

Sotomayor's 'Analogous Sentiments'

By ED WHELAN | December 13, 2021 10:44 AM

The quality of Justice Sotomayor's dissent (joined by Justices Breyer and Kagan) in *Whole Woman's Health v. Jackson* is captured in this badly confused and grandstanding passage:

This [S. B. 8] is a brazen challenge to our federal structure. It echoes the philosophy of John C. Calhoun, a virulent defender of the slaveholding South who insisted that States had the right to “veto” or “nullif[y]” any federal law with which they disagreed. Address of J. Calhoun, *Speeches of John C. Calhoun* 17–43 (1843). Lest the parallel be lost on the Court, analogous sentiments were expressed in this case's companion: “The Supreme Court's *interpretations* of the Constitution are not the Constitution itself—they are, after all, called *opinions*.” Reply Brief for Intervenors in No. 21– 50949 (CA5), p. 4. [Italics in original; my underlining.]

The Nation fought a Civil War over that proposition....

It's fitting in a way that Sotomayor calls these “analogous *sentiments*” because sentiment is substituting for the simple analysis that would show them not to be analogous at all.

The proposition that the “Supreme Court's *interpretations* of the Constitution are not the Constitution itself” is obviously correct. If it weren't, it would make no sense to speak of an erroneous decision by the Supreme Court on a constitutional

matter, and Sotomayor herself would have no basis for disputing any constitutional precedent (or perhaps even for dissenting from a constitutional ruling, as the majority's interpretation would *ipso facto* be the Constitution). The fact that anyone would fail to grasp, much less would bristle at, this elementary truth is a sad testament to how besotted our legal culture is by the **myth of judicial supremacy**.

Sotomayor's claim that S. B. 8 "echoes the philosophy" of Calhoun is also quite a distortion. Calhoun maintained that a state legislature could reject any federal law that it considered unconstitutional. By contrast, S. B. 8 is designed merely to prevent *pre-enforcement* review by federal courts. No one contests that in any enforcement actions Texas courts must entertain all federal constitutional defenses that a defendant might present and that they must apply Supreme Court precedent in doing so. So, contrary to Calhoun's theory, Texas is not maintaining that it has unilateral authority to determine what the federal Constitution means within its borders.

Sotomayor's assertion that the Civil War was fought "over *that* proposition" is so it's not clear which she is referring to. Insofar as she is maintaining that the Civil War was fought over the proposition that the "Supreme Court's interpretations of the Constitution are not the Constitution itself," her point has substantial merit, *but in exactly the opposite way that she means*. It was Abraham Lincoln who, in his presidential campaign and in his first inaugural address, properly insisted that the Supreme Court's interpretations of the Constitution in the *Dred Scott* case were wrong and declared that he would not abide by them. Lincoln's actions as president were faithful to his words. In defiance of the dual holdings of *Dred Scott*, he signed into law a bill that outlawed slavery in the federal territories, and he instructed the State Department to issue passports to free blacks, thus recognizing them as citizens. (Insofar as Sotomayor is maintaining that the Civil War was fought over the proposition that states can't nullify federal law, her assertion would be sounder if it were directed against the

corollary proposition that states can't secede from the Union.)

It is true, of course, that Lincoln's rejection of the myth of judicial supremacy can be understood as an exercise of departmentalism among the three branches of the federal government, and there is plenty of room to argue that state legislatures ought to have less leeway in contesting or defying the Supreme Court's interpretations of the Constitution. But Sotomayor's confused "sentiments" distract her from giving any attention to that matter.