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May 27, 2009: Judge Sonia Sotomayor and Judicial Activism

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Title: Judge Sonia Sotomayor and Judicial Activism

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5/27/2009--It is tiresome to hear conservatives instantly trot out the script of judicial activism in attacking the nomination of Sonia Sotomayor for the Supreme Court. The issue of the balance between judicial decision and decision by elected officials is obviously important, but it cannot be decided by slogans. When conservatives say judicial activism, they are referring almost exclusively to abortion rights and the possibility that the United States Supreme Court might recognize gay marriage as a fundamental right. But consider instead the right to bear arms. When in 2008 the Court recognized a personal right to bear arms that the federal courts had rejected for over 200 years, conservatives did not call this judicial activism. They called it a belated recognition of constitutional rights. The same can be said for the constitutional rights of corporations and free speech protection for advertising, both of which would have seemed lunacy to the framers of the Constitution. I could also add constitutional protections against regulation of property under the Takings Clause. All of these are rights of capitalism against democracy. All are supported by conservatives. All are policy crafted by judges. Then there are the powers of Congress. The Fourteenth Amendment gives Congress the power to enforce individual's constitutional rights. But when Congress does so, the Court second guesses these decisions, usually in the name of state rights. Conservatives support this also. All of this is policy made by federal judges. Maybe it is all inescapable. But it is all activism.