

ON JUDGES: A TRIBUTE TO CHIEF JUDGE CARNES

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This Volume of the Law Review rightly swells with praise for Chief Judge Carnes, who has devoted his entire career to serving his state and nation.¹ I am delighted to add my voice to the chorus. In doing that, I will also reflect a bit on some characteristics that make their holder well-suited to serve as a federal appellate judge.² Specifically, I will discuss writing ability, intelligence, engagement, fortitude, and self-restraint.³

1. Writing Ability. Writing ability, obviously, is a prerequisite for a good appellate judge.⁴ After all, appellate courts in our system generally explain their decisions through opinions, and opinions must be written. And, if an appellate judge cannot write clearly, he will not provide useful guidance to (1) future panels of his court⁵ and (2) to the lower courts who must follow the appellate court's holdings.⁶ Much less will that judge communicate effectively to members of the general public, whom he ultimately serves and who must plan their affairs in light of his court's decisions.⁷ Moreover, to maximize the future impact of his opinions—

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1. In this piece, I generally refer to Chief Judge Carnes by that title. In discussing decisions before he became chief judge, though, I will refer to him as Judge Carnes.

2. The characteristics discussed in this piece benefit any judge. But, given the subject of this tribute, I focus here on federal circuit court judges.

3. I hope it goes without saying, but this list is not meant to be exclusive. There are many characteristics that go into making someone a good appellate judge, and a piece as short as this one could not possibly cover all of them.

4. See, e.g., MARVIN SCHICK, *LEARNED HAND'S COURT* 189 n.96 (Johns Hopkins Press 1970).

5. See, e.g., *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir. 1999) (Carnes, J.) (later panels “are bound to follow prior panel decisions, except where they have been overruled either by an en banc decision of this Court or a decision of the Supreme Court”).

6. See, e.g., Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2023 (2002) (while speaking of the Supreme Court, observing the “crucial duty . . . to write . . . opinions so as to provide guidance to lower courts” who “must follow [the opinions] and apply them to future cases”).

7. See, e.g., Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 652–55 (2012).

whether for his court or in a separate writing—a judge must write persuasively, and perhaps with a memorable turn of phrase.⁸

Chief Judge Carnes' writing ability is well-known and oft-praised. Indeed, Chief Judge Carnes has been counted among “the world’s best judicial writers”⁹ and described as “one of the more talented writers on the federal appellate bench.”¹⁰ And this very Volume contains still further praise for his authorial skill. I agree wholeheartedly with these assessments. But, because Chief Judge Carnes' wordsmithing skills are so well-known, I focus in this short piece on some of the other characteristics that make for a good appellate judge.

2. Intelligence. A good appellate judge needs smarts because judging can be intellectually difficult.¹¹ To be sure, there are easy cases, where it is clear what law applies and how.¹² With the easy cases, a judge need only apply the applicable rule to reach the correct result and resolve the case.¹³ But there are many hard cases.

Any one (or more) of a number of factors might make a case difficult. For instance, challenges might arise due to the sheer complexity of the statute or regulation governing a case.¹⁴ Or ambiguities in the operative laws might create difficulties.¹⁵ The same goes for ambiguities in the relevant decisions of the Supreme Court¹⁶ or prior decisions of the judge's

8. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The [Fourteenth] Amendment does not enact Mr. Herbert Spencer’s Social Statics.”); *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016) (“But when [an administrative] remedy is, in Judge Carnes’ phrasing, essentially ‘unknowable’—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable.” (quoting *Goebert v. Lee Cty.*, 510 F.3d 1312, 1323 (11th Cir. 2007) (Carnes, J.)).

9. Ross Guberman, *No Thanks: Six More Words and Phrases to Avoid*, LEGAL WRITING PRO (Feb. 24, 2015), <https://www.legalwritingpro.com/blog/no-thanks-six-more-words-and-phrases-to-avoid/>.

10. Howard Bashman, HOW APPEALING (Feb. 8, 2007), <http://howappealing.abovethelaw.com/0207.html>. Chief Judge Carnes’ writing has also drawn judicial praise. See *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1156 (11th Cir. 2017) (Rosenbaum, J., dissenting) (“As always with the Chief, his concurrence is beautifully written.”).

11. See Kenneth W. Starr, *A Tribute to Justice Sandra Day O’Connor*, 1996 ANN. SURV. OF AM. L., at xlvi.

12. See, e.g., Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 410 (1985).

13. See *id.*

14. See, e.g., *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11th Cir. 2007) (Carnes, J.) (noting that ERISA can make for “challenging cases”).

15. See, e.g., *Hunter v. City of Montgomery*, 859 F.3d 1329, 1335–36 (11th Cir. 2017) (Carnes, C.J.) (“reluctantly and cautiously turn[ing] to legislative history materials” to resolve statutory ambiguity that could not be resolved by the “statutory ‘language itself, the specific context in which that language is used, and the broader context of the statute as a whole’” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

16. See, e.g., *Chabad–Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1388 & n.8 (11th Cir. 1993) (applying, but noting indeterminacy of, the so-called *Lemon* test for identifying violations of the Establishment Clause). See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1991) (articulating what would come to be known as the *Lemon* test).

own court.¹⁷ And things can get especially knotty when a case lies at the intersection of multiple laws or lines of decisions.¹⁸ This is hardly an exhaustive list, but it outlines the sorts of intellectual puzzles facing every appellate judge.

A judge simply cannot work through those sorts of puzzles without a sharp mind. And Chief Judge Carnes certainly has one. Short of citing an IQ test, that statement probably cannot be proved in print, and it certainly cannot be proved in a piece of this length. But I have anecdotal evidence to support the claim. For one thing, Chief Judge Carnes has skillfully grappled with every one of the difficulties mentioned in the last paragraph, and no doubt many others. Indeed, he participated in every single one of the Eleventh Circuit decisions cited in support of that paragraph. For another thing, I can speak from personal experience: I had the good fortune to clerk for Judge Carnes for a year, during which I watched him cut through legal problems the way Sandy Koufax cut through batters. The Chief Judge is, to put it bluntly, very sharp.

3. Engagement. A good appellate judge must also be engaged—he must be willing to put in serious time and toil. And, to be clear, judging is hard work.¹⁹

Sometimes a judge must spend long hours working through a case's complicated facts or tangled procedural history. Consider, for instance, *United States v. Brown*,²⁰ in which Judge Carnes and his colleagues had to decide whether, because of Brown's 1989 acquittal of bank fraud and conspiracy charges, the Double Jeopardy Clause²¹ barred his 1991 conviction for bank fraud, mail fraud, and conspiracy.²² Under the governing law, the decision turned on whether the acquittal in the first trial necessarily resulted from the jury's determination in Brown's favor of a fact essential for a conviction in the second trial.²³

17. See, e.g., *Morstein v. Nat'l Ins. Servs., Inc.*, 93 F.3d 715, 718 (11th Cir. 1996) (noting that earlier Eleventh Circuit decisions were "neither consistent nor clear").

18. For instance, consider *Brisentine v. Stone & Webster Engineering Corporation*, 117 F.3d 519 (11th Cir. 1997). As Judge Carnes explained the situation facing the Eleventh Circuit:

We deal here with the intersection of federal statutory anti-discrimination rights and mandatory grievance and arbitration clauses in a collective bargaining agreement. This area of the law has been staked out by two Supreme Court decisions, although neither one is directly on point to our case. Moreover, those two Supreme Court decisions reached different results. Our task then is to examine the precedential orbit of the two decisions and decide which one this case falls within.

Id. at 522. Resolving a legal problem of that sort is no easy task.

19. See, e.g., Irma S. Russell, *An Authentic Life in the Law: A Tribute to James K. Logan*, 43 U. KAN. L. REV. 609, 622 (1995).

20. 983 F.2d 201 (11th Cir. 1993) (Carnes, J.).

21. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .").

22. *Brown*, 983 F.2d at 202.

23. *Id.*

To answer that question, the court had to do two things. First, the court had to decide whether there was a single factual determination on which the acquittal in the first trial necessarily rested.²⁴ That task required the court to examine the charges, instructions, and record in the first trial, which involved multiple financial transactions made by multiple coconspirators with multiple banks and dealing with multiple condominium units.²⁵ After sifting through those materials, the court concluded that the first jury necessarily acquitted Brown because it had a reasonable doubt about whether he acted willfully with respect to the transactions at issue in the first trial.²⁶ Second, the court had to determine whether “a jury rationally could not have a reasonable doubt about Brown’s willfulness in the scheme involved in the first trial without also having a reasonable doubt about his willfulness in the scheme involved in the second trial.”²⁷ That second task forced the court to compare the charges and records in the two trials—the second of which also dealt with multiple financial transactions made by multiple coconspirators with multiple banks and dealing with multiple condominium units.²⁸ After doing that, the court held that the Double Jeopardy Clause did not bar Brown’s second conviction because there were factual differences in the two schemes at issue in the two trials.²⁹ That holding is simple enough to state—but a simple statement of the holding obscures all the hard work the court put into the case. And no one who has ever met Chief Judge Carnes will think that he cut any corners in doing that work.

So a judge must put in hard work reviewing the record—and, as *Brown* shows, sometimes multiple records in a single case.³⁰ But judicial engagement manifests in other ways, too. I have already mentioned a pair of situations calling for judicial engagement: when the law relevant to a case is either facially ambiguous or complex, even the smartest of judges must spend time and effort trying to arrive at the correct result.³¹

Even where the law at first glance seems simple and clear, however, a good judge will probe a bit below the surface to ensure that it does not obscure a different meaning. That sort of obfuscation can happen with statutes. For instance, when read alone, the text of a statute might not fully reflect a different, larger, or more complicated set of ideas borrowed from

24. *Id.*

25. *Id.* at 202–05.

26. *Id.* at 204.

27. *Id.*

28. *Id.* at 204–05.

29. *Id.* at 205–06.

30. *See also* *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009) (Carnes, J.) (thoroughly reviewing factual and legal records developed over six different judicial proceedings in the course of resolving sixteen separate claims of error).

31. *See supra* notes 15–17 and accompanying text.

another legal source, like the common law.³² Similarly, in order to accurately capture the meaning of a statute, a judge must consider the backdrop against which the statutory text was enacted, and not just the text alone. Or, as Judge Carnes put it, “To understand what [a statutory phrase] means,” one must “examin[e] . . . the historical development of [the relevant area of the] law . . . , mindful of Holmes’ advice that in order to know what the law is we must know what it has been and is becoming.”³³ Of course, it takes more judicial work to check for and study such a background meaning than it does to simply recite the text of a statute.

Judicial opinions require similar probing. An appellate judge ideally will be sharp of mind and pen.³⁴ As a result, the judge sometimes will include in an opinion a felicitous figure of speech or phrase—what we might call a judicial meme.³⁵ And, to some extent, that is a good thing: judicial memes can transmit ideas to future judges easily, making it a bit less difficult for them to adhere to and apply precedent.³⁶

But judicial memes have a downside. Specifically, a meme often seems simple, which helps it to spread from judicial mind to judicial mind, but that seeming simplicity can cause the meme to overshadow the more complex or precise idea the meme originally was intended to encapsulate. In short, a judicial meme creates a risk of error because future judges might stop with the meme and overlook the underlying principle established by the case that generated the meme.

A judge, then, must dig underneath a judicial meme to ensure that he does not misapply or fail to apply the controlling principle that lies below. As Chief Judge Carnes put the point, a judge must watch out for “what Holmes once referred to as . . . ‘inadequate catch word[s],’ which could by [their] ‘very felicity, delay further analysis.’”³⁷ That vigilance takes hard

32. See *Med. Transp. Mgmt. Corp. v. Comm’r*, 506 F.3d 1364, 1368–69 (11th Cir. 2007) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” (quoting *Morrisette v. United States*, 342 U.S. 246, 263 (1952) (alteration in original))).

33. *Guevara v. Republic of Peru*, 468 F.3d 1289, 1295 (11th Cir. 2006) (Carnes, J.) (citing OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1881)).

34. See *supra* notes 4–19 and accompanying text.

35. Richard Dawkins coined the word “meme” to describe a “unit of cultural transmission” or “self-replicating pattern[] of information.” RICHARD DAWKINS, *THE SELFISH GENE* 249, 431 (40th anniversary ed. Oxford Univ. Press 2016). The word has since developed a second, more popular meaning: “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media.” *Meme*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/meme> (last visited Nov. 4, 2017). Here, I use the word more or less in Dawkins’ original sense.

36. See DAWKINS, *supra* note 35 at 249–250.

37. *United States v. Irey*, 612 F.3d 1160, 1197 n.22 (11th Cir. 2010) (Carnes, J.) (quoting Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 455 (1899)); see also

work, and so too does the further analysis that is necessary if the meme itself does not capture the underlying, controlling principle with complete accuracy. A judge who is not engaged will not put in that hard work, and so a good judge must be engaged.³⁸

4. Fortitude. A good judge also must have the fortitude to follow the law to the conclusion that he, by his best lights, believes it to lead.³⁹ In doing that, the judge sometimes will arrive at a destination different than the one reached by his colleagues. When that happens, the judge must write separately to explain how and why he disagrees with his colleagues' result or reasoning—and, when necessary, Chief Judge Carnes has done just that.⁴⁰ It takes courage for a judge to state in print, for all the world to read, his view that his colleagues have gotten things wrong.⁴¹ After all, judges are people, and most people prefer to agree with their peers—especially peers with whom they likely will work for decades.⁴²

While it takes courage for a judge to disagree with his fellow judges, it probably takes more courage for a judge to follow the law to a conclusion contrary to the popular opinion of his place and time. Even the most secluded of judges will venture into public on occasion, and there he must face those who, by and large, favor a policy he believes the law requires him to frustrate. And even if the judge somehow avoids ever going into public, he still will face the news and public opinion polls, both of which will tug at what Mark Twain called “our nature to conform,” “seat[ed] . . .

United States v. Roy, 855 F.3d 1133, 1160 (11th Cir. 2017) (Carnes, C.J.) (“Many of the problems encountered in determining whether to apply a presumption of prejudice to a defense counsel’s absence from trial arise because courts try to cram all absence-of-counsel situations into *Cronic*’s Procrustean bed or, to vary the metaphor, fail to heed Cardozo’s warning about ‘the repression of a formula, the tyranny of tags and tickets.’” (quoting Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 688 (1931))).

38. I do not, of course, suggest that judges will always agree on the meaning of earlier decisions and the judicial memes contained therein. Good-faith disagreements will inevitably arise between engaged judges. For proof, one need look no further than the competing opinions in *Irey* and *Roy*, cited in note 37, *supra*. Indeed, a judge’s willingness to write in disagreement with her colleagues might itself be a sign of that judge’s engagement. See *infra* notes 39–42 and accompanying text.

39. See Hon. John T. Noonan, Jr., *Education, Intelligence, and Character in Judges*, 71 MINN. L. REV. 1119, 1130 (1987) (noting that fortitude marks a great judge and explaining that “[t]rue fortitude is courageous, indeed expressed as courage in adversity.”).

40. See, e.g., *Dana’s R.R. Supply v. Att’y Gen. of Fla.*, 807 F.3d 1235, 1251–59 (11th Cir. 2015) (Carnes, C.J., dissenting); *United States v. Martinez*, 736 F.3d 981, 990–92 (11th Cir. 2013) (Carnes, C.J., concurring in the result), *vacated by* *Martinez v. United States*, 135 S. Ct. 2798 (2015); *Sultenfuss v. Snow*, 35 F.3d 1494, 1503–06 (11th Cir. 1994) (Carnes, J., dissenting).

41. See, e.g., Hon. Myron H. Bright, *Theodore McMillian: A Wise Judge*, 43 ST. LOUIS U. L.J. 1263, 1263–64 (1999).

42. See, e.g., Noonan, *supra* note 39, at 1131.

[in t]he inborn requirement of self-approval.”⁴³ I imagine those are difficult things to overcome, even for a judge with a lifetime appointment.⁴⁴

But a good judge must overcome them when the law so requires. As an example, consider the situation facing Judge Carnes and his colleagues in *Glassroth v. Moore*.⁴⁵ In that case, three attorneys (as plaintiffs) sued Alabama’s Chief Justice to compel the removal of “a two-and-one-half ton monument to the Ten Commandments,” which stood “as the centerpiece of the rotunda in the Alabama State Judicial Building.”⁴⁶ The monument, the attorneys claimed, violated the First Amendment’s Establishment Clause.⁴⁷ In an opinion authored by Judge Carnes, the Eleventh Circuit applied the Supreme Court’s *Lemon* test for adjudicating Establishment Clause claims,⁴⁸ concluded that the monument violated the Establishment Clause,⁴⁹ and affirmed a district court order requiring its removal from the Alabama State Judicial Building.⁵⁰

In *Glassroth*, then, Judge Carnes and his colleagues reached their conclusion by following the law, even though the public—or a large portion of the public—seemingly opposed that conclusion. After all, the defendant in *Glassroth* was Alabama’s Chief Justice, a public official selected by the citizens in a state-wide election.⁵¹ Not only that, but the defendant successfully campaigned for the Chief Justiceship as “the ‘Ten Commandments Judge,’” including by using that moniker on billboards and in “television and radio commercials, telephone scripts, and mailings.”⁵² The defendant’s success in that campaign suggests widespread public support for his action in placing the Ten Commandments monument in the Alabama State Judicial Building, which sits only a short walk away from the federal courthouse in Montgomery. Despite that current of public opinion, the Eleventh Circuit followed the course charted for them by the law. That took fortitude, and without it Judge Carnes and his fellow panel

43. MARK TWAIN, *Corn-Pone Opinions*, in GREAT SHORT WORKS OF MARK TWAIN 189 (Justin Kaplan ed., Perennial Classics 2004).

44. See U.S. CONST. art. III, § 1.

45. 335 F.3d 1282 (11th Cir. 2003) (Carnes, J.).

46. *Id.* at 1284–85.

47. See *id.* at 1284, 1288; see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

48. See *Glassroth*, 335 F.3d at 1293–1301.

49. See *id.* at 1297.

50. See *id.* at 1284, 1288, 1303; see also *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1319 (M.D. Ala. 2002) (stating the initial judgment of the district court); *Glassroth v. Moore*, 242 F. Supp. 2d 1067, 1067 (M.D. Ala. 2002) (imposing injunction requiring removal of the monument).

51. See ALA. CODE § 12-2-1 (2012) (“The Supreme Court . . . shall consist of a chief justice and eight associate justices, who shall be elected by the qualified electors of the state at the general elections as provided by law . . .”).

52. See *Glassroth*, 335 F.3d at 1285.

members could not truthfully have assured the public that “[t]he rule of law will prevail.”⁵³

5. Self-Restraint. Finally, a good appellate judge must have self-restraint.⁵⁴ By that, I mean that the judge must be able and willing to defer to the decisions of others when the law so requires. Deferring to others (where the law requires, of course) sounds easier than I suspect it is. To see the potential difficulty, just consider what we have seen so far. A good appellate judge will be intelligent enough to solve difficult problems.⁵⁵ He also will be engaged enough to actually solve them,⁵⁶ which suggests that he enjoys doing so. On top of that, a good appellate judge will be courageous enough to stand by his solutions even if others disagree.⁵⁷ And, to top it all off, the judge will be a gifted writer capable of clearly and persuasively explaining his solutions.⁵⁸ I can only imagine someone with all of those characteristics comes to strongly-held positions and faces a near-constant temptation to make those positions binding—a temptation that can only become stronger when the person is given a position in the federal judiciary.⁵⁹

A good appellate judge must resist that temptation when that is what the law requires. And, to be clear, the law often requires appellate judges to defer. For instance, federal judges generally must defer to others concerning the content of the law because our constitutional system for the most part allocates substantive lawmaking authority to Congress and the states.⁶⁰ Thus, as Judge Carnes has explained, courts “are not licensed to

53. *Id.* at 1303.

54. I deliberately refrain from using the phrase “judicial restraint.” In my view, that phrase has been freighted with so many meanings as to be utterly unhelpful. By self-restraint, I mean that the judge is willing to defer to the decision of others when the law allocates the relevant decision to them. When a judge does that, he really defers to the law itself, which sometimes offers not a substantive decision, but instead only a decision about who decides. By self-restraint, then, I mean something like what Professor Marah McLeod has referred to as “[j]udicial humility.” See Marah Stith McLeod, *A Humble Justice*, 127 *YALE L.J. F.* 196, 198 n.10 (2017) (defining “judicial humility” as “subordination of self to some higher authority,” especially “to law”).

55. See *supra* notes 11–18 and accompanying text.

56. See *supra* notes 19–38 and accompanying text.

57. See *supra* notes 39–53 and accompanying text.

58. See *supra* notes 4–10 and accompanying text.

59. See U.S. CONST. art. III, § 1; see also *T-Mobile S., LLC v. City of Milton*, 728 F.3d 1274, 1284 (11th Cir. 2013) (Carnes, C.J.) (“Although we, like most judges, have enough ego to believe that we could improve a good many statutes if given the chance, statutory construction does not give us that chance if we are true to the judicial function. Our duty is to say what statutory language means, not what it should mean, and not what it would mean if we had drafted it.”).

60. See U.S. CONST. art. I, § 1 (“All legislative [p]owers herein granted shall be vested in a Congress of the United States . . .”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state,” as established by its legislature or its courts.).

practice statutory remodeling,”⁶¹ but must instead content themselves with whatever model Congress has built.⁶² Nor does a federal judge have authority to remake state law. Instead, he must defer to the decisions of the state courts because, as Judge Carnes once observed, “[they]—not Pomeroy, or Scott, or anyone who ever sat on a woosack—[are] the ultimate arbiter[s] of [state] law and equity.”⁶³ In short, a federal judge needs self-restraint because he usually must defer to the designs of others when it comes to the governing law.

But the need to defer—and, thus, for self-restraint—does not end there. A federal circuit court judge also must defer to others *within* the federal judicial branch. Perhaps most obvious, he must defer to the Supreme Court of the United States which is, after all, supreme.⁶⁴ In doing that, the circuit judge no doubt will find himself following Supreme Court precedent he thinks misguided. Indeed, the judge must even follow Supreme Court precedent that the Supreme Court *itself* seems to think misguided. As Judge Carnes has explained: While “[t]he Supreme Court has not always been consistent in its decisions or in its instructions to lower courts,” it has “been perfectly consistent . . . that ‘it is [the Supreme] Court’s prerogative alone to overrule one of its precedents,’” even if the Supreme Court has called those decisions into question.⁶⁵

61. *United States v. Griffith*, 455 F.3d 1339, 1344 (11th Cir. 2006) (Carnes, J.); *see also, e.g., Mamani v. Berzain*, 825 F.3d 1304, 1310 (11th Cir. 2016) (Carnes, C.J.) (“[U]nless and until the first and third branches of government swap duties and responsibilities, we cannot rewrite statutes.”).

62. Assuming, of course, the model is up to constitutional code.

63. *Mitsubishi Int’l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1523 (11th Cir. 1994) (Carnes, J., concurring in part and dissenting in part). Of course, none of this is to suggest that good judges will always agree on what Congress or a state has decreed. *Compare*, for example, *id.* at 1517–20 (affirming district court’s refusal to impose a constructive trust under state law), *with id.* at 1523–25 (Carnes, J., concurring in part and dissenting in part) (concluding that state law permitted imposition of constructive trust). Nor is the discussion in the text meant to suggest that Congress and the states are the *only* entities capable of making law to which federal appellate courts must defer. *See, e.g., Jaramillo v. Immigration & Naturalization Serv.*, 1 F.3d 1149, 1155 (11th Cir. 1993) (Carnes, J.) (applying the *Chevron* doctrine to defer to the decision of an agency: “The Board’s interpretation of the statute is not necessarily the one we would choose were the choice ours to make. . . . Nonetheless. . . . the Board’s interpretation is reasonable and permissible.”); *infra* notes 64–68 and accompanying text (discussing judicial precedent, itself a form of law to which judges sometimes must defer).

64. The Supreme Court’s supremacy follows naturally from its position atop the judicial hierarchy. *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (“We are not final because we are infallible, but we are infallible only because we are final.”).

65. *Evans v. Sec’y, Fla. Dep’t of Corrs.*, 699 F.3d 1249, 1263 (11th Cir. 2012) (Carnes, J.) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001)); *see also id.* (“Even if a Supreme Court decision looks dead to us, ‘the Supreme Court has insisted on reserving to itself the task of burying its own decisions.’” (quoting *Jefferson Cty. v. Acker*, 210 F.3d 1317, 1320 (11th Cir. 2000)). Of course, a circuit court *could* decide to ignore the Supreme Court’s precedent. But to do that would be to court reversal—and invite lawlessness.

The judge must also defer to earlier decisions of his own court when he is sitting as part of a panel, and not the en banc court.⁶⁶ That requirement of deference helps to stabilize the law, but it requires later courts to stand by decisions they think wrong—sometimes badly wrong.⁶⁷ As usual, Judge Carnes has illustrated the doctrine well: “Even if [the later panel] thought [an earlier decision] wrong, the prior panel precedent rule is not dependent upon a subsequent panel’s appraisal of the initial decision’s correctness,” nor on “the skill of the attorneys or wisdom of the judges involved with the prior decision—upon what was argued or considered.”⁶⁸ The cost of stability is thus paid with the self-restraint of judges who are pretty well convinced their predecessors have gotten things wrong.

The good appellate judge will pay deference to substantive lawmakers, courts above, and courts past. Not only that, but he also will sometimes defer to decisions of the district courts that sit below in the Article III hierarchy. An appellate judge should do so, for instance, on questions of fact or where the issue under review falls within the district court’s discretion. Specifically, an appellate judge must live with a district court’s factual findings so long as “the district court has chosen one of two plausible views of the evidence,” even if the appellate judge strongly disagrees with the view chosen by the district court.⁶⁹ And, as Judge Carnes has observed, the abuse of discretion standard will require the appellate judge on occasion to vote to “affirm the district court even though [h]e would have gone the other way had it been [his] call,” because “[t]hat is how an abuse of discretion standard differs from a *de novo* standard of review.”⁷⁰ The upshot is that, to properly play his role, our gifted appellate judge often must sit on his hands when reviewing a district court’s decision.

Conclusion. In sum, a good appellate judge will have talents and traits that make him well-suited, and maybe even eager, to solve the sorts of problems that come before him—and yet he often must hold those talents and traits in check and defer to others. A federal appellate judge might therefore offer his own version of the Serenity Prayer, asking for the skill, work ethic, and courage to correctly decide the things he should; the restraint to refrain from deciding the things he shouldn’t; and the wisdom

66. This requirement, commonly known as the law of the circuit rule, applies to one degree or another in all of the federal courts of appeals. See Amy E. Sloan, *The Dog that Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 718 (2009). I focus in the text on the doctrine as applied by the United States Court of Appeals for the Eleventh Circuit.

67. *Id.* at 717–18.

68. *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000).

69. *Glassroth v. Moore*, 335 F.3d 1282, 1291 (11th Cir. 2003) (Carnes, J.).

70. *United States v. Lopez*, 649 F.3d 1222, 1236 (11th Cir. 2011) (Carnes, J.) (quoting *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004)).

to know the difference. As I hope this short tribute shows, Chief Judge Carnes has all of those attributes. The rest of us can pray for more judges like him.