

# A Limited Defense of (at Least Some of) the Umpire Analogy

*Michael P. Allen*<sup>†</sup>

## I. INTRODUCTION

When Professor Andy Siegel of Seattle University School of Law invited participants to take part in this symposium, he challenged us to think broadly about the proper role of the courts in the American system of constitutional government. As is characteristic of Professor Siegel, the challenge was a significant one. Indeed, when these papers were first presented in an earlier form at the 2008 Annual Meeting of the Southeastern Association of Law Schools, he gently chided the participants that, perhaps, we had not thought broadly enough about his challenge!

I have taken those comments to heart in revising my thoughts. However, I ultimately concluded that the best way to “think big” about the role of courts was to start on a small scale and build up. Accordingly, this Essay suggests that the broader role of courts in the United States can be at least marginally better understood through a relatively simple analogy: the recently popularized conception of judges as umpires.

During the hearings on his nomination to become Chief Justice of the United States, John Roberts stated:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of the umpire and a judge is critical. They make sure everyone plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.<sup>1</sup>

---

<sup>†</sup> Professor of Law, Stetson University College of Law; J.D. 1992 Columbia University Law School; B.A. 1989 University of Rochester. This Essay grew out of a presentation at the 2008 Annual Meeting of the Southeastern Association of Law Schools. I thank the panelists at that presentation for their insights. I also wish to thank Professor Andrew Siegel of Seattle University School of Law for organizing this symposium and inviting me to participate with such a distinguished group of panel-

Roberts' umpire analogy<sup>2</sup> drew attention in the media at the time of the confirmation hearing.<sup>3</sup> It has also been the subject of academic commentary, most of which has been highly critical of the comparison.<sup>4</sup>

---

ists. The staff of the *Seattle University Law Review* has also done an incredible job working on this Essay as well as the symposium in general. I am grateful for their efforts. I am also indebted to Debbie Allen for her excellent substantive comments on this Essay as well as Jason Stearns for enduring many discussions about my ideas (as well as his comments, which were quite helpful in shaping my thoughts). Finally, thank you to my sons, Ben and Noah, for their incessant talk of baseball in the summer of 2008, which made writing this particular Essay the only realistic way I could get any work done while in their presence.

1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter "*Roberts's Conf. Hearing*"]; see also *id.* at 56 ("I will remember that it's my job to call balls and strikes, and not pitch or bat.").

2. Of course, John Roberts was not the first person to compare the roles of judges and umpires. Other such references have appeared in speeches by prominent American legal luminaries, court decisions at both the state and federal level, and academic commentary. See, e.g., *Young v. Corrigan*, 208 F. 431, 437 (N.D. Ohio 1912) ("[T]he judge must cease to be merely an umpire at the game of litigation."); *State v. Crittenden*, 38 La. Ann. 448, 451 (1886) (a judge does not "sit[] merely as an umpire to decide disputes which may arise between [counsel]"); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (discussing the neutral role of the trial judge in American adversarial litigation); Justice Robert H. Jackson, Address at the Bar Association's Annual Dinner at the Hotel Waldorf-Astoria, *Why Learned and Augustus Hand Became Great* (Dec. 13, 1951), available at <http://www.roberthjackson.org/documents/121351/> ("And the test of an independent judiciary is a simple one—the one you would apply in choosing an umpire for a baseball game. What do you ask of him? You do not ask that he shall never make a mistake or always agree with you, or always support the home team. You want an umpire who calls them as he sees them.").

3. See, e.g., Mike Conklin, *Make the Call: Are Judges Umps?*, CHI. TRIB., Sept. 16, 2005, at 1; Susan N. Herman, *Roberts' Pitch More Like a Curve Ball*, NEWSDAY, Sept. 16, 2005, at A57.

4. See, e.g., Paul Butler, *Rehnquist, Racism and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1035 (2006) (generally criticizing the analogy); Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) ("At his confirmation hearings for the Chief Justice position, Judge John Roberts began the proceedings by analogizing his future role to that of a baseball umpire. Although both make decisions, it is hard to think of a less apt analogy."); Michael J. Gerhardt, *Constitutional Humility*, 76 U. CIN. L. REV. 23, 46–47 (2007) (noting that the analogy has some appealing elements but concluding that it ultimately "breaks down"); Susan N. Herman, *Balancing the Five Hundred Hats: On Being a Legal Educator/Scholar/Activist*, 41 TULSA L. REV. 637, 640–46 (2006) (criticizing the analogy for failing to take into account the inherent biases of judges); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1723 (2007) (supporting some elements of the analogy but concluding that "the umpire metaphor has dumbed down the public's appreciation of the constitutional role of judges."); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006) ("The formalist conception of judging crudely depicted by Roberts is fancied up in versions intended for academic audiences. No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires."); L.A. Powe, Jr., *Judges Struck by Lightning: Some Observations on the Politics of Recent Supreme Court Appointments*, 39 ARIZ. ST. L. J. 875, 882 (2007) (describing the analogy as "absurd[]"); Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 617–19 (2007) (criticizing the analogy and referring to it as a "pontification[]"); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 701–02 (2007)

This Essay provides at least a limited defense of some parts of the umpire analogy and ultimately suggests that this analogy may tell us something important about the more general role of courts in the United States. Before embarking on this limited defense, it is important to highlight a preliminary point: by their very nature, all analogies are of limited utility. An analogy compares things that are by definition different from one another.<sup>5</sup> For example, one can draw an analogy between an apple and an orange. That analogy can tell one something, perhaps even something important, about the two items. For instance, it may make clear that both items grow on trees or that both are fruits. However, what the analogy does not do is make an apple into an orange or vice versa. At the end of the day, the apple remains an apple and the orange remains an orange. The upshot is that one must be vigilant to use analogies properly.<sup>6</sup> The comparison with an umpire may explain something about a judge. Perhaps it explains a great deal. But, and this is a critical but, the analogy does not mean that a judge is an umpire. Just as the apple remains an apple, the judge remains a judge.

True to the fact that analogies compare dissimilar things, it goes without saying that there are critical differences between umpires and judges.<sup>7</sup> For example, an umpire's decision is a one-shot endeavor with limited, if any, effect on later plays. Calling a runner out at first base during the first inning tells one nothing about whether a runner will be out at first base in the fifth inning. Of course, judicial decisions do have an effect in later cases. Judges also generally explain their decisions while umpires rarely do. An umpire's decision is generally not

---

(arguing that recent United States Supreme Court decisions concerning race-conscious student assignment “vividly illustrate how inapt the umpire analogy is if one takes its appeal to formalism seriously as a statement about how judges can or should execute their responsibilities in constitutional cases.”); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 166 (2006) (noting that “there is something to the umpire analogy—although not as much as [Chief] Justice Roberts’s testimony suggests.”).

5. For example, the first definition of “analogy” in a widely available dictionary is “Correspondence in some respects between otherwise dissimilar things.” WEBSTER’S II NEW COLLEGE DICTIONARY 40 (1999).

6. The dangers of analogical reasoning were not lost on either the Chief Justice or some of his questioners. See, e.g., *Roberts’s Conf. Hearing*, *supra* note 1, at 266 (statement of Sen. John Cornyn) (“As a good lawyer, you know the danger of analogies, and yesterday we started talking about judges and umpires.”); *id.* at 267 (statement of John Roberts) (“Well, I think I agree with your point about the dangers of analogies in some situations.”).

7. Others have noted various differences between umpires and judges when discussing the Chief Justice’s confirmation hearing analogy, some of which I discuss in the text. See, e.g., Gerhardt, *supra* note 4, at 47–48; N. Siegel, *supra* note 4, at 710 n.34; Solum, *supra* note 4, at 166 n.28.

subject to appellate review as judicial decisions are.<sup>8</sup> Moreover, umpires do not possess the life tenure held by federal judges under Article III of the Constitution.<sup>9</sup> Therefore, umpires are, at least in theory, more susceptible to outside influences than are judges. And, of course, judges operate in a political environment far different from that in which an umpire makes his or her decisions. Thus, politics (or perhaps more accurately political ideology) matters to a judge—to one degree or another—in a way it does not for an umpire.

However, just because there are significant differences between umpires and judges does not mean that the analogy should be rejected out-of-hand. To begin with, the fact that there are differences allows one to use an analogy in the first place. If there were no differences between the two actors, an analogy would not be necessary; the judge and the umpire would be the same. Moreover, these differences are important because they may inform how useful the analogy may be in determining the role of the courts. I return to that question later in this Essay.<sup>10</sup> The point now is that the mere fact that differences exist between umpires and judges, even important ones, does not require rejection of the analogy.

With these critical preliminary points out of the way, we can move to the limited defense of the umpire analogy. This Essay proceeds in four parts. Part II explores in more depth what those making the umpire analogy appear to mean. At its heart, the analogy principally has been used to address the substantive decision making of judges. This Part will explain that there is more to the analogy than such a narrow decisional focus suggests. Part III builds on Part II. It explains non-decision making similarities between umpires and judges. This Part suggests that the analogy is more complex than is apparent if one only views it through the lens of decision making. It also explores how these non-decisional similarities can be useful in understanding the role of the judiciary in our constitutional system.

---

8. Although infrequent in practice, an umpire's decisions may be reviewed in some situations. A prominent example is the famous "pine tar" call in a game between the New York Yankees and the Kansas City Royals in 1983. Kansas City Royals All-Star third baseman George Brett was called out after hitting what appeared to be a home run when the umpires concluded that Brett's bat had too much pine tar applied to the handle. That call was overturned by American League management officials and the game was resumed at a later date. For a description of this famous baseball incident, see MLB.COM BASEBALL'S BEST: THE PINE TAR GAME (1983), available at [http://mlb.mlb.com/mlb/baseballs\\_best/mlb\\_bb\\_gamepage.jsp?story\\_page=bb\\_83reg\\_072483\\_kcmyy](http://mlb.mlb.com/mlb/baseballs_best/mlb_bb_gamepage.jsp?story_page=bb_83reg_072483_kcmyy).

9. See U.S. CONST. art. III, § 1.

10. See *infra* Part V.

Part IV of the Essay turns to the analogy as applied to decision making specifically. It is here that the debate has raged. Part IV argues that the analogy provides some important insight into the decisional role of judges. Part V returns to the broader theme of this symposium. It explains how the umpire analogy informs a consideration of the appropriate role of a judge in American constitutional democracy. It acknowledges the dangers inherent in the use of this particular analogy, but ultimately concludes that the risks are worth taking.

## II. THE UMPIRE ANALOGY IN OPERATION

We can only speculate about what Roberts meant to illustrate by comparing judges with baseball umpires. It might have been a statement of philosophy cast in workaday terms,<sup>11</sup> a shrewd political tactic designed to advance the prospects of his confirmation,<sup>12</sup> or even a bit of humor.<sup>13</sup> Perhaps it was some of all of these things.

Regardless of what Chief Justice Roberts meant, it is important to consider how the analogy has been perceived or used by others. It seems clear that, with one significant exception, the analogy has been used largely to compare the “decisional” roles of the judge and the umpire;<sup>14</sup>

---

11. See, e.g., Gerhardt, *supra* note 4, at 24 (“Both Roberts’ emphasis on judicial modesty and the likening of judges to baseball umpires are brilliant ways to characterize judging in almost entirely non-controversial but nevertheless significant ways. Roberts appreciated, I am sure, that in making these statements he was tapping into many if not most Americans’ attitudes about judges—they want their judges to follow the law, wherever it takes them, and not to legislate from the bench or substitute their personal preferences for those embodied in the law.”).

12. Some commentators have mused about this possibility. See, e.g., C. Roberts, *supra* note 4, at 616–17 (discussing the analogy in the context of a performance quite accurately described as “politically smooth”); N. Siegel, *supra* note 4, at 711 n.38 (commenting that Judge Roberts “may have been politicking by telling Senators and the public what he thought they wanted to hear”).

13. See Posner, *supra* note 4, at 1051 (referring to the umpire analogy and writing that he assumed its use was “tongue-in-cheek”).

14. The principal exception to the decisional focus of the use of the umpire analogy concerns the point that both umpires and judges are expected to be neutral. This aspect of judging was discussed at the Chief Justice’s confirmation hearings. See, e.g., *Roberts’s Conf. Hearing*, *supra* note 1, at 8 (statement of Sen. Orrin Hatch) (“Judges must be impartial and independent.”); Statement of Senator Jeff Sessions, *id.* at 31 (noting that “the legal system demands . . . a fair and unbiased umpire . . .”); *id.* at 56 (statement of John Roberts) (“If I am confirmed, I will confront every case with an open mind.”). The analogy’s implications for this aspect of judging have also been noted in academic commentary. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1279 (2007) (noting that “[m]ost view the ideal judge as a neutral and unbiased decision maker” and opining that the Chief Justice “invoke[ed] this ideal in his confirmation hearings by using the umpire analogy”); N. Siegel, *supra* note 4, at 704 (recognizing that the umpire analogy captures the notion that judges should not base their decisions on, among other things, “personal policy preferences”). Three decades before John Roberts’s use of the analogy, United States District Court Judge Marvin Frankel made a similar point when comparing judges and umpires. See Frankel, *supra* note 2, at 1035 (“Whether or not the judge generally achieves or maintains neutrality, it is his assigned task to

in other words, the debate principally has been centered on *how* these actors should make decisions as a substantive matter. In brief, the argument goes that judges, like umpires, should enforce rules, not make them.

The decisional focus of the analogy was on display rather clearly at the Chief Justice's confirmation hearings. For example, when favorably discussing the umpire analogy, Senator Jeff Sessions noted that "the people rightly demand judges who follow, not make the law."<sup>15</sup> And other Senators echoed Senator Sessions's sentiments, whether focused on the umpire analogy itself<sup>16</sup> or more generally on the role of judges under the Constitution.<sup>17</sup> Roberts also picked up on this decisional theme, commenting that "judges operate as judges when they are confined by the law."<sup>18</sup>

The analogy has also been discussed in decisional terms in much of the academic commentary. For example, Duke University School of Law Professor Neil Siegel has powerfully critiqued the analogy as shorthand for representing an "across the board . . . limited judicial role in vindicating constitutional rights."<sup>19</sup> Similarly, Judge William Pryor of the United States Court of Appeals for the Eleventh Circuit praised the analogy precisely because he viewed it as an indication of modesty in judicial decision making.<sup>20</sup>

---

be nonpartisan and to promote through trial an objective search for the truth." I discuss this non-decisional aspect of the analogy in more detail below. See *infra* Part III.B. As I explain, the neutrality point is correct, but it is also incomplete as most frequently employed.

15. *Roberts's Conf. Hearing*, *supra* note 1, at 31 (statement of Sen. Jeff Sessions).

16. See, e.g., *id.* at 46 (statement of Sen. Sam Brownback) (discussing the analogy with approval and noting that "we need a more modest Court—a Court that is a court, and not a super-legislature. That looks to the Constitution as it is, not as we wish it might be, but as it is, so that we can be a rule-of-law nation.").

17. See, e.g., *id.* at 2 (statement of Sen. Arlen Specter) (noting that confirming John Roberts "would present a very unique opportunity for a new Chief Justice to rebuild the image of the Court away from what many believe it has become, a super-legislature . . ."); *id.* at 8 (Statement of Sen. Orrin Hatch) ("I applaud President Bush for resisting this trend [of using politics as a guide for judicial nominations] and for nominating qualified men and women who as judges will not legislate from the bench . . ."); *id.* at 24 (statement of Sen. Mike DeWine) ("Judges need to restrict themselves to the proper resolution of the case before them. They need to avoid the temptation to set broad policy."); *id.* at 35 (statement of Sen. Lindsey Graham) (praising President Bush for nominating "strict constructionist[s]" as federal judges); *id.* at 49 (statement of Sen. Tom Coburn) ("Essentially, the Court will not become an activist court if it adheres to its appropriate role and does not attempt to legislate or create policy.").

18. *Id.* at 177 (statement of John Roberts).

19. N. Siegel, *supra* note 4, at 706.

20. See William H. Pryor, Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1009, 1013–14 (2008); see also Gerhardt, *supra* note 4, at 37–38 (discussing the analogy in context of judicial modesty, although ultimately rejecting the comparison).

It is understandable that the discussion has been centered on decisional matters. The core function of both a judge and an umpire is to make decisions. A pitch is a ball or a strike; a government action is constitutional or unconstitutional. It is precisely because decisional matters are critical to both umpires and judges that it is so tempting to limit analysis of an analogy between these two actors to this one—albeit critical—aspect of their roles.

However, in addition to assessing the decision making aspect of the analogy, it is important to consider whether there are other bases of comparison that can tell us something useful about the role of the judge. Accordingly, I consider first what might be drawn from the umpire analogy with respect to non-decisional matters. Only then does this Essay discuss whether the analogy tells us anything meaningful about the content of decision making itself, which is a far more difficult and controversial question.

### III. NON-DECISIONAL ASPECTS OF THE UMPIRE ANALOGY

Leaving aside comparisons concerning the content of decision making, there are several respects in which the role of umpires in baseball can be used to understand the role of judges in the American system of government. This Part first discusses four such bases of comparisons highlighting the similarities between judges and umpires. It then discusses what these similarities tell us about the role of the judiciary. Importantly, these non-decisional aspects of the analogy have received almost no attention in the debate.

#### *A. Both Umpires and Judges are Part of the “Game”*<sup>21</sup>

One similarity between judges and umpires is that both actors are a part of the “game” in which they are empowered to make decisions.<sup>22</sup> At one level, this point is glaringly obvious. A professional baseball game is not official without an umpire just as a formal trial cannot take place without a judge. But there is more to this basis of comparison than this simplistic explanation suggests.

---

21. My reference to a “game” is in no way meant to trivialize the importance of litigation, constitutional or otherwise. I use the term merely for dramatic effect. Of course, it is precisely because litigation is not a game that makes an analogy in this context inherently dangerous.

22. One of the constitutional scholars I most admire, Professor Michael Gerhardt, mistakenly rejects the umpire analogy in part “because umpires are not part of the actual game of baseball whereas judges and Justices are a part of the system of checks and balances set forth in the Constitution.” Gerhardt, *supra* note 4, at 47. As described in this sub-part, umpires are, in fact, a critical part of what we call the game of baseball.

In baseball, the umpire is not merely required to be present for a game to be official. The umpire is, in fact, a part of the field of play just as are the players. For example, if a baseball touches an umpire in fair territory before it touches an infielder, the ball is a fair ball and runners may advance.<sup>23</sup> Thus, the umpire is not simply some external presence to be ignored. He or she is an integral part of the game itself.<sup>24</sup>

This aspect of the umpire's position in baseball is useful in describing a part of the judge's role. The judicial branch of government under the Constitution is not a mere observer. Instead, it is a co-equal branch in the tripartite national government under the Constitution.<sup>25</sup> After all, the Framers created a system of government with three branches, not two and "something extra." And, of course, we can find many writings contemporaneous with the Constitution's ratification to support the basic notion that the judiciary was meant to be an integral part of the American constitutional order.<sup>26</sup>

It is true that recognizing that both umpires and judges are part of their respective "games" tells one nothing about how they each make substantive decisions. But this reality does not indicate that this similarity means nothing. Instead, it illustrates a fundamental point about analogies themselves. They may be useful to describe some aspects of similarity between dissimilar things even if they do not answer all possible questions. Thus, one should take this point of comparison on its own terms for what it describes about the role of a judge vis-a-vis the role of an umpire. They each play a role in their respective games in part because they are a part of those games.

### *B. Both Umpires and Judges are Neutral, but Neither is Disinterested*

A second important similarity between an umpire and a judge is that both are expected to be neutral. In the judicial context, the neutral

---

23. See Official Major League Baseball (MLB) Rule 5.09(f) (describing effect of a fair ball touching an umpire before it touches or passes an infielder other than the pitcher); see also *id.* 6.08(d) (noting in part that "[i]f a fair ball touches an umpire after having passed a fielder other than the pitcher, or having touched a fielder, including the pitcher, the ball is in play."). The MLB rules can be found at [http://mlb.mlb.com/mlb/official\\_info/official\\_rules/foreword.jsp](http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp).

24. Other rules make this point as well. See, e.g., *id.* 5.08 ("If . . . a pitched or thrown ball touches an umpire, the ball is alive and in play."); *id.* 5.09(b) (describing effect of plate umpire's interference with a catcher's throw); *id.* 5.09(g) (describing effect of a ball being lodged in the umpire's mask or other equipment).

25. See U.S. CONST. art. I (describing the Legislative Power); art. II (describing the Executive Power); art. III (describing the Judicial Power).

26. See, e.g., THE FEDERALIST Nos. 78, 79 (Alexander Hamilton) (George W. Casey & James McClellan eds., 2001); see also Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 S. CT. ECON. REV. 115 (2004) (collecting sources concerning views of judicial power contemporaneous with the ratification of the Constitution).

judge is a basic prerequisite of due process.<sup>27</sup> In baseball, the umpire is reminded to be “impartial” in the official commentary to the game’s rules.<sup>28</sup> Neither litigation nor baseball would be the same without such fundamental impartiality.

When we say that an umpire is neutral or impartial, we mean that he or she does not have a bias concerning the outcome of a given play or game. The umpire should not care whether the runner is out or safe at first base or whether the Boston Red Sox or Tampa Bay Rays win the game. This, of course, is the same neutrality we demand of a judge. He or she should not care if the plaintiff or defendant wins a motion or a trial. And it is this similarity in the neutral positions of judges and umpires that has been cited as important by others relying on the analogy.<sup>29</sup>

Neutrality as described above provides only limited utility in constructing the proper role of a judge. This “do not fix the game” type of neutrality is simply so obvious that an analogy really is not necessary. Once one moves beyond this form of impartiality, I agree with other commentators that the analogy breaks down because judges will never be able to prevent their life experiences or even overall judicial philosophies from influencing their decisions.<sup>30</sup> This does not mean that judges are consciously biased. Rather, it indicates that there are influences in judging that effect outcomes beyond the nature of the “play.” Similar influences tend to be absent from umpiring.

---

27. See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in a trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”).

28. See MLB Rule 9 official cmt. (specifically reminding umpires of their obligation to be “impartial”).

29. See, e.g., Jackson, *supra* note 2 (noting that as with a judge one does not want an umpire who will “always support the home team. You want an umpire who calls them as he sees them.”); Ilya Somin, *Judge Jerry E. Smith and the Origins of the Judge-Umpire Analogy*, THE VOLOKH CONSPIRACY, Aug. 2, 2008, <http://volokh.com/posts/1217669631.shtml> (quoting Fifth Circuit Judge Jerry E. Smith as saying that “A judge should not consider his or her personal preferences as to outcome, any more than an umpire should call balls and strikes based on which team is his or her favorite.”); see also sources cited in note 14, *supra*.

30. See, e.g., Choi & Gulati, *supra* note 14, at 1280 (“The problem with the vision of the judge as baseball umpire is apparent if one talks to a skilled litigator. The litigator will tell you that a key element of preparing a case is figuring out a judge’s biases and playing to them.”); McKee, *supra* note 4, at 1712 (“The umpire metaphor obscures the reality of personal bias. Getting beyond that bias is extremely difficult even for the most introspective and sincere judge. I submit that we will never get beyond it if we do not allow for the certainty that each of us harbors some bias in some degree, and that our bias may be impacting a given decision in ways in which we are simply not aware.”). Of course, an umpire’s life experiences matter too because all human behavior is affected by who we are, where we have been, and what we have done. Yet, the umpire’s experience does not seem to compare qualitatively to a judge’s judicial philosophy.

Thus, comparing the sole element of neutrality has limited (if any) utility in our quest to better convey the role of the judiciary through the judges-as-umpires analogy. Stopping the analysis there, however, leads many in this debate to miss an important and related point of comparison: investment. For although an umpire is a neutral actor in his or her game, he or she still has an interest in ensuring that the game proceeds in accordance with the rules.<sup>31</sup> The same is true for a judge. While he or she should not care which litigant prevails, the judge has a vested interest in ensuring that the applicable rules are followed.<sup>32</sup> A judge is not indifferent to maintaining constitutional government. This conclusion does not tell one anything about the content of decision making, but it need not do so to be helpful for purposes unrelated to the substantive content of decisions.

*C. Both Umpires and Judges Rely on Adversary  
Contests to Trigger Their Power*

Umpires have tremendous power in the context of a baseball game.<sup>33</sup> One obvious and critically important aspect of this power is determining whether base runners are out or safe.<sup>34</sup> But that power lies fallow until there is an actual play between the opposing teams. Just imagine if there is no base runner and, before the pitcher even throws the ball, the second base umpire calls the batter out in a play at second base. That call is inappropriate not because the second base umpire lacks power in the abstract, but rather because the adversary contest that is a necessary precondition to the exercise of that power is absent.

There are strong similarities between this power-triggering aspect of an umpire's authority and that of a judge. A judge's authority is contingent on an actual adversary contest. Constitutional doctrines prohibiting advisory opinions<sup>35</sup> and requiring that litigants have standing<sup>36</sup> are concrete implementations of this principle. Indeed, the Chief Justice

---

31. See, e.g., MLB Rule 9.01(a) (directing that the umpire is to ensure that the game is played "in accordance with these official rules...").

32. The Chief Justice, in his confirmation hearings, recognized this as a valid basis of comparison between umpires and judges. See *Robert's Conf. Hearing*, *supra* note 1, at 55.

33. See, e.g., MLB Rule 9.01 (generally outlining the broad authority of umpires in a baseball game); *id.* 9.01(a)(1) (directing that the umpire-in-chief "take full charge of, and be responsible for, the proper conduct of the game").

34. See, e.g., *id.* 9.04(b)(1) (empowering umpires to make "all decisions on the bases except those specifically reserved to the umpire-in-chief").

35. For a general discussion of advisory opinions in federal court, see Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 53–60 (3d ed. 2006).

36. For a general discussion of standing doctrine in federal court, see *id.* at 60–102.

recognized the importance of such matters at his confirmation hearings even if he did not expressly tie them to umpiring.<sup>37</sup>

*D. The Importance of Position for Both Umpires and Judges*

Perhaps the most significant non-decisional similarity between umpires and judges is the importance of position as related to their substantive decisions. Specifically, the state of the rest of the “game,” in particular the positions of the other participants, provides the necessary context for the judgments of those charged with decision making authority.

Baseball provides a good example. In scenario number one, assume there are no base runners when the batter steps into the batter’s box. Given this setting, you will see that the second base umpire positions himself or herself in the shallow outfield. Why? Given the state of the game, the umpire is more likely to make a call in the outfield (e.g., determining whether a ball is caught or trapped) than anywhere else on the field of play.<sup>38</sup> Contrast scenario number one with scenario number two. Here, assume that in addition to the batter there is a runner on first base. In this scenario, the second base umpire positions himself or herself in the infield. The reason, of course, is that given the situation—critically, the physical position of the players—the umpire’s eyes are most needed for a play at second base.<sup>39</sup>

The point one can draw from these two baseball scenarios is *not* related (at least directly) to the substantive content of decision making. After all, an out is an out. Rather, they illustrate something useful about the context in which the decision is made. Other actors’ positions make an important difference in the setting in which the umpire’s decision is to be made.

This same basic insight is consistent with the application of judicial power. A judge employs his or her power differently depending on the narrowly defined context of the case, as well as the broader context in which the case is presented. Perhaps most obviously in the narrow sense, the decisions that are made are dictated by the parties and their litigation claims and defenses. More significantly, however, is the impact of

---

37. See *Roberts’s Conf. Hearing*, *supra* note 1, at 161 (statement of John Roberts) (“So the obligation to decide cases is the only basis for the authority to interpret the Constitution and laws. That means that judges should be careful in making sure that they have a real case in front of them, a real live dispute between parties who have actual injury involved, actual interests at stake, because that is the basis for their legitimacy.”).

38. See MANUAL FOR THE FOUR-MAN UMPIRE SYSTEM 1, available at [http://www.littleleague.org/Assets/forms\\_pubs/Umpires/FourManUmpireSystem.pdf](http://www.littleleague.org/Assets/forms_pubs/Umpires/FourManUmpireSystem.pdf).

39. *Id.* at 1–2.

position in the broader sense. In other words, the political context in which a case is presented matters a great deal.

Some concrete examples make the point. One can begin with a famous, or perhaps infamous, relatively recent Supreme Court decision: *Bush v. Gore*.<sup>40</sup> The decision concerned the disputed recount in Florida after the 2000 presidential election.<sup>41</sup> I will not argue here in favor of or against the controversial decision on the merits halting the recount. Rather, the point I wish to make is that the political context in which the case arose—the position of the players if you will—almost certainly made a difference both in terms of the Court's decision to hear the case<sup>42</sup> as well as the nature of the decision itself. At least as far as the Court appeared to be concerned, the political actors in our system were not capable of resolving the dispute—at least not in a sufficiently timely manner. The Court felt compelled to act given that context but also appeared concerned about the broader effects its decision might have. So, for example, the per curiam opinion's attempt to limit the precedential impact of the decision was a result of the position in which the Court found itself.<sup>43</sup> One can fault the Court's substantive decision while acknowledging the contextual reality that pushed the Court to at least attempt to limit the broader impact of its holding.

Another illustration of positional importance concerns cases in which courts are confronted with separation of powers questions. Specifically, when the Supreme Court is called upon to resolve a power-oriented dispute between the coordinate political branches, the position of the other players (here, the other branches) makes a world of difference. There is much that could be said about how a court should approach this issue substantively. Indeed, I have argued elsewhere that, in such situations, the courts should structure their decisions so as to most likely advance certain foundational constitutional values.<sup>44</sup> My

---

40. 531 U.S. 98 (2000) (per curiam).

41. *Id.* at 100–03. The Supreme Court ultimately halted the recount based on equal protection principles. *Id.* at 110.

42. One senses the weight of the moment in both the per curiam opinion and Chief Justice Rehnquist's concurrence. *See id.* at 111 (“None are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.”) (per curiam opinion); *id.* at 112 (“We deal here not with an ordinary election, but with an election for the President of the United States.”) (Rehnquist, C. J., concurring).

43. *Id.* at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

44. *See* Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 881–90 (2007).

limited point here goes instead to a non-decisional component of the matter. When a court faces serious separation of powers questions, the relative positions of the competing branches should inform the approach the court takes in the case. Thus, for example, if the political branches are controlled by different parties, a court's approach might be less "intrusive" than if there is unified political control.<sup>45</sup> The reason is that competing political parties might be seen as proxies to protect the institutional prerogatives of the branches of government.

Yet another possibility in which the political situation matters is where the legal or popular cultural landscape is such that the political actors are effectively incapable of acting. In such a situation, the position of other players in the system might suggest a more aggressive judicial role than situations in which the centers of political authority are oriented so that they are realistically capable of addressing the matter. An excellent illustration of such a situation is the actions of federal courts, particularly in the South, in the context of the civil rights movement.<sup>46</sup> As John Roberts noted at his confirmation hearings when discussing with approval the Supreme Court's landmark decision *Brown v. Board of Education*,<sup>47</sup> "the other branches and society were not addressing the problems of segregation in the schools. They were not just slow to act. They weren't acting."<sup>48</sup> In sum, the positions in which

---

45. See, e.g., Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2331, 2335–72 (2006) (arguing that the theory of separation of powers should be viewed differently depending on whether the political branches are controlled by the same political party).

46. A prime example of this point can be found in decisions in the area of the country covered by the United States Court of Appeals for the Fifth Circuit during the 1950s and 1960s. See, e.g., *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966) (upholding orders concerning faculty desegregation); *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963) (three-judge district court struck down Louisiana's use of certain voting tests on equal protection grounds); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) (three-judge district court struck down Montgomery, Alabama ordinance requiring segregation of city buses). For a relatively recent biography of one of these path-breaking southern federal judges, see Jack Bass, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* (Doubleday 1993). One could also cite some of the Supreme Court's decisions early in the so-called "war on terror" to illustrate the point. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (striking down military commission system at Guantanamo Bay, Cuba, as inconsistent with the Uniform Code of Military Justice); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that 28 U.S.C. § 2241 provided federal courts with jurisdiction to consider habeas corpus petitions filed by detainees at Guantanamo Bay, Cuba). Some would say that the political branches were not sufficiently willing to confront the separation of powers issues implicated by the indefinite detention of enemy combatants. See generally Allen, *supra* note 44, at 881–90 (discussing the role of courts in this context).

47. 347 U.S. 483 (1954).

48. *Roberts's Conf. Hearing*, *supra* note 1, at 178. The Chief Justice went on to note that the courts could not appropriately have reached out to address the situation without an actual case or controversy. See *id.* ("But that didn't mean courts should step in and act. But when the courts were presented with a case that presented the challenge, this segregation violates the Equal Protection

the political actors found themselves provided the context—indeed, perhaps the necessity—for the courts’ decisions in these civil rights matters,<sup>49</sup> much as the context of a baseball game provides the rubric within which umpires make their calls. This is the case even though the positions of the other relevant actors do not dictate the substantive content of the decisions to be made.<sup>50</sup>

*E. What the Non-Decisional Similarities Between  
Umpires and Judges Tell Us*

In and of themselves, the four non-decisional similarities between umpires and judges discussed above are not necessarily monumental. Collectively, however, they provide important context for considering the broader questions posed by this symposium concerning the proper role of the judiciary in American constitutional government.

In the aggregate, the non-decisional similarities remind us that judges are an integral part of the whole that is democracy in the United States. The “game” of American government, as the Constitution constructs it, would not be the same if the judiciary were eliminated. Judges are a part of the process as much as the political players. And while judges must be neutral if they are to play their pivotal role in the system as a whole, they cannot be seen as disinterested in the process itself. They have institutional values at stake, much as the political participants do.

Extending the analysis, it is also clear that the comparison to umpires illustrates that the considerable power judges hold is not properly viewed in the abstract. Rather, that power, both in terms of its *ability* to be used as well as the *manner* in which it is exercised, depends on the other players in the system. As to the ability to exercise judicial power, the necessity for an adversarial contest is an essential part of the overall process by which governmental power is balanced among different political centers of authority. Just as baseball would be almost unrecognizable if umpires could wield their unquestioned authority without an actual play, American government would simply not be the same

---

Clause, the courts did have an obligation to decide the case and resolve it, and in the course of doing that, of course, change the course of American history.”). This point goes to the requirement for an adversarial contest to trigger a court’s authority, which I have discussed above. *See supra* Part III.C.

49. Professor Siegel makes a similar point when discussing *Brown*. *See* N. Siegel, *supra* note 4, at 706 (“Whether a case calls for restraint or decisive action or something in between seems less a theoretical question and more a matter of tact, context, and judgment.”).

50. Professor Solum has made a similar point in discussing the roles of judges. *See* Solum, *supra* note 4, at 171 (“The application of rules to particular facts may require sensitivity to context and purpose, but that does not mean that there are no rules or that rules do not have constraining force.”).

without the limiting effect of requiring that an adversarial contest trigger judicial authority.

Perhaps most importantly is that the manner in which judicial power is exercised is dependent on the state of the game, including the positions of the other actors in the system. This aspect of a judge's role is just as important as requiring that some adversarial contest exist before a judge can use his or her power. Indeed, it may be more important because it is more subtle. The neutral judge, who is part of the game and has his or her power triggered, may apply that power quite differently depending on the situation. Thus, the same exercise of authority may be considered more or less legitimate depending on the situation in which it is brought to bear.

#### IV. DECISIONAL ASPECTS OF THE UMPIRE ANALOGY

The judges-as-umpires analogy is not usually invoked to debate the non-decisional similarities between judges and umpires. Without question, the far more common use of the analogy is to discuss the substantive content of decision making. In other words, as described above, the analogy is deployed most frequently to describe how judges should make decisions.<sup>51</sup>

Decisional comparisons between judges and umpires are powerful. When a judge acts, he or she almost by definition makes a decision. If an analogy accurately describes how those decisions are made, the analogy is highly significant. It is likely precisely because of the power of the analogy that it is so controversial. This part of the Essay suggests that there are similarities between the decisional roles of judges and umpires that could assist one in articulating the appropriate role of the judiciary in American government.

##### *A. The Umpire and Decisional Authority*

Let us begin by considering the umpire. An umpire is constrained by the rules of baseball; he or she is required to enforce those pre-existing rules.<sup>52</sup> Thus, the umpire has no discretion to ignore a rule based on his or her personal view of what the "correct" rule should be; an

---

51. *See supra* Part II.

52. *See* MLB Rule 9.01(b) ("Each umpire is the representative of the league and of professional baseball, and is authorized and required to enforce all of [the MLB] rules. . . ."); *see also id.* 9.05 official cmt. ("Do not allow criticism to keep you from studying out bad situations that may lead to protested games. *Carry your rule book.* It is better to consult the rules and hold up the game ten minutes to decide a knotty problem than to have a game thrown out on protest and replayed.") (emphasis added).

umpire simply cannot say that a player has walked with only three balls pitched outside the strike zone instead of four.<sup>53</sup>

But saying that the umpire is limited by the rules of the game is only the beginning of a description of his or her authority. At times, the rules themselves provide the umpire with explicit authority to make judgment calls.<sup>54</sup> And even when there is no explicit discretion granted to the umpire, there is no doubt that he or she is called upon—indeed, expected to—make myriad judgment calls during the course of a game. The rules define what is a strike<sup>55</sup> and what is a balk,<sup>56</sup> for example, but the implementation of these rules necessarily requires judgment.

Despite the detailed nature of baseball's official rules, there are situations in which the rules will not address a given situation that may occur in a game. When that occurs, what is an umpire to do? He or she cannot wait for a rule to be drafted which will then be enforceable. A call must be made and the umpire must make it. Take for example a situation posited in a blog-posting by Professor Howard Wasserman.<sup>57</sup> Assume that a batter hits a long fly ball into the deep outfield. The centerfielder almost catches the ball, but it pops out of his glove. If the ball lands on the field it would be in play.<sup>58</sup> If the ball makes it into the

---

53. See *id.* 2.00 (defining “base on balls” to be “an award of first base [which is] granted to a batter who, during his time at bat, receives four pitches outside the strike zone”); *id.* 6.08(a) (providing that “a batter becomes a runner and is entitled to first base” when “[f]our ‘balls’ have been called by the umpire”).

54. See, e.g., *id.* 6.06(d) (providing that a batter is out if “[h]e uses or attempts to use a bat that, in the umpire’s judgment, has been altered or tampered with in such a way to improve the distance factor or cause an unusual reaction on the baseball”); *id.* 7.06(b) (providing that an umpire “in his judgment” may impose penalties “to nullify [an] act of obstruction”); *id.* 7.09(f) (providing that it is interference “If, in the judgment of the umpire, a base runner willfully and deliberately interferes with a batted ball or a fielder in the act of fielding a batted ball with the obvious intent to break up a double play . . . .”); *id.* 7.09(h) (providing that it is interference if “In the judgment of the umpire, the base coach at third base, or first base, by touching or holding the runner, physically assists him in returning to or leaving third base or first base.”); *id.* 8.02(d) (providing certain penalties should the umpire “in his judgment” determine that a pitcher intentionally pitched a ball at a batter); *id.* 9.01(e) (providing the umpire with discretion to eject players and other participants or spectators from the game).

55. See *id.* 2.00 (defining the strike zone as “that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the kneecap”).

56. See *id.* 8.05 (defining 13 situations each of which constitutes a balk by the pitcher). MLB Rule 7.04(a) provides that when there is a balk each runner other than the batter may advance one base.

57. The situation discussed in the text is based on Professor Wasserman’s posting on Prawfsblawg in the summer of 2008. See Posting of Howard Wasserman to PRAWFSBLAWG, *Umpires, Judges, and Interpretation*, <http://prawfsblawg.blogs.com/prawfsblawg/2008/07/umpires-and-jud.html> (July 8, 2008 07:45 EST).

58. See MLB Rule 2.00 (defining a “fair ball” to include a batted ball that “while on or over fair territory touches the person of an umpire or a player”).

stands after hitting the player's glove and without touching the ground it would be a home run.<sup>59</sup> But what if the ball hits the player's glove and lands on the outfield wall, neither on the field nor in the stands? The rules of baseball do not address that situation, but an umpire would be required to rule on the matter.

In the situation posited above, the absence of a specific rule on the situation does not mean that an umpire is free to start from first principles and make a ruling based on his or her personal views of how baseball should be played. This is so even though the official rules of the game expressly provide that "[e]ach umpire has authority to rule on any point not specifically covered in these rules."<sup>60</sup> Instead, he or she must make a decision that is informed by the pre-existing rules, even if those rules do not address the specific matter at hand. In other words, the decision will not be dictated by the rules in the same way as the size of the strike zone (which is specified in the rules), but it will be influenced by the extant rules.

In the end, what we see by considering an umpire's decisional authority is that rules matter because they frame the game. When rules are clear, the umpire enforces them. At times, the rules themselves provide authority to the umpire to make a judgment call while at others such authority is implicit in the nature of the question (e.g., whether a pitch is a ball or strike).<sup>61</sup> And then there are those situations in which the rules do not provide an answer. Yet, even here the existing rules are a powerful influence on an umpire because they provide the broader context within which the specific decision is to be made. If that decision is fundamentally inconsistent with baseball, the game has been changed. Essentially, we trust the umpire to make a judgment consistent with the

---

59. See *id.* 6.09(h) (providing that if a fielder deflects a fly ball "into the stands or over the fence in fair territory, the batter shall be entitled to a home run").

60. *Id.* 9.01(c).

61. Discussion of the strike zone appears to be a common means of engaging with the umpire analogy. What one notices in these discussions is that there is often a misconceived notion that having discretion about whether a pitch is a ball or a strike means that the rule defining the strike zone has no constraining effect on the umpire. See, e.g., *Roberts's Conf. Hearing*, *supra* note 1, at 203 (statement of Sen. Herb Kohl) ("No two umpires . . . have the same strike zone . . . and ballplayers . . . understand that, depending upon who the umpire is . . . the game can be called entirely differently."); McKee, *supra* note 4, at 1724 ("I think it fair to say that the umpire metaphor would be more accurate if, rather than proclaiming that we merely call balls and strikes like an umpire, we recognize that the strike zone is actually defined by the umpire who is calling the balls and strikes."). Now-Vice President Biden came closest to accurately placing the strike zone in context when he served in the Senate during the Chief Justice's confirmation hearings. He indicated that umpires don't get to change the pre-existing strike zone and therefore would not be able "to say that was down around the ankles, you know, and I think it was a strike. They don't get to do that." *Roberts's Conf. Hearing*, *supra* note 1, at 185 (statement of Sen. Joe Biden). There is discretion, but it is constrained.

nature of the game itself. After all, as outlined above, umpires may be neutral but they are not disinterested.<sup>62</sup>

### *B. The Judge and Decisional Authority*

The similarities between the decisional authority of an umpire and a judge are remarkable in many respects, at least when viewed at a certain level of abstraction. Just like an umpire, a judge is constrained by rules, whether they are based in the common law, statutes and associated regulations, or the Constitution. This does not mean that one must be a rigid formalist in terms of judicial philosophy.<sup>63</sup> Where a rule provides a clear answer to a question presented, we expect that a judge will apply the pre-existing rule. For example, the Constitution mandates that a person must have “attained to the Age of thirty five years” in order to be eligible to serve as President.<sup>64</sup> Assuming a justiciable controversy arose concerning this constitutional rule, we would expect a judge to apply it as written and not “interpret” the provision in a manner at odds with the straightforward meaning of the document.

Of course, anyone who has gone to law school (or probably even read about judicial decisions in a newspaper) understands that the overwhelming majority of questions judges address are not as clear-cut as the one concerning a thirty-year-old person’s eligibility to serve as President of the United States. Some of these less clear-cut situations are akin to those in baseball in which the umpire is given express or has implicit discretion to exercise judgment.<sup>65</sup> The more interesting comparison, however, concerns the judicial equivalent of the ball coming to rest on the outfield fence. How does a judge’s role compare to that of an umpire in a situation that is not covered by the applicable rule, whether it is based in the common law, statutes, or constitutions?

---

62. See *supra* Part III.B.

63. Much of the academic commentary has discussed the analogy as it relates to formalism in legal reasoning. See, e.g., Posner, *supra* note 4, at 1051; C. Roberts, *supra* note 4, at 618; N. Siegel, *supra* note 4, at 701–02; Solum, *supra* note 4, at 165–66. This is not surprising given the manner in which the analogy was discussed at the Chief Justice’s confirmation hearings. See *supra* Part II. As this Part of the Essay explains, however, the analogy need not be restricted to pure formalist reasoning.

64. U.S. CONST. art II, § 1, cl. 5.

65. For example, there are legal rules that provide express discretion to judges. See, e.g., 28 U.S.C. § 1292(b) (2000) (providing explicit discretion to circuit courts of appeals to permit certain interlocutory appeals). There are also rules in which the exercise of judicial discretion is necessarily implicit. Many of the Federal Rules of Evidence operate on this principle. See, e.g., FED. R. EVID. 402 (authorizing admissions of relevant evidence as defined by Rule 401); *id.* 403 (authorizing exclusion of relevant evidence on grounds such as prejudice and confusion). Judge Posner has written about a concept similar to such implied discretion in which judges make decisions in a “zone of reasonableness.” See Posner, *supra* note 4, at 1065–66.

A judge does essentially what an umpire does when confronted with a situation not contemplated by the relevant set of rules. By necessity, the way in which a judge approaches such a situation will vary depending on the source of the rule relevant to the given situation. But what is common to the judge's approach is that, like an umpire, his or her decision is not based on personal preferences. Instead, the judge seeks to ground his or her ruling within the broader structure of the "game"—American democracy. For example, it is a common principle that when faced with an open question in the context of a statute, the judge will rule in such a way that advances the intent of the legislature that enacted the law at issue.<sup>66</sup>

The situation may appear to be more complicated when the issue concerns constitutional interpretation. Whether it is in fact more complicated might be debated. What is not debatable is that the need to make decisions not dictated by the language of the governing rule arises with great frequency when dealing with the Constitution and its highly open-textured provisions.<sup>67</sup> At its heart, however, the judge approaches this situation in the same general manner as does the umpire when confronted with a matter not addressed in the rules: he or she bases decisions on the nature of the American democratic structure.

The similarities between umpires and judges in approaching questions left open by pre-existing rules are clear. There is no question that saying a judge should use the structure of American democracy as a constitutional guide leaves many specifics unaddressed. For example, was the Supreme Court majority in *Boumediene v. Bush*<sup>68</sup> correct that the Constitution's Suspension Clause<sup>69</sup> applies in the context of non-citizens detained at Guantanamo Bay, Cuba, even though the historical record did not show that the writ of habeas corpus had been available to such persons in the past?<sup>70</sup> Or, on the other hand, was Justice Scalia correct in his dissent that the absence of historical support for the extension of the Great Writ to such situations decided the question against those seeking the writ's protection?<sup>71</sup>

---

66. See generally 73 AM. JUR. 2D *Statutes* § 61 (2008) (discussing legislative intent as stated key to interpreting statutes).

67. One need only consult the constitutional text itself to recognize that many questions are not addressed by the words of the document alone. For example, what is an "unreasonable search," U.S. CONST. amend. IV, or a "cruel and unusual punishment," U.S. CONST. amend. VIII, to cite just two constitutional provisions?

68. 128 S. Ct. 2229 (2008).

69. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.").

70. See *Boumediene*, 128 S. Ct. at 2248–51.

71. *Id.* at 2297.

The fact is that the umpire analogy does *not* answer the question of whether the *Boumediene* majority's approach was correct or whether Justice Scalia should have carried the day. But this acknowledgment does not undermine the utility of the analogy, for criticism of the analogy on this ground conflates different questions. The first, and the one for which the analogy is potentially useful, concerns the general rubric that should be used to "fill in gaps" in pre-existing rules. The judge (and umpire) should use the larger structure of the game, be it democracy or baseball, as a guide. The second question, the one the analogy does not reach, concerns the interpretative tool or tools the judge (and umpire) is to use to determine what is consistent with that larger structure.

The analogy need not answer every question to be successful. It is useful because it tells us something about how the judge should orient his or her thinking. It is true that saying that a ruling should take into account the nature of the game leaves questions unanswered. But this simply means that the analogy is not all-encompassing. When we say that an umpire should make decisions with an eye toward the nature of baseball, we do not say anything about how he or she should make that determination. Whether the umpire considers the views of Abner Doubleday or other early fathers of the game<sup>72</sup> as controlling or instead considers how the game has developed over time is the next level of the analysis. The same is true in constitutional interpretation when one considers whether the views of the Framers are dispositive or whether the changing nature of American culture makes any difference at all. The fact is that one can accept the analogy's applicability to the first generic question without fear that it falls apart because it does not address, for example, whether original public meaning is the guiding principle of constitutional interpretation.<sup>73</sup>

---

72. Abner Doubleday is popularly credited with inventing baseball, but in fact Alexander Jay Cartwright appears to be responsible for what we understand the game to be today. See, e.g., Sean Lahman, *A Brief History of Baseball: Part I: Origins of the Game*, available at <http://www.baseball1.com/bb-data/e-hist-1.html> (discussing early history of modern baseball); see also JULES TYGIEL, *PAST TIME: BASEBALL AS HISTORY* 3–14 (Oxford Univ. Press 2001).

73. In a recent decision, the Supreme Court described the original public meaning approach to constitutional interpretation as focused on what the ratifiers of a particular constitutional provision would have understood the words of the document to mean. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) ("In interpreting this [Constitutional] text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.") (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) (other citations omitted)). Justice Scalia's majority opinion in *Heller* was consistent with his earlier work advocating an original public meaning approach to constitutional interpretation. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998). A significant competing view can be seen in Justice Stephen Breyer's articulation of a more

V. THE UMPIRE ANALOGY IN CONTEXT:  
A TENTATIVE, CAUTIOUS CONCLUSION

Let us return to where we began: What should be the role of the judiciary in American democracy today? This fundamental question has generated wide-ranging discussion almost since the Constitution was ratified. Perhaps there is no single theory that can adequately capture the role of the judge in democratic government. Yet, it is possible, I think, to suggest some broad parameters within which a judge should perform his or her function. The umpire analogy can assist us in that endeavor.

As explained above, the analogy can be used to explain both decisional and non-decisional aspects of the judiciary's role.<sup>74</sup> Fundamentally, the analogy underscores four important points about the role of judges: First, judges are as much a part of our system of government as are the more explicitly political actors. Their power is triggered only in limited circumstances—when there is an adversarial contest—but when such a situation is presented, judges are not mere appendages or bystanders. Second, the way in which judges should approach a given problem should vary depending on the particular positions of the other actors in American democracy, including the other coordinate branches of the federal government, the States, and the People. Third, judges must be neutral, but we should not expect them to be disinterested. To the contrary, we should expect them to have a vested interest in preserving our system of constitutional government. And finally, where pre-existing rules do not provide a clear answer, judges should be guided by the overall structure of the system in which they operate.

It may be true that one need not use an analogy to establish these principles concerning the proper role of the judiciary. But that criticism can be made with respect to all analogies; they are never necessary to make a point. Rather, analogies are useful because they help translate a concept that may be difficult to grasp into a conceptual framework that is more accessible. Many Americans—perhaps most Americans—do not confront the profound issues of the judiciary's role in democratic government on a regular basis. Invoking baseball, often referred to as America's favorite pastime,<sup>75</sup> might be a way to send a message in a way that more people will understand. After all, baseball is a part of popular

---

flexible form of constitutional interpretation taking into account a number of variables. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (Vintage 2005).

74. See *supra* Parts III–IV.

75. See TYGIEL, *supra* note 72.

culture in many respects, including pop-art,<sup>76</sup> music,<sup>77</sup> and poetry,<sup>78</sup> to name but a few avenues of expression.<sup>79</sup> Indeed, as then-Senator Biden recognized, John Roberts's use of the analogy at his confirmation hearings most certainly played to this populist theme.<sup>80</sup>

I fully recognize that there are dangers associated with comparing judges to umpires. As Professor Gerhardt colorfully put it: "How could anyone disagree with [John Roberts] and not sound like a nut?"<sup>81</sup> Since at some level analogies can only have meaning in the eye of the beholder, there will be a risk that comparing umpires and judges could lead to a minimization of the judiciary's role. It could be that the analogy is taken (or employed) to demean the institution instead of proclaiming its important role in government. However, the need to explain why judges are important in our system of government is critical enough (at least for me) to take the risks associated with using the analogy. The Essay explains how this can be done and, in this way, contributes something to a broader theory of the role of the judiciary.

In the end, it seems that we are still engaged in the same basic enterprise with which John Marshall and the other members of the Court were concerned over two hundred years ago when they struggled to define the role of the Article III judiciary under the newly ratified Constitution. It is as true today as it was in 1803 that it is "emphatically the province and duty of the judicial department to say what the law is."<sup>82</sup> But this statement is only the beginning, as it was in many respects for the Marshall Court. It is merely a piece of the much larger puzzle that is American constitutional government. Perhaps we will always be working on that puzzle. It is a worthwhile endeavor so that we can live up to President Abraham Lincoln's exhortation on the battlefield at

---

76. A famous example is the Norman Rockwell print showing three umpires standing as the rain begin begins to fall. Norman Rockwell, *Bottom of the Sixth*, available at <http://www.rockwellprints.com/prints/bottomsixth.htm>.

77. See, e.g., JOHN FOGERTY, *Centerfield*, on CENTERFIELD (Warner Bros. 1985).

78. See, e.g., ERNEST LAWRENCE THAYER, *CASEY AT THE BAT* (A.C. McClurg & Co., Caslon Press 1912) (1888).

79. The American obsession with baseball is also evidenced by Justice Harry Blackmun's famous—or infamous—ode to the great players of the game in *Flood v. Kuhn*, 407 U.S. 258, 260–64 (1972). Some of the internal anxiety at the Supreme Court concerning Justice Blackmun's decision to write about the game itself in this antitrust case is described in a book detailing life at the Court in the early 1970s. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 223–26 (Simon & Schuster 1979).

80. See *Roberts's Conf. Hearing*, *supra* note 1, at 185 (statement of Sen. Joe Biden) (describing popular reaction to the umpire analogy). The same point was also made by Senator Lindsey Graham. See *id.* at 256 (statement of Sen. Lindsey Graham) (describing the analogy to baseball as one that "[a]verage people could understand.").

81. Gerhardt, *supra* note 4, at 24.

82. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Gettysburg that “government of the people, by the people, for the people, shall not perish from the earth.”<sup>83</sup>

---

83. President Abraham Lincoln, Address at Soldiers' National Cemetery in Gettysburg, Penn.: Gettysburg Address (Nov. 19, 1863), *available at* <http://www.bartleby.com/43/36.html>.