with our judicial duty under Article III" by elevating "demonstrably erroneous decisions . . . over the text of the Constitution and other duly enacted federal law." However, one could stress that Thomas and other justices should exercise epistemological humility when considering overturning long lines of precedent, established by prior judges who were also duly authorized to interpret and apply the law.[50] For a decision or judge to be properly praised as "humble" in a constitutional context, one would need to account for all these aspects of constitutional humility.

Third, this conception of constitutional humility can improve our public discourse by identifying when humility is not the fundamental cause of disagreement.

50. Interestingly for our purposes, Justice Thomas concludes that "the Court's multifactor approach to *stare decisis* invites conflict with its constitutional duty. Whatever benefits may be seen to inhere in that approach—e.g., 'stability' in the law, preservation of reliance interests, or judicial 'humility' . . . —they cannot overcome that fundamental flaw." See Gamble v. United States, 587 U.S. ___ (2019). Whereas Thomas associates judicial humility with what he considers a problematic approach to deference to precedent, our conception of constitutional humility brings to light that Thomas could make this criticism on the grounds of institutional humility.

As we have noted, unlike epistemological humility, institutional humility necessarily relies on certain foundational premises about the judiciary's institutional context. If those engaged in dialogue share enough common premises about the role of the judiciary, then they can debate the merits of judicial activities on the basis of humility. With the input of more specific premises about American constitutionalism, including how the Constitution should be interpreted and the role of the judiciary within it, one could advance a thicker notion of institutional humility, one that is more concrete in application. However, the more detailed one's theory of constitutional meaning, the more likely it is to be contested. As we have already noted, institutional humility will look very different for subscribers to Dworkin's "moral reading" than it does for adherents to McConnell's originalism. Likewise, Randy Barnett's "presumption of liberty" and Clint Bolick's "case for an activist judiciary" would both inform a more active conception of institutional humility than approaches that demand much more deference to precedent or the democratic branches (Bolick 2007; Barnett 2014). If those in dialogue do not accept the same first-order premises, uses of humility and hubris are merely proxies for a dispute about constitutional theory and interpretation.

While constitutional humility will no doubt continue to have a contested meaning as a judicial virtue, our aim in this article has been to set the terms of that discussion. As humility persists as an important part of our constitutional discourse, our conception demonstrates the necessity of accounting for its epistemological, inward-looking dimension; its institutional, outward-looking dimension; and the interactions between those dimensions. Such a framework can inform our public and scholarly discourse regarding judicial virtues and our persistent concern about the power of the judiciary.

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