

Bench & Bar

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Judges are not like umpires

BY J. ANDREW HIRTH

Editor's Note. In August 2009, we published an article by former Cubs and Phillies center fielder Doug Glanville about the relationship between baseball players and umpires to illustrate the relationship between lawyers and judges. Here is another view on the subject.

If there is any silver lining to umpire Jim Joyce's botched call that cost the Detroit Tigers' Armando Galarraga a perfect game, it's that Elena Kagan was slightly less likely to be asked during her Senate confirmation hearings whether she thinks judges are like umpires.

Since John Roberts first suggested during his 2005 Senate confirmation hearings that judges merely call balls and strikes, his baseball metaphor has become a shibboleth among Republicans on the Senate Judiciary Committee. The umpire analogy appeals to conservatives and purported champions of judicial restraint because, as then Circuit Judge Roberts reminded the Senate, "Umpires don't make the rules; they apply them." It's a misleading metaphor, however, because it confuses the roles of judges and juries and leaves no room for the adversarial process. It also reinforces the misconception—cultivated by conservative think-tanks, pundits and politicians—that liberal judges who invalidate statutes as unconstitutional are "judicial activists" while conservative judges who do the same thing are merely applying the law to the facts.

The main problem with the umpire analogy is that it conflates judges and juries. Legal disputes have two components: issues of law (such as what evidence is admissible at trial) and issues of fact (such as whether the light was red or green). Issues of law are always resolved by judges, who have specialized training in what rules previous courts have applied in similar situations. Issues of fact are generally resolved by jurors with no legal training. Judges instruct the jury on the law, and the jurors apply that law to the facts they find. Juries form an important bulwark between the rights of the individual and the power of the state by assigning the power to determine the truth to the people rather than to the government. Indeed, it is this division of labor—more accurately, this division of power—between judges and juries that makes our legal system the best in the world.

It's also why the judges-as-umpires analogy flies foul. In a baseball game, there are no issues of law to resolve. The rules are fixed by Major League Baseball, and (with the exception of the designated hitter rule) they are applied universally to every game. The only decisions left to the umpires are factual: Did the pitch fall within the batter's strike zone? Did the runner beat the throw to first? Umps have no power to determine which rules apply or to interpret what the rules mean. They merely determine the occurrence or non-occurrence of relevant

facts and enforce the rules as given to them by the League. To say that judges are like umpires who merely call balls and strikes, then, is to suggest that judges are no different than jurors applying a series of if/then algorithms given to them by Congress or the state legislature. It insinuates that judges who assert their constitutional power to keep the president and the legislature in check are self-aggrandizing usurpers undeserving of life-tenure. What might seem a curiously modest position for the nation's top judge to take, the umpire analogy is in fact part of a conservative jurisprudential narrative undermining the independence of the judiciary.

The portrait of judicial restraint among conservative judges is also disingenuous. For all the outcry against the "judicial activism" of liberal judges, conservative judges have no greater qualms about striking down legislation enacted by duly elected representatives. Going far beyond simply calling balls and strikes, the Roberts Court has invalidated federal statutes as unconstitutional in *United States v. Stevens* (striking down bans on violent images), *Citizens United v. FEC* (striking down limits on campaign contributions by corporations), and *District of Columbia v. Heller* (striking down limits on gun possession in the nation's capital) to name just a few. The rights at issue in those cases may have been different, but from a separation of powers perspective

the Roberts Court has been every bit as “active” as the Court in *Roe v. Wade* or *Marbury v. Madison*. Whether the majority of justices trend toward the left or right, it remains emphatically the province and duty of the judiciary to say what the law is. Conservatives should stop pretending otherwise.

Finally, the umpire analogy makes short shrift of the adversarial nature of our legal system. The official comment to Rule 9.02(a) of Major League Baseball warns

those who would challenge an umpire’s decision that “Players leaving their position in the field or on base, or managers or coaches leaving the bench or coaches box, to argue on BALLS AND STRIKES will . . . be ejected from the game.” (Emphasis in original). Those who contend a judge’s only purpose is to call balls and strikes must think very little of the arguments advanced by the advocates who come before the Court. Arguing with the ump did not lead to justice for Armando Galarraga. Let’s

hope that those who seek justice from our courts fare better. ■

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