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A need for judicial humility

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As the U.S. Supreme Court faces contentious issues such as protecting civil liberties in an age of terrorism and reconciling campaign finance reform with the First Amendment in its 2003-2004 term, it is a good time to reflect on the role of judges in our representative democracy. There has long been a recognition in Anglo-American law that judges should bring a spirit of humility to the work of deciding cases.

Judicial humility is neither liberal nor conservative. It recognizes that judges and lawyers hold no monopoly on wisdom; in certain situations, institutions other than courts may be better positioned to resolve a particular issue.

Judicial humility manifests itself in a number of ways, including a recognition that not all dumb laws are unconstitutional or need to be rewritten by judges. One mark of a humble judge is that he not infrequently implements laws he neither would have passed (as a legislator) nor enforced (as a bureaucrat) in the first place.

A humble judge recognizes that he or she has neither the power of the purse nor the power of the police. Instead, a judge's authority comes from the power of persuasion-the public's recognition that there is something special about judges that separates them from legislators and bureaucrats.

In mediating power struggles among varying institutions, groups and individuals, judges employ various legal tools of the trade that distinguish their actions from those of legislators and bureaucrats. The humble judge takes seriously constraints such as the language of constitutional and statutory texts, legal doctrine and precedent in deciding individual cases.

In recent years, however, the U.S. Supreme Court has strayed far from a jurisprudence of humility and instead embraced a result-oriented jurisprudence that has run roughshod over these traditional constraints. Both the liberal and conservative wings of the high court have engaged in this practice, turning these tools of the trade into nothing more than cover for judicial decisions reached on other (often undisclosed) grounds.

Nowhere was this practice more clearly illustrated than in the *Bush v. Gore* decision. Several other legal institutions were in the process of sorting out the serious problems that had arisen in Florida's vote-counting process. Yet the Supreme Court intervened, manipulating existing constitutional doctrine and exposing itself to charges that it played partisan politics in choosing the U.S. president.

They're at it again

The court did it again last term in upholding the University of Michigan Law School's use of racial preferences in admissions. There is, of course, widespread social acceptance of the goal of diversity in all aspects of American life. But the devil is in the details of how we accomplish that goal without engaging in the very discrimination we seek to eradicate. Reasonable people can and do disagree on where to strike that balance. Michigan's approach-giving undefined extra consideration to applicants of certain minority groups who otherwise lack sufficiently high test scores and college grades in order to admit a "critical mass" of those students-certainly is one way to strike that balance.

Yet the majority faced a pesky problem: Michigan's policy seemed unconstitutional under the court's well-settled legal doctrine for analyzing racial classifications, which requires that racial classifications be used only for the most compelling reasons and only if the classifications are narrowly tailored to further those reasons.

A humble judge would have accepted that result and left it to education officials to work on more race-neutral means to achieve the goal of diversity or, at the very least, honestly confronted the adverse legal doctrine and explained either why it did not apply or needed to be changed. The majority did neither and instead twisted the legal doctrine in order to uphold Michigan's policy. The result is to enshrine constitutionally Michigan's system and discourage efforts by other institutions and people of good faith to foster diversity through less racially intrusive

means.

The loss of humility also is evidenced by the tone of the debate both outside and inside the Supreme Court. In the 2000 campaign, President Bush promised to restore civility to our national discourse, but the failure to find weapons of mass destruction in Iraq has only heightened the politics of personal destruction on Capitol Hill. For example, judicial nominees now must run a gauntlet of personal attacks from both sides of the aisle.

The debate within the Supreme Court has become increasingly shrill as well, with Justice Antonin Scalia at the forefront of the rhetorical assault in judicial opinions; his writings are often short on judicial temperament and long on intemperate opinion. The court speaks to the country when it decides cases, and the country is not uplifted by language written neither to convince an ideological opponent nor to edify the public, but rather to disparage a judicial colleague.

As the court moves through the 2003-2004 term, both liberal and conservative justices should return to a posture of judicial humility in which the process of judging matters at least as much as the results of judging.

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