

## A Conversation with Justice Sotomayor

*Justice Sonia Sotomayor & Linda Greenhouse*

*On February 3, 2014, Justice Sonia Sotomayor delivered the James A. Thomas Lecture at Yale Law School. This transcript is adapted (with slight editing) from that lecture, which took the form of a conversation between Justice Sotomayor and Linda Greenhouse. The lecture touched on topics including Justice Sotomayor's conception of her role and her jurisprudence, her agreements and disagreements with colleagues, and her outreach to the wider public.*

Linda Greenhouse: I think I'll start out with a dissent you published in November, a dissent from a denial of certiorari. Justice Breyer joined you on it, but you wrote it, in a case called *Woodward v. Alabama*.<sup>1</sup>

Justice Sonia Sotomayor: He only joined me in part.

LG: Oh, only in part, okay. So this case had to do with the practice in Alabama, the all-too-common practice, of judges having the ability in capital cases to override a jury's determination that the death penalty should not be imposed. So it's life to death at the hands of judges. And the Court denies cert, the case didn't get the requisite four votes for cert, and Justice Sotomayor published a twelve page dissenting opinion with an appendix that listed every one of the ninety-five life-to-death judicial overrides, and calling for the Supreme Court to overturn its precedents—including one that the Court had issued as recently as 1995—that upheld this practice. And she said Alabama is essentially unique in its use of these judicial overrides, and I just want to quote, to give you the flavor of this very interesting dissent from denial. She wrote,

What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges,

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1. 134 S. Ct. 405 (2013).

who are elected in partisan proceedings, appear to have succumbed to electoral pressures.<sup>2</sup>

That's powerful, and she went on to quote judges sort of bragging about the fact that they were tough enough to impose the death penalty even though a jury didn't.<sup>3</sup> This wasn't the first time you've published a powerful dissent from a denial, telling the Court what kind of cases would better fit on its agenda, but I think it was maybe the most systemic, so I'd just be interested in hearing you talk us through the decision to publish something like this. A dissent from denial kind of opens the curtain on the least transparent but certainly one of the most important processes of the Court, which is setting the agenda.

SS: Dissents from the denial of certiorari, for those who don't know the Court's work intimately, are rare, and I think that's where Linda's question is coming from; it's not the norm. And in fact there's a lot of pressure among colleagues not to issue those statements—and I'm not immune to collegial pressure. We are a Court that has to find compromise often, and I don't think the public should take the failure of other Justices to join or not join a dissent as an ultimate view by them of the legitimacy of the issue being discussed or raised. But there are institutional reasons why some people don't think it's appropriate to write them or to join them once they're written. What I view as driving my jurisprudence is process. I can't control the outcomes of cases. Law, precedent, losing the majority are reasons that I can't control outcomes. And I can live with that if I perceive the process to be fair. Has someone been given a fair chance within the legal system? So if you think of that dissent and others that I've authored—I'm sure you're thinking of the one regarding what I considered the racist comments by the prosecutor<sup>4</sup>—I feel personally compelled to make a statement about it, because, I think, I open the door—not just to the sensitivity of my colleagues to issues. I lost it this time; I have hope that I can win the Alabama issue over time. It may be very hard to do, but I still have eternal hope, and the Court does change over time, so things might be different on that score, particularly since our *Apprendi*<sup>5</sup> jurisprudence is a little bit schizophrenic. So there's always hope. But there are other issues, like statements that that prosecutor made. The voice of a Justice does get a lot of attention, and I believe it makes people think. And I got letters from prosecutors, some angry at what I had done, but some happy that I had pointed out what can be a flaw in our judicial system—comments of that type,

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2. *Id.* at 408 (Sotomayor, J., dissenting from the denial of certiorari).

3. *Id.* at 409.

4. *Calhoun v. United States*, 133 S. Ct. 1136 (2013) (statement of Sotomayor, J., respecting the denial of certiorari).

5. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

which are really not befitting a prosecutor in my judgment. Having been one, I hold us to a very high standard. You can see I'm still thinking of me as a prosecutor, even though my jurisprudence doesn't quite show that all the time. *[Audience laughter.]*

LG: I want to get back to your background as a prosecutor at length, but to stay with this for a bit—so if I understand you, it's a way of leveraging a position in which you're often in the minority on the Court on things that you care deeply about. You could go quietly; a denial of certiorari is just one case name and number on an order list that comes out every Monday, and unless somebody shone a spotlight on a particular one, it would be a tree falling in the forest, basically. So it's a long-term strategy; it's making a record. Could you not persuade a couple other people to come along? For people that don't know, it takes four votes; four out of the nine have to vote to hear a case. You've got Stephen Breyer's support mostly—Ruth Ginsburg, Elena Kagan?

SS: People don't join for a variety of reasons. But, you know, if people are not reading our decisions and don't know that every Justice has areas of personal interest, which they signal and lay out the potential arguments in support of, look at our—you know, we're studying *Basic* right now in the securities area, coming up in the February sitting.<sup>6</sup> The reason for that challenge was the writings of some of my colleagues in an earlier decision about their interest in revisiting that question.<sup>7</sup> And so, yes, there is strategic thinking by every Justice about issues that are important to them, and that's why I think more diversity—and I don't mean just diversity in terms of gender or ethnicity, I mean more diversity in terms of legal and life experience—would be very helpful for a Court like ours. I get asked that diversity question by so many people, and I tell them today I worry more about the lack of diversity in life experience and legal experience than I do in other forms, or other lacks of diversity.

LG: Well, that raises an interesting question, because there are, of course, two former prosecutors on the Supreme Court: you and another graduate here, Justice Alito.

SS: Federal.<sup>8</sup>

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6. *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. argued Mar. 5, 2014) (posing the question whether the Court should overrule *Basic Inc. v. Levinson*, 485 U.S. 224 (1988)).

7. *See Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1208 n.4 (2013) (Thomas, J., joined by Scalia & Kennedy, JJ., dissenting) (“The *Basic* decision itself is questionable.”); *id.* at 1204 (Alito, J., concurring) (suggesting that “reconsideration of the *Basic* presumption may be appropriate” because “more recent evidence suggests that the presumption may rest on a faulty economic premise”).

8. Justice Alito served as an Assistant U.S. Attorney from 1977 to 1981, as an Assistant to the Solicitor General from 1981 to 1985, as a Deputy Assistant Attorney General from 1985 to 1987, and as U.S. Attorney for the District of New Jersey from 1987 to 1990. *See Biographies*

LG: Federal, right.

SS: No, no, no—I'll share a story with you. When I was in the New York state courts and I was a prosecutor, I had to really learn how to try a case. Sorry to all the federal prosecutors out there—I see some of you [*Audience laughter.*] New York rules were stricter—much, much stricter—than the federal constitutional rules. When they talked about corroborating an informant, you really had to do homework to do that. The federal rules are so loosey-goosey that almost everything gets in, in terms of evidence, and it's so much easier to be a prosecutor in the federal system. That's, in part, the difference, I think, in the outcomes of cases. Not only do you have more resources at your disposal, but you also have better law at your disposal that favors the introduction of a greater variety of evidence than the state system. But that makes a very big difference, I think, in the types of experiences that I had with criminal law—and an understanding, because it was given to me in state practice, about the importance of not only enforcing constitutional rules, but also state rules and procedural rules, because they serve a function in due process that should be respected and honored.

LG: I remember crunching some numbers at the end of the last Term, and in every criminal law or criminal procedure case in which the vote was divided—and they're not all divided, I mean, there's a fair number of unanimous ones—but in every divided vote, Justice Alito voted for the prosecution. He's the most prosecution-prone of the nine. And I've wondered whether the difference between the outlook that the two of you express in these kinds of cases is that, as you suggested, from the federal prosecutor's point of view, you can really come away thinking, well, the system works pretty well most of the time.

SS: I think it's also, when you're talking about prosecutor's offices, especially on the level that he headed the offices . . .

LG: He was U.S. Attorney.

SS: Exactly. You really only get to see the best in people. You're working with the top echelon, most of whom you've handpicked. You're not in the courtroom day to day. You really don't get to experience the challenges to ethics that everyday prosecutors have to deal with. And you don't get to deal with witnesses who are not terribly sophisticated. Most of the witnesses—not the informants, I'm talking about the FBI agents or the DEA agents—they're pretty well trained in the art of testimony. When you're dealing with state police officers, their experience with trials is much less and their training is not comparable. All of that, I think, gives you a different perspective on the human dynamic—both in the prosecution itself, in the presentation of evidence, and in the challenges that judges are meeting in the courtroom in those situations.

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*of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Mar. 6, 2014).

You can have more lofty views about the basic good in the system if you come to it at the top. If you're someone like me who worked in the trenches, what you have experienced gives you a wider breadth of expectations.

LG: So I don't know if people realize that you came to the Court with seventeen years' experience as a federal judge, as a trial judge, and as a judge on the Second Circuit, and that's more than all but the tiniest handful of people that have ever come to the Supreme Court.<sup>9</sup>

SS: I learned this from the President during my nomination speech, because I didn't know it. There's only been three Justices in a hundred years with that experience. I didn't know that. [*Audience laughter.*]

LG: Listening to you talk about the lessons you drew from your time as a very young prosecutor in the trenches, would you say that's the most important, professionally formative experience? What's the most important thing that you brought?

SS: It was, and it was because it made me very, very record-sensitive. How to build a case, how to get evidence in that's admissible and is not so prejudicial that you're going to be reversed later, or your case is going to be reversed, is a teaching that has stayed with me my entire judicial career. And I know that I ask more questions about facts than any of my colleagues, and I get criticized for it, and I'm trying to control it a little bit. [*Audience laughter.*] But, I really learned that law should be announced based on a factual record that exists, not a supposition of how you would like a case to come out or the principle to come out, but to ground the principle in a record and in facts, because that will permit you to have some flexibility in the future development of the law. If you are someone like me, who appreciates the complexity and nuance of the human condition, broad absolute rules don't really suit me, because I can always imagine—and do—the next case. Dean Post talked about *Jones*.<sup>10</sup> How was the *Jones* concurrence born? It was born in my going back to search-and-seizure law and thinking more broadly about its application to new technology. That particular case was easy to resolve, because there was an existing line of cases. But I knew what was coming up. You don't need to put a tracking device on a car anymore. All you've got to do is ping the satellite and your phone will tell it where you are, and I knew that was the next case.<sup>11</sup> And as I was examining our precedents, and our thinking in this area, I was thinking of those complexities and nuances, and even in existing jurisprudence, like “reasonable expectation of privacy”—we've defined it in our jurisprudence

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9. Justice Sotomayor served as an Assistant District Attorney in the New York County District Attorney's Office from 1979 to 1984, as a judge on the U.S. District Court for the Southern District of New York from 1992 to 1998, and as a judge on the U.S. Court of Appeals for the Second Circuit from 1998 to 2009. *See id.*

10. *United States v. Jones*, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring).

11. *See id.* at 955.

in certain ways. Telephone records used to have every phone call you make. You don't see that on a cell phone anymore. Does that change the equation? And these are questions I was asking myself. So yes, I think those were the most formative years in molding the kind of judge I would become.

LG: So you brought up *Jones*, and I was going to get to it later, but why don't we stay on it for a minute because I have a couple of questions. One of them is a kind of judicial behavior question. You gave Justice Scalia a fifth vote, you gave him a Court for that outcome, even though others of the nine declined to sign his opinion and joined other opinions. And you disagreed with him quite profoundly—or at least you didn't think his approach, as the Dean indicated, the old-fashioned physical trespass, was at all adequate to the question.<sup>12</sup> So, why did you sign his opinion?

SS: Because I didn't agree with the other. [*Laughter.*] I mean, neither outcome, I thought, got to the heart of the issue in the way I wanted to approach it, and each had some fundamental flaws, and I felt that his did the least damage. Because if you read the other concurrence, you understand that it's pitching an approach that has its own inherent limitations too.<sup>13</sup> Nino's really was the most uncontroversial of the outcomes, and I didn't want to tie myself to an approach that I don't agree with completely.

LG: So rather than leave him hanging out there with a plurality, you were a good soldier and signed your name.

SS: I said we compromise, and I think we compromise—I hope—where we do the least harm.

LG: So I'll quote another part of your *Jones* concurrence to lead to another question. You said, in your opinion, “[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”<sup>14</sup> This is *Smith v. Maryland*.<sup>15</sup> You're calling for departing from stare decisis, as, in fact, you were in that Alabama life-to-death override case. So, what's your feeling about stare decisis? When should a judge or a Justice call for overturning?

SS: One of my dearest friends in the room, Professor Bill Eskridge, wrote an article, I bet he's even forgotten which one it was, on stare decisis.<sup>16</sup> And basically, I'm summarizing it not quite in the elegant way that he said it, but he was talking about it as a doctrine that has many faces. And I actually do believe

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12. *See id.* at 955-57.

13. *Id.* at 957 (Alito, J., concurring).

14. *Id.* at 957 (Sotomayor, J., concurring).

15. *Smith v. Maryland*, 442 U.S. 735 (1979).

16. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

in stare decisis, but I think that Souter’s factors are at the essence of what you have to balance when you’re making the choices of what to overturn.<sup>17</sup>

There was great, great reliance by the society that preexisted *Brown v. Board of Education*, and I think in most situations that reliance would lead me to stay the course. But there are moments when you understand that the consequence of stare decisis so burdens another side, so unfairly deprives them of something that is really critical to the system that you’re examining, that you have to decide to change existing precedent or else continue what you view as an injustice. And so, you know, what people want is a fixed answer—and that’s what Bill was trying to do, to make heads or tail of what we were doing—but I bet in the end, when you read the decisions of the Justices, if you examine the presumptions in those decisions about what they think is at the core of the system that they’re looking at—what’s important about it? If it’s an issue of democracy, how do they think it’s best defined? Think of people like Tony Kennedy, who has an extraordinary belief in our democratic system, and it’s a thread that runs through all of his jurisprudence. He is more than willing to overturn existing precedents of all kinds in the First Amendment, whereas he’s very respectful of them in others. Well, how do you reconcile those two things? You understand that the First Amendment is fundamental to his view of how democracy needs to work for us to have a vibrant constitutional system. And so, I think that that is not an answer that satisfies people, because it’s sort of hit-or-miss when you can convince the Court that a change is necessary, but I don’t know that that’s such a bad thing. I mean, you put us there, I hope, in part because you have some confidence in our judgment, and sometimes you disagree with how that judgment is exercised, but I think collectively we sort of check each other in overturning precedent too quickly.

LG: One thing I found interesting, back to the Alabama dissent, is that you chronicle how in fact there have been many changes in our understanding of the role of the jury, through the Sixth Amendment, through the *Apprendi* cases, since the Court last visited that issue.<sup>18</sup>

SS: You saw me in that dissent chronicling how I convinced myself, how I really studied this again to see where did I come out in this history, what made the most fundamental sense. And so you watched me on paper, just as in *Jones*, chronicling my thinking. And I share it because I do want to put out there what I’m thinking, and I know people like you and others in this audience write about it, and occasionally I even read it and think about it. [*Audience laughter.*]

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17. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.).

18. *Woodward v. Alabama*, 134 S. Ct. 405, 411 (2013) (Sotomayor, J., dissenting from the denial of certiorari) (“Eighteen years have passed since we last considered Alabama’s capital sentencing scheme, and much has changed since then. . . . *Apprendi* and its progeny have made clear the sanctity of the jury’s role in our system of criminal justice.”).

LG: And there's your colleague Justice Scalia who has pretty much invented our current thoughts about the jury within the Sixth Amendment, but you couldn't get his vote for this? So . . . *[Audience laughter.]*

Okay, moving right along, and this is a question I wouldn't quite have had the nerve to ask until the new mayor of New York was inaugurated and withdrew the city's appeal in the stop-and-frisk case, which means it's not coming to you. I'd be interested in how closely you followed that controversy, and whether you had any thoughts about the stop-and-frisk issue that you're happily avoiding having to dig into.

SS: I followed it very closely, and I'm not going to share it with you. *[Audience laughter.]*

LG: Worth a try. *[Audience laughter, applause.]*

SS: I know. You've been good so far. *[Audience laughter.]*

LG: So even though obviously you disagree with Justice Kennedy on some important matters, you just spoke of him with great respect, and, I think, reflecting an effort to really deeply understand where the man is coming from. Have you, kind of, analyzed all your colleagues with that, I would say, open-minded respect? I won't say "empathy," I wouldn't use that word. But that's what strikes me.

SS: Actually, I do. And I have spent a lot of time growing to know them as people, to try to understand what motivates their thinking. What's the human experience that they've had that has led them to some of the choices that they made in our jurisprudence? It's a simple fact that he advertises repeatedly: Justice Scalia in high school used to carry his rifle on the train to go do his rifle club things. *[Audience laughter.]* Sorry, target shooting and stuff. *[Audience laughter.]* He and I both come from a city, but his views of the Second Amendment have been very different than mine. Our experiences on the same issue were very different, and knowing that fact about him has given me an insight into where his well of passion springs from. And it's not useful on outcomes, necessarily. It is useful in knowing what cases to take or not take for cert, and how to vote, when you're reviewing cases. And thinking about what the possible outcomes are.

LG: So that's the whole interesting category that political scientists call a "defensive denial," right?<sup>19</sup>

SS: Arlen Specter hated them, so I'm not going to talk about defensive denials, but yes.

LG: Talking about learning to understand where your colleagues are coming from, I think one thing that surprises many people when they start learning about the Supreme Court is . . .

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19. See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 198-207 (1991).

SS: By the way, Linda, on defensive denials, there are lots of legal issues that are percolating, and as they percolate, there are some facts that put the issue to its crossbow point, and then there are facts that slant the issue in favor of one side or another. And they're—as Justice Scalia once said to me, “I don't worry about cert grants. We get thousands of cases every year. If we miss a case today, we'll see it again tomorrow.” And he's right. And so what people think of as defensive denials sometimes are just judgments about what's the best set of facts to bring this up on . . .

LG: What's the best vehicle . . .

SS: And have a full discussion about the legal issue. It's good and it's bad. And so you're waiting for that case to come up . . .

LG: So it's more of a vehicle issue than a . . .

SS: Yes, but not in the traditional sense. When we talk about “vehicle issues,” we're generally talking about a procedural barrier that might not let us get to the issue we want to actually decide. And that's the traditional vehicle issue. But sometimes, as well, we get issues where the facts just are skewed to one side or another too much and are really not going to engage the full human impact of the decision we're being asked to look at.

LG: What I was going to say a minute ago was that I think people are often surprised to learn how relatively isolated the work of the nine is at the Court—that people don't tend to kind of sit down on the sofa and have a good chat about a pending case before argument and so on, that you lead rather solitary lives in chambers during the decisional process except for circulating opinions in a rather formal way. And if that's true, I know some Justices have said they were kind of surprised and disappointed by that. I wondered what your response to it was. Is it an isolating life?

SS: We've got some talkers on the Court, and I won't identify them. *[Audience laughter.]* People who do like talking about cases, and who like engaging, and those people really do keep the channels of talk open among the Justices. I actually would not like talking to my colleagues beforehand because I really don't finally make up my mind until argument, or sometimes after, and sometimes even conference, because you come to resolutions in your own head, strong leanings, but even the talk at conference is more balanced. When you have a colleague lobbying you beforehand, you don't really get to do the balancing in your own head. And it's dangerous, I find. And so for me, it's not as “isolating,” as others would not like. I actually think there's just about enough.

LG: So the whole notion of a collegial court raises the question of—and we talked about it at the very beginning, but it's a broader question—of when to go it alone. Diane Wood gave a lecture and published an article recently called

something like “When to Hold, When to Fold, and When to Shuffle the Deck.”<sup>20</sup>

SS: That’s a great descriptor. I’m going to use it. You know I’m a poker player, right? Actually, it is true. I think that I have always known that when you’re going it alone, you better do a lot of thinking. If you’re a holdout, you really should clarify in your own mind what the purpose of your dissent is. And if the purpose is just to say “I’m right, you’re wrong,” I think it’s not very useful. The purpose should be broader than that. Often, you’re talking to Congress; sometimes, you’re talking to the executive branch; sometimes, you’re talking to the public in the sense of engaging them around an issue that might get missed—the prosecutor making comments that were more than offensive. This was a case where the audience I was aiming for was not just prosecutors, but the public—engaging them in a conversation about what’s important to talk about and say about people in a criminal trial. And some people disagreed with me.

LG: But it worked; that got a lot of attention.

SS: It got a lot of *discussion*. I wasn’t doing it for the attention. I was doing it for the discussion around the issue. And I think that’s healthy, talking about some things, but I felt strongly that I was right in that case. Now I didn’t dissent in it just to do it—because there has to be a purpose to what you’re doing, and in the Alabama case, my purpose was to get my colleagues thinking. And that has a value. They know these things, but whether you actually think about them and put it all together into a picture while you’re deciding to grant or deny cert is not always certain. Because of the thousands of cases we get, we don’t always go back through our own jurisprudence to see its coherence. That’s one of the advantages of being a new Justice. Because I have to start from the beginning on almost everything, and because I’m starting from the beginning and re-reading cases and thinking about their applicability to new situations, I think I can come to it with a fresh eye. And so sometimes, it leads me to dissent by myself because there’s a way in which the Court is moving that I think is wrong for whatever reason, and I usually try to explain why.

LG: Have you ever issued an oral dissent from the bench?

SS: No.

LG: Can you envision feeling so strongly that you would do that? I know Justice Ginsburg did it repeatedly at the end of the last Term.<sup>21</sup>

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20. Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445 (2012).

21. On June 24, 2013, Justice Ginsburg issued oral dissents in three cases: *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Vance v. Ball State University*, 133 S. Ct. 2434 (2013); and *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). For an earlier discussion of Justice Ginsburg’s use of oral dissents, see Linda Greenhouse, *Oral*

SS: I know that you, being a member of the press, are going to hate this: Announcing it from the bench is like entertainment for the press.

LG: Whoa! That's very cynical. [*Audience laughter.*]

SS: You know, the general public doesn't see what we say; they see what you're reporting. If you really want the full explanation of our opinions, you should read them. And it really bothers me when a Justice slants the presentation of a case—hence last year's moment with Justice Alito and Justice Ginsburg.<sup>22</sup> I don't agree with what happened or think that we shouldn't show a little bit more restraint, but I certainly understand the impulse. Sometimes I'm listening to my colleagues read their summary of our opinion and I'm saying, "That's not what the case is really about; that's not what it said." But the point is that, yes, that is—for as optimistic and open a person as I am—I really wish it didn't happen at all. And so I guess today, it's become a signal of how fiercely someone believes that the Court is wrong, and I understand some of that value, but I also hope that the opinion—that people will actually read it and be moved by it.

LG: That's so interesting because, of course, Lani Guinier a couple years ago wrote a whole *Harvard Law Review* Foreword celebrating the practice of the oral dissent as a way . . .<sup>23</sup>

SS: I didn't read that article; you want to send it to me? I'll look it up. Maybe I'll reconsider my answer. [*Audience laughter.*]

LG: Now you did go it alone a couple weeks ago, not in a dissenting opinion, but a concurrence in the judgment in a jurisdiction case, *Daimler v. Bauman*,<sup>24</sup> that has caused quite a lot of comment. For people who don't know, this was a nine-nothing, but really kind of eight-to-one opinion about jurisdiction. I won't go into the details, but you would have decided it, basically limited to its facts or facts like those, and Justice Ginsburg took a much broader cut at the issue, and the two of you obviously felt rather strongly about the disagreement between you. So talk us through the decision—since you agreed with the outcome—the decision to write, I think it was a nineteen or twenty page concurrence, almost as long as the majority opinion. You did not pull your punches. You said, "The Court rules against respondents today on a ground that no court has considered in the history of this case, that this Court did not grant certiorari to decide, and that *Daimler* raised only in a

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*Dissents Give Ginsburg a New Voice on the Court*, N.Y. TIMES, May 31, 2007, <http://www.nytimes.com/2007/05/31/washington/31scotus.html>.

22. See Debra Cassens Weiss, *Did Alito Roll His Eyes During Ginsburg Dissent?*, ABA J. (June 26, 2013, 4:40 AM), [http://www.abajournal.com/news/article/did\\_alito\\_roll\\_his\\_eyes\\_during\\_ginsburg\\_dissent](http://www.abajournal.com/news/article/did_alito_roll_his_eyes_during_ginsburg_dissent).

23. Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

24. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

footnote of its brief. In doing so, the Court adopts a new rule of constitutional law that is unmoored from decades of precedent.”<sup>25</sup> You’re saying this to Justice Ginsburg, the civil procedure professor, so . . . [Audience laughter.]

SS: I welcome everyone to read the decision that she relies on, and I think I got the fair reading. [Audience laughter.] We talked a little while ago about how you should sometimes wait for the difficult cases because bad facts make bad law. The Court announced a rule limiting the test for general jurisdiction on a set of facts that were the worst for the exercise of jurisdiction. And it’s very easy in those situations to announce a broad limiting principle and not feel that the consequences of it could ever be really bad. However, if you know where our jurisdiction jurisprudence is going, you understand that each of the Court’s decisions over time has been narrowing that exercise. Well, in one of Justice Ginsburg’s dissents in one of those cases, she pointed out the incongruity of what’s going to happen if there is no jurisdiction over people who put things in the stream of commerce and cause injury in the United States when those people actually targeted the U.S. for the sale of their goods.<sup>26</sup> If you’re me sitting there and thinking about what’s happening in that area, and then seeing what’s happening in general jurisdiction, you think about raising a flag. You think about talking about the dangers of the path the Court is on.

LG: It’s almost as a whistleblower, in a way.

SS: Well, it is. Because there are legislative fixes, there are things that the society will have to think about in terms of how business will be done here, how goods will be sold, depending on what direction the Court goes with limiting our jurisdiction here. And so all of those things affect when you think it’s important to say something.

LG: So once you started down that road and persuaded yourself, there was really no collegial turning back. You were very sure of that.

SS: No, we had quite an extended exchange.

LG: Yeah, for those who haven’t read the exchange of footnotes, that’s evident, right?

So I attended the very interesting symposium that the *Yale Law Journal* put on today and there were many interesting points brought out. One was, Professor Cristina Rodríguez reminded me, that you made quite an impact in an immigration case by, instead of using the phrase, the ugly phrase, “illegal alien,” you referred to an “undocumented immigrant.”<sup>27</sup> And that that really

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25. *Id.* at 773 (Sotomayor, J., concurring in the judgment).

26. *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2794 (2011) (Ginsburg, J., dissenting).

27. See Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 *YALE L.J. F.* 499, 504-05 (2014), <http://yalelawjournal.org/forum/uniformity-and-integrity-in-immigration-law> (citing *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009)).

had an impact on the language that the country – maybe just the elites, but in any event – uses in talking about immigration. So I'd just be curious what your thought process was in deciding that it was time to make that rhetorical move.

SS: Almost everybody breaks a law, whether it's a speeding law, a traffic law, shading your taxes a little bit. I used to use the example when there were payphones – who goes to a payphone, and there's a quarter inside the return, and you walk away with it?

LG: That's a crime?

SS: Yeah, you're stealing property from someone. [*Audience laughter.*] That quarter belongs to the telephone company. How many of you have taken a pad home from work? You're stealing company property. When your kids are using it for their homework that night. We don't think of you as criminals, we don't perceive ourselves as criminals. There are crimes and there are crimes. There are the violent breaches of societal norms – killing, assaulting, stealing violently or even stealing in frauds. Those are criminals. But regulatory laws – there isn't a company anywhere in the United States that doesn't regularly break one of those laws. Whether inadvertently, or because of a lack of attention, or sometimes not even knowing the law exists. To dub every immigrant a criminal because they're undocumented, to call them “illegal aliens,” seemed, and has seemed, insulting to me. Many of these people are people I know, and they're no different than the people I grew up with or who share my life. And they're human beings with a serious legal problem, but the word “illegal” alien made them sound like those other kinds of criminals. And I think people then paint those individuals as something less than worthy human beings. And it changes the conversation when you recognize that this is a different – it's a regulatory problem. We've criminalized a lot of it, but it started as, and fundamentally remains, a regulatory problem, not a criminal one. And so that's why I chose my words. [*Applause*]

LG: Were you waiting for the opportunity to do that, or were you working on an immigration case and you suddenly said to yourself, “hey, I . . .”

SS: Mostly it was the first time that I actually got to write an opinion, and I think it was a product of the immigration question really percolating as loud as it was in public. It has been for a number of years, but listening to the conversation in the public discourse sensitized me to the issue. You know, it made me more cognizant of what was happening, in part. Every immigrant, by using “illegal alien,” was getting painted with a broad brush, and I realized that I was participating in that conversation in that way with the words. Now, you do know that some of my colleagues disagree, and I even got a colleague to write an opinion I did not join, sort of taking me to task for changing the

normal vocabulary.<sup>28</sup> There's a basis for disagreement in everything in the world.

LG: So you're obviously very aware of the many ways in which somebody in your position can deliver a message—a choice of a word, a choice of where to go for your public appearances—so I want to segue a little from the jurisprudence to your life as a Justice. One of the interesting talks today was by Professor David Fontana from George Washington University Law School, who talked about you as the “People’s Justice,” as he put it.<sup>29</sup> You're out there, just because of who you are, where you go, the audiences that you speak to, inherently delivering a liberal constitutional message—the message of affirmative action is a good thing, what you just told us about thinking about immigration—kind of communicating the essence of a liberal project; that was his interpretation. I'd just be interested in getting your response to that. What's the goal, the goal of going on *Sesame Street*, the goal of going on *Colbert*, the goal of just being out there in a way that your colleagues aren't?

SS: Well, some of that was because I wanted to sell books. [*Audience laughter.*] *Colbert* and those shows were really for the book sales. The writing of the book had the same sort of message, a message of hope to people. Having come from where I did, I knew that message of hope can't be recounted often enough for people. And so I understood and I hoped that my candor about myself as a person would permit others to be more introspective about themselves and more hopeful about themselves, and so I think my need to examine my life after I was catapulted from, not an unknown life as a Second Circuit judge, but not as prominent a life as I have now as a Supreme Court Justice—that was landing on a different universe yet again. You know from my book that I explain that my life at Princeton was moving from one universe to another, and I actually have felt that at times going to the Supreme Court. And so the book had many levels of reasons, and some of the public stuff related to it, I think, was for me to be introspective about how I got to where I was going, and an attempt to hold on to what I saw within myself as the best of what I'd been given—by the friends, the mentors, and the life that I had. And I needed to do that as my world was changing around me. The Supreme Court would be a perfect place if I could take that entire block, lift it wholesale, and plant it in lower Manhattan. [*Audience laughter.*] That would be perfect.

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28. In *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), Justice Sotomayor's opinion for the Court described the Immigration and Nationality Act as providing that “a noncitizen who has been convicted of an ‘aggravated felony’ may be deported from this country.” *Id.* at 1682. In describing the same provision, Justice Alito observed that “[a]lien’ is the term used in the relevant provisions of the Immigration and Nationality Act, and this term does not encompass all noncitizens.” *Id.* at 1695 n.1 (Alito, J., dissenting).

29. See David Fontana, *The People's Justice?*, 123 YALE L.J. F. 447 (2014), <http://yalelawjournal.org/forum/the-peoples-justice>.

But I'm going to answer the other part of your question. Things like *Sesame Street*, which was a choice by me—when I was invited, I told them specifically I wanted to teach kids something positive about the law. Now, I was criticized—Colbert criticized me because of the princess, and he rightly pointed out that there are more American princesses than Supreme Court Justices, so aspiring to be a princess has better odds.<sup>30</sup> And I thought that was pretty humorous at the time; I still do. But the discussion was around the word “career,” and it was to inspire young girls to think about nontraditional careers. And the other episode was about Goldilocks and how judges help to solve problems.<sup>31</sup> Because it was geared towards young people, I couldn't take it to its natural ending, which is to have ruled in favor of the bear or Goldilocks, and so I did an unrealistic . . .

LG: Not too big, not too little . . .

SS: . . . I did an unrealistic Solomon-like resolution: I told them to go fix the chair. But you know, family court judges do it that way. I don't, but family court judges do it. And where I think and I hope that I can add value is in the public's perception of Justices—first as human beings, as people like them, but also, you talked about my respect for my colleagues. It comes from my understanding that each of them is as passionate about the law as I am, and about our Constitution and our system of government. We disagree, sometimes fundamentally, on what's best for these institutions, but it is motivated by that passion. And it's much easier to forgive Nino for his dissent in *Michigan v. Bryant*<sup>32</sup> when you can understand—it's a really nasty dissent, I've told him that—but you can forgive him when you know, or realize, that he worked so hard on *Crawford*,<sup>33</sup> because he really thinks that that's what the Constitution means. And to have me sort of change the dialogue somewhat . . .

LG: Puncture the whole balloon.

SS: Not the whole one, but at least an important part to him. It would create passions, and I can deal with that, because it's not motivated by ill will even though it sounded like it. But if I can communicate that to non-lawyers, then I think I'm serving an important function. Most of the students I spoke to today were college students. I'm here at the Law School, but I've combined visits. Every time I travel, I speak to college students, high school students, I've

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30. See *The Colbert Report: Sonia Sotomayor* (Comedy Central television broadcast Feb. 4, 2013), <http://www.colbertnation.com/the-colbert-report-videos/423505/february-04-2013/sonia-sotomayor>; *Sesame Street, Sesame Street: Sonia Sotomayor and Abby—Career*, YOUTUBE (Nov. 9, 2012), <http://www.youtube.com/watch?v=EHICz5MYxNQ>.

31. See Debra Cassens Weiss, *Goldilocks Avoids Criminal Sanction When Sotomayor Judges Dispute on Sesame Street*, ABA J. (Feb. 8, 2012, 11:58 AM), [http://www.abajournal.com/news/article/goldilocks\\_avoids\\_criminal\\_sanction\\_when\\_sotomayor\\_judges\\_dispute\\_on\\_sesame](http://www.abajournal.com/news/article/goldilocks_avoids_criminal_sanction_when_sotomayor_judges_dispute_on_sesame).

32. *Michigan v. Bryant*, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting).

33. *Crawford v. Washington*, 541 U.S. 36 (2004).

met with second graders, I've met with Head Start students. Their teachers teach about me and I go talk to the kids, and if any one of them sort of comes away with a sense of respect for the law as an important institution in their lives, then I think I'm serving an important purpose.

LG: Is there, obviously you're not talking constitutional law when you meet with groups like this, but is there a kind of constitutional doctrine embedded in your message, in the sense of—well, you know, you're not talking originalism . . .

SS: No, I'm talking about—yes, the importance of democracy in a different way than Tony [Kennedy] does, in my way, which is of this having to be a democratic system that's inclusive, not exclusive, of people. That we have to be willing to develop our institutions and our laws to be part of a greater community than just the individual world that we live in. There is a great deal of my jurisprudence that talks about or is involved in how to engage people fairly in being a part of the community. And so a big message I deliver to every group that asks me about the current debate on immigration law, I tell them, you know, it's not right for me to talk about it because all of those laws are going to end up before me at some point, and I don't want people to have an idea that I've pre-made up my mind—as you know, I joined an immigration case where I upheld some of the provisions, or voted to uphold some of the provisions, and voted to strike down some of the provisions.<sup>34</sup> You know, I don't rule on abstract theories; I rule on laws and what they actually say and do. But I tell kids all the time, we are only one part of the society—an important part, the courts, we're a co-equal branch of government—but you're the most important part of it. Because you're the guys who can have an influence on those laws you like or dislike. Participate. Find your nook to be a community member. I found mine in the law and being a judge. You don't have to be a lawyer, but you have to be an involved person. You have to care enough about things to do something about them. And you know, it doesn't have to be politics—it can be your church, your school, your community centers. However you want to be involved. But what you can't do is ignore things. You have to structure what you want them to be. And so, yes, there is a message in that. It's a message about inclusion rather than exclusion. And most of my votes in that way tend to lean in some of the directions Ruth Bader Ginsburg does. And sometimes, we disagree.

LG: I think we've reached the end of our time and that's actually a great place to stop, so I'm going to thank you for joining us.

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34. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

CONVERSATION WITH JUSTICE SOTOMAYOR

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