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## The Judge as Umpire: Ten Principles

### Cover Page Footnote

Circuit Judge, U.S. Court of Appeals for the D.C. Circuit. J.D., 1990, Yale Law School; B.A., 1987, Yale College. This speech was given as part of the Pope John XXIII Lecture Series at the Catholic University of America, Columbus School of Law on March 30, 2015.

## THE JUDGE AS UMPIRE: TEN PRINCIPLES

*Brett M. Kavanaugh*<sup>+</sup>

Thank you, Dean Attridge, for that generous introduction. Dan is a wonderful man. We worked together at Kirkland & Ellis, and I am honored to be with him today.

It is a particular honor to be with all of you at Catholic University and this distinguished law school. This school is rightly proud of its Catholic heritage. In line with the Gospel of Matthew, one of the stated missions of this law school is to care for the poor, the neglected, and the vulnerable. This university and this law school stand for those principles and do it very well.

For my part, I am a product of Catholic boys schools in this area. I attended Mater Dei and Georgetown Prep. Georgetown Prep's motto was to be "men for others." I have tried to live that creed. I am proud to say that three Georgetown Prep classmates of mine—Mike Bidwill, Don Urgo, and Phil Merkle—happen to be 1990 graduates of this law school. They remain very good friends of mine, and they well reflect the values and excellence of both Georgetown Prep and this law school. You may recognize Mike Bidwill's name. He is the President of the Arizona Cardinals football team. I am pretty sure he is on the Dean's speed dial. Yet he is the same humble, generous, friendly guy he was when he was fourteen years old.

Of course, you don't forget your time in Catholic schools: The voices of your teachers and coaches still ring in your ears even decades later. Father Byrne was my Latin professor. He would tell us, in his inimitable voice, "Be prepared, be prepared, you can't go wrong as you go along if you are prepared."<sup>1</sup> He had a lot of one-liners, and more than a few Latinisms. If you went up to any of my classmates and asked about Father Byrne, they probably could not translate the *Aeneid* but they would quickly recall his lessons in preparation. He could pound his fist on the desk pretty well too. And Mr. Fegan, our football coach—I can still hear him telling us to do things better, to do things the right way at all times, to stay tough in the midst of adversity. On a steamy hot August day with two-a-day practices, he would yell: "No day to die, Blue." I can hear it clearly even now. So to the teachers, professors, and educators at this school, I offer this reminder: your lessons are heard, not just in the classroom, but years later as they influence the graduates of this distinguished law school and distinguished university. I thank all of you who are teaching this future generation of lawyers and leaders.

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<sup>+</sup> Circuit Judge, U.S. Court of Appeals for the D.C. Circuit. J.D., 1990, Yale Law School; B.A., 1987, Yale College. This speech was given as part of the Pope John XXIII Lecture Series at the Catholic University of America, Columbus School of Law on March 30, 2015.

1. Neal Conway, *The Little Saint of Georgetown Prep*, NEALJCONWAY.COM (Revised Nov. 5, 2011), <http://www.nealjconway.com/catholic/frbyrne/frbyrne.html>.

We are here at a lecture series named for a Pope. The Pope for most of my adult life was Pope John Paul II. When I worked at the White House, one of the great highlights of my Staff Secretary job was traveling around the world and the country with President Bush. I traveled to the Vatican in 2004, when President Bush met with the Pope and awarded him the Presidential Medal of Freedom, which is the highest civilian honor of the United States.<sup>2</sup> Usually the ceremony takes place at the White House—the President hosts many distinguished Americans or world leaders—and he puts a medal around the recipient’s neck and gives a speech about all of their contributions to the United States. You have probably seen those ceremonies on television. In this instance, President Bush said, “We are going to be at the Vatican. I am not going to stand up at the Vatican and put a medal around the Pope’s neck. How are we going to accomplish this?” I said, “It is all under control, Sir.” Which, it wasn’t. That is what you say. And then you make it under control. So we had to scramble. We found this nice box. It was a box with the Presidential Seal, and it really looked good. And the medal was placed nicely in the box. At the ceremony, the President had the box on a little table, and he was speaking about the Pope. And then the President was fiddling with the box. I thought, “*Oh, no. The box is not going to open!*” It lasted all of one second, but it felt like a lifetime. Check it out on YouTube.<sup>3</sup> And then the President read the citation to the crowd and handed the box with the medal to the Pope. The Pope was pretty frail then, and he held it up. I was sweating and all I could think was, “*The medal. What if the medal falls out of the box? What if the medal falls out of the box?*” In that moment, it was sheer panic. Again, check it out on YouTube.<sup>4</sup> But it all worked out. It was a great ceremony, and the Pope concluded it by saying “God Bless America.”<sup>5</sup>

I will always remember what the President said that day because I found it so moving.

A devoted servant of God, His Holiness Pope John Paul II has championed the cause of the poor, the weak, the hungry, and the outcast. He has defended the unique dignity of every life, and the goodness of all life. Through his faith and moral conviction, he has given courage to others to be not afraid in overcoming injustice and oppression. His principled stand for peace and freedom has inspired millions and helped to topple Communism and tyranny. The United

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2. Lauren Johnston, *Bush Meets Pope at Vatican*, CBS NEWS (June 4, 2004 11:15 AM), <http://www.cbsnews.com/news/bush-meets-pope-at-vatican/>.

3. Johnston, *supra* note 2. See also AP Archive, *President Bush meets the Pope and Italy’s President*, YOUTUBE (July 21, 2015), <https://www.youtube.com/watch?v=Iz51K7iWANY>.

4. AP Archive, *supra* note 3.

5. *Id.*

States honors this son of Poland who became the Bishop of Rome and a hero of our time.<sup>6</sup>

That really stands out as a special memory from my time at the White House. As the product of Catholic education, to be there in the presence of both the Pope and the President of the United States, and for the medal to actually stay in the box—well, you can't get any better than that.

I could tell war stories about my White House experiences all day long, but I am here today to talk about judging. I have been doing that for almost nine years now, on the U.S. Court of Appeals for the D.C. Circuit. And I want to discuss the notion of judges as umpires. Chief Justice John Roberts conveyed that image at his confirmation hearing. He was asked, "What kind of a Justice would you be Judge Roberts?"<sup>7</sup> And he gave this great description of being an umpire: umpires call balls and strikes. They do not favor one team or the other. And umpires should stay out of the way when possible. No one ever went to the game to see the umpire.<sup>8</sup>

What a great way to capture a key principle in a very simple explanation.

But that notion, that a judge is just an umpire, has been criticized. Some say, "Judges are just politicians in robes." Or, "Judges are advocates; they're partisans." Or "Judges are policymakers." Or "Judges are not mere robots." The varying objections reflect, in my view, a misapprehension of what a judge does and should do—and also a bit of a misapprehension of what an umpire does and should do.

At its core, in our separation of powers system, to be an umpire as a judge means to follow the law and not to make or re-make the law—and to be impartial in how we go about doing that. That has to be our goal. We can talk about the limits to achieving that goal, that objective. But in a system of even-handed justice, in a system dedicated to the rule of law, that must be our aspiration.

For those of us who want to be judges as umpires, how do we do it? What are the attributes that we are seeking to achieve? I will go through ten of them. I will say right away: I know I fall short, I know all of us fall short at times. To paraphrase the current Pope, Pope Francis, I too am a sinner. But I am always striving to do better and to meet the ideal.

First, and most obviously, a good judge, like a good umpire, cannot act as a partisan. Judges often come from backgrounds in politics or policy. Indeed, we want judges in our judicial system who have different backgrounds, including in government. That is a difference between our system and judicial systems in other parts of the world. We come from the private practice of law, we come

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6. Press Release, Office of the Press Secretary, President Bush Presents Medal of Freedom to Pope (June 4, 2004), <http://georgewbushwhitehouse.archives.gov/news/releases/2004/06/20040604-3.html>.

7. *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 443 (2005) (Sen. Diane Feinstein questioning J. John Roberts).

8. *Id.* at 55.

from public defender's offices, we come from the executive branch, and we come from the legislative branch, among other prior service. For those who come from the Executive Branch, the model, of course, is Justice Robert Jackson, who had been Attorney General. Similarly, Chief Justice Roberts worked for President Reagan and Justice Elena Kagan worked for President Clinton; Justice Stephen Breyer was a Senate staffer working for Senator Kennedy for many years.

But federal judges have to check any prior political allegiances at the door. You have to shed them. We can no longer contribute money to political campaigns. We do not participate in partisan campaigns. We do not support or endorse candidates. We do not attend political rallies. Some judges do not even vote, on the theory that to vote is a solemn expression (at least to yourself) of your political or policy affiliation and beliefs. For example, when Justice John Harlan was on the Supreme Court, he reportedly chose not to vote.<sup>9</sup> I am no Justice Harlan, I will be the first to emphasize, but after a short time as a judge, I ultimately chose to follow his lead about voting. So it is very important at the outset for a judge who wants to be an umpire to avoid any semblance of that partisanship, of that political background. If you are playing the Yankees, you don't want the umpires to show up wearing pinstripes. So too with judges. That is the first, probably most fundamental thing for a judge who wants to be an umpire.

Second, to be a good judge and a good umpire, you also have to follow the established rules and the established principles. A good umpire should not be making up the strike zone as he or she goes along. Judges likewise should not make up the rules as they go along. We see this in statutory interpretation, for example. A good judge sticks to the established text and canons of construction that help guide us in interpreting ambiguous text. Justice Antonin Scalia has had a profound influence on statutory interpretation. One of the things he has helped to do is to narrow the areas of disagreement about how to interpret statutes. Every judge now seems to start with the text of the statute. If you came to our court and sat in our courtroom for a week—and I do not advise that for anyone who wants to stay sane—you would hear every judge asking, “What does the text of the statute say? How does the text of the statute support your position?” That has been a big change in statutory interpretation, and it has helped establish better and clearer rules of the road.

Following established rules includes *stare decisis*: we follow the cases that have been decided. We operate in a system built on Supreme Court precedent. As lower court judges, we must adhere to absolute vertical *stare decisis*, meaning we follow what the Supreme Court says. And to be a good lower court judge, you must follow the Supreme Court precedent in letter and in spirit. We should not try to wriggle out of what the Supreme Court said, or to twist what the Supreme Court said, or to push the law in a particular direction, but to follow

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9. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 148 (1979).

what the Supreme Court said in both letter and spirit. Horizontal stare decisis has some flexibility, as it must. Vertical stare decisis is absolute.

Third, to be a good judge and a good umpire, you have to strive for consistency not just with precedent, but from day to day. You often hear this in sports, too.<sup>10</sup> “We just want consistency. Call it the same for both teams.” You will see a basketball player get a charge call, and you will see the coach yelling and pointing down to the other end of the court. The coach is saying to the referee, “Call that down at the other end of the court as well.” Or in baseball, when the outside corner is called a strike. “Call it the same for us,” a manager will yell from the dugout. And so, too, for judges. I think it is important to be consistent within the game and across games, following precedent. We must strive to be consistent in how we’re deciding cases, how we’re confronting issues, whether it be constitutional interpretation or statutory interpretation—consistency is a great virtue. Consistency is another check. I decided a case yesterday on this basis, but today the parties are in different positions. Am I going to rely on that same principle today? The answer has to be “yes.” Judges have to be consistent in how we decide things, even though the parties may be flipped.

Fourth, to be a good judge and a good umpire, you have to understand your proper role in the game: to apply the rules and not to re-make the rules based on your own policy views. At his confirmation hearing, Chief Justice Roberts memorably referred to being a modest judge.<sup>11</sup> What does this mean? We must recognize that we do not make the policy ourselves. It is not our job to make the policy choices that belong to the political branches.<sup>12</sup> We have to recognize and operate within our more limited role. It is an important role, and it can be a decisive role on crucial matters affecting our system of government.<sup>13</sup> But it is a more limited role. We are not the ones designing the rules and making the policy choices in the first instance.<sup>14</sup> We do not design our own strike zones.

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10. See, e.g., Tom Pelissero, *NFL Looking at Mixing Up Officiating Crews*, USA TODAY (Nov. 22, 2015, 3:14 PM), <http://www.usatoday.com/story/sports/nfl/2015/11/22/officiating-crews-referees/76221432/> (quoting National Football League Commissioner Roger Goodell as saying, “[t]he number one thing you want in officiating is consistency”).

11. *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States*, *supra* note 7, at 158 (quoting Chief Justice Roberts during his confirmation hearing as saying, “Like most people, I resist the labels. I have told people, when pressed, that I prefer to be known as a modest judge.”).

12. See *id.* (“The role of the judge is limited; the judge is to decide the cases before them; they’re not to legislate; they’re not to execute the laws[.]” and that “[courts] are not making policy[.]”).

13. See *id.* (“I [do not] think the courts should have a dominant role in society and stressing society’s problems” but that “[i]t is their job to say what the law is[.]” and “it is emphatically the obligation of the courts to step up and say what the Constitution provides, and to strike down either unconstitutional legislation or unconstitutional executive action[.]”).

14. See *id.* (describing the court’s limited role of interpreting the Constitutional legitimacy of legislation enacted and executive decisions made).

Fifth, at the same time, to be a good judge and a good umpire you have to possess some backbone. An umpire or referee has to keep control of the game, and be able to make tough calls against the star players or the home team. As a judge, you must, when appropriate, stand up to the political branches and say some action is unconstitutional or otherwise unlawful. Whether it was *Marbury*,<sup>15</sup> or *Youngstown*,<sup>16</sup> or *Brown*,<sup>17</sup> or *Nixon*,<sup>18</sup> some of the greatest moments in American judicial history have been when judges stood up to the other branches, were not cowed, and enforced the law.<sup>19</sup> That takes backbone, or what some call judicial engagement. To be a good judge and a good umpire, you have to possess strong backbone.

Sixth, to be a good judge and a good umpire, you have to tune out the crowd noise. There is a lot of crowd noise directed at the umpires and referees in sports. So, too, with judges. There is a lot of criticism of judges' decisions in the media, in law reviews, and on blogs. Sometimes, there is even "working the ref" before the game is played, with blog posts and opinion commentaries.<sup>20</sup> Politicians sometimes do this, journalists do this, and professors do this.<sup>21</sup> And you see this of course in sports. Coach Mike Krzyzewski, a legendary basketball coach, is pretty good at working the ref during the game.<sup>22</sup> Nothing wrong with that for the coaches or advocates. But as judges, we have to tune out the Coach K's of the legal-political world who are trying to work the judges. We cannot be buffaloes, influenced, or pressured into worrying too much about transient popularity when we are trying to decide a case based on a long-term principle that controls a particular case. One of the most important duties of a judge as umpire is to stand up for the unpopular party who has the correct position on an issue of law in a particular case. To stand up for the unpopular position, we need

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15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

17. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

18. *United States v. Nixon*, 418 U.S. 683 (1974).

19. See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States*, *supra* note 7, at 256 ("Judges have to have the courage to make the unpopular decisions when they have to. That sometimes involves striking down acts of Congress. That sometimes involves ruling that acts of th[e] executive are unconstitutional. That is a requirement of the judicial oath.").

20. See, e.g., Conor McEvily, *Wednesday round-up*, SCOTUSBLOG (Nov. 16, 2011), <http://www.scotusblog.com/2011/11/wednesday-round-up-110/> (detailing the process by which commentators hope to influence the court, and indicating several articles and blogs written by third party commenters in advance of a Supreme Court decision in which the authors advocated for differing positions).

21. See, e.g., *id.* (explaining that individuals and organizations frequently attempt to influence court decisions by publishing their own interpretations of issues before the court, including criticizing the aspects of certain cases, and questioning potential biases).

22. See, e.g., Chris Good, *In Defense of Duke*, THE ATLANTIC (Apr. 2, 2010), <http://www.theatlantic.com/entertainment/archive/2010/04/in-defense-of-duke/38379/> ("Duke getting all the calls . . . [is] certainly not Coach K's [fault]. It's his job to work the refs; it's his job to try to win.").

to be able to tune out the crowd noise. At the same time, we cannot tune it out so much that we are not willing to learn from our mistakes or to learn from informed commentary. So there is a balance there: tune out the crowd noise, but remember that we are not perfect—far from it—and that we have to learn over time from those who, in good faith, critique and analyze our decisions.

Seventh, to be a good judge and a good umpire, you must have an open mind. You cannot decide cases based on preconceived notions, but must discipline yourself to work through each dispute based on the law, the precedents, and the facts. And you must be willing to change your mind. Judges have to say: “Well, I didn’t look at it that way a few years ago, but now it looks different to me.” Sometimes people think that it is weak to change your mind. I disagree. It requires strength, not weakness, to be able to say you were wrong before. We need that willingness to be humble about it and to change our minds.

Relatedly, to be a good judge and a good umpire, we must keep learning. We do not know it all. Sometimes in a courtroom, it may appear that the judge thinks he or she knows it all. Judges have to remember we do not know it all. We have to constantly learn. We should draw from the law reviews and the treatises that professors have worked on for years to study a problem that we may have a couple of days to focus on. We should study the briefs and precedents carefully and challenge our instincts or prior inclinations. We are not the font of all wisdom.

Eighth, to be a good judge and a good umpire, it is critical to have the proper demeanor. We must walk in the shoes of the other judges, the lawyers, and the parties. It is important to understand them, to keep our emotions in check, and be calm amidst the storm. To put it in the vernacular: to be a good umpire and a good judge, don’t be a jerk.

That’s true in the courtroom, and it is also true when issuing judgments and opinions. A good judge and good umpire must demonstrate civility. Judges must show that we are trying to make the decisions impartially and dispassionately based on the law and not based on our emotions. Sometimes you hear coaches complain about umpires or referees, “The umpires think they are bigger than the game.”<sup>23</sup> Judges cannot act like we are bigger than the game. There is a danger of arrogance for umpires and also for judges. The danger grows the longer you are on the bench. As one of my colleagues puts it, “As you get older as a judge, you get more like yourself.” Some umpires and referees are like that, too. We have to guard against that arrogance, against that pernicious and vain idea that you know better than others. You may be final, but you are surely not infallible.

Ninth, to be a good judge and a good umpire, especially on an appellate court, you need collegiality—to work well with and to learn from your colleagues. We

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23. See Dean Hybl, *Umpire Big Egos are a Bad Thing for Baseball*, SPORTS THEN AND NOW (April 18, 2015), <http://sportsthenandnow.com/2015/04/18/umpire-big-egos-are-bad-thing-for-baseball>.

are collective bodies. I cannot do much of anything alone. We work in panels of three, so we have to work together with the other judges to try to produce the best decision. This group decision-making helps reduce errors; it helps check subtle biases that might creep into a particular case. You see baseball umpires or football referees sometimes huddle in what in football is called a “zebra conference”—when they get together to talk about whether they made the right call. On appellate courts such as mine, we have a zebra conference on every play. That is what we do—we get together and work together in panels. And to do that well, we have to work well with others. That does not mean sacrificing or compromising your core principles to the views of the group. Not at all. Judges can issue dissenting opinions, and we should do so on important cases. We should not fold. But we can and should be civil and cordial to our colleagues.

Tenth, to be a good judge and a good umpire, you have to be clear in explaining why you have made the decision you made. You don’t just make the call and move on. We write opinions to justify why we have decided a particular way, how we have come to the conclusion that we have come to. Those opinions are important, and we spend a lot of time carefully crafting those opinions. I was on a panel one time with Justice Scalia at a conference in Europe. Some of the European judges said, “Oh, Justice Scalia you are such a beautiful writer. You must love writing!” Justice Scalia said something to the effect of, “I can’t stand writing! It is painful! It hurts!” “But,” he said, “I love having written.” Yes, indeed. Writing is painful. It hurts. Having heard that from Justice Scalia, I thought, “Oh, thank goodness.” Because what that showed for me is that even for the best writers, it is hard work to get the words on the page to explain in clear language why you have decided a particular way. But it is so important. And the writing process is also a discipline to make sure we are deciding things the right way. Sometimes you will hear judges say, “It just wouldn’t write.” And then you change your mind. We often say that to each other. We voted a particular way, but, “It just wouldn’t write.” In the National Football League, why do the referees wear microphones? To explain things to the teams and the crowd.<sup>24</sup> Ed Hochuli, one of the famous NFL referees, gives multi-part explanations.<sup>25</sup> “A, the receiver’s toe was out of bounds, and B, the pass was bobbled.”<sup>26</sup> He will give you this whole explanation. That is good. He is a model for concise judicial decision-making. In baseball, too, the umpires will try to explain the decision, albeit only to the managers and not to the crowd.

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24. See Mark Schultz, *Referee Announcements Have Come a Long Way in 38 Years*, FOOTBALL ZEBRAS (Oct. 18, 2013), <http://www.footballzebras.com/2013/10/18/referee-announcements-have-come-a-long-way-in-38-years/>.

25. See Rob Demovsky, *Ed Hochuli Explains His Explanations*, ESPN, (July 31, 2014), [http://espn.go.com/blog/nflnation/post/\\_id/133557/ed-hochuli-explains-his-explanations](http://espn.go.com/blog/nflnation/post/_id/133557/ed-hochuli-explains-his-explanations).

26. See Rodger Sherman, *An Ode to NFL Ref Ed Hochuli and His Incredibly Long Explanations*, SB NATION (Jan. 3, 2015, 8:26 PM), <http://www.sbnation.com/lookit/2015/1/3/7487775/nfl-referee-ed-hochuli>.

Sometimes the managers will come out and kick dirt at the umpire. Fortunately, in the courthouse, no one comes up and kicks dirt at us. The lesson is: explain well and hopefully no one will kick dirt on you. The duty of explanation is central to being a good judge and a good umpire.

Of course, for us to be good judges and good umpires, the rule-makers can help by drafting rules that are as clear as possible. And, in the federal system, that means Congress. And that is hard because Congress is a body of 535 people and they have to compromise. And it is hard to write clear laws. When you are in a courtroom or you are in litigation, an advocate might say, “Well, Congress didn’t draft this law clearly.” For the most part, it is not because someone was incompetent. It is usually because the drafting process is a compromise, which means that sometimes Congress has to kick the can on certain issues, or might have to be ambiguous about something that otherwise would benefit from clarity. But to the extent Congress can be clearer in statutes, Congress should try to do so. Congress can really do a service to the ideal of judges as neutral umpires. Clear laws and clear rules avoid unnecessary courtroom disputes.

The NFL gets this. Consider the Dez Bryant catch in last year’s NFL playoff game against the Packers.<sup>27</sup> There was all this controversy about, “Was it a catch? Was it not a catch?”<sup>28</sup> The NFL rule had been drafted quite clearly to cover that situation: it was not a catch.<sup>29</sup> Now, maybe the rules should be changed—just as maybe Congress should change the laws sometimes—but the rule was quite clear. The NFL is actually pretty good about drafting clear rules, anticipating issues, and responding with new rules when issues arise. They just drafted a new rule, for example, in response to the Patriots shuffling their players and confusing the Ravens towards the end of a playoff game.<sup>30</sup> That is now illegal in the NFL.<sup>31</sup> So they promptly responded to that new situation. Congress can do the same thing. Congress does it sometimes—that is, improve statutes after court decisions reveal issues. But I think Congress could be more responsive when issues of ambiguity arise or when it learns of ambiguity in

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27. *Did Dez Catch It?*, NFL, <http://www.nfl.com/videos/nfl-game-highlights/0ap3000000456759/Did-Dez-catch-it> (last visited Feb. 7, 2016).

28. *Id.*; see also Laces Out: NFL Blog, *Controversy! Did Dez Bryant Get Robbed of an Amazing Catch?*, FOX SPORTS (Jan. 11, 2015, 3:56 PM), <http://www.foxsports.com/nfl/laces-out/dallas-cowboys-green-bay-packers-nfc-playoffs-dez-bryant-catch-overtuned-011115>.

29. See Chris Strauss, *The NFL Rules, Not Refs, Are Responsible for the Dez Bryant Catch Controversy*, USA TODAY (Jan. 11, 2015, 5:25 PM), <http://ftw.usatoday.com/2015/01/dez-bryant-nfl-catch-cowboys>; see also John Breech, *NFL Rewrites New Rule and it Might Actually Be More Confusing*, CBS SPORTS (July 24, 2015, 5:05 PM), <http://www.cbssports.com/nfl/eye-on-football/25249589/nfl-rewrites-dez-bryant-rule-and-it-might-actually-be-more-confusing>.

30. John Keim, *New Rule Responds to Pats’ Formation*, ESPN (Mar. 25, 2015), [http://espn.go.com/nfl/story/\\_/id/12556985/new-england-patriots-formation-now-ruled-illegal-substitution](http://espn.go.com/nfl/story/_/id/12556985/new-england-patriots-formation-now-ruled-illegal-substitution); Ben Volin, *NFL Passes Rule Aimed at Patriot’s Ineligible Receiver Tactic*, BOSTON GLOBE (Mar. 25, 2015), <https://www.bostonglobe.com/sports/2015/03/25/nfl-passes-rule-change-aimed-patriots-ineligible-receiver-tactic/uBqPWS5dKYdMYMcliJ3sKO/story.html> (explaining that the NFL implemented this new rule in March 2015 in response to the Patriots-Ravens game).

31. See Strauss, *supra* note 29.

statutes. Judge Robert A. Katzmann, a great judge who is Chief Judge of the Second Circuit, has done a wonderful job of trying to have the judiciary communicate formally to Congress when flaws become apparent—not partisan flaws, not ideological flaws, but just mistakes or ambiguities in statutes.<sup>32</sup>

Having said all of the above, there are areas of the law that sometimes entail discretion. And it is important to acknowledge that sometimes judges must exercise reasoned decision-making within a law that gives judges some discretion over the decision. For example, what is “reasonable” under the Fourth Amendment? There is a body of precedent that helps inform that, but what’s “reasonable” under the Fourth Amendment is not a question that can be answered by staring at a code or dictionary. What is a “compelling government interest” under the Religious Freedom Restoration Act?<sup>33</sup> “Compelling government interest” is all the statute says—what are judges supposed to do with that? Rule 501 of the Federal Rules of Evidence directs judges to devise evidentiary privileges in light of “reason and experience.” How are we supposed to do that? The Sherman Act prohibits “unreasonable restraints of trade.”<sup>34</sup> How are we supposed to figure out what are unreasonable restraints of trade? That is not pure interpretation.

In other words, there are areas of law where there is judicial discretion, where it is not purely interpretive, it is not just figuring out what the meaning of a term is. And there will probably always be some discretion in some areas in the law. So I think it is important that if you articulate the vision of judge as umpire, that you also acknowledge that reality, so your vision is not caricatured as being “every case is simply mechanical and robotic for judges.” Many cases come down to interpretation of the text of the Constitution, a statute, a rule, or a contract. But not every case comes down to pure interpretation. Even in those cases where there is discretion, however, where judges are assigned what may be described as common-law-like authority, it is important that we do those things that I mentioned: that we try to follow precedent and have a stable body of precedent; that we try to write our decisions in reasoned and clear ways; that we try to be consistent in how we go about deciding like cases alike; and that we do so candidly. This happens in sports as well. Issues arise in games that were not foreseen by the rules or that give discretion to the umpires. And the umpires or the referees have to make a decision on the spot. Judges are not robots, and neither are umpires or referees.

These are just ten of the ways in which judges should strive to be like umpires. It is a great honor to be at this distinguished law school. Thank you for listening and allowing me to explain and defend the vision of the judge as umpire.

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32. See ROBERT A. KATZMANN, *JUDGING STATUTES* 101 (2014).

33. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, 1489 (1993).

34. 15 U.S.C. § 1 (2012).