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LETTERS

How Judges See the Constitution

To the Editor:

"Our Fill-in-the-Blank Constitution," by Geoffrey R. Stone (Op-Ed, April 14), deserves to be widely read.

Judicial decisions on the central issues of our time — separation of church and state, freedom of speech and the press, the right to assemble, gun control, affirmative action, capital punishment, abortion rights and so on, are in general governed by constitutional provisions like due process of law, equal protection of the law, privileges and immunities of citizens, unreasonable search and seizure, and the right of people to keep and bear arms. These provisions and others like them were purposely drafted by the founding fathers in broad and general terms.

They were written centuries ago when, obviously, there was no electric power, no television or radio, no airplanes or railroads, no Internet and so forth. Most of them were written when blacks were considered property and women did not have the right to vote.

To insist, as some judges and justices do, that they now be interpreted as written is, therefore, completely without foundation.

Owen Birnbaum
Boca Raton, Fla., April 14, 2010

The writer is a former law professor at Howard University School of Law and lawyer for the federal government.

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To the Editor:

Every practicing lawyer knows that one of the best predictors of the outcome of a lawsuit is the politics of the judge. The law sets some boundaries on how far the judge can drift left or right, but it rarely dictates a precise outcome. Analytical ability and judicial experience play a role, but personal convictions or biases often matter more.

Richard Joffe
New York, April 14, 2010

The writer is a lawyer.

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To the Editor:

Geoffrey R. Stone's panegyric to liberal Supreme Court justices doesn't mention the vast expansion of government power and truncation of individual liberties that can be laid at the doorstep of his judicial heroes.

Thanks to so-called empathetic judges who have ignored the commandments of the Constitution, Congress can regulate anything and everything, redistribute money from anyone to anyone else, delegate its lawmaking authority to unaccountable and unelected bureaucrats, erase private contracts between consenting adults, extend less protection to political speech than to flag burning, seize private property for transfer to politically connected developers, punish blameless but disfavored racial majorities and impose anticompetitive restrictions on would-be entrepreneurs seeking only to earn an honest living.

Professor Stone might at least have acknowledged the pro-liberty role played by more conservative justices who managed to restrain their personal impulses in favor of the text of our founding documents.

Robert A. Levy
Chairman, Cato Institute
Naples, Fla., April 14, 2010

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To the Editor:

Prof. Geoffrey R. Stone has hit the proverbial nail on the head in rebutting the notion, advanced hypocritically these days by certain judges and politicians, that appellate judges are somehow like baseball umpires, making objective decisions according to immutable rules of the game. While that characterization may be somewhat applicable to trial judges, it has nothing to do with the work of appellate judges, state or federal.

The judge is not a clean slate, inputting arguments, reading precedent and rendering a more or less predictable decision. Rather, judging, particularly appellate judging, is not a science, and certainly not a baseball game, but an art. Judges come to the bench with a mind-set reflecting their life and work experiences, and their decision making is apt to be influenced by that background. The best judges can do is to keep an internal rein on their preconceived biases or prejudices.

In the federal system, any effort to dispel the myths exposed by Professor Stone would require an honest debate by our senators and the political will to retreat from purely ideological attacks on federal judicial candidates, whether for district courts, courts of appeal or the Supreme Court.

At the moment, such a sea change appears highly unlikely, and the confirmation process, when exposed to view (which is not often), remains a national disgrace.

Harvey Weissbard
Newark, April 16, 2010

The writer is a retired appellate judge.

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To the Editor:

It's been clear since Gore v. Bush that the right-wing cabal on the United States Supreme Court are the "activists."

That's when the Conservative Five used equal protection, a constitutional provision that they had routinely rejected in civil rights cases, to impose their ideological choice for president on the country. While Geoffrey R. Stone's article is somewhat nuanced, at least he is challenging the right-wing propaganda that claims that the Conservative Five are only following the Constitution.

In fact, the Constitution has been turned on its head by the conclusion-driven decisions of this court.

Barbara Blinderman
Beverly Hills, Calif., April 14, 2010

The writer is a retired lawyer.

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To the Editor:

Geoffrey R. Stone cites James Madison's apprehension about the tyranny of the majority, going on to argue that "conservative judges often stand this idea on its head" when they "invalidate laws that disadvantage corporations, business interests, the wealthy and other powerful interests in society."

But Madison's idea does not support the point Mr. Stone wishes to make. The wealthy, in Madison's time and ours, are the few. But they have rights, too, and arguably their rights are violated when the majority support a law that, for example, tends to silence them. Madison's concern for the rights of the few, as against the will of the majority, supports the conservative side of the argument.

Mark DeBellis
New York, April 14, 2010

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