

THE ROLE OF THE FEDERAL JUDGE UNDER THE CONSTITUTION: SOME PERSPECTIVES FROM THE NINTH CIRCUIT

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When considering the role of the federal judge under the Constitution, we should begin with the text of the Constitution itself.

I. THE NATURE OF THE JUDICIAL POWER

Article III, Section 1 provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹ The text of the Constitution contains few other references to the “judicial Power.” The term appears again in Article III, Section 2, which provides that “[t]he judicial Power shall extend to” particular “Cases” and “Controversies,”² and in the Eleventh Amendment, which recognizes certain limits on the “judicial Power” because of sovereign immunity.³ But that is all. The Constitution nowhere says what the “judicial Power” entails, or explains how it should be exercised.

Given the Constitution’s brief treatment of the subject, one might infer that the Framers meant to leave the nature of the “judicial Power” “relatively open-ended.”⁴ Such an inference

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1. U.S. CONST. art. III, § 1.

2. U.S. CONST art. III, § 2.

3. U.S. CONST amend. XI.

4. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 321 (2008).

would be wrong. The “judicial Power” was not a term coined by the new Constitution, but rather one quite familiar to the founding generation. As Philip Hamburger explains in his recent book, *Law and Judicial Duty*, the “judicial Power” was originally understood to mean essentially what it had meant in England: the power of courts to decide cases “in accord with the law of the land.”⁵ That the “judicial Power” was left largely undefined in the new Constitution merely reflected that its meaning was already widely accepted and understood.⁶

The traditional conception of the “judicial Power” embodied important ideals. Because judges were to decide cases according to the law, they were not free to decide cases according to their personal values or individual notions of justice. The law alone was to supply the basis for decision, and it was the duty of judges to discover the preexisting rules contained therein. In *Federalist* No. 78, Alexander Hamilton defended the proposed Constitution on this very ground—that an independent judiciary would help ensure that “*nothing* would be consulted [in the courts] *but* the constitution and the laws.”⁷ Of course, because judges would be applying the law, they would not be making it; the Framers wisely placed the power to make the laws in the political branches, which, unlike the judiciary, are directly accountable to the people.

The Framers thus envisioned that the “judicial Power” would be exercised in a neutral fashion. Precisely because judges would be, in the words of Hamilton, “bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them,” there would be no “arbitrary discretion in the courts.”⁸ Ideally, whether a party prevailed would depend not on the whims of any particular judge, but on the content of the applicable law. In that sense, as Hamilton famously put it, the judiciary was to exercise “neither Force nor Will, but merely judgment.”⁹

Chief Justice Roberts recently sought to capture the Framers’ ideal of judging at his confirmation hearing by comparing

5. *Id.* at 17.

6. *See id.* at 615.

7. THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

8. *Id.*

9. *Id.* at 523.

judges to baseball umpires. He said that “[u]mpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role.”¹⁰ Chief Justice Roberts also said that, if confirmed, he would “remember that it’s [his] job to call balls and strikes, and not to pitch or bat.”¹¹

Although the baseball analogy is a good one, there might be a better sports model for the Framers’ ideal. A judge may be even more like a football referee than a baseball umpire.¹² The baseball analogy may imply too much rulemaking discretion on the part of the judge. It is largely accepted that baseball umpires may define their own strike zones.¹³ One umpire might have a strike zone higher or lower than that of another, forcing pitchers and batters to adjust accordingly. Judges do not enjoy a similar power to remake the rules; judges must take the rules as given, however they are expressed in the law. In this respect, judges are more like football referees, who lack discretion, for example, to alter the length of the end zone.

Judges are more like football referees in another respect. In baseball, a pitch either passes through the strike zone or does not, a runner either avoids a tag or does not, and a ball either lands in foul territory or does not. Football, by contrast, is more often a matter of degree. There might be some contact between the cornerback and the wide receiver, but not enough to constitute pass interference. Or there might be some tugging and grabbing between an offensive lineman and his defensive counterpart, but not enough to qualify as holding. Similarly, in the law, there might be some indicia of government coercion, but not enough to render a confession involuntary.¹⁴ There

10. *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) (statement of John G. Roberts, Jr.).

11. *Id.* at 56.

12. The comparison of judges to football referees is nothing new. See Chad M. Oldfather & Matthew M. Fernholz, *Comparative Procedure on a Sunday Afternoon: Instant Replay in the NFL as a Process of Appellate Review*, 43 *IND. L. REV.* 45, 45–47 (2009).

13. See Alan Schwarz, *Ball-Strike Monitor May Reopen Wounds*, *N.Y. TIMES*, Apr. 1, 2009, at B16 (“[T]he functional size of the strike zone . . . often varies from umpire to umpire, despite the rulebook definition.”).

14. See, e.g., *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir. 1986) (“[I]t is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect.”).

might be some evidence that an employer fired an employee for a discriminatory reason, but not enough to survive a motion for summary judgment.¹⁵ The calls that a football referee must make more closely mirror the judgments that a judge must render.

Putting all sports analogies aside, however, I am in full agreement with the Chief Justice's views on judging. It appears we both embrace the traditional ideal of the "judicial Power" — that of judges deciding cases in accord with the law. For much of our nation's history, that traditional ideal remained the dominant conception of judging. But in the 1920s and 1930s, scholars began questioning whether achieving the ideal was possible, let alone desirable.¹⁶ Legal realists, as they came to be known, purported to "look[] beyond ideals and appearances for what [was] 'really going on.'"¹⁷ They argued that judges do not in fact decide cases in accord with the law—not because judges are wilful or incompetent, but because the law itself is radically indeterminate.¹⁸ According to the realists, conventional legal materials—such as text, history, and precedent—are too ambiguous or conflicting to yield a single right answer in a given case. Thus, the realists argued, judges cannot be trusted when they say the law dictates a particular result: Whether judges realize it or not, their decisions rest on considerations outside the law—be it their own values, their own biases, or their own views of justice.¹⁹ Because resort to such extralegal considera-

15. See, e.g., *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 664 (9th Cir. 2002) (affirming summary judgment in favor of the employer on an employee's racial discrimination claim under Title VII, on the ground that the employee had not presented sufficient evidence that the employer's stated nondiscriminatory reason for laying off the employee was pretextual). See generally FED. R. CIV. P. 56(c) ("[Summary judgment] should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

16. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 169–92 (1992) (describing the rise of legal realism).

17. BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 190 (5th ed. 2009).

18. See *id.* at 196.

19. See *id.* at 190, 193, 196.

tions is unavoidable, the realists concluded, it is impossible for judicial decision making to be either neutral or objective.²⁰

Having supposedly debunked the traditional ideal of judging, the realists opened the door for new theories of adjudication to take its place. The 1940s and 1950s witnessed the rise of the legal process school.²¹ Like the realists, legal process theorists had lost faith in the determinacy of the law.²² But they went beyond the realists by developing a new approach to deciding cases in the face of legal indeterminacy. Particularly influential in this respect were the teachings of Professors Henry Hart and Albert Sacks at the Harvard Law School when I was a student there during the 1960s.²³ Hart and Sacks built their theory on the premise that every law has a purpose—a purpose, that is, to address some societal need.²⁴ It is the task of the judge, Hart and Sacks argued, to ensure that those purposes are carried out.²⁵ Hart and Sacks urged judges to think of themselves as the legislature’s partners in lawmaking, continuing the process of the law’s “reasoned elaboration.”²⁶ Hart and Sacks even recommended that judges keep a proper mindset by imagining themselves “in the position of the legisla-

20. See *id.* at 193.

21. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 570–73 (3d ed. 2001); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 *GEO. WASH. L. REV.* 1731, 1738–43 (1993) [hereinafter Eskridge, *Statutory Interpretation*].

22. See HORWITZ, *supra* note 16, at 254 (“The legal process school sought to absorb and temper the insights of Legal Realism after the triumph of the New Deal. Its most important concession to Realism was in its recognition that doctrinal formalism was incapable of eliminating discretion in the law.”); Eskridge, *Statutory Interpretation*, *supra* note 21, at 1739 (“The new generation of scholars and judges accepted the realist argument that unelected officials *do* engage in lawmaking . . .”).

23. See HORWITZ, *supra* note 16, at 254 (“The most influential and widely used text in American law schools during the 1950s was *The Legal Process* by Henry Hart and Albert M. Sacks.”).

24. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living It can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or to agree exactly how it should be phrased.”).

25. *Id.* at 1374.

26. *Id.* at 146.

ture . . . pursuing reasonable purposes reasonably.”²⁷ In short, Hart and Sacks remade the conception of the judicial role: Whereas before, the judge was expected to exercise neither force nor will, now he was encouraged to exercise will in pursuit of reasonable purposes.²⁸

Since the mid-twentieth century, the Hart and Sacks approach has evolved into an even more freewheeling theory of judging. Hart and Sacks at least acknowledged that the legislature had a *primary* role in lawmaking.²⁹ Some of my colleagues on the federal bench today may not acknowledge even that proposition. One of my fellow judges was once told, “[Y]ou’re not a judge. You’re a social worker.”³⁰ Rather than deny the label, my colleague embraced it. “I guess I believe that all judges should be social workers,” he said.³¹ The same judge stated at his confirmation hearing that if he found that the law offended his conscience as a judge, he would “try and find a way to follow [his] conscience and do what [he] perceived to be right and just.”³² Another colleague of mine has expressed similar views on the judicial role, saying that the “guiding principle of the judicial branch” should be “concern for social justice and individual rights.”³³ He has also advocated what he calls “a par-

27. *Id.* at 1378; see also STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 88 (2005) (“At the heart of a purpose-based approach stands the ‘reasonable member of Congress’—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem. The judge will ask how this person (real or fictional), aware of the statute’s language, structure, and general objectives (actually or hypothetically), *would have wanted* a court to interpret the statute in light of present circumstances in the particular case.”); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 624 (1949) (“Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose.”).

28. See HART & SACKS, *supra* note 24, at 1379 (“What is crucial here is the realization that law is being made, and that law is not supposed to be irrational.”).

29. See *id.* at 1374 (reminding judges to “[r]espect the position of the legislature as the chief policy-determining agency of the society”).

30. Linda Deutsch, *Federal Judge Finds Way To House the Homeless*, KINGMAN DAILY MINER, Apr. 16, 2000, at 12B (quoting Judge Harry Pregerson).

31. *Id.* (quoting Judge Harry Pregerson).

32. Hugh Hewitt, *The Law’s Conscience*, WEEKLYSTANDARD.COM, Sept. 19, 2003, <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/130tript.asp> (quoting Judge Harry Pregerson).

33. How Appealing, <http://howappealing.law.com> (Feb. 2, 2004, 00:00 EST) (quoting Judge Stephen Reinhardt).

ticular philosophy of law . . . infused by concepts like ‘rights’ and ‘social justice.’”³⁴

Such views misconceive the “judicial Power” and the proper role of the judge. If the law protects certain rights, then of course judges have a duty to uphold those rights. And if the law embraces a particular vision of social justice, then of course judges must uphold that vision—but as embodied in the law. Yet what some legal theorists seem to be suggesting is that unelected judges should enforce a particular conception of individual rights and social justice *regardless* of whether that conception finds expression in the law. Rather than have judges decide cases according to rules and concepts within the law, they would have judges decide cases according to norms and values outside it. And rather than have judges act as neutral umpires or referees, they would have judges behave as ideological partisans on behalf of the causes they deem right and just. A social worker, after all, is someone who provides support services to those in urgent need. I have the highest respect for social work, and I am proud that a daughter of mine is a highly regarded member of that profession. But we each have our separate roles to play.

In many ways, this revisionist conception of the judge as social worker represents the natural fulfillment of the movement the legal realists began a century ago. The realists criticized the traditional ideal of the judicial role as unattainable because the law was radically indeterminate. Legal process theorists embraced that criticism and urged judges to decide cases by picturing themselves in the legislature, pursuing reasonable purposes reasonably. Today, some of my colleagues have done away with even the pretense of imagining what the legislature would do. Their ideal of judging is loftier. In their conception of the judicial role, judges should imagine themselves as moral guardians, imposing from above their own notions (albeit sincere and deeply held) of what is right and just.

II. THREE CORE JUDICIAL DOCTRINES

I have thus far described the competing understandings of the role of the federal judiciary in the abstract. The following

34. *Id.*

Part explores in more concrete terms just what is at stake in the choice between the traditional and revisionist conceptions.

There have been many cases from my experience as a Ninth Circuit judge that highlight the difference between the two conceptions. There was, for example, *Washington v. Glucksberg*, in which a majority of the Ninth Circuit sitting en banc invoked the doctrine of substantive due process to strike down as unconstitutional a state ban on physician-assisted suicide as applied to terminally ill adults.³⁵ More recently, there was *Parents Involved in Community Schools v. Seattle School District No. 1*, in which the Ninth Circuit, again sitting en banc, held that the use of a racial tiebreaker to assign students to schools did not offend the Equal Protection Clause of the Fourteenth Amendment.³⁶ In both cases, the reasoning of the majority did not follow a strictly legal path, and was therefore inconsistent with the judicial role as originally and properly understood.³⁷ In both cases, the Supreme Court reversed—*Glucksberg* by a unanimous vote,³⁸ *Parents Involved* by a 5-4 vote³⁹—lending support to the belief that my court's decisions were premised on an improper conception of the judicial role.

Glucksberg, *Parents Involved*, and other cases involving important questions of constitutional interpretation could occupy an extended discussion. But given the attention those cases have already received in both the media and the academy, the remainder of this Part will focus on “technical” legal rules—rules relating to three core judicial doctrines: standing, jurisdiction, and standard of review. In cases involving such rules, the contrast between the traditional and revisionist conceptions is often sharpest, because all that stands in the way of reaching the “right” or “just” result is a mere legal “technicality.” Cases involving technical legal rules test a judge's commitment to deciding in accord with the law, for the temptation in such cases is to

35. *Compassion in Dying v. Washington*, 79 F.3d 790, 793–94 (9th Cir. 1996) (en banc), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

36. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166, 1192–93 (9th Cir. 2005) (en banc), *rev'd*, 551 U.S. 701 (2007).

37. See *Compassion in Dying*, 85 F.3d at 1442–43 (O'Scannlain, J., dissenting from order rejecting request for rehearing en banc by the full court).

38. *Glucksberg*, 521 U.S. at 704.

39. *Parents Involved*, 551 U.S. at 707.

favor the interests of “justice” over the legal rules themselves. Therein lies one of the greatest threats to the Framers’ ideal.

And this is where the football analogy really comes into play. Because the discussion will involve technical legal rules with which non-lawyers may be unfamiliar, it might be helpful to frame the rules in terms of their closest analogues in the National Football League. The NFL has a sophisticated process of instant replay video review similar to our legal system, and football referees face many of the same procedural and technical issues of the sort confronted by federal judges. The comparisons can be most revealing.

A. *Standing*

Let us begin with the doctrine of standing—the doctrine that not just anyone with an agenda can invoke the judicial power of the federal courts. Just as the NFL rulebook defines who may challenge a ruling on the field, the Constitution defines who may bring a lawsuit in federal court. In the NFL, the procedures for instant replay review vary depending on how much time is left on the clock.⁴⁰ Before the last two minutes of each half, only a team’s head coach may initiate an instant replay request.⁴¹ Players may not initiate challenges, even if they believe one is appropriate. Fans and sportscasters may not initiate challenges either. It goes without saying, moreover, that a head coach’s challenge must pertain to an actual, specific play in a live contest involving the coach’s team.

Similar rules exist in the Constitution. “In limiting the judicial power to ‘Cases’ and ‘Controversies,’” the Supreme Court has said, “Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law.”⁴² This “fundamental limitation” is reflected primarily in the doctrine of standing, which “requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdic-

40. OFFICIAL RULES OF THE NFL, R.15, § 9 (2009).

41. *Id.*

42. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009).

tion.”⁴³ To establish standing, a plaintiff must show, among other things, that “he is under threat of suffering ‘injury in fact’ that is concrete and particularized,” as well as “actual and imminent.”⁴⁴ This requirement should not be taken lightly.

A panel of the Ninth Circuit recently learned that lesson the hard way. The question presented in *Summers v. Earth Island Institute* was whether a group of environmental organizations had standing to challenge regulations issued by the United States Forest Service. In 1992, Congress enacted a statute requiring the Forest Service to subject proposed actions “concerning projects and activities implementing land and resource management plans” to a process of notice, comment, and appeal involving the public.⁴⁵ The Forest Service later issued regulations exempting certain small-scale projects from the notice, comment, and appeal process.⁴⁶ One of the exempted projects was the Burnt Ridge Project, which approved the sale of timber on 238 acres of the Sequoia National Forest that had been damaged by fire in the summer of 2002.⁴⁷

The Earth Island Institute, the Sierra Club, and other environmental organizations filed suit in federal court, challenging the failure of the Forest Service to subject the Burnt Ridge Project to a process of notice, comment, and appeal.⁴⁸ After “[t]he District Court granted a preliminary injunction against the Burnt Ridge salvage-timber sale,” however, “the parties settled their dispute . . . and the District Court concluded that ‘the Burnt Ridge timber sale [was no longer] at issue in this case.’”⁴⁹ At that point, the government contended that the environmental organizations lacked standing to challenge the Forest Service’s regulations.⁵⁰ After all, the government argued, the parties had settled the Burnt Ridge dispute, and there was no other project that directly affected the environmental groups.⁵¹

43. *Id.* at 1149 (internal quotation marks omitted).

44. *Id.*

45. Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, § 322, 106 Stat. 1419, 1419–20 (1992) (codified at 16 U.S.C. § 1612 note (2006)).

46. 36 C.F.R. § 215.4(a) (2009) (notice and comment); *id.* § 215.12(f) (appeal).

47. *Summers*, 129 S. Ct. at 1147–48.

48. *Id.* at 1148.

49. *Id.* (quoting *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 999 (E.D. Cal. 2005)).

50. *Id.*

51. *Id.*

Nevertheless, the district court adjudicated the merits of the environmental groups' claims, invalidating the Forest Service's regulations exempting small-scale projects from the notice, comment, and appeal process.⁵²

A three-judge panel of the Ninth Circuit affirmed the district court.⁵³ The panel concluded that, notwithstanding the parties' settlement of the Burnt Ridge dispute, the environmental organizations still had standing to challenge the regulations at issue.⁵⁴ The panel identified the requisite "injury in fact" suffered by the environmental organizations as a "procedural injury" occasioned by their being denied participation in the notice, comment, and appeal process.⁵⁵ Having satisfied itself that the environmental organizations had standing, the panel held that the challenged regulations violated the appeals reform statute.⁵⁶

The Supreme Court reversed the judgment of the Ninth Circuit panel.⁵⁷ In an opinion by Justice Scalia, joined by four other Justices, the Court stated that it knew of

no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.⁵⁸

"Such a holding," the Court explained, "would fly in the face of Article III's injury-in-fact requirement."⁵⁹ Furthermore, the

52. *Id.*

53. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 690 (9th Cir. 2007), *rev'd sub nom. Summers*, 129 S. Ct. 1142.

54. *Id.* at 694 ("Earth Island was unable to appeal the Burnt Ridge Project because the Forest Service applied 36 C.F.R. § 215.12(f); the loss of that right of administrative appeal is sufficient procedural injury in fact to support a challenge to the regulation."); *see also id.* at 696 ("The parties' agreement to settle the Burnt Ridge Timber Sale dispute does not affect the ripeness of Earth Island's challenge to 36 C.F.R. §§ 215.12(f) and 215.4(a).").

55. *Id.* at 694.

56. *Id.* at 698–99.

57. *Summers*, 129 S. Ct. at 1153.

58. *Id.* at 1149–50; *see also id.* at 1151 ("[The environmental organizations] alleged [sufficient] injury in their challenge to the Burnt Ridge Project, claiming that but for the allegedly unlawful abridged procedures they would have been able to oppose the project that threatened to impinge on their concrete plans to observe nature in that specific area. But Burnt Ridge is now off the table.").

59. *Id.* at 1150.

Court concluded, the environmental organizations “identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members.”⁶⁰ The Court acknowledged the assertion of one of the organizations’ members that he wanted to visit “projects in the Allegheny National Forest that are subject to the challenged regulations.”⁶¹ But, the Court concluded, “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”⁶² Thus, contrary to the holding of the Ninth Circuit, the environmental organizations lacked standing to challenge the regulations exempting small-scale projects.

Proponents of the revisionist conception of the judicial role might take issue with Justice Scalia’s opinion for the Court in *Summers*. They might say that by preventing environmental organizations from challenging the sale of timber on federal land, the opinion misses the forest for the trees—that it elevates the doctrine of standing above the interests of “justice.” Indeed, one of my Ninth Circuit colleagues recently said that he considers the doctrine of standing “an instrument of injustice,” apparently because he thinks it is too often used to close the courthouse doors to worthy causes. If judges are to be social workers, then Justice Scalia and the rest of the majority indeed failed miserably. Good social workers would have at least let the environmental groups continue to air broadly their grievances against the Forest Service.

But, of course, the proper role of the judge is not that of a social worker, and the doctrine of standing is not an irrational device whose purpose is to frustrate the aims of environmental groups. The doctrine of standing is grounded in Article III’s limitation of the judicial power to “Cases” and “Controversies.” That limitation, in turn, “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”⁶³ Without the requirements of standing, which “assure[] that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining

60. *Id.*

61. *Id.*

62. *Id.* at 1151 (internal quotation marks omitted).

63. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

party,"⁶⁴ a court would have "a roving commission 'to survey the statute books and pass judgment on laws before [they] are called upon to enforce them.'"⁶⁵

Allowing the environmental groups in *Summers* to pursue their claims against the Forest Service after the parties had settled would have been like allowing a quarterback in an NFL game to challenge a ruling after his coach had decided not to do so. Just as football referees must abide by the NFL rule-book's limitations on who may challenge a call, judges must abide by the Constitution's limitations on who may bring a lawsuit. That is what it means to decide cases in accord with the law, as the Framers envisioned.

B. *Jurisdiction*

Whether jurisdiction exists to hear a dispute often depends on *whether* and *when* review is sought. Recall that before the last two minutes of each half the responsibility to challenge a questionable ruling lies with each team's head coach.⁶⁶ When a head coach believes that a ruling was in error, it is up to him to throw the red flag onto the field, indicating his disagreement with the ruling and initiating the instant replay process. The window to challenge a ruling on the field closes with the beginning of the next play; once the next play starts, the referee has no jurisdiction to hear a challenge to the previous play. The upshot of these rules is that coaches must be vigilant. Because only coaches can make challenges (at least for the better part of the game), they have only themselves to blame if the team misses an opportunity to request review of a game-changing call.

Like football, our legal system is adversarial in nature. It is the responsibility of parties and their lawyers to bring arguments to the attention of the court, just as it is the responsibility of teams and their head coaches to bring challenges to the attention of the officiating crew.⁶⁷ Indeed, a party's failure to

64. *Summers*, 129 S. Ct. at 1149 (internal quotation marks omitted).

65. *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 976 (1984) (Rehnquist, J., dissenting) (quoting *Younger v. Harris*, 401 U.S. 37, 52 (1971)).

66. OFFICIAL RULES OF THE NFL, *supra* note 40, R.15, § 9.

67. *See Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame

raise an argument has consequences. Sometimes it means that the party has waived the argument altogether. Every circuit has a rule, for example, that a party abandons arguments not made in the party's opening brief to the court.⁶⁸ A corollary is the rule that a court will not consider points raised for the first time at oral argument.⁶⁹

In my experience, proponents of the revisionist conception of the judicial role often find such rules hard to swallow. Take the case of *Socop-Gonzalez v. INS*.⁷⁰ Oscar Socop-Gonzalez was a native and citizen of Guatemala who entered the United States as a nonimmigrant visitor in 1991.⁷¹ Four years later, the then-Immigration and Naturalization Service (INS) initiated deportation proceedings against him for overstaying his visa.⁷² Socop-Gonzalez appealed the deportation order to the Board of Immigration Appeals.⁷³ While his appeal was pending, he married a United States citizen.⁷⁴ Believing that his marriage would allow him to get his immigration status changed regardless of whether there was a deportation order against him, Socop-Gonzalez withdrew his appeal before the Board of Immigration Appeals.⁷⁵

Socop-Gonzalez eventually realized, however, that by withdrawing his appeal, he caused the deportation order to become effective immediately.⁷⁶ In an attempt to remedy the situation, he decided to file a motion to reopen his case.⁷⁷ But by the time he got around to filing the motion, the ninety-day filing period had expired.⁷⁸ Socop-Gonzalez urged the Board of Immigration Appeals to treat his motion as timely under a theory of equita-

the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

68. See, e.g., *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 858 n.4 (9th Cir. 2008).

69. See, e.g., *United States v. Larson*, 460 F.3d 1200, 1214 n.13 (9th Cir. 2006).

70. 272 F.3d 1176 (9th Cir. 2001) (en banc).

71. *Id.* at 1181.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1182.

77. *Id.*

78. *Id.*; see also 8 C.F.R. § 1003.2(c)(2) (formerly 8 C.F.R. § 3.2(c)(2)).

ble estoppel.⁷⁹ The Board, however, declined to do so and denied his motion as untimely.⁸⁰

Socop-Gonzalez appealed to the Ninth Circuit, and argued for the first time at oral argument before the en banc court that his motion to reopen was timely under an entirely different theory called equitable tolling.⁸¹ In my view, the court had no jurisdiction to consider Socop-Gonzalez's equitable tolling argument.⁸² The federal immigration statute in effect at the time restricted the jurisdiction of the courts of appeals to issues raised before the Board of Immigration Appeals.⁸³ The purpose of that rule was to give the Board "a full opportunity to resolve a controversy or correct its own errors before judicial intervention."⁸⁴ Before the Board, Socop-Gonzalez had raised only the doctrine of equitable estoppel; he had not raised the doctrine of equitable tolling. The two doctrines are distinct. Whereas equitable estoppel "focuses on the actions of the defendant," equitable tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant."⁸⁵ Because Socop-Gonzalez had failed to raise the issue of equitable tolling below, the court lacked jurisdiction over the issue.

Only one other judge on the en banc court agreed with me. The majority, by contrast, held that we did have jurisdiction to consider Socop-Gonzalez's equitable tolling argument.⁸⁶ The majority acknowledged that Socop-Gonzalez failed to pursue a theory of equitable tolling before the Board.⁸⁷ The majority reasoned, however, that because the Board was aware of equitable considerations in favor of treating Socop-Gonzalez's motion as

79. *Socop-Gonzalez*, 272 F.3d at 1184.

80. *Id.* at 1182. The Board also denied the motion on a second ground: "Socop did not submit an approved visa petition and an application for adjustment of status at the time he filed his motion to reopen." *Id.* at 1182-83.

81. *Id.* at 1198 (O'Scannlain, J., dissenting).

82. *Id.*

83. 8 U.S.C. § 1105a(c) (1994), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 306(b), 110 Stat. 3009-546, 3009-612. Section 1105a remained applicable to Socop-Gonzalez under the transitional rules of IIRIRA. *Socop-Gonzalez*, 272 F.3d at 1198 n.1 (O'Scannlain, J., dissenting).

84. *Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1985).

85. *Socop-Gonzalez*, 272 F.3d at 1184 (internal quotation marks omitted).

86. *Id.* at 1186.

87. *Id.* at 1184 ("Unfortunately, neither Socop's opening brief nor his reply brief [before the Board] explicitly requested that the ninety-day limitations period for filing motions to reopen be equitably tolled.').

timely, it would have been “bizarre” and “decidedly unfair” for the Ninth Circuit to refuse to consider the issue of equitable tolling.⁸⁸ The majority ultimately concluded that the Board erred in treating Socop-Gonzalez’s motion as untimely.⁸⁹

Socop-Gonzalez captures the tension between the revisionist conception of the judicial role on the one hand and the faithful application of procedural rules on the other. The jurisdictional rule barring consideration of issues not raised below was the law of the land. Yet, because following the rule would have led to what the majority regarded as a “bizarre” and “decidedly unfair” result, the majority essentially decided to disregard it. Apparently, the majority was loath to let a “technicality” like the failure to raise an issue below get in the way of “justice,” which demanded that Socop-Gonzalez be given the benefit of equitable tolling.

But however unfortunate Socop-Gonzalez’s plight might have seemed, the role of the federal judge must be limited to deciding cases according to the law. If a coach fails to challenge a ruling in the requisite time period, a referee cannot allow him to raise the challenge later just because the referee thinks that the ruling was indeed wrong. So, too, if Socop-Gonzalez failed to raise the issue of equitable tolling before the Board, the court should not have allowed him to raise the issue later just because the alternative would have been “unfair.” The rule of law depends on precisely this separation between what the law says and what the judge thinks is right or just.

Socop-Gonzalez, however, is not even the most egregious example of my court giving a sympathetic party a second bite at the apple. In *Rand v. Rowland*, a majority of the Ninth Circuit, sitting en banc, decided to give Lee Rand an additional opportunity to respond to his opponent’s summary judgment motion because the district court had failed the first time to give Rand, a pro se prisoner, a tutorial on the requirements for how to respond.⁹⁰ According to the majority, district courts had an obligation to ensure that all prisoners proceeding pro se received “fair notice” of the requirements contained in Federal Rule of Civil Procedure 56, the governing rule.⁹¹ I disagreed. In my

88. *Id.* at 1186 (internal quotation marks omitted).

89. *Id.* at 1196.

90. 154 F.3d 952, 958–59 (9th Cir. 1998) (en banc).

91. *Id.*

view, which I expressed as a member of the three-judge panel that originally heard Rand's appeal, imposing such an obligation invited "undesirable, open-ended participation by [district] court[s] in the summary judgment process."⁹² My concern was not only that such an obligation "lack[ed] any foundation in the text of Rule 56,"⁹³ but also that it "would entail the district court's becoming a player in the adversary process rather than remaining its referee."⁹⁴ Unlike the majority, I did not think the law afforded Rand a second chance to respond to his opponent's summary judgment motion, let alone a second chance in which the district court could be required to assist him in preparing his case.

Socop-Gonzales and *Rand* show the judge as a social worker in action. In both cases, the court bent the doctrine of jurisdiction to help a sympathetic party—but only by sacrificing the rule of law. Instead of acting as a neutral referee, the court made sure neither Mr. Socop-Gonzalez nor Mr. Rand fell victim to what the majority regarded as "intricacies of civil procedure."⁹⁵ But just as it is not the responsibility of football referees to ensure that head coaches make the right calls on the field, it is not the duty of judges to ensure that sympathetic parties prevail in our legal system. The duty of judges under the Constitution is simply to decide cases in accord with the law. That was what the Framers expected, and nothing has changed to justify modern deviation from that original understanding.

C. Standard of Review

The final judicial doctrine is the standard of review. Assume that a coach has timely challenged a ruling, consistent with the rules already described. The head referee then goes into a booth to watch an instant replay of what happened on the field.⁹⁶ Under NFL rules, the referee may not reverse the ruling on the field simply because he would have ruled differently based on the replay. Rather, he may reverse the ruling on the

92. *Rand v. Rowland*, 113 F.3d 1520, 1526 (9th Cir. 1997) (O'Scannlain, J., specially concurring) (internal quotation marks omitted), *withdrawn in part*, 154 F.3d 952 (9th Cir. 1998) (en banc).

93. *Id.*

94. *Id.* (internal quotation marks omitted).

95. *Socop-Gonzalez*, 272 F.3d at 957.

96. OFFICIAL RULES OF THE NFL, *supra* note 40, R.15, § 9.

field only if there is “indisputable visual evidence” that the ruling was incorrect.⁹⁷ Absent such evidence, the ruling on the field must stand. Thus, for example, if the ruling on the field was that the running back scored a touchdown by carrying the football across the plane of the end zone, then there must be “indisputable visual evidence” on instant replay that the football did *not* cross the plane for the ruling to be overturned. If the visual evidence is not indisputable—say, because the camera angles on instant replay are poor—then the team challenging the ruling is simply out of luck.

“Indisputable visual evidence” is an example of a standard of review. Appellate courts apply standards of review in every case they decide. In some contexts, an appellate court applies a *de novo* standard of review, exercising its independent judgment on the merits of another court’s decision.⁹⁸ In other contexts, however, an appellate court must apply a more deferential standard, such as “abuse of discretion” or “clear error.”⁹⁹ Whatever the proper standard, an appellate court must observe it. Consider, in this vein, the case of *Waddington v. Sarausad*,¹⁰⁰ which came before the Ninth Circuit in 2005.¹⁰¹

Cesar Sarausad was a member of a gang known as the Diablos.¹⁰² One day, he and other members of the Diablos decided to head to a local Seattle high school, where a rival gang had gathered.¹⁰³ Sarausad drove, with his fellow gang member Brian Ronquillo in the front passenger seat.¹⁰⁴ As they approached the school, Sarausad slowed down, and Ronquillo

97. *Id.* (emphasis removed).

98. *See, e.g.*, *United States v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009) (reviewing *de novo* whether an individual was “in custody” under *Miranda v. Arizona*, 384 U.S. 436 (1966)).

99. *See, e.g.*, *United States v. Verduzco*, 373 F.3d 1022, 1029–30 (9th Cir. 2004) (reviewing for abuse of discretion the admission of evidence under the *Federal Rules of Evidence*); *Secular Orgs. for Sobriety, Inc. v. Ullrich*, 213 F.3d 1125, 1129 (9th Cir. 2000) (reviewing for clear error the district court’s findings of fact following a bench trial).

100. 129 S. Ct. 823 (2009).

101. *Sarausad v. Porter*, 479 F.3d 671, 671 (9th Cir. 2007), *rev’d sub nom.* *Waddington v. Sarausad*, 129 S. Ct. 823 (2009).

102. *Sarausad*, 129 S. Ct. at 827.

103. *Id.*

104. *Id.*

fired six to ten gunshots at a group outside, killing one student named Melissa Fernandes.¹⁰⁵

Sarausad was tried in Washington state court, and the jury found him guilty as an accomplice in the commission of Fernandes's murder.¹⁰⁶ After his conviction was affirmed on direct appeal,¹⁰⁷ Sarausad sought another round of review by the Washington courts. He argued that the jury was given an ambiguous instruction on accomplice liability, and that there was a reasonable likelihood that the jury applied the instruction in a way that unconstitutionally relieved the State of its burden of proving that he acted with knowledge that Ronquillo was going to open fire on the students outside the school.¹⁰⁸ The Washington courts disagreed,¹⁰⁹ and Sarausad then filed a petition for a writ of habeas corpus in federal court.¹¹⁰

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) strictly limits the circumstances in which a federal court may grant habeas relief on a claim "adjudicated on the merits" in state court.¹¹¹ As relevant here, AEDPA provides that a federal court may grant habeas relief only if the state court decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."¹¹² This standard is highly deferential. For a federal court to grant a writ of habeas corpus, the state court decision "must be shown to be not only erroneous, but objectively unreasonable."¹¹³

Purporting to apply the proper standard of review, a majority of a three-judge panel of the Ninth Circuit held that Sarausad was entitled to habeas relief.¹¹⁴ According to the majority, "the ambiguous jury instruction[] on accomplice liability, in combination with other factors, unconstitutionally relieved the State of its burden of proof of an element of the crime[] with which

105. *Id.*

106. *Id.* at 829.

107. *State v. Ronquillo*, No. 35840-5-I, 1998 WL 87641, at *12 (Wash. Ct. App. Mar. 2, 1998), *review denied*, 966 P.2d 1277 (Wash. 1998).

108. *See Sarausad*, 129 S. Ct. at 830.

109. *Sarausad v. State*, 39 P.3d 308, 312 (Wash. Ct. App. 2001).

110. *Sarausad*, 129 S. Ct. at 831.

111. 28 U.S.C. § 2254(d) (2006).

112. *Id.* § 2254(d)(1).

113. *Sarausad*, 129 S. Ct. at 831 (internal quotation marks omitted).

114. *Sarausad v. Porter*, 479 F.3d 671, 694 (9th Cir. 2007), *rev'd sub nom. Wadlington v. Sarausad*, 129 S. Ct. 823 (2009).

Sarausad was charged.”¹¹⁵ The majority concluded that the state court unreasonably applied clearly established law in upholding Sarausad’s conviction despite the ambiguous jury instruction.¹¹⁶ I, along with four other judges, dissented from the denial of rehearing en banc, criticizing the majority for paying only lip service to the proper standard of review.¹¹⁷

The Supreme Court agreed to hear the case. In an opinion by Justice Thomas, the Court, by a 6-3 vote, reversed the Ninth Circuit. It held that “[e]ven if we agreed that the [accomplice-liability] instruction was ambiguous, the Court of Appeals still erred in finding that the instruction was so ambiguous as to cause a federal constitutional violation, as required for us to reverse the state court’s determination under AEDPA.”¹¹⁸ The Supreme Court criticized the Ninth Circuit majority for “dissect[ing]” and “exaggerat[ing]” parts of the record to justify the grant of habeas relief.¹¹⁹ In short, the Supreme Court concluded, the Ninth Circuit majority had “failed to review [the state court decision] through the deferential lens of AEDPA.”¹²⁰

If one’s conception of the judicial role is that judges should be like social workers, the Supreme Court’s decision in *Sarausad* would understandably be frustrating. Under the standard of review set forth in AEDPA, Sarausad was entitled to habeas relief only if the state court unreasonably applied federal law; it did not matter whether the state court erroneously applied federal law. But if judges should be like social workers, why should AEDPA’s standard of review get in the way of achieving “justice” for Sarausad? After all, if the state court decision seemed harsh, why should relief be denied based on a mere “technicality”—which is what AEDPA’s standard of review represents? Under the revisionist conception of the judicial role, it is difficult to justify observance of a standard of review that requires federal courts to tolerate allegedly erroneous state court decisions.

115. *Id.* at 674.

116. *Id.* at 694.

117. *Sarausad v. Porter*, 503 F.3d 822, 823 (9th Cir. 2007) (Callahan, J., dissenting from the denial of rehearing en banc).

118. *Sarausad*, 129 S. Ct. at 833.

119. *Id.* at 834.

120. *Id.* at 833.

Under the traditional conception of the judicial role, however, justifying observance of the standard of review is straightforward: The “judicial Power,” as originally understood, was the power to decide cases according to the law of the land. AEDPA is a duly enacted statute and, as such, is the law of the land. Therefore, judges must apply the standard of review set forth in AEDPA, regardless of whether they regard the standard as unjust.

In any event, AEDPA’s deferential standard of review is hardly irrational. It reflects Congress’s considered judgment that federal courts owe a degree of respect to their state counterparts within our system of federalism and that, in the interests of comity, they should not overturn state court decisions absent adequate justification.¹²¹ The rationale behind AEDPA is not all that different from the rationale behind the NFL’s requirement of “indisputable visual evidence” before a ruling may be disturbed on instant replay. The idea is not just that the official who made the original ruling might have had a better view of the action on the field, but also that his judgment is entitled to a certain degree of respect as that of a fellow member of the officiating team. Football referees are expected to observe the proper standard of review; federal judges should be expected to do the same.¹²²

III. THE MEDIA’S VIEW OF THE JUDGE’S ROLE

The purpose of the football analogy has been to show that faithful adherence to technical and procedural requirements is just as central to the “evenhanded administration of the law”¹²³ as it is to a level playing field in football. Indeed, what is at stake between the traditional and revisionist conceptions of the judicial role, as the cases discussed illustrate, is nothing short of

121. *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that “[t]here is no doubt Congress intended AEDPA to advance” the principles of “comity, finality, and federalism”).

122. *Sarasad* is not the only example of the Supreme Court reversing the Ninth Circuit for failing to observe AEDPA’s standard of review. For other recent examples, see *McDaniel v. Brown*, 130 S. Ct. 665 (2010); *Knowles v. Mirzayance*, 129 S. Ct. 1411 (2009); *Uttecht v. Brown*, 551 U.S. 1 (2007); *Carey v. Musladin*, 549 U.S. 70 (2006); and *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam).

123. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (“[E]xperience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.”).

the rule of law itself. When it comes to technical legal doctrines like standing, jurisdiction, and standard of review, some might argue that the cost to the rule of law is worth it. Why let such doctrines stand in the way of the pursuit of “justice”? But once judges start sacrificing the rule of law in cases in which they regard the legal rules as unimportant, we no longer live under the Constitution of our Framers, who envisioned that judges would exercise “neither Force nor Will, but merely judgment.”¹²⁴

Unfortunately, the revisionist conception of the judicial role has already infected our public discourse on judicial decisions. Consider the recent controversy surrounding the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*¹²⁵ After the Court, in an opinion by Justice Alito, held that a female employee’s claim of sex discrimination was barred by Title VII’s statute of limitations,¹²⁶ the media depicted the five male Justices in the majority as insensitive to women’s rights. Much was made of the fact that Justice Ginsburg—at the time, the only female Justice—took the rare step of reading her dissent from the bench.¹²⁷ Writing in the *New York Times*, Linda Greenhouse speculated that had Justice Sandra Day O’Connor still been on the Court, she “would almost certainly have voted the other way, bringing the opposite outcome.”¹²⁸ In essence, the Justices in the majority were accused of failing to perceive the injustice of discrimination because of sex. By attributing the Justices’ interpretation of Title VII to insensitivity to women’s rights, the mainstream media seemed to reject the autonomy of the law on which the traditional ideal of judging is premised.

It was “déjà vu all over again” when the Supreme Court decided *AT&T Corp. v. Hulteen*.¹²⁹ The Ninth Circuit, sitting en banc, had held that AT&T violated the Pregnancy Discrimination Act (PDA) by failing to credit fully (for purposes of pension benefits) pregnancy leave taken prior to the enactment of the

124. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 7, at 523.

125. 550 U.S. 618 (2007).

126. *Id.* at 632.

127. See, e.g., Robert Barnes, *Over Ginsburg’s Dissent, Court Limits Bias Suits*, WASH. POST, May 30, 2007, at A1.

128. Linda Greenhouse, *Justices’ Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1.

129. 129 S. Ct. 1962 (2009).

PDA.¹³⁰ I wrote a dissent, joined by three other judges. In my view, there had been no violation of the PDA because there was no evidence that “AT&T [had] adopted [its] pre-PDA pregnancy leave rules for an intentionally discriminatory purpose.”¹³¹ Not only had AT&T adopted those rules before the enactment of the PDA—when such rules were perfectly legal—but it had also prospectively changed those rules once the PDA went into effect.¹³²

In a 7-2 decision, with Justice Ginsburg again in dissent, the Supreme Court reversed the Ninth Circuit. In the words of Justice Souter, who wrote for the majority, “AT&T’s [pension plan] provides future benefits based on past, completed events, that were entirely lawful at the time they occurred.”¹³³ Accordingly, the Court concluded, AT&T’s pension plan “must . . . be viewed as bona fide, that is, as a system that has no discriminatory terms.”¹³⁴ In short, AT&T had not violated the PDA.

The mainstream media pounced on the Court’s decision in *Hulteen*, just as it had the Court’s decision in *Ledbetter*. “The Supreme Court keeps finding ways to deny women equal pay and benefits,” read the first line of the *New York Times*’s editorial.¹³⁵ After summarizing the reasoning of Justice Souter’s majority opinion, the editorial concluded that the reasoning “may sound logical, but it is not just.”¹³⁶ The not-so-subtle suggestion is that the Justices in the majority should have enforced a “just” result, regardless of what the law actually required; they should have granted relief to the plaintiffs, even if that meant rewriting what Congress had duly enacted.

For proponents of the traditional ideal, the mainstream media’s coverage of *Ledbetter* and *Hulteen* was anything but comforting. The media seemed to view both decisions through the lens of the revisionist conception of the judicial role—that is, by focusing on whether the results reached were consistent with some abstract notion of justice, as opposed to whether the reasoning adopted was faithful to the law. By expecting judges to behave as social

130. *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1002–03 (9th Cir. 2007) (en banc), *rev’d* 129 S. Ct. 1962 (2009).

131. *Id.* at 1031 (O’Scannlain, J., dissenting) (emphasis removed).

132. *Id.*

133. *Hulteen*, 129 S. Ct. at 1972.

134. *Id.* at 1970.

135. Editorial, *Equal Pay for Women Denied, Again*, N.Y. TIMES, May 21, 2009, at A34.

136. *Id.*

workers on behalf of sympathetic parties, the media leaves the public with a misleading impression of the proper role of the judge. Whether some judges contribute to this misimpression or whether they are responding to media pressure themselves can be debated. But whatever the case may be, resisting the revisionist conception has been the most serious challenge of my life as a judge.

CONCLUSION

Let me end on a note of cautious optimism. At her confirmation hearing last summer, Justice Sotomayor said that her judicial philosophy was “simple: fidelity to the law.”¹³⁷ She explained that “[t]he task of a judge is not to make the law—it is to apply the law.”¹³⁸ She even disagreed with the view expressed by the President who appointed her that there is a place for “empathy” in judicial decision making,¹³⁹ maintaining, instead, that “judges can’t rely on what’s in their heart,” and that judges “don’t apply feelings to facts.”¹⁴⁰ In short, Justice Sotomayor seemed to embrace the traditional conception and to reject the revisionist one. If Justice Sotomayor’s testimony is any indication, the Framers’ vision of the judicial role remains alive and well.

And that is good news. For if our Constitution is to continue to be, in the words of Mr. Herbert Vaughan, “the greatest practical achievement of political science,”¹⁴¹ we need judges who understand, as the Framers did, that the “judicial Power” is the power to decide cases in accord with the law of the land, and that proper exercise of the power entails faithful adherence to the core doctrines of judicial decision making. Let us not yield to the temptation to exercise arbitrary discretion or to engage in social policy. The Framers would expect no less from those of us who are entrusted with the “judicial Power” today.

137. *The Nomination of Sonia Sotomayor To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (opening statement of Sonia Sotomayor), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=8102.

138. *Id.*

139. See Michael Powell, *Strong Words in Ohio as Obama and Clinton Press On*, N.Y. TIMES, Mar. 3, 2008, at A16.

140. Top of the Ticket, <http://latimesblogs.latimes.com/washington> (July 14, 2009, 14:58 PDT) (transcribing the Sotomayor hearing).

141. Herbert W. Vaughan, Statement at the Herbert W. Vaughan Lecture on America’s Founding Principles (Oct. 22, 2009).