

The 'Empathy' Nominee

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ABSTRACT

[...] 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.

FULL TEXT

In making Sonia Sotomayor his first nominee for the Supreme Court yesterday, President Obama appears to have found the ideal match for his view that personal experience and cultural identity are the better part of judicial wisdom.

This isn't a jurisprudence that the Founders would recognize, but it is the creative view that has dominated the law schools since the 1970s and from which both the President and Judge Sotomayor emerged. In the President's now-famous word, judging should be shaped by "empathy" as much or more than by reason. In this sense, Judge Sotomayor would be a thoroughly modern Justice, one for whom the law is a voyage of personal identity.

"Experience being tested by obstacles and barriers, by hardship and misfortune; experience insisting, persisting, and ultimately overcoming those barriers," Mr. Obama said yesterday in introducing Ms. Sotomayor. "It is experience that can give a person a common touch of compassion; an understanding of how the world works and how ordinary people live. And that is why it is a necessary ingredient in the kind of Justice we need on the Supreme Court."

In a speech published in the Berkeley La Raza Law Journal in 2002, Judge Sotomayor offered her own interpretation of this jurisprudence. "Justice [Sandra Day] O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases," she declared. "I am . . . not so sure that I agree with the statement. First, . . . there can never be a universal definition of wise. Second, 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."

We quote at such length because, even more than her opinions, these words are a guide to Ms. Sotomayor's likely behavior on the High Court. She is a judge steeped in the legal school of identity politics. This is not the same as taking justifiable pride in being the first Puerto Rican-American nominated to the Court, as both she and the President did yesterday. Her personal and family stories are admirable. Italian-Americans also swelled at the achievement of Justice Antonin Scalia, as Jewish-Americans did at the nomination of Benjamin Cardozo.

But these men saw themselves as judges first and ethnic representatives second. Judge Sotomayor's belief is that a "Latina woman" is by definition a superior judge to a "white male" because she has had more "richness" in her struggle. The danger inherent in this judicial view is that the law isn't what the Constitution says but whatever the judge in the "richness" of her experience comes to believe it should be.

There are signs of what this means in practice in her lower court decisions. One of them is *Ricci v. DeStefano*,

involving the promotion of white firefighters in New Haven and now pending before the Supreme Court. In the case, heard by a three-judge panel including Judge Sotomayor, the city refused to certify promotion exams when the results of the exam would have elevated 18 white firefighters and one Hispanic – an outcome that would have underrepresented minorities. The firefighters sued, charging discrimination.

After the three judge panel issued a brief opinion repeating the district court's decision, the appeals court declined to rehear the case en banc, an outcome which infuriated Ms. Sotomayor's colleague and fellow Clinton appointee Jose Cabranes. In a dissent joined by five of his colleagues, Judge Cabranes criticized the slipshod handling of the case by a majority that lacked the courage of its racial preference convictions. The "perfunctory disposition" of the opinion, he noted, "lacks a clear statement of either the claims raised by the plaintiffs or the issues on appeal."

Judge Cabranes added that the discrimination issues raised by the case were "worthy of review" by the Supreme Court, which took the case and may well overturn the Sotomayor panel's ruling. The case raises the question of whether a judge with an avowed commitment to applying her own "experience" to cases was disinclined to an argument made by those not sharing that personal experience.

Or consider the result last year in *Knight v. Commissioner*, in which the Supreme Court unanimously upheld her ruling in a tax case involving individual tax deductions, even as her reasoning drew a rebuke from Chief Justice John Roberts. The Second Circuit opinion "flies in the face of the statutory language," he wrote for the Court.

In April, the Supreme Court overturned 6-3 her 2007 ruling in *Riverkeeper v. EPA* in which she found that the EPA could not consider cost-benefit analysis in judging whether companies need to upgrade to the best technology available, even when the costs were wholly disproportionate to the benefits. And in the 2006 case of *Merrill Lynch v. Dabit*, the Court ruled 8-0 to overturn her position that a state class-action lawsuit against Merrill Lynch was not pre-empted by federal law.

Even the best judges get overturned, of course, but the issue here is less the result than Judge Sotomayor's legal reasoning. As a lower court judge, she was restrained by a higher authority. On the Supreme Court, she is limited only by the other Justices she can win over to her arguments.

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As the first nominee of a popular President and with 59 Democrats in the Senate, Judge Sotomayor is likely to be confirmed barring some major blunder. But Republicans can use the process as a teaching moment, not to tear down Ms. Sotomayor on personal issues the way the left tried with Justices Clarence Thomas and Sam Alito, but to educate Americans about the proper role of the judiciary and to explore whether Judge Sotomayor's Constitutional principles are as free-form as they seem from her record.

(See related letters: "Letters to the Editor: Do We Want Empathetic Justice or Blind Justice?" – WSJ June 4, 2009)

DETAILS

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