Written by **Jack Kenny** on May 26, 2009

Judge Sonia Sotomayor's Shadowy Thinking

"Penumbras"? That's how the Supreme Court has rationalized certain actions establishing new federal laws, and overturning state laws, that cannot be justified based on the clear language of the Constitution.

While the nation's media will make much of the nominee's gender (female) and ethnicity (Latino), conservatives both in and beyond the U.S. Senate are likely to devote more time and attention to Sotomayor's utterances concerning the development of law on both the Supreme Court and on appeals courts, "where policy is made," according to the judge.

A Youtube clip of Sotomayor, who sits on the Second Court of Appeals in New York, shows her participating in a panel discussion at Duke University Law School in 2005, talking about what kind of Supreme Court nominee certain interest groups would want for the Supreme Court.

"All of the legal defense funds out there, they're looking for people with court of appeals experience because it is, court of appeals is where policy is made," Sotomayor said. At that point, seemingly aware that she had committed a gaffe, she turned to the other members of the panel, and made a pro forma equivocation. "And I know, and I know, this is on tape and I should never say that, because we don't make law," she said, waving her hands in the air and drawing laughter from the audience. "I know. I know. I'm not promoting it, I'm not advocating it, I know."

Sotomayor then went on to describe the difference between the way a case is adjudicated at the federal district court level and at a court of appeals. In district court, the application of the law is "not precedential, so the facts control the case," she explained. "On the court of appeals, you are looking to how the law is developing, so it will then be applied to a broad class of cases. So that you're always thinking about the ramification of this ruling on the next step in the development of the law."

It is possible a potential nominee could wave a bigger, brighter red flag before both political and judicial conservatives indicating that the judge will legislate from the bench, but it is hard to imagine how. Those opposed to the high court's 1973 *Roe v. Wade* ruling, establishing abortion as a constitutional right, will be quick to point out that the right was "discovered" in a previous (i.e. "precedential") ruling in a case in which the court overturned Connecticut's ban on contraception. (*Griswold v. Connecticut*, 1965). Associate Justice William O. Douglas, writing for a 6-3 majority, based his ruling on a broad right of privacy, to be found in a "penumbra," or shadowy area, formed by "emanations" from other privacy rights spelled out in the Constitution.

The Constitution protects personal privacy by demanding security in "persons, houses, papers and effects" from "unreasonable searches and seizures." It stipulates that soldiers shall not in peacetime be

quartered in a private home without the consent of the owner. It guarantees the right of a criminal defendant to be free from self-incrimination. It guarantees the free exercise of religion and of speech and of the press and of assembly, and to petition the government for redress of grievances. These all form a zone of privacy which, in its "penumbras," must also include the right of a married couple to be free from interference by the state in their acquisition of and use of contraceptives, the court said. "Ipso fatso," as Archie Bunker used to say. In the past, state and local governments decided laws regarding public morality, which fell outside the few and defined powers of the federal government, but *Griswold* opened a Pandora's box.

That ruling became "precedential" and the basis for further expansions of the "right to privacy." The court would later rule that unmarried persons must also be free to practice contraception. Eventually, the right of privacy became the basis for overturning laws against sodomy. Today, five states even recognize same-sex unions as marriages. And the right of privacy in family planning and family life became the basis of the court's 7-2 *Roe* ruling on January 22, 1973 that the right to terminate a pregnancy is protected by the Constitution. Today, based on subsequent court rulings, states may not require the consent or even notification of parents of minors seeking abortion without including "health of the mother" and "judicial bypass" provisions to speed the process along and ensure that the right of the "woman" (sometimes as young as 14) to an abortion is not impeded.

In recent years, it has become common practice to give out condoms to students in public schools. The sex-education curricula in most public schools treat homosexuality and same-sex unions (or "marriages" in some states) as natural, normal, and even healthy. An estimated 4,000 babies are aborted, on average, every day in the United States. And there is virtually nothing either the Congress or the states may do about it, according to *Roe* and subsequent rulings of the Supreme Court.

By the late 1960s, some states were already moving toward a "liberalization" of laws governing contraception, abortion, and sodomy. But there is little doubt that the rulings of the Supreme and appellate courts made policy that not only accelerated the process, but left all states defenseless to stop it or even slow it down. That is how not only law, but "compassion" has developed in America over the last 43 years. The answer to President Obama's quest for "real world" compassion might be for the people in their respective states to say what the infants in the womb are unable to say on their own behalf: "We are defenseless before the onslaught of your 'compassion.'"

It is also worth remembering that President Reagan's first choice for the third Supreme Court vacancy he would fill was Judge Robert Bork, who was skewered (the term of art is now "Borked") for his stated belief that there was no general, undefined "right of privacy, " as described in *Griswold*, *Roe* et al., anywhere in the Constitution. Bork's nomination was defeated and Reagan then chose Judge Douglas Ginsburg, who withdrew after confessing to having smoked marijuana in his youth. Reagan's third choice, Judge Anthony Kennedy, was confirmed and became, with Sandra Day O'Connor, one of the pivotal swing votes between the liberal and conservative blocs on the court.

It remains to be seen if Republicans and conservative Democrats in the Senate today, most of whom have said they favor "strict constructionists" on the bench, have the stomach for anything like the kind of fight against Sotomayor that liberals waged against Bork.