With the Senate about to begin hearings on the nomination of Sonia Sotomayor to the Supreme Court and major league baseball at the all-star break, thoughts turn naturally to the intersection of America's Court and America's pastime. That intersection, of course, lies at the question of whether the judge should play the same role in the administration of justice as the umpire does in the administration of baseball.

At his confirmation hearing in 2005, now-Chief Justice John Roberts famously said that judges should be umpires, applying the rules rather than making them. The analogy was not original to Roberts. It had been used by Sen. Orrin Hatch in 2002. Now it seems to be the weapon of choice against Sotomayor, as some Republicans question her ability to decide cases impartially.

The analogy between umpires and judges rings false to me. In one respect, it's accurate but not helpful. Judges, like umpires are supposed not to have a bias in favor of one or the other of the contending parties. Fair enough, but that was obvious without any analogy. Everyone (including the current Supreme Court) already knows that judges must not have, or even appear to have, a direct interest in the outcome of the cases they hear just as umpires (or basketball referees) cannot profit from the games they officiate.

But that's not the point that Roberts or Hatch intended to make. They intended to say that judges, like umpires, should be objective agents of the rule-makers, implementing policy decisions others have made. Anything else, according to the conventional Republican wisdom, is "activist" and improper.

That argument, it turns out, is wrong from both directions. Bruce Weber, the author of a book on umpires, has a great piece in the NY Times explaining why it's not an accurate view of the task of umpiring. Umpires have, and understand themselves to have, more discretion than the average baseball viewer might think in interpreting the rules. One umpire Weber interviewed described the strike zone as "like the Constitution . . . a living, breathing document," a description that presumably would not please Roberts or Hatch.

From the judicial direction, the analogy is even further off base (so to speak).

First, the rules judges must implement can be anything but clear. The text of the strike zone rule at least is textually unambiguous, although the principles that motivate it are obscure. The text of many statutes and constitutional provisions is far less easy to make sense of, particularly when (as is often the case in litigation) the specific issue in contention was far from the forefront of legislative attention. Consider, for example, one of the environmental law questions that has bedeviled the Court for years — the scope of federal jurisdiction

under the Clean Water Act (Sean blogged about the current status of this debate here). The Act requires a permit for the discharge of pollutants to "navigable waters," which it defines as "waters of the United States." Does that include wetlands? The Court (and EPA and the Corps of Engineers) agree that it does, even though those may not be obviously "waters" rather than "lands." But exactly which wetlands and waters are covered depends very much on who is doing the reading — the Court divided 4-4-1 when it addressed that issue in *Rapanos*.

Adding to the complexity, and the need for judgment rather than mechanical application of some objective formula, there are many overlapping rules, and it can be hard to tell either whether they conflict or if they do which ought to prevail. Another environmental case, 2007's National Association of Homebuilders v. Defenders of Wildlife is a perfect example. Five justices thought that the Clean Water Act's directive to EPA to transfer authority over Clean Water Act permits to states that meet certain basic requirements, trumped the Endangered Species Act's call for federal agencies to consult with the Fish and Wildlife Service before taking actions that may adversely affect listed species. Four disagreed; they saw no conflict, but thought if there was one the ESA should prevail.

It seems obvious that both personal experiences and political viewpoints necessarily inform the way justices, liberal or conservative, interpret legislative commands in these sorts of difficult cases, which of course are the cases most likely to get to reach the Supreme Court. In *Rapanos*, for example, Justice Kennedy's western roots undoubtedly helped him understand the importance of ephemeral streams; Justice Scalia's suspicion of government regulation was clearly important to his view that the scope of federal authority ought to be limited. Umpires don't face any comparable demands (luckily for them, since unlike the justices they have to make their decisions in split seconds with only one look at the play).

Second, while umpires do not make the rules of baseball, in the Anglo-American tradition judges are actually supposed to make some of the rules. Before the advent of statutes, judges were the only rule-makers, and the law evolved with their decisions. Today, most of the rules are indeed made by legislatures, but not all, and for very good reason. Legislatures are slow to act, with high activation energy, and they do not have the capacity (or interest) to address every individual conflict. Judge-made doctrines survive, and several remain important in environmental law.

One is the law of nuisance, at issue in *Connecticut v. American Electric Power*, the long-delayed decision from a 2d Circuit panel including Judge Sotomayor, which Jonathan blogged about here. Legislatures can and do get involved in the development of nuisance law, declaring directly or indirectly that some activities are or are not nuisances, but in the

face of legislative silence courts continue to make those determinations, applying some very general principles that themselves were developed by courts rather than legislatures to the new facts and new social conditions of the day.

Another example of judicial rule-making, one which conservatives ought to consider carefully before they condemn the whole process, is the law of standing. Article III of the federal constitution says that the judicial power of the United States shall extend to a list of "cases" and "controversies." It does not mention "standing," nor does it explicitly say anything about who can invoke that judicial power or under what circumstances. From that scant textual base, the Supreme Court has developed a complex jurisprudence of standing. Far from being subservient to congressional rule-makers, that jurisprudence can keep people out of court even when Congress has broadly authorized citizen suits.

The mythic umpire calling balls and strikes objectively as written in the rule book is the wrong model for a judge. Judges have a much more difficult task, which involves deciphering rules that are written with a sometimes stunning lack of clarity, harmonizing or prioritizing conflicting rules, and legitimately revising, extending and reconsidering judge-made rules to accomodate new facts and new societal interests. The right person in that role is not the typical baseball umpire, who insists on unquestioned authority, gets to throw those who disagree out of the game, and has no obligation to explain decisions. Instead, we should want justices who forthrightly acknowledge the difficulty of the decisions they must make, recognize that views can legitimately differ, are willing to articulate the principles which motivate their decision, and understand both the need for continuity in the law and the need for change when the law no longer fits the problems it must address. Simplistic analogies to baseball may make good sound bites, but they aren't likely to produce good justices.