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The Religious Underpinnings of the Sotomayor Hearings

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Foundational Texts, Interpretation, and Playing the Game: 
The Religious Underpinnings of the Sotomayor Hearings

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My first week living in a new state coincided with the Senate Judiciary Committee hearings for the nomination of Sonia Sotomayor to the Supreme Court. While unpacking boxes, I took full advantage of NPR’s live coverage and listened with more concerted attention than I might have had I already developed a daily routine. The opening speeches especially, had my rapt attention. They exposed the deep effects of *American* religious anxiety on the theatre of American justice as only our country’s Supreme Court has the capacity to reveal.

Patrick Leahy opened the first morning urging his fellow senators not to allow the caricature floating around of Judge Sotomayor to affect their sober consideration of her nomination. Except for one “I Love Lucy” gaffe referencing a famous line from Desi Arnez, the Senatorial piety of race-awareness was pristine. Overall, it was not Sotomayor who was caricatured, but rather the very nature of law, legal reasoning, and the high court’s role in our so-called secular society. Law professor at Georgetown, Mike Seidman reacted strongly to the whole spectacle, deriding Sotomayor and the entire committee for simplifying Constitutional law to such an extent as to be toxic. “Anyone who knows anything about the law knows that the official version is a lie, but many Americans don’t know anything about law. To them, the official version sounds plausible.”

As Seidman indicates, the “official version” we saw on display this past week is that “fidelity to uncontested legal principles dictates results.” This simple claim, adopted by Sotomayor in her opening statements, funded most of the Senators’ affirmations and critiques over the four days. It even re-spawned in the form of a now famous metaphor coined by then Judge Roberts who said, “Judges are like umpires. Umpires don’t make the rules. They apply them.” The appeal of the metaphor is that the ump stands behind the plate, outside of the diamond of play, and objectively observes the facts of the game, calling outs, safes, balls, and strikes for what they are. This is the ‘official version’ of the role of the third branch of government. Almost like jeers from the ball stands, Senators called out “activist judge,” “identity politics,” “empathetic ideology” to express dissatisfaction with the ump’s ability to call it like it is. The umpire metaphor won its adherents and detractors among the Senators, but by and large the hearings proceeded as if law could be applied using a self-evident, almost mechanical process of applying law to the facts.

The simple claim that law is straight-forward and a judge merely applies the law to the presenting facts served as the fork for Senator Jeff Sessions’ “dangerous crossroads.” In Sessions’ opening statement, he carefully outlined the two paths facing our legal system and

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1 Complete transcripts of the Senate Judiciary hearings, including the manuscripts of the opening speeches, can be found at [http://judiciary.senate.gov/hearings](http://judiciary.senate.gov/hearings)

2 Louis Michael Seidman’s comments can be found in “The Federalist Society Online Debate Series,” at [http://www.fed-soc.org/debates/dbtid.30/default.asp](http://www.fed-soc.org/debates/dbtid.30/default.asp)

3 Ibid.
asked Sotomayor which path she planned to tread. The religious/philosophical subtext was, in this case, quite plain. “Our legal system is based on a firm belief in an ordered universe and the objective truth,” he said to clarify the correct path, calling the judge the ‘guide to truth’. The other direction, according to Sessions was a “relativistic world” where “words have no true meaning” and new policy is created according to the “liberal activist, results oriented” judge’s “own political and social agenda.” Charles Grassley’s remarks rang the same tune, urging Sotomayor to “resist the temptation to mold the Constitution to your own personal beliefs and preferences.”

The terms “temptation,” “truth,” “ordered universe,” and even the metaphor of the path are only the terminological patina of religious effects on these deliberations. More fundamentally, the Constitution was often treated as a sacred text akin to the Scripture’s role in various Bible-based faiths. The issues of fixed, self-evident meanings for words and the negative role of the interpreter are two of the most prominent anxieties felt in contemporary Christian Fundamentalist doctrines of Scripture. These were the same concerns driving the accusations against Sotomayor for her subjective, identity-based, empathetic judging. We even heard strange emphasis on the written Constitution in the hearings, particularly in John Cornyn’s remarks. In fact, Cornyn’s analogical thinking won the day when he said

It (the court) could continue to depart from the written Constitution. It could further erode the established rights we have in the text of the Constitution. And it could invent even more brand new rights not rooted in the text.

Where most advocates of the official version spoke about strict fidelity to the “law,” Cornyn reduced the concept of the law to the textuality of our founding document. In fact, whether a Senator referenced the written word or the entire body of law, his reduction was the same: law is objective, self-evident, and clear. Judges merely execute the truth of the law. All of this could easily be reduced to the independent Southern Christian church billboard I saw yesterday that read “We do not change the message. The message changes us.”

Once this conceptual analogy was exposed to me, the repeatedly scripted exchanges in the proceedings seemed engined by similar religious concerns. Even someone like Ben Cardin used familiar theological language when he described the Constitution and Bill of Rights as “living documents,” which is consistent with some approaches to the Bible as requiring the completion of the church, or the sermon, or personal experience and reason to be authoritative. Cardin was followed by Sheldon Whitehouse’s appeal to the document’s “great principles.” Did Whitehouse intend to imply that the truth is not in the details, in every jot and tittle of the text? Have any of these Senators had the time to read anything about philosophical hermeneutics and biblical interpretation?

Two other prominent areas of discussion, foreign law and mainstream values fell into place within the conceptual analogy as well. First, the hearings frequently focused on the use of foreign law in legal reasoning. It was established that foreign law is often consulted but that it cannot be considered binding on an American legal outcome. However, some argued that foreign law should never be consulted at all because even when not treated as binding, foreign law still acquires authority in the deliberation of justice. It’s as if the priests were telling parishioners not to read the sacred texts of other religions, or to look for truth anywhere but in the Authority of our sacred text. Where Sotomayor claimed
ideas are ideas, and whatever their source…if the idea has validity, if it persuades you…then you are going to adopt its reasoning. 4

the priest responds, ‘No! Authority lies in the American Constitution alone.’

Second, much emphasis was placed on how mainstream are Sotomayor’s values. Such a concern is easily correlated with hermeneutical theory. When one concedes that subjectivity plays a role in interpretation, anxiety often follows about the identity of the community of interpreters. Here it fell to the Senators who affirmed the judicial role of subjectivity to insure Sotomayor’s status as mainstream. Leahy called her a “judge for all Americans,” Ben Cardin talked about “mainstream American values,” and Charles Schumer even itemized a list of statistics to prove Sotomayor’s membership in the mainstream. Almost everyone mentioned her “truly American” story. All of this was, of course, necessary given the at-risk status of the white man in Sotomayor’s worldview. Her comment about the wise Latina woman being better able to arrive at a fair and excellent judicial outcome than a white man vexed the hearings for all four days.

In the end, however, it was a return to baseball that was supposed to provide the balm to all the religious anxiety. When Schumer ended his questions to Sotomayor about her ruling on the baseball strike, he got Chairman Leahy in on the most powerful hermeneutical example of horizons of interpretation: play. The Red Sox, Mets, Yankees, and regional team affiliation served as powerful proxies for differences of identity. As in baseball, so in hermeneutical theory: play more than shared interpretive horizons, determines who can be on the playing field. And for all Senators, regardless of their stated opinion about the metaphor, the judge does not stand outside the diamond only calling balls and strikes. She is a player, awaiting invitation to the field.