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OP-ED CONTRIBUTOR

Our Fill-in-the-Blank Constitution

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AS the Senate awaits the nomination of a new Supreme Court justice, a frank discussion is needed on the proper role of judges in our constitutional system. For 30 years, conservative commentators have persuaded the public that conservative judges apply the law, whereas liberal judges make up the law. According to Chief Justice John Roberts, his job is just to [“call balls and strikes.”](#) According to Justice Antonin Scalia, conservative jurists merely carry out the “original meaning” of the framers. These are appealing but wholly disingenuous descriptions of what judges — liberal or conservative — actually do.

To see why this is so, we need only look to the text of the Constitution. It defines our most fundamental rights and protections in open-ended terms: “freedom of speech,” for example, and “equal protection of the laws,” “due process of law,” “unreasonable searches and seizures,” “free exercise” of religion and “cruel and unusual punishment.” These terms are not self-defining; they did not have clear meanings even to the people who drafted them. The framers fully understood that they were leaving it to future generations to use their intelligence, judgment and experience to give concrete meaning to the expressed aspirations.

Rulings by conservative justices in the past decade make it perfectly clear that they do not “apply the law” in a neutral and detached manner. Consider, for example, their decisions

holding that [corporations have the same right of free speech](#) as individuals, that commercial advertising receives [robust protection](#) under the First Amendment, that the Second Amendment [prohibits the regulation of guns](#), that [affirmative action is unconstitutional](#), that the equal protection clause mandated the election of George W. Bush and that the Boy Scouts have a First Amendment right [to exclude gay scoutmasters](#).

Whatever one thinks of these decisions, it should be apparent that conservative judges do not disinterestedly call balls and strikes. Rather, fueled by their own political and ideological convictions, they make value judgments, often in an aggressively activist manner that goes well beyond anything the framers themselves envisioned. There is nothing simple, neutral, objective or restrained about such decisions. For too long, conservatives have set the terms of the debate about judges, and they have done so in a highly misleading way. Americans should see conservative constitutional jurisprudence for what it really is. And liberals must stand up for their vision of the judiciary.

So, how should judges interpret the Constitution? To answer that question, we need to consider why we give courts the power of judicial review — the power to hold laws unconstitutional — in the first place. Although the framers thought democracy to be the best system of government, they recognized that it was imperfect. One flaw that troubled them was the risk that prejudice or intolerance on the part of the majority might threaten the liberties of a minority. [As James Madison observed](#), in a democratic society “the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended ... from acts in which the government is the mere instrument of the major number of the constituents.” It was therefore essential, Madison concluded, for judges, whose life tenure insulates them from the demands of the majority, to serve as the guardians of our liberties and as [“an impenetrable bulwark”](#) against every encroachment upon our most cherished freedoms.

Conservative judges often stand this idea on its head. As the list of rulings above shows, they tend to exercise the power of judicial review to invalidate laws that disadvantage corporations, business interests, the wealthy and other powerful interests in society. They employ judicial review to protect the powerful rather than the powerless.

Liberal judges, on the other hand, have tended to exercise the power of judicial review to invalidate laws that disadvantage racial and religious minorities, political dissenters, people accused of crimes and others who are unlikely to have their interests fully and fairly considered by the majority. Liberal judges have [ended racial segregation](#), recognized the principle of [“one person, one vote.”](#) prohibited censorship of the Pentagon Papers and [upheld the right to due process](#), even at Guantánamo Bay. This approach to judicial review fits much more naturally with the concerns and intentions of people like Madison who forged the American constitutional system.

Should “empathy” enter into this process? In the days before he nominated Sonia Sotomayor to the Supreme Court, President Obama was criticized by conservatives for [suggesting that a sense of empathy](#) might make for a better judge.

But the president was correct. If all judges did was umpire, then judicial empathy would be irrelevant. In baseball, we wouldn’t want an umpire to say a ball was a strike just because he felt empathy for the pitcher. But once you understand that the umpire analogy is absurd, it’s evident that a sense of empathy can, in fact, help judges fulfill their responsibilities — in at least two ways.

First, empathy helps judges understand the aspirations of the framers, who were themselves determined to protect the rights of political, religious, racial and other minorities. Second, it helps judges understand the effects of the law on the real world. Think of judicial decisions that have invalidated laws [prohibiting interracial marriage](#), [granted hearings to welfare recipients](#) before their benefits could be terminated, [forbidden forced sterilization](#) of people accused of crime, protected the rights of [political dissenters](#)

and members of minority religious faiths, guaranteed a right to counsel for indigent defendants and invalidated laws denying women equal rights under the law. In each of these situations, in order to give full and proper meaning to the Constitution it was necessary and appropriate for the justices to comprehend the effect that the laws under consideration had, or could have, on the lives of real people.

Faithfully applying our Constitution's 18th- and 19th-century text to 21st-century problems requires not only careful attention to the text, fidelity to the framers' goals and respect for precedent, but also an awareness of the practical realities of the present. Only with such awareness can judges, in a constantly changing society, hope to keep faith with our highest law.

This does not mean judges are free to make up the law as they go along. But it does mean that constitutional law is not a mechanical exercise of just "applying the law." Before there can be a serious national dialogue about our Constitution, our laws and the proper role of our judges, that myth must be exposed.

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