



## **Should constitutional interpretation resemble common law decisionmaking?**

**Context:** Judge Sotomayor's cited former Second Circuit Court of Appeals Judge Jerome Frank in a speech she gave about restoring integrity to the legal system. She quoted his statement that "the very nature of the common law is based upon the lack of certainty." See Hon. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 Suffolk U. L. Rev. 35 (1996-1997). Republicans suggests that this means Judge Sotomayor believes that "what is true for the 'common law' is true for the rest of law." Yet, she made no such suggestion.

**Republican Attacks:** Today, Senator Graham attacked Judge Sotomayor for her alleged perspective on constitutional interpretation. Moreover, in an earlier statement, Senator Cornyn stated that "lawyers know [that] the common law refers to judge-made law that the colonists inherited from England in a period before a written Constitution." But, actually *most* lawyers know that while the common law in America was originally based on English common law, it has evolved and been added to by *American* jurists for almost 240 years.

Senator Cornyn buttressed his argument by quoting *Erie Railroad Co. v. Tompkins* for the assertion that there is no such thing as federal common law. However, the Supreme Court would be surprised to learn that their federal common law jurisprudence in the areas of maritime law, antitrust law, agricultural law, banking law, bankruptcy law, eminent domain, government contracting law, law governing disputes between states, law governing interstate pollution, patent law, postal law, and securities law has been disregarded. Most recently, Justice Souter affirmed the existence of federal common law when he said, in his majority opinion in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2616 (2008), that "maritime law remains federal common law."

Finally, Senator Cornyn expresses his erroneous view that "while a common law judge can make the law, a federal judge can only interpret the law enacted by the elected branches." However, the Supreme Court's recent decision in *Ricci v. DeStefano*, 557 U.S. \_\_\_ (2009), illustrates the fallacy of this claim. In *Ricci*, the Supreme Court adopted a new standard for evaluating disparate treatment claims – a standard not articulated by Congress. Senator Cornyn, however, doesn't seem to mind when courts "make the law" in a way he approves. In his press release following *Ricci*, he noted that "[t]oday's decision is a victory for evenhanded application of the law." We hope Republicans will show the same deference to Judge Sotomayor when she is on the Supreme Court as he did for the 5 ultra-conservative members of the Court who voted against Title VII.