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Defining Activism Down

A liberal vote cast in conservative judicial rhetoric.

After two days of Senate hearings on the nomination of Sonia Sotomayor, an onlooker could be forgiven for wondering where all the judicial liberals went. To hear the adjectives heaped on the judge by members of the President's party, you'd think Mr. Obama had nominated Chief Justice John Roberts's conservative cousin.

Judge Sotomayor is smart and accomplished, New York Democrat Chuck Schumer said Monday, "but most important . . . [her record] bespeaks judicial modesty" and shows she is a better "umpire" than Justice Roberts himself. Dick Durbin called her "restrained, moderate and neutral," while Pat Leahy said her record shows a "careful and restrained judge with a deep respect for judicial precedent."

The activists in Mr. Leahy's rhetorical show are, presto, the conservatives of the Roberts Court, which has very, very cautiously chipped away at some precedent in cases on issues like the Second Amendment and campaign finance reform.

Under this brave new meaning of judicial activism advanced several years ago by now-White House aide Cass Sunstein, a judicial activist is any judge invalidating a federal law, however shoddily made. Ergo, conservative judges are obliged to uphold liberal precedents no matter how narrow the vote and how recent the case, while liberals can overturn long-time principles in the name of the evolving Constitution.

The effect is a liberal ratchet, where precedents like *Miranda v. Arizona* and *Roe v. Wade* are cast in stone, but any rethinking by the Roberts Court of the six-year-old 5-4 campaign-finance ruling in *McConnell v. FEC* is a scandal. "So many of the rulings of the current conservative majority on the Supreme Court can be described as activist," Wisconsin Democrat Russ Feingold insisted. "The best definition of a judicial activist is when a judge decides a case in a way you don't like."

Actually, we have a better one. An activist judge is one who is willing to decide cases based on something other than what's in the Constitution. But that's a troublesome standard for Sonia Sotomayor, who in speeches and writings has shown she is open to a wide variety of sources, from human empathy to personal experience to foreign and international law to help her in judging cases, or to "set our creative juices flowing," as she said of the latter.

Under questioning yesterday on her controversial remark that a "wise Latina" would make better decisions than a white male, Judge Sotomayor backed away from the statement, calling it a "bad" play on the words of Sandra Day O'Connor that a wise old man and a wise old woman would reach the same conclusion. Still, she insisted, she

was trying to inspire Hispanic law students "to believe that their life experiences would enrich the legal system, because different life experiences and backgrounds always do."

Democrats emphasize that Judge Sotomayor's record on the bench shows she is a moderate whose decisions were frequently in step with her colleagues on the Second Circuit Court of Appeals. According to a study by the left-leaning Brennan Center for Justice, Judge Sotomayor voted with the majority in 98.2% of her 217 constitutional cases, dissenting only four times.

Falling within the mainstream of liberal judges, however, is not the same as falling into the mainstream of the rest of the country. The judge's decision to deny a racial bias claim by white firefighters was overturned by the Supreme Court in *Ricci v. DeStefano* last month. Afterward, a Rasmussen poll found that 46% of voters considered her a political liberal compared to only 32% who thought she was a moderate. Justices shouldn't be confirmed based on polls, but the numbers do explain the concerted Democratic attempts to define her as a conservative.

In fact, what was once the Felix Frankfurter-Whizzer White school of liberal judicial restraint no longer exists in the polite echelons of the judicial left. The new school is now remarkably uniform in wanting to dictate racial outcomes, limit political speech, invoke foreign rulings as a legal guide, and do whatever else the activist cause of the moment demands.

Judge Sotomayor gives every sign of being of that school, and there's little reason to believe she wouldn't be a reliable liberal vote on every important issue. Elections have consequences, and Justice Sotomayor is almost certain to be confirmed. But for a President who was elected on the promise of moving beyond old racial divisions, Mr. Obama's first Supreme Court nominee looks jarringly passé.

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