

The Supreme Court: Judicial Temperament and the Democratic Ideal

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It was an honor to deliver the Foulston Siefkin lecture. I would like to use this distinguished platform to explore the relationship between two ideas about the Supreme Court that I have been thinking about recently. One involves judicial temperament and the other, the role of the Court in American democracy.

The idea about judicial temperament suggests that much of what we were taught in law school about judicial success is wrong. The most important predictors of success on the Supreme Court, are not academic brilliance, philosophical consistency, or methodological ambition. Instead, many of the most successful Supreme Court Justices are those who get along well with their colleagues, are able to compromise, and can set aside their own ideological agendas in the interest of preserving the institutional legitimacy of the Court. By contrast, the most brilliant and philosophically ambitious Justices have often alienated their colleagues and subverted the ideals they hoped to promote.

The idea about the courts and democracy suggests that much of what we were taught in high school civics is wrong. Many of us were taught that the role of the courts in democracy is to serve as a heroic protector of the rights of minorities against the tyranny of the majority. But this heroic vision of the counter-majoritarian court is hard to sustain. Throughout American history, courts have tended to reflect rather than to challenge popular views about constitutional ideals, and on the rare occasions when courts have acted unilaterally—that is, when they have tried to impose intensely contested visions of the Constitution on a divided nation—they have often provoked backlashes that have harmed the causes they intended to help.

What is the relationship between judicial temperament and the role of courts in democracy? They are related most convincingly in a single figure, John Marshall. America's greatest Chief Justice embodied the kind of judicial temperament that defines judicial success and also the

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subtle and complicated relationship that defines the appropriate balance between judicial independence and democratic accountability. In terms of temperament, Marshall's virtues are well known. "I am in love with his character, positively in love," gushed his friend Joseph Story.¹ And Story was not in the habit of gushing. Story loved Marshall for his laugh, which he said was "too hearty for an intriguer,"² and for his conviviality, sociability, and warmth. He famously brought the justices to live together in the same boarding house, so they were able to discuss cases over pipes of his excellent Madeira. Once, in an unfortunate burst of temperance, the other Justices resolved to drink only when it rained. Marshall looked out the window and said, "[O]ur jurisdiction extends over so large a territory . . . that it must be raining somewhere."³

Marshall was modest, humble, and had no airs. He was famously mistaken for a servant in the Richmond market when a newcomer threw him a coin and hired the Chief Justice to carry his turkey home, which Marshall did without complaint. This modesty had tangible results. Marshall remade the Court in his own image because he was able to win over a series of Republican appointees nominated by his archrival, Thomas Jefferson, and Jefferson's Republican successors. To Jefferson's consternation, Marshall won these Republicans over to the cause of nationalism, persuading them to join unanimous opinions written in his name. Jefferson was driven to distraction by his distant cousin, stewing ineffectively on the sidelines, and Marshall enthusiastically reciprocated Jefferson's disdain. Henry Adams said of Marshall that his only failing was that he "detested Thomas Jefferson."⁴ Marshall dismissed Jefferson as "the great Lama of the Mountain."⁵ Jefferson replied by belittling Marshall as a sophist who engaged in "twistifications."⁶

When he accused Marshall of "twistifications," Jefferson accurately captured something of Marshall's complicated understanding of the relationship between judicial independence on the one hand, and judicial accountability on the other. With his "deft blend of boldness and restraint,"⁷ Marshall was able to pursue the Federalist ideal of judicial independence by embracing the Jeffersonian ideal of democratic accountability. He took office at a time when these two visions were clashing dramatically. The Federalists insisted that judges had to be independent of public opinion in order to protect property rights and national power; the Jeffersonian Republicans questioned the power of judges to strike

1. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 32 (2007).

2. *Id.* at 33.

3. *Id.* at 34.

4. *Id.* at 36.

5. *Id.* at 32.

6. *Id.* at 35-6.

7. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 45 (2005).

down laws in the name of fundamental rights. Marshall defended judicial independence by asserting it in theory, but declining to press it very far in practice, except in cases where he knew public opinion would support him. Marshall embodied judicial restraint, defined neutrally as a reluctance to strike down very many laws, and almost all of his decisions were readily accepted by national majorities, inspiring opposition only among local minorities.

This combination of boldness in theory and restraint in practice made Marshall a model of democratic constitutionalism. *Marbury v. Madison*,⁸ of course, was the most famous example of Marshall's "twistifications," and of the pragmatism that led him to walk up to the edge of a political abyss, and then to announce at the last minute that he had no alternative but to embrace the opposite conclusion. In *Marbury*, Marshall found himself in what appeared to be an impossible dilemma.⁹ If he ordered Jefferson to deliver Marbury's commission, the President would ignore him and the Court would be revealed as a paper tiger; however, if he refused to order Jefferson to deliver the commission, he would appear to be caving in the face of political pressure and the Court, once again, would seem weak and exposed.¹⁰ Marshall removed himself from this exquisite dilemma with an act of judicial jujitsu that even today inspires awe for its craftiness and subtlety. He announced that Marbury had a right to the commission, but went on to say that the Court had no power to order Jefferson to deliver it because the law authorizing the courts to hear cases of this kind was itself unconstitutional.¹¹ The Jeffersonians were happy with their pyrrhic victory in the short term—no commission for Marbury—while the Federalists were delighted with their strategic victory in the long term—the theory of judicial review, which they knew could be pressed at times when the political climate was more auspicious.

John Marshall, in short, is my paradigm of a Justice who combines an effective judicial temperament with sensitivity to democratic constitutionalism. Let us fast forward to the present. Are there Justices on the current Court who combine Marshall's winning temperament with his political cunning and commitment to democratic constitutionalism? In July 2006, at the end of his first term as Chief Justice, John Roberts explicitly embraced Marshall as a model.¹²

Roberts agreed that Marshall succeeded in persuading his colleagues to join unanimous opinions because of his temperament, and he said he hoped to resurrect Marshall's model in a polarized age, urging

8. 5 U.S. (1 Cranch) 137 (1803).

9. See ROSEN, *supra* note 1, at 28-31.

10. *Id.*

11. See *Marbury*, 5 U.S. (1 Cranch) at 167-69, 174-80.

12. ROSEN, *supra* note 1, at 222-26.

his own colleagues to converge around narrow, unanimous opinions.¹³ Roberts said candidly that he realized he faced a daunting challenge in resurrecting Marshall's model because many of his colleagues were more inclined to act like law professors rather than judges.¹⁴ They were more interested, in other words, in pursuing their own ideological visions than in compromising out of concern for the legitimacy of the Court.¹⁵ If the Court continued to hand down 5-4 decisions on predictable partisan lines, Roberts feared it would squander its carefully hoarded stores of institutional legitimacy.¹⁶ In Roberts's view, the definition of judicial temperament was a willingness to act less like a law professor and more like a member of a collegial Court, and Roberts said he would do everything in his power to try to persuade his colleagues to take a different path.¹⁷

When Roberts announced this admirable ambition, he had been notably successful in achieving it. Under his leadership, he noted, the Court had handed down more unanimous opinions in a row than at any point in its modern history.¹⁸ Roberts's first term on the bench, however, now appears to have been something of a honeymoon. A year later, in the Supreme Court term that ended in June, 2007, a third of the cases were decided by 5-4 votes, the highest percentage in at least ten years.¹⁹

Will Roberts be more successful in the future in achieving his worthy goals of unanimity, collegiality, and narrow opinions? Judgments so early in his term are premature, and predications are hazardous. But if the patterns of history hold, Roberts's success will turn on at least three factors: his judicial temperament, his vision of the relationship between the Court and democracy, and ultimately the temperaments and dispositions of his colleagues.

In terms of his temperament, Roberts seems especially well prepared for success. He is genuinely humble and thoughtful; he has a knack for charming his ideological opponents, and even his liberal colleagues like him as a person. He made his name as an appellate advocate arguing liberal as well as conservative positions, and these gifts have prepared him well, as an appellate judge and as Chief Justice, for framing his arguments in ways that colleagues of different sensibilities can accept. Moreover, since he has embraced unanimity, collegiality, and narrow opinions as the standard by which his tenure should be judged, Roberts presumably understands that he cannot preside over a

13. *Id.*

14. *Id.*

15. *See id.*

16. *Id.*

17. *Id.* at 222.

18. ROSEN, *supra* note 1, at 225.

19. Charlie Savage, *High Court Remains Politically Divided*, BOSTON GLOBE, June 30, 2007.

decade of 5-4 decisions. Far from going down in history as a unifier in the tradition of John Marshall, he would be perceived as the leader of a partisan and polarized conservative Court, one that may be increasingly at odds with a more liberal President and Congress.

Roberts's success will be determined not only by his temperament, but also by his vision of the Court's role in a democracy, and by the temperaments and democratic visions of his colleagues. In Roberts's confirmation hearings, he discussed the importance of incrementalism. He said he was a bottom-up rather than a top-down judge. A bottom-up judge, he suggests, begins with facts, and reasons to conclusions, while a top-down judge begins with a sweeping ideological vision and tries to impose it on cases across the board. During his brief tenure, Roberts has demonstrated a commitment to incrementalism, but his incrementalism has not impressed his colleagues on the right or on the left. In several important cases during the October 2006 term, Roberts declined to join Justices Antonin Scalia and Clarence Thomas in calling for the open overruling of previous precedents. Scalia accused Roberts of "judicial obfuscation" and "faux judicial restraint" for his refusal to overturn the entire structure of campaign finance law rather than dismantling it incrementally.²⁰

Scalia is not the only skeptic of conservative incrementalism. At the end of the 2006 term, Justice Stephen Breyer, also suggested that it was better to overturn precedents cleanly than to pretend to preserve them while distorting them beyond recognition.²¹

There were ten cases listed as important cases in the newspapers. I was in the majority twice – that was better than nothing," he said. "In three of the other cases, the majority of the Court said it was overruling prior precedents, and, in four other cases, the minority of the Court said you are overruling prior precedents. I thought there was quite a lot of precedent overruled, but the people on the other side, who are very good judges, thought they weren't overruling. I do think it's better to be open."²²

History suggests that a more reliable predictor of judicial success is not incrementalism or minimalism, but an avoidance of judicial unilateralism. In other words, will Roberts defer to Congress and state legislatures in the face of uncertainty, or will he attempt to impose contested principles that are being actively and intensely contested by a majority of the American people? It is too soon to say whether Roberts will defer to popular understandings of constitutional principles or attempt systematically to challenge them. But there are powerful strains in the legal culture today on the left and the right that exalt judicial

20. Fed. Election Comm'n v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2684 n.7 (2007) (Scalia, J., concurring).

21. Jeffrey Rosen, *Will John Roberts Ever Get Better?*, THE NEW REPUBLIC, July 23, 2007, available at <http://www.cbsnews.com/stories/2007/07/13/opinion/main3056257.shtml>.

22. *Id.*

unilateralism. On the right, there are strains of an economic judicial activism that some have called an attempt to resurrect “the Constitution in Exile”²³—namely a group of pre-New Deal doctrines that could lead to the invalidation of great swaths of the post-New Deal regulatory state. On the left, similarly, there is an exaltation of international law and a willingness to strike practices that are supported by national majorities of Americans—such as the death penalty—in the name of a purported international consensus that may not, in fact, exist.²⁴

Both of these invitations to judicial unilateralism are short-sighted and self-defeating. Throughout history, as I have suggested, the Court has tended to reflect popular views about contested constitutional issues, and has gotten into trouble on the rare occasions when it has acted overconfidently in the face of intense national disagreement. By and large, the Rehnquist Court avoided the temptations of unilateralism. Under the leadership of Sandra Day O’Connor, the Court was remarkably effective in reflecting the views of the median American voter more precisely, at times, than Congress itself. The Court tacked modestly to the right in areas of criminal procedure, economics, and property rights while tacking modestly to the left in other matters.²⁵ When the Rehnquist Court engaged in unilateralism—during *Bush v. Gore*,²⁶ for example—its approval ratings fell,²⁷ but by and large, they were higher than those of Congress.²⁸

Consider some initial objections to this counter-intuitive argument that the Court should avoid unilateralism by not imposing constitutional visions that are actively and intensely contested by a majority of the American people. This does not mean that judges should follow the polls. Judges are not legislators, and they are not supposed to court popularity by submitting their decisions to focus groups—that would make them unprincipled. Democratic constitutionalism is more of a sensibility than an axiom, and it has to do with a willingness to defer to the political branches in the face of constitutional uncertainty. Judges should enforce only those constitutional values that a majority of the nation views as fundamental, but identifying what those values are is often difficult. For much of American history, the other branches of govern-

23. JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 205 (2006).

24. *Id.* at 202-06.

25. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (gay rights); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action); *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (crime); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (regulatory takings).

26. 531 U.S. 98 (2000).

27. Jeffrey Rosen, *Political Questions and the Hazards of Pragmatism, in BUSH v. GORE* 145 (Bruce Ackerman ed., 2002) (“Among Republicans, approval of the Court between August 2000 and January 2001 jumped from 60 percent to 80 percent, according to a Galup poll, but among Democrats it fell from 70 percent to 42 percent.”).

28. ROSEN, *supra* note 23, at 3.

ment—Congress and the President—have been reliable representatives of the constitutional views of a majority of the country.

In fact, many of the greatest achievements of our constitutional history—in particular, expansive conceptions of free speech and racial equality—were principles initially forged not in the courts but in Congress and the political arena. It was Congress, surprisingly enough, during the antebellum and Reconstruction eras, that formulated the idea that speech should not be abridged unless it posed an imminent threat of serious lawless action, endorsing a principle that abolitionists had formulated in the course of defending the rights of African Americans to read in defiance of the Southern Slave Codes. Similarly, during the Red Scare that followed World War I, President Wilson and illiberal judges were eager to punish critics of the war for sedition, and it was Congress that refined the Sedition Acts to ensure that they protected more speech than the President and courts demanded. Thus, when the Supreme Court, in the 1960s, finally said that speech could not be banned unless it posed an imminent threat of lawless action, it was merely clarifying principles that Congress had forged a century earlier. It is no coincidence that the Court waited for a time when the public was willing to accept free speech libertarianism,²⁹ for the Court is most effective when it codifies principles whose constitutional status has become broadly accepted across the political spectrum.

Racial equality, too, was won in the political arena rather than exclusively in the courts. Although *Brown v. Board of Education*³⁰ was one of the Court's most important achievements, it was not intensely counter-majoritarian. Presidents Roosevelt and Truman, had asked the Court to overturn *Plessy v. Ferguson*,³¹ and President Eisenhower, although publicly cautious about *Brown*, did not actively oppose it, but rather, supported it behind the scenes.³² *Brown* was popular with fifty-four percent of the country when it came down in 1954, and was opposed most by the Southern Democratic minority that prevented the Republican Congress from passing laws to protect racial equality.³³ For all these reasons, *Brown* does not seem unilateralist—the decision to strike down twenty-one state laws that required segregation was not actively and intensely contested by a majority of the country. The question, however, is close, and if democratic constitutionalism generally urges judges to defer in the face of uncertainty, *Brown* may be the exception that proves the rule. It is clear, in any event, that *Brown* did not

29. See ROSEN, *supra* note 23, at 162.

30. 347 U.S. 483 (1954).

31. 163 U.S. 537 (1896).

32. DAVID A. NICHOLAS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* (2007).

33. ROSEN, *supra* note 23, at 6, 63.

lead to meaningful desegregation on its own. As Michael Klarman argues, meaningful desegregation did not occur until the 1960s when the Northern public opinion turned in favor of civil rights, galvanized by those familiar television pictures of police dogs attacking demonstrators.³⁴ It was those images that precipitated the backlash that eventually led to federal guidelines, which allowed southern district judges to put some teeth behind desegregation.³⁵

Backlash, of course, is a complicated phenomenon. Although the Court provokes backlashes when it decides cases on the basis of principles that inspire intense national opposition, it can shape constitutional principles as well as reflecting them—as *Brown* demonstrates. Speaking broadly, and at the risk of belaboring the obvious, the Court only provokes intense national backlashes when it makes decisions that national majorities intensely oppose. As Gerald Rosenberg has argued, there have been only three periods in the Court's history when the congressional backlashes it has provoked have been intense enough to lead the Justices to abandon their views: the Marshall Court's capitulation to the Jeffersonian Republicans' attempt to control its agenda; the response to *Dred Scott v. Sandford*,³⁶ Lincoln, and Johnson between 1858 and 1869; and the New Deal Court's switch in time in 1937. In three other periods, national opposition has been less intense and the Court moderated its views rather than abandoning them: Congress's resistance to the Marshall Court's nationalizing decisions; its assault on the Warren Court's efforts to defend free speech during the anti-communist investigations of the 1950s; and the response to *Roe v. Wade*.³⁷ Finally, in other periods, such as during the *Lochner* era or after the school prayer decisions of the 1960s, Congressional opposition was diffuse and the Court ignored it.³⁸

Since *Roe* was decided, national polls have been remarkably consistent—two thirds of the country supports early term choice and larger majorities—from seventy to eighty percent support restrictions on later term choice.³⁹ The core of *Roe*, which protected choice in the first trimester, has always been popular with a majority of Americans ever since it was decided. The parts of *Roe* that provoked a backlash were those that called into question later term restrictions that most Americans support. In the wake of *Roe*, Congress enacted thirty laws restrict-

34. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 364 (2004).

35. *Id.*

36. 60 U.S. (19 How.) 393 (1856).

37. 410 U.S. 113 (1973).

38. Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369, 396 (1992).

39. ROSEN, *supra* note 23, at 95.

ing abortion,⁴⁰ and the Court responded. In *Planned Parenthood of Pennsylvania v. Casey*,⁴¹ the Court perfectly aligned itself with public understandings of the right to choose, protecting early term choice and allowing restrictions on late term choice.⁴² In *Gonzales v. Carhart*,⁴³ furthermore, despite Justice Kennedy's unnecessary lucubrations about abortion trauma syndrome, the Court upheld a federal prohibition on partial birth abortions supported by bipartisan majorities in every state and Congress.⁴⁴

Where does that leave the Roberts Court? Some liberals are in the mood for a backlash. Recently, in the New York Times, Jean Edward Smith, author of the definitive biography of John Marshall, wrote: "If the current five-man majority persists in thumbing its nose at popular values, the election of a Democratic president and Congress could provide a corrective."⁴⁵

In the short term, however, this seems unlikely. In many cases in which the Roberts Court is turning right, it appears to have at least a narrow majority of the country on its side. Think about the issues in which the center of the Court, defined by Kennedy, is now more conservative than it was with O'Connor. When it comes to abortion, the Kennedy Court continues to mirror the wishes of the American center, protecting early term abortions and allowing the regulation of late term abortions.⁴⁶ It is also reflecting the public's conflicted views about affirmative action. After the Court upheld the University of Michigan Law School's affirmative-action plan in 2003, for example, Michigan voters repudiated it in a referendum.⁴⁷ By contrast, when a Texas court banned affirmative action in the 1990s, the Texas legislature resurrected it.⁴⁸ In the last week of the 2007 term, Kennedy joined 5-4 opinions upholding the power of school principals to discipline students and limiting challenges to public funding of religion, but he left open the door for upholding better designed affirmative action programs in the future.⁴⁹ Whatever its constitutional merits, this position is not likely to provoke a widespread rebellion.

40. *Id.* at 96.

41. 505 U.S. 833 (1992).

42. *See id.* at 900-01.

43. 127 S. Ct. 1610 (2007).

44. *Id.* at 1638-39.

45. Jean Edward Smith, *Stacking the Court*, N.Y. TIMES, July 26, 2007, http://www.nytimes.com/2007/07/26/opinion/26smith.html?_r=1&oref=slogin.

46. KARLYN H. BOWMAN ET AL., AEI STUDIES IN PUBLIC OPINION: ATTITUDES ABOUT ABORTION 10 (2006), http://www.aei.org/docLib/20050722_abortion0722.pdf.

47. *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003); MICH. CONST. of 1963, art. I, § 26 (amended 2006).

48. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *see also* Joseph Berger, *Adjusting a Formula Devised for Diversity*, N.Y. TIMES, Dec. 13, 2006, at 7.

49. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

If the court reversed *Casey* and allowed the regulation of early term abortions, or began striking down environmental laws like the Clean Air Act, national majorities might well become energized and alarmed. Although Justice Clarence Thomas has signaled his willingness to overturn *Roe* and gut the heart of the regulatory state, Kennedy is unlikely to provide a fifth vote for either possibility. In the partial-birth abortion case, he repeated his longstanding view that although late-term abortions could be restricted, the early-term abortions at the core of *Roe* had to be protected.⁵⁰ He also made clear his support for environmental regulations when he joined the Court's four liberals in holding that the Bush Environmental Protection Agency thwarted the will of Congress in refusing to regulate greenhouse gases.⁵¹

Although Kennedy has O'Connor's knack for aligning himself with the median American voter, he lacks her ability to compromise in the interest of achieving institutional consensus and legitimacy. On my template of judicial temperaments, he is an ideologue (or at least an idealist); she was the quintessential pragmatist. Pragmatism alone, however, is not a guarantee of judicial success. The most successful pragmatists have had an additional quality—namely, judicial humility, or a willingness to defer to legislatures in the face of constitutional uncertainty. Neither Kennedy nor O'Connor was deferential in this sense. On the late Rehnquist Court, between 1994 and 2000, the most activist Justices, judged by their willingness to strike down federal and state laws, were Kennedy (fifty-one laws), followed by O'Connor (fifty laws), and Scalia and Thomas (forty-eight laws each). By contrast, the most restrained or deferential Justices were Ginsburg (thirty-nine laws), followed by Rehnquist and Breyer (forty-one laws each).⁵² Nevertheless, in the first years of the Robert Court, these patterns may be changing. During the 2006 term, there were eighteen nonunanimous decisions involving constitutional law: Justice Breyer voted to uphold the challenged law or policy in only four of these cases, compared to Justice Kennedy, who was deferential in nine cases and Roberts who was deferential in fourteen.⁵³ If these trends continue, it would mark a dramatic realignment of longstanding patterns of activism and restraint.

Humility, ultimately, is a character trait as well as a judicial disposition. It describes the spirit, as Judge Hand put it, "which is not too sure that it is right."⁵⁴ That spirit was embodied by Marshall, with his shambling clothes and lack of airs. People genuinely liked him, and his per-

50. See *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (upholding the constitutionality of the Partial-Birth Abortion Ban Act of 2003).

51. See *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

52. THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 251 (2004).

53. Matthew J. Franck, *Rosen's Restraint*, *NAT'L REV.*, July 24, 2007.

54. LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (1953).

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sonal modesty was mirrored in his jurisprudential modesty. He recognized that, although the Court had the authority to interpret the Constitution, it did not have a monopoly on this authority. He defended judicial independence, not judicial supremacy; and when Chief Justice Warren in *Cooper v. Aaron*,⁵⁵ quoted Marshall to the effect that the Court alone could interpret the Constitution,⁵⁶ he quoted Marshall out of context.

William Rehnquist was another successful Chief Justice because he combined a degree of pragmatism with personal and jurisprudential humility. He abandoned his longstanding opposition to the Miranda warnings, because he thought the good of the Court required it. As the statistics above suggest, he deferred to democratic decisions in the face of uncertainty. Will Chief Justice Roberts follow in the footsteps of his predecessor and mentor? It is still too early to tell. It seems clear that Roberts has the personal qualities—the charm, modesty, and humility—to exercise leadership in the tradition of the most successful Chief Justices. What is less clear is his jurisprudential humility. How determined is he to avoid judicial unilateralism and generally practice judicial deference? Might he preside over a Court that tries to challenge Congress and perhaps the President on issues that Americans care intensely about—such as environmental protections like the Clean Air Act? If so, he could provoke the first national backlash since the 1930s.

Roberts's success or failure will be determined not only by his temperament and instincts about judicial deference. It will ultimately depend on his colleagues, several of whom have made it clear that they have little interest in supporting his efforts to achieve unanimity and consensus. Roberts's tenure, presumably, will be long, and even small changes in the composition of the Court may create an atmosphere more or less amenable to compromise and consensus. Roberts has quoted a statement of Chief Justice Hughes: "Marshall's preeminence was due to the fact that he was John Marshall."⁵⁷ If Roberts succeeds, it will be due to the fact that he is John Roberts.

55. 38 U.S. 1 (1958).

56. *Id.* at 19-20.

57. ROSEN, *supra* note 1, at 240.