The Reality Behind Supreme Court Picks

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From press accounts, you might think that the most salient issue of Judge Sonia Sotomayor's Supreme Court nomination is whether she will responsibly "apply" the law as written or recklessly "make" law according to her personal predilections.

Time and again, conservatives have found ominous signs that Judge Sotomayor will do the latter. When President Obama said she wanted a justice "for doing whatever "feels" right," when conservatives learned that Judge Sotomayor would not "strictly construe" the law, they said she would decide cases based on a person's race and gender and not the merits.

These critics want you to think that only conservative judges properly interpret the Constitution. Conservative judges, they say, apply the Constitution as written by "strictly construing" it. And if the text is ambiguous, the judges don't import their own views but follow the Framers' intent.

This sure sounds good. But so did Bernie Madoff's investments. The reality is that not one judge simply "applies" the Constitution as written. The document is filled with majestic generalities—such as due process, equal protection and freedom of speech—that give only the vaguest guidance as to how they should be applied to specific cases. And discerning the Framers' intent is often as reliable as reading tea leaves.

The bottom line is that all judges—conservative and liberal alike—can't help but make law. It comes with the territory, especially for Supreme Court justices, who have the final word on the Constitution's meaning.

Yet if interpreting the Constitution involves discretion, why do we let a cabal of life insured justices do the interpreting and not our democratically-elected representatives? Constitutional scholars have wrestled with that question ever since they realized that constitutional interpretation did not entail the judges divining absolute principles but was the product of all-too-human discretion.

These scholars often justify judicial review by saying that we need it to check our democratic institutions. Sure, they say, a democracy should be largely governed by majority rule. But without a judicially-enforced constitutional check, we risk having minority groups come to a tyranny of the majority.

Indeed, finding the right balance between majority will and minority rights is one of the Constitution's trickiest acts. But part of that balance can come from judges who "empathize" with those most affected by law. After all, the majority may be too comfortable with its own interests to consider how its actions affect others. Perhaps it's good to have judges charged with putting themselves in the other people's shoes.

But these judges are not infallible. They, too, may strike the wrong balance (whether they think it's on the liberal end by protecting abortion rights or on the conservative end by preserving gun rights). Our complex constitutional democracy therefore needs a check on the justices themselves. And one of those checks is that the politically accountable branches get to replace justices whenever one of them retires.

This decision to replace a Supreme Court justice is— and should be— a political decision. After all, this is the majority's turn to redress the Court's way that favors its interpretation of the Constitution. Thus, it is the nationally-elected president who gets to choose the nominee, and the state-elected senators who must approve the nomination.

Presidents will naturally try to pick judges who agree with their views of how the Constitution should be interpreted. Of course, some nominees would inevitably disappoint their patrons. President Dwight Eisenhower called Chief Justice Earl Warren and Justice William Brennan Jr. two biggest mistakes, and the soon-to-retire Justice David Souter disappointed conservatives even though he was appointed by the first President Bush. But more often than not, presidents pick justices who do not disappoint.

Now is the time for the nation to consider Judge Sonia Sotomayor's nomination. President Obama quite properly chose a nominee whom he thinks will interpret the Constitution in a way that is acceptable, just as President Bush did when he appointed Chief Justice John Roberts and Justice Samuel Alito.

Senators, for their part, should of course ensure that Judge Sotomayor has the intellectual abilities and the moral character required for the job. And conservative senators have every right to complain that they would rather have a nominee who interprets the Constitution differently. But they should not suggest that Judge Sotomayor is disqualified because she honestly admits that judges have discretion in interpreting the Constitution and are influenced by their personal experiences.

If conservatives want a justice more to their liking, they should try to find enough votes to kill the nomination. If they can't, they should try to win more seats in the Senate in the next election or win the presidency.

But now is the majority's time to influence the Supreme Court's make-up. And, for now at least, that majority has chosen President Obama to make the appointment.