



Are judges supposed to update the law to reflect changing social policy?

Context: In 1996, Judge Sotomayor gave a speech titled “Returning Majesty to the Law and Politics: A Modern Approach.” 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). She addressed how lawyers may satisfy “societal expectations about ‘The Law’ and help create a better atmosphere in which public officials, and especially lawyers and judges, can inspire more confidence and respect for the ‘majesty of the law’ and for the people whose professional lives are devoted to it.” *Id.* She cites Jerome Frank, former Court of Appeals judge and founder of Legal Realism, who “postulated that the public's distrust of lawyers arises because the law is ‘uncertain, indefinite, and subject to incalculable changes,’ while the public instead needs and wants certainty and clarity from the law”. Jurists including Oliver Wendell Holmes, Benjamin Cardozo, and Richard Posner have all followed Legal Realism.

Republican Attacks: Today, Senator Sessions suggested that her perspective is an endorsement of *carte blanche* judicial activism, changing the law on the basis of indiscriminate personal bias.

Judge Sotomayor’s Record: As an initial matter, these attacks mischaracterize her words. Instead of using the law as a tool to further one’s own goals, Judge Sotomayor suggests that judges and lawyers should be proud of the collective work the law has done to further social justice for all. “The law can change its direction entirely, as when *Brown v. Board of Education* overturned *Plessy v. Ferguson*, or as the common law has gradually done by altering the standards of products liability law directly contrary to the originally restricted view that instructed ‘caveat emptor.’ As these cases show, change--sometimes radical change--can and does occur in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society.”

Moreover, on the bench Judge Sotomayor routinely issues very narrow decisions and avoids creating broad policy-laden decisions. See *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006) (balancing homeland security against civil liberties, ruling that ferry company’s practice of searching the carry-on bags of randomly selected passengers and inspecting randomly selected vehicles did not violate the Fourth Amendment); see also *Vento v. Lord*, 1997 U.S. Dist. LEXIS 11022 (S.D.N.Y. 1997) (denying Eighth Amendment claim for prisoner who alleging she did not receive proper x-rays because incident did not rise to the level of “deliberate indifference” required sustain a claim); *Center for Reproductive Law and Pol. v. Bush*, 304 F.3d 183 (2d Cir. 2002) (rejecting claim that Bush Administration’s “Mexico City Policy,” which prohibited foreign organizations from receiving development funds unless they agreed to neither perform abortions nor promote abortion generally, violated the First Amendment speech and association rights of reproductive rights organizations).