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Justice Sotomayor: The Unjust Hearings

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Sonia Sotomayor; drawing by Pancho

1.

It may be too late to save any future Senate hearings on Supreme Court nominations from farce, as the Judge Sonia Sotomayor hearings quickly became. She is an excellently qualified nominee and will make a careful, thorough justice.[1] She demonstrated her clarity and technical skill in correcting several senators' misunderstandings of constitutional issues and explaining the facts of a large number of her own lower court and recent Supreme Court decisions to them. Her personal history is remarkable—from a poor South Bronx family she became a Princeton *summa* graduate and an editor of *The Yale Law Journal*. Her long judicial and extrajudicial record suggests that she is markedly less driven by ideology and more respectful of technical legal argument than Chief Justice John Roberts and Justice Samuel Alito seemed before their nominations and have shown themselves to be once on the Court.

Her hearings could therefore have been a particularly valuable opportunity to explain the complexity of constitutional issues to the public and thus improve public understanding of this crucially important aspect of our government. But she destroyed any possibility of that benefit in her opening statement when she proclaimed, and repeated at every opportunity throughout the hearings, that her constitutional philosophy is very simple: fidelity to the law. That empty statement perpetuated the silly and democratically harmful fiction that a judge can interpret the key abstract clauses of the United States Constitution without making controversial judgments of political morality in the light of his or her own political principles. Fidelity to law, as such, cannot be a constitutional philosophy because a judge needs a constitutional philosophy to decide what the law is.

The constitutional provisions that provoke the most controversial Supreme Court decisions are drafted in abstract moral language: the Constitution refers to "due process of law," "equal protection of the laws," "cruel and unusual" punishment, the "right" of free speech, the "free" exercise of religion, and the "right" to "bear arms," for example. Some lawyers, including Justices Antonin Scalia and Clarence Thomas, insist that we can interpret these clauses and apply them to concrete contemporary cases by asking a historical question: What did those who wrote that language, and the citizens they spoke to, assume the clauses meant? But that conservative theory can itself be defended only by appealing to highly controversial political principles about the nature of democracy and about the role of intention in constitutional interpretation. The theory is unhelpful anyway because the authors of the abstract clauses almost certainly intended to say what their words naturally mean: they meant to forbid any law that denies equal status to all citizens, which is very different from forbidding any law they themselves thought denies equal status.

The clauses, read literally, therefore require interpreters to develop what they believe to be the best theory of equal citizenship, which is not necessarily the theory of the framers. The same Congress that approved the equal protection clause in 1868 itself segregated the public schools of the District of Columbia, but no one now supposes that the equal protection clause allows segregation.

The Supreme Court's past decisions do act as precedents that limit contemporary interpretation. But these past decisions often themselves require interpretation. In 1937 Justice Benjamin Cardozo laid down a test for interpreting the due process clause: he said it protects those rights that are "of the very essence of a scheme of ordered liberty. To abolish them is...to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[2] What is

now the leading precedent on abortion rights declares that constraints on abortion are unconstitutional if they impose an "undue burden" on pregnant women. [3] Lawyers and judges disagree markedly about what is essential to ordered liberty, how American traditions and conscience are to be understood, and what constraints on abortion are undue. And justices may ignore past decisions, openly or covertly, as Roberts and Alito, who themselves promised fidelity to the law, have done brazenly since their confirmations. [4]

So a genuine constitutional philosophy must be a system of different kinds of political principle that guide a judge in interpreting the abstract constitutional clauses and the past decisions of other judges. It must include some at least rough theory about the best conception of democracy, including the best understanding of the individual rights that must be secured by law, as a matter of justice, if government by majority rule is to be fair. I emphasize that these are principles held as a matter of moral conviction; they are not prejudices of political partisanship or sympathy for or identification with any class or racial or ethnic group. The difference is crucial: a judge will try to justify his principles by some more general theory of political morality and he will respect their demands even when they cut against his partisan preferences or loyalties. The difference was made stark by the Court's shameful decision in *Bush* v. *Gore*, when five conservative justices declared George W. Bush president on grounds that they had themselves rejected in past cases and that they conceded would have no application in future ones. [5]

Sadly, practically everyone concerned in judicial confirmation hearings—senators and nominees—has an overriding interest in embracing the myth that judges' own political principles are irrelevant. Sotomayor was, of course, well advised to embrace that myth. Her initial statement, and her constant repetition of it, made her confirmation absolutely certain; she could lose the great prize only by a candor she had no reason to display. She was faced by a group of Republican senators who had no interest in exploring genuine constitutional issues but wanted only to score political points, if possible by embarrassing her but in any case to preen before their constituents. They scoured her record of extrajudicial speeches for any sign that she actually doubts the myth so they could declare her a hypocrite who is not faithful to the law after all.

Democratic senators had no wish to challenge the myth either. They only wanted to protect her from questions that might supply ammunition to her opponents, so they offered her endless opportunities to repeat her empty promise to follow the law. Only President Obama, in a remarkably candid statement, seemed to challenge the

myth. The law, he said, decides 95 percent of the cases but that leaves 5 percent to be decided in the judge's "heart." Senator Jon Kyl of Arizona asked Sotomayor if she agreed with Obama on this point. No, she roundly declared, I do not.

So the minuet was choreographed, and any illumination ruled out, before the hearings began. Both supporting and opposition senators asked Sotomayor whether she approved of recent Supreme Court decisions they believe of particular concern to their constituents: about abortion, of course, but also gun control, the president's power to defy Congress, his power to detain suspected terrorists indefinitely, and the permissibility of a city taking private property for private development. They wanted to be seen as knowledgeable and concerned by what worried voters.

She refused to answer, as they knew she would, on the ground that these issues might come before the Court again, and she would therefore violate judicial ethics if she took a position. As she asked Senator Tom Coburn of Oklahoma: "Would you want a judge or a nominee who...said I agree with you, this is unconstitutional—before I had a case before me...?" Opposition senators told journalists, predictably, that they were irritated with her evasions; supporting senators praised her for wise judicial restraint.

If the myth had been abandoned, the senators could have asked different and better questions that Sotomayor could not as easily have refused to answer. For example,

> Judge, I know you can't prejudge cases that may come before you if confirmed. But we both know that in many cases a judge's philosophical convictions play an unavoidable role. So can you tell us, speaking abstractly, what individual rights you think should be protected, in your personal opinion as a matter of justice, to give all citizens equal status in our democracy? Or whether you think there is any moral objection to race-sensitive policies, short of quotas, that are well designed to reduce racial inequality and tension? Or whether and how far you think that the majority of citizens should have the right to bar sexual practices that they find immoral or distasteful?
>
> Of course I know that many other factors affect your decision about equal protection and due process cases: the Constitution's text, the Court's precedents, statutes, and so forth. So I can't and won't draw any inferences about how you would vote in any actual case from what you say. But it would be helpful to this committee, and valuable to citizens watching, to know your thoughts.[6]

> Such questions are, of course, out of order so long as the myth is accepted; it declares that a judge's moral opinions are beside the point because she should be guided only by the law.

2.

The main bone the Republican senators gnawed during the hearings was Sotomayor's now famous remark that "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." That statement does seem to challenge the myth: if a judge has only to discover the law, and if personal experiences and convictions are irrelevant, what difference could it make whether the judge is a woman and a Latina? It was therefore imperative for Sotomayor, since she had declared that her constitutional philosophy was only fidelity to the law, either to explain away or to abandon her remark. She first said that she meant only that judges should set their personal experiences aside, which appears the opposite of what she had said. Later, on several occasions, she retracted the statement altogether:

> My rhetorical device failed. It failed because it left an impression that I believe something that I don't.... It left an impression that has offended people and has left an impression that I didn't intend.

In fact, however, if we substitute "sometimes" for "more often than not," leaving the question open which kinds of cases she had in mind, her remark makes eminent sense. It plainly helps a judge not only in finding facts but in formulating law to be able empathetically to understand the law's impact on people of different kinds. As Justice Ruth Bader Ginsburg told *The New York Times*, for example, being a woman helps a judge understand the horror of a strip search for a teenage girl.[7] Being a Latina may give a judge a better understanding of the crucial moral difference between racial discrimination poisoned by prejudice and race-sensitive policies aimed at erasing that prejudice. A judge with that understanding would reach a better interpretation of the Constitution's equal protection clause than a judge without it. No wise Latina would miss the obtuseness of South Carolina Senator Lindsey Graham's observation, for instance, that if he had said a wise white man could make better decisions his career would have been destroyed.

The Republican senators also claimed to be worried by another of her speeches. In 2005, replying to a question at Duke University, Sotomayor said that the "court of appeals is where policy is made" and then immediately added, "and I know...we don't make law, I know." That statement appears to mean exactly what the myth

denies: that judges must take "policy" into account in deciding what the law is. But Sotomayor, again, denied that natural meaning and said instead that she meant only that the rulings of appellate courts, unlike those of district courts, create precedents that other courts are required to follow. Once again she was led to convert something the public would do well to understand into a banality.

3.

Sotomayor has made thousands of decisions in her seventeen years as a federal judge. Only one of these, however, attracted any sustained attention in the hearings: her vote in the New Haven firefighters case.[8] That city employed an examination scheme for promoting firefighters to the ranks of lieutenant and captain; the results made none of the black candidates and at most two Hispanic candidates immediately eligible. An association of black firefighters threatened to sue the city for using the wrong test. When the city withdrew the results, white firefighters sued to protest that action. Sotomayor voted in a panel with two other judges to uphold the city's decision to withdraw the test and then to deny a petition asking all the other Second Circuit judges to review that ruling. The white firefighters appealed to the Supreme Court, which, in a 5–4 decision and an opinion written by Justice Anthony Kennedy, reversed the Second Circuit and ordered New Haven to reinstate the test results.

Republican senators insisted that Sotomayor's votes in the case revealed racial bias. They arranged for the white firefights to sit in a row—in uniform—in the hearing room, and for one of them, Frank Ricci, the lead plaintiff, to testify that he is a dyslexic and had spent a great deal of time and expense preparing for the test, paying others to read to him. The hearings suggest, however, that few of the Republicans who charged bias had read the various decisions or understood what was really at issue in the case. In view of the widespread attention the decision has attracted—Utah's Republican Senator Orrin Hatch declared it not some "itty-bitty case" but one involving one of the most important issues facing the nation—it is worth a more careful examination.

The legal arguments were dominated by the interaction between two different provisions of Title VII of the Civil Rights Act of 1964. The black firefighters who threatened to sue the city cited what is called the "disparate impact" provision. This provides that an employer may not use "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin" unless the practice is "job related for the position in question and consistent with business necessity" and the employer has not refused to use an available alternative

employment practice that has less disparate impact and would also serve the employer's legitimate needs. When the city withdrew the test results, claiming it might be liable under this disparate impact rule, the white firefighters sued the city under the different "disparate treatment" provision of Title VII, which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

It is a crucial question how these two clauses interact. The disparate treatment rule condemns, in principle, acts taken "because of" race and other forbidden categories. How should the quoted words be understood? Does an employer act because of race whenever he takes the expected racial composition of his workforce into account in designing or rejecting an employment practice? If so, New Haven necessarily offended the disparate treatment provision in trying to comply with the disparate impact provision. It had to count the number of blacks who had passed. Or does an employer act because of race only when he aims, out of favoritism or animus, to prefer one racial group to the disadvantage of another? If so, then New Haven did not show disparate treatment if its only motive was to avoid disparate impact.

The federal district court trial judge, declaring herself bound by precedent, adopted the second interpretation. She said that though the city did take race into account in abandoning the test results, it did so to avoid violating the disparate impact provision and therefore did not act "because of" race. "The intent to remedy the disparate impact" of a promotional exam, she said, quoting an earlier Second Circuit decision, "is not equivalent to an intent to discriminate against non-minority applicants." (The white firefighters contested her description of the city's motive. They argued that New Haven had thrown out the tests to placate a powerful black religious leader and avoid alienating black voters. But the trial judge rejected that claim.)

Sotomayor and the two other Circuit Court judges on her panel affirmed the trial judge's interpretation in an unrevealing one-paragraph statement. She was pressed at her Senate hearings to say why she had not explained her reasons more fully; she replied that that was unnecessary because the district court's lengthy explanation was thorough and persuasive. She voted against all the judges of the Second Circuit rehearing the decision because, she said, she knew the case would be argued before the Supreme Court anyway.

The second interpretation seems correct as a matter of statutory interpretation. The disparate impact requirement was first recognized not by Congress but by the Supreme Court in its 1971 *Griggs* decision: the Court held that employment and promotion tests are illegal if their effect is to the disadvantage of any race and they are not necessary to a business purpose, even if the employer had not intended that result.[9] In 1991, Congress amended the Civil Rights Act to adopt the Court's decision by adding the disparate impact provision to the existing disparate treatment rule. It did so to prevent covert violations of equal treatment by the use of apparently race-neutral practices that were not race neutral in result. It therefore required an employer to consider the consequences of his practices for different groups. It would not have done that if it assumed that the main purpose of its law was to forbid anyone from taking race into account for any purpose.

But when the New Haven case reached the Supreme Court, Kennedy, writing for himself and the four more conservative justices, adopted the first interpretation and therefore declared the city's motive irrelevant. "Our analysis begins with this premise," he said, "The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense" not because its motive was racial favoritism but just because it acted to avoid a result that made no members of one racial group eligible for promotion. He held, that is, that any attempt to satisfy the disparate impact rule would necessarily offend the disparate treatment rule.

Since the two rules conflict in that way, he continued, the Court must find some way of reconciling them. So he declared a new rule: New Haven was wrong to withdraw the test results unless it had "a strong basis in evidence that [it] would have been liable under Title VII had it certified the examination results." It had to show, that is, not just that it was reasonable to think that its test offended the disparate impact rule, but that it would actually have lost the lawsuit the black firefighters had threatened to bring.

It is far from clear what constitutes a "strong" basis in evidence. Kennedy's opinion makes plain, however, how difficult it would be for an employer to meet that test. New Haven had presented volumes of testimony, summarized at length in the district court's long opinion, that the test it had used did not satisfy the disparate impact requirement. Evidence showed, it argued, that alternative tests were available that would likely have passed more minority candidates and that were at least equally well suited to identify qualified officers. Kennedy did not simply describe that evidence as insufficiently strong; if he had he would have voted to remand the case to the district court for further taking of evidence. He said that the city had in effect

supplied no evidence at all and then simply ordered the city to certify the original results. An employer who wants to change an employment practice that has had disparate impact is now in a very difficult position. His only sure way of proving that he is entitled to change that practice is to encourage an actual disparate impact lawsuit by offended minority applicants and then to lose that suit. Otherwise he could not be sure that he had shown "a strong basis in evidence" for thinking that he would have lost it.

So the decision marks yet another step in the conservative justices' campaign to ban the most effective means of reducing racial tension in our country. They want to eliminate all vestiges of race-sensitive measures designed to help end racial stratification. They outlawed sensible school assignment plans in Louisville and Seattle that used racial tests.[10] They hope to overrule Justice Sandra Day O'Connor's *Grutter* decision that allowed law schools to take race into account in admissions policies,[11] and now they have all but neutered the disparate impact provisions of the Civil Rights Act. Yes, it would have been unfortunate for the white firefighters who had studied so hard to make them take a new and different test. Sotomayor's panel expressed sympathy for them. But it is also bad—for community harmony and effective municipal service—when a city with a 60 percent minority population fields a police or fire department with few or no minority officers.

It is not likely that Congress, even if so minded, could effectively overrule Kennedy's decision by amending the Civil Rights Act. Kennedy was careful to say that since the Court had decided against the city by interpreting that act, it was unnecessary to resolve a further issue: whether the disparate impact provision was itself unconstitutional because it violated the Constitution's equal protection clause. Scalia, in a concurring opinion, left little doubt of his intentions:

> I...write separately to observe that [the Court's] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate- impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?...The war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.

If the conservative justices declare the disparate impact provision of Title VII unconstitutional, as part of their so-far triumphant campaign, Congress will be powerless to oppose them.

4.

On one important issue Sotomayor seemed, at least at first, to take an unequivocal stand: "Foreign law," she told Republican Senator John Cornyn of Texas, "cannot be used as a holding or a precedent, or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law." In their earlier hearings, both Roberts and Alito, while refusing to commit themselves on any other issue, said much the same. Conservatives have been particularly angered by the Court's 6–3 *Lawrence* decision, in 2003, in which Justice Kennedy cited the European Court of Human Rights and other foreign sources in his argument that the equal protection clause forbids making homosexual acts criminal, [12] and its 5–4 *Roper* decision in 2005, in which Kennedy cited the United Nations' Convention on the Rights of the Child as support for the Court's ruling that the juvenile death penalty is unconstitutional. [13]

Sotomayor acknowledged that justices sometimes mention foreign sources, but "in my experience," she said, "when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using it just to point something out about a comparison between American law and foreign law. But they're not using it in the sense of compelling a result." Later, in response to written questions, she said that "in some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles and treatises can be sources of ideas." But the contrast she made, between using foreign law as controlling precedent, which no one has suggested, and simply as a source of ideas on a par with law review articles, ignores the use that has actually been made of foreign legal material. Kennedy said, in his *Roper* opinion:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.... It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

We share traditions, problems, and challenges with many other nations with similar cultures, and the fact that almost all of them have concluded that certain individual rights are of fundamental importance provides a reason, though of course not necessarily a decisive one, for us to suppose that it is of fundamental importance for us too. We should always carefully reexamine our own moral convictions when we

find that no one else shares them. Of course this use of foreign law assumes that interpreting our Constitution requires conviction, and that is what the myth of "fidelity to the law" denies. Apparently the Republican senators will demand that all future nominees abjure any serious use of foreign legal materials; the result might well be to make our constitutional practice more insular, to our cost. We pay an increasingly heavy price for our stubborn fidelity to a foolish myth.

What is to be done? Nothing, I fear, until the idea that judges' personal convictions can and should play no role in their decisions loosens its grip not just on politicians but on the public at large. Perhaps a brave senator, who declares that he will not vote for any candidate who does not respond to questions like those I described earlier, may begin that process. But the only realistic solution is longer-term. In a book recently reviewed in these pages I suggested that our politics would be improved if high school classes were encouraged to explore political issues in a much more sophisticated way than has been customary.[14] An enlightened discussion of the Constitution and of constitutional adjudication would be an essential part of such courses.

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1. 1
   Sotomayor was confirmed by the full Senate, 68–31, on August 6. Nine Republicans voted for her and the rest voted against. Her margin of victory was significantly greater than Justice Samuel Alito's margin—58 to 42, with only four Democrats supporting the nomination—when he was confirmed on January 31, 2006. ↩

2. 2
   Palko v. *Connecticut*, 302 U.S. 319 (1937). ↩

3. 3
   Planned Parenthood of Southeastern Pa. v. *Casey*, 505 U.S. 833 (1992). ↩

4. 4
   See my *The Supreme Court Phalanx: The Court's New Right-Wing Bloc* (New York Review Books, 2008). ↩

5. 5
   See my "A Badly Flawed Election," *The New York Review*, January 11, 2001. ↩

6. 6

Senator Tom Coburn apparently wanted to ask a question of that kind. With his mind on gun control, he asked Sotomayor whether people have a right to defend themselves. When she began to describe what the courts had decided in the past he interrupted: "I wasn't asking about the legal question. I'm asking about your personal opinion." She then dismissed the question as "abstract." ↩

7. 7
See Emily Bazelon, "The Place of Women on the Court," *The New York Times Magazine*, July 7, 2009. Ginsburg was referring to *Safford Unified School Dist. #1* v. *Redding*, Supreme Court, decided June 25, 2009. ↩

8. 8
Ricci et al. v. *DeStefano et al.*, unpublished per curiam decision, reversed by the Supreme Court, June 29, 2009. ↩

9. 9
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971). ↩

0. 10
See *The Supreme Court Phalanx*. ↩

1. 11
Grutter v. *Bollinger*, 539 U.S. 306 (2003). ↩

2. 12
Lawrence v. *Texas*, 539 U.S. 558 (2003). ↩

3. 13
Roper v. *Simmons*, 543 U.S. 551 (2005). ↩

4. 14
Is Democracy Possible Here? Principles for a New Constitutional Debate (Princeton University Press, 2006); reviewed by Paul Starr, *The New York Review*, July 16, 2009. ↩