1-1-2016

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BUFFALO LAW REVIEW
THE DOCKET

VOLUME 64 JANUARY 2016 PAGES 1–13

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In her five terms on the Supreme Court, Sonia Sotomayor has become the most visible and recognizable Justice. Much of her public presence is owed to her recent autobiography, *My Beloved World*, which appeared in 2013 and promptly rose to the top of the *New York Times* bestseller list.[1] In the process, Sotomayor became a public celebrity, speaking candidly about her life in media interviews, appearing on *Sesame Street*, throwing out the first baseball at a Yankee Stadium game, and ushering in the New Year at Times Square.[2]

Readers of Justice Sotomayor's Supreme Court opinions might be surprised to find few traces of that exuberant personality. Instead, Sotomayor's voice is generally restrained, avoiding the emotional tone that characterizes her autobiography. But her judicial voice is scarcely dry and academic. It conveys a distinctive judicial persona, that of a judge who is often puzzled by the responses of her colleagues but not indignant in the manner of Justice Scalia[3] or playfully

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1. SONIA SOTOMAYOR, MY BELOVED WORLD (2013); *see* David Fontana, *The People's Justice?*, 123 YALE L.J. FORUM 447, 449 (2014).

2. For a substantial list of her public appearances, see Fontana, *supra* note 1, at 468-69.

3. Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 226-29 (2002).

conversational in the manner of Justice Kagan.[4] Sotomayor's judicial persona is generally hard at work trying to understand the unfortunate positions taken by her colleagues and pointing out to them in an ironic, though never harsh, manner their inconsistencies and errors.

In this spirit, she is likely to react with bewilderment rather than anger when she disagrees with the Justices on the other side of an issue. Writing in dissent from the majority's view that state law issues heard below are barred from habeas review while new claims might be heard, she notes that "[t]his suggestion is puzzling."[5] And finding the majority's statement of Fourth Amendment law inaccurate, she again observes mildly "[t]hat is puzzling."[6] She has a number of synonyms to convey the same response. What the other side has offered may be "perplexing,"[7] "nothing short of baffling,"[8] "curious,"[9] "paradoxical,"[10] something that she simply "cannot fathom,"[11] or, more broadly, "a mystery the majority opinion leaves unsolved."[12] She refrains, however, from combative or harshly critical language, and the focus remains on the conundrum presented by the other side's outcome.

In her most extended use of this imagery, Sotomayor in dissent compares the process of evaluating the majority's

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4. Laura Krugman Ray, *Doctrinal Conversation: Justice Kagan's Supreme Court Opinions*, 89 IND. L.J. SUPP. 1-2 (2013).

5. Cullen v. Pinholster, 131 S. Ct. 1388, 1418 (2011) (Sotomayor, J., dissenting).

6. Messerschmidt v. Millender, 132 S. Ct. 1235, 1258 (2012) (Sotomayor, J., dissenting).

7. Blueford v. Arkansas, 132 S. Ct. 2044, 2059 n.4 (2012) (Sotomayor, J., dissenting).

8. Schuette v. Coal. to Def. Affirmative Action, 134 S. Ct. 1623, 1664 (2014) (Sotomayor, J., dissenting).

9. Sossamon v. Texas, 131 S. Ct. 1651, 1666 (2011) (Sotomayor, J., dissenting).

10. Chaidez v. United States, 133 S. Ct. 1103, 1120 (2013) (Sotomayor, J., dissenting).

11. *Schuette*, 134 S. Ct. at 1673. For another use of the same phrase, see *Pliva v. Mensing*, 131 S. Ct. 2567, 2592 (2011) (Sotomayor, J., dissenting).

12. *Sossamon*, 131 S. Ct. at 1666 n.3.

argument in a case awarding custody under the Indian Child Welfare Act to the process of solving a mystery.[13] Although "[a] casual reader of the Court's opinion could be forgiven for thinking this an easy case,"[14] the skilled reader knows better. Thus, "[t]he reader's first clue that the majority's supposedly straightforward reasoning is flawed is that not all Members who adopt its interpretation believe it is compelled by the text of the statute."[15] Next, "[t]he second clue is that the majority begins its analysis by plucking out of context a single phrase."[16] And "[t]he third clue is that the majority openly professes its aversion to Congress' explicitly stated purpose."[17] Like an experienced reader of detective novels, the perceptive reader of Court opinions should respond to the majority's baffling result by analysis of the clues provided rather than by attack.

Readers of Sotomayor's autobiography may be reminded of her recollection that, in her early life, the girl detective "Nancy Drew had a powerful hold on [her] imagination."[18] Considering the careers open to her as a diabetic, she ponders how she could be a detective without joining the police force, an occupation barred by her illness.[19] And Nancy Drew, the heroine of a series of mystery novels for girls, seemed to provide a tempting solution: the eighteen-year-old "sleuth tools around in her little blue roadster with the top down," solving mysteries that crop up in her "fairy tale" world of summer homes, country clubs, and travel to Paris.[20] Nancy is "an incurable optimist who cleverly turns obstacles to her own advantage."[21] The mystery novels thus offer a tempting, though ultimately unreachable, prospect:

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13. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2572 (2013) (Sotomayor, J., dissenting).

14. *Id.* at 2572.

15. *Id.*

16. *Id.*

17. *Id.*

18. SOTOMAYOR, *supra* note 1, at 79.

19. *Id.*

20. *Id.* at 79-80.

21. *Id.* at 80.

> I was convinced I would make an excellent detective. My mind worked in ways very similar to Nancy Drew's, I told myself: I was a keen observer and listener. I picked up on clues. I figured things out logically, and I enjoyed puzzles. I loved the clear, focused feeling that came when I concentrated on solving a problem and everything else faded out. And I could be brave when I needed to be. . . . I could be a great detective, if only I weren't diabetic.[22]

Thwarted in her original plan, Sotomayor redirects her focus to another fictional character, the defense lawyer Perry Mason, whose weekly television program featured a trial in which he invariably established his client's innocence. But she finds her interest expanding also to include the prosecutor, because he "was more committed to finding the truth than to winning his case."[23] And, finally, she becomes "fascinated" by the judge, a shadowy figure who nonetheless served as "a personification of justice," controlling the courtroom and resolving the case.[24] She finds in the television trials "a whole new vocabulary" that was "like the puzzles [she] enjoyed, a complex game with its own rules, and one that intersected with grand themes of right and wrong."[25] In the course of her career, Sotomayor would later play variants of all three roles: defense attorney, prosecutor, and trial court judge. And, finally, as a Supreme Court Justice, she would continue to puzzle out the arguments of her colleagues and chart their intersections with those grand themes.

Although Sotomayor presents herself as a Justice who enjoys solving puzzles, she shows little inclination to challenge her readers by creating them. Her opinions, even those written alone in dissent, seldom offer elevated diction or complicated verbal structures. They tend instead to be direct and even colloquial in their diction, in most instances accessible to lay readers as well as legal professionals. And in treating the "grand themes of right and wrong" she prefers the simple statement and accessible image to the more technical and elaborate language of some of her colleagues. There are relatively few metaphors in the ninety-three

22. *Id.*

23. *Id.*

24. *Id.* at 81.

25. *Id.*

majority opinions, concurrences, and dissents that she has authored in her first five terms on the Court. And those that do appear are generally familiar from common usage. She complains, for example, that a federal statute will force plaintiffs to try to enforce their rights "with one hand tied behind their backs,"[26] and a federal statutory provision "ensur[es] that an air carrier cannot avoid liability for a baseless report by sticking its head in the sand."[27] She tends to favor literal and vivid images to make her point, as when she observes that a motorist's limited privacy interest while in a vehicle "does not diminish [his] privacy interest in preventing an agent of the government from piercing his skin"[28] to test his blood alcohol level.

Sotomayor also seems comfortable drawing her imagery from baseball, a sport that she has long followed as a devoted New York Yankees fan. Looking for a counter to the plurality's examples of the way in which "and" is used to join two statutory elements, she offers the following language from a stadium ticket: "If today's baseball game is rained out, your ticket shall automatically be converted to a ticket for next Saturday's game, and you shall retain your free souvenir from today's game."[29] More directly, she applies baseball rules to emphasize a defendant's fatal lack of the needed qualifications to bring his suit:

> He seeks to challenge the Government's title to Indian trust land (strike one); he seeks to force the Government to relinquish possession and title outright (strike two); and he does not claim any personal right, title, or interest in the property (strike three).[30]

In a decision on water rights in the Red River Valley, she playfully introduces another sport by noting that the river "has lent its name to a valley, a Civil War campaign, and a

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26. Sossamon v. Texas, 131 S. Ct. 1651, 1669 (2011) (Sotomayor, J., dissenting).

27. Air Wis. Airlines Corp. v. Hoeper, 134 S. Ct. 852, 862 (2014).

28. Missouri v. McNeely, 133 S. Ct. 1552, 1565 (2013).

29. Scialabba v. Cuellar De Osorio, 134 S. Ct. 2191, 2221 (2014) (Sotomayor, J., dissenting).

30. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2214 (2012) (Sotomayor, J., dissenting).

famed college football rivalry between the Longhorns of Texas and the Sooners of Oklahoma."[31]

In contrast to the images of luxury in the bankruptcy case, Sotomayor chooses a very different sort of image when she dissents from the majority's interpretation of the federal immigration statute. As she constructs her analysis for determining whether "aged-out children" who have reached the age of twenty-one should retain their priority to join their family members in the United States, she employs a vivid image drawn from ordinary experience.[32] Under the majority's reading of the statute, she points out, if a parent fails to reach "the front of the visa line" before the child turns twenty-one, that child will be placed "all the way at the back of the F2B line."[33] Her reading of the statute differs:

> Congress could have required aged-out children like Ruth Uy to lose their place in line and wait many additional years (or even decades) before being reunited with their parents, or it could have enabled such immigrants to retain their place in line—albeit at the cost of extending the wait for other immigrants by some shorter amount.[34]

Instead, she argues, Congress has chosen the fairest way to resolve the competing interests at stake: the child who has already waited patiently in line for many years has been favored over the child who has just joined the line and will have to wait just a bit longer. Her reading is, she concludes, "a commonsense approach to statutory interpretation"[35] that will result in an equitable distribution of burdens. And her image is carefully chosen to resonate with all those who have waited in line for far less significant benefits.

Sotomayor's preference for examples drawn from ordinary life appears in some surprising contexts. Writing for the majority to reverse a defamation judgment against an airline that had fired a pilot after his angry response to a

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31. Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2125 (2013).

32. *Scialabba*, 134 S. Ct. at 2217.

33. *Id.* at 2218.

34. *Id.* at 2228.

35. *Id.*

failed simulator test, Sotomayor distinguishes the pilot's outburst from less dramatic situations:

> But Hoeper did not just lose his temper; he lost it in circumstances that he knew would lead to his firing, which he regarded as the culmination of a vendetta against him. . . . In short, Hoeper was not some traveling businessman who yelled at a barista in a fit of pique over a badly brewed cup of coffee.[36]

The businessman has lost his temper in a commonplace, if unpleasant, incident, while the pilot's explosion raises legitimate issues about his professional performance. Rejecting the Court's holding of broad whistleblower protection under the Sarbanes-Oxley Act, Sotomayor offers an example of what she considers an excessively broad reading of the statute. "If, for example," she writes, "a nanny is discharged after expressing a concern to his employer that the employer's teenage son may be participating in some Internet fraud, the nanny can bring a § 1514A suit."[37] The domestic setting highlights her sense that "there is little reason to think that Congress intended to sweep" such a broad range of potential situations under the statute.[38]

This opinion is also noteworthy in another regard: Sotomayor's deliberate use of "his" when referring to the nanny. That gesture, silently challenging the widespread assumption that a nanny would be female rather than male, is not an isolated instance. In several other opinions, Sotomayor makes the same point by switching genders in the opposite direction. Writing for the Court in her first term, she observes that "[a]n attorney uncertain about what the FDCPA requires must choose between, on the one hand, exposing herself to liability and, on the other, resolving the legal ambiguity against her client's interest or advising the client to settle."[39] In a concurring opinion later that same term, she refers to the lodestar calculation of an attorney's fee by "examining the attorney's reasonable hours expended

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36. Air Wis. Airlines Corp. v. Hoeper, 134 S. Ct. 852, 866.

37. Lawson v. FMR LLC, 134 S. Ct. 1158, 1184 (2014) (Sotomayor, J., dissenting).

38. *Id.*

39. Jerman v. Carlisle, 559 U.S. 573, 597 (2010).

and her reasonable hourly rate . . . ."[40] Expanding her focus, in a Fourth Amendment case she refers to a GPS system's ability to "generate[ ] a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[41] And, writing for the Court, she goes a step further, observing that "[a]n acquittal is unreviewable whether a judge directs a jury to return a verdict of acquittal . . . or forgoes that formality by entering a judgment of acquittal herself."[42] These pronouns all make the same point: the roles played by women in the legal arena as litigants, attorneys, and judges are identical to those played by men.

Closely linked to her preference for examples drawn from ordinary experience is Sotomayor's similar invocation of common sense as a valuable, and sometimes neglected, tool of legal analysis. Writing for the Court, she rejects the petitioners' claim that the Torture Victim Prosecution Act's use of "individual" should be read to include nonsovereign organizations, in this case the Palestinian Authority and the Palestinian Liberation Organization.[43] Since the statute does not define "individual," she turns to "the word's ordinary meaning."[44] Elaborating on the point, she offers a commonsensical explanation:

> After all, that is how we use the word in everyday parlance. We say "the individual went to the store," "the individual left the room," and "the individual took the car," each time referring unmistakably to a natural person. And no one, we hazard to guess, refers in normal parlance to an organization as an "individual."[45]

Elsewhere, she dissents from the majority's reading of the statutory phrase "actual damages" to exclude mental distress, insisting that her broader reading "accords with

40. Astrue v. Ratliff, 560 U.S. 586, 602 (2010) (Sotomayor, J., concurring).

41. United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring).

42. Evans v. Michigan, 133 S. Ct. 1069, 1074 (2013).

43. Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1706 (2012).

44. *Id.*

45. *Id.* at 1707.

common sense."[46] And when, in another case, the dissent claims that there is "'no practical, real-world effect'" to treating a jurisdictional rule as mandatory, she counters that its position in fact "ignores the real world."[47] For Sotomayor, the legal universe is not a closed system; it must be viewed as part of that "real world" in determining how its rules apply to actual situations.

The tone of Sotomayor's opinions remains in harmony with her "real world" perspective through her use of colloquial diction. Thus, the majority's view that a search for "gang-related items" was justified by their possible usefulness in impeaching the defendant "is a non-starter";[48] neither "snippet" from legislative reports cited by petitioners undermines the Court's holding;[49] the dissent has failed to identify its "true gripe";[50] a proposed reading of a tax regulation "tell[s] courts to treat outliers . . . as flukes";[51] and a federal statute doesn't "so much as hint that it views a $5 hit to the pocketbook as more worthy of remedy than debilitating mental distress."[52]

Sotomayor also uses sentence fragments to introduce a conversational tone that sharpens her points. In her first dissent on the Court, she responds to the majority's dismissal of an issue raised by the Solicitor General with a tentative "Perhaps so" before going on to criticize its easy dismissal of executive expertise.[53] Disregarding conventional syntax, she may ask the reader the one word question "Why?" to ponder why the political process must remain open to all citizens on

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46. Fed. Aviation Admin. v. Cooper, 132 S. Ct. 1441, 1463 (2012) (Sotomayor, J., dissenting).

47. Gonzalez v. Thaler, 132 S. Ct. 641, 651 n.7 (2012) (quoting 132 S. Ct. at 658 (Scalia, J., dissenting)).

48. Messerschmidt v. Millender, 132 S. Ct. 1235, 1256 (2012).

49. Hall v. United States, 132 S. Ct. 1882, 1892 (2012).

50. Evans v. Michigan, 133 S. Ct. 1069, 1080 n.8 (2013).

51. PPL Corp. v. Comm'r., 133 S. Ct. 1897, 1910 (2013) (Sotomayor, J., concurring).

52. Fed. Aviation Admin. v. Cooper, 132 S. Ct. 1441, 1463 (2012).

53. Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 312-13 (2010) (Sotomayor, J., dissenting).

equal terms and then answer her own question with another sentence fragment: "[f]or the same reason we guard the right of every citizen to vote."[54] She may seem to accept the majority's criticism of a statute's vagueness by responding simply "Fair enough" before going on to criticize Congress' unclear drafting.[55] Or she may challenge the majority's position by asking simply and colloquially "Says who?" before answering her own question with another fragment: "Certainly not the statute."[56] Such informal structures serve to engage the reader as well as the opposing Justices in an exchange of views.

Although Sotomayor generally prefers to counter the other side's arguments with her own persuasive strategies rather than to launch a direct attack, she will occasionally offer a restrained rejoinder. When the majority notes that two thirds of the jurors and alternates in Skilling's trial lacked any personal link to Enron, she counters mildly that "[t]his means, of course, that five of the seated jurors and alternates did have connections to friends or colleagues who had lost jobs or money as a result of Enron's collapse—a fact that does not strike me as particularly reassuring."[57] At other times she is more direct in her criticism. Writing for the Court, she counters Justice Scalia's criticism of "the complexity of [her] approach" in another criminal case with a two-pronged attack, first noting tartly that the dissent has misread the majority and then adding that "we, at least, are unwilling to sacrifice accuracy for simplicity."[58] Writing in dissent in another case, she notes that "[u]nlike my colleagues in the majority, I refuse to assume that Congress simply engaged in sloppy drafting."[59] More pointedly, in a third dissent she rejects the majority's reliance on the fact

54. Schuette v. Coal. to Def. Affirmative Action, 134 S. Ct. 1623, 1669 (2014).

55. Lawson v. FMR, 134 S. Ct. 1158, 1158, 1179 (2014) (Sotomayor, J., dissenting).

56. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2576 (2013) (Sotomayor, J., dissenting).

57. Skilling v. United States, 561 U.S. 358, 459 n.21 (2010) (Sotomayor, J., concurring in part and dissenting in part).

58. Michigan v. Bryant, 562 U.S. 344, 369 (2011).

59. Cullen v. Pinholster, 131 S. Ct. 1388, 1416 (2011).

that the police officer's disputed warrant had been approved by two of his of superiors and a district attorney. "Under the majority's test," she concludes, "four wrongs apparently make a right."[60]

Perhaps Sotomayor's harshest critique of a majority opinion appears in *Schuette v. Coalition to Defend Affirmative Action*,[61] where six Justices upheld an amendment to the Michigan State Constitution banning affirmative action in public education.[62] She offers examples of the ways in which "race matters," a phrase that she repeats no fewer than eight times in less than a single page of her opinion. Those echoes appear most powerfully in a paragraph offering examples drawn from minority experience:

> And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, "No, where are you *really* from?", regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: "I do not belong here."[63]

Rejecting the majority view that such concerns serve only to "perpetuate[ ] racial discrimination,"[64] she paraphrases Chief Justice Roberts' often quoted conclusion from *Parents Involved in Community Schools v. Seattle School District*—"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"—while turning it on its head to support her argument.[65] In Sotomayor's version, "[t]he way to stop discrimination on the basis of race is to

60. Messerschmidt v. Millender, 132 S. Ct. 1235, 1260 (2012).

61. 134 S. Ct. 1623, 1651 (2014) (Sotomayor, J., dissenting).

62. 134 S. Ct. at 1623-24 (2014) (Kennedy, J., plurality).

63. *Id.* at 1676 (Sotomayor, J., dissenting).

64. *Id.*

65. 551 U.S.701, 748 (2007) (Roberts, C.J.).

speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[66]

Just as Sotomayor uses some of her bluntest language when discussing the value of affirmative action to young men and women, she is at her most sympathetic when dealing with the rights of children. The issue in *J.D.B. v. North Carolina*[67] was whether the Court's analysis of *Miranda* rights should be altered when the suspect is a child. J.D.B., a thirteen year old, was suspected of breaking and entering and larceny. The investigating officer came to his school and questioned J.D.B. in the presence of school officials; he received no *Miranda* warnings and no opportunity to contact his family before the questioning, which resulted in his confession. Writing for the majority, Sotomayor found that a suspect's age should be a factor in considering whether a suspect's *Miranda* rights have been violated.

The starting point for Sotomayor's analysis is the clear difference between a child and an adult. In her view, "[a] child's age is far 'more than a chronological fact.'"[68] It follows that a child's response will differ from an adult's in the same situation. That "commonsense" perception, she observes dryly, is "self-evident to anyone who was a child once himself, including any police officer or judge."[69] This is, in other words, an obvious proposition, one that requires no "citation to social science and cognitive science authorities."[70] And she sees "no reason for police officers or courts to blind themselves to that commonsense reality."[71] In fact, she finds, it would be "nonsensical" to fail to consider age in assessing a custody situation.[72]

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66. *Schuette*, 134 S. Ct. at 1676.

67. 131 S. Ct. 2394 (2011).

68. *Id.* at 2403 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

69. *Id.*

70. *Id*. at 2403 n.5.

71. *Id.* at 2399.

72. *Id.* at 2405.

Sotomayor thus links two related propositions: "Children cannot be viewed simply as miniature adults,"[73] and judges, "including those whose childhoods have long since passed,"[74] are perfectly capable of taking into account the age of a child being questioned. Returning to one of her favorite themes, the usefulness of common sense in legal analysis, she concludes with a tidy summary: "In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."[75]

The theme of common sense legal analysis is tied in turn to another theme, the role of empathy in judicial decisionmaking. Here, she insists, "the question becomes how a reasonable person would understand the circumstances, either from the perspective of a blind person or, as here, a 13-year-old child."[76] Since we have all been children, however long ago, she feels comfortable drawing on that shared human experience to inform the way in which legal doctrine should apply to children in the legal system.

Justice Sotomayor locates her opinions in a framework broader than the current state of the law, a framework based on her sense that the law should be interpreted not merely as a technical discipline but also as a reflection of human experience. When she weighs the impact of an immigration statute on family unity or police interrogation on a child suspect, she reminds her colleagues that they may, and at times should, draw on that experience to reach their decisions. In both of her public roles—as autobiographer and Justice—Sotomayor asks her readers and her judicial colleagues to keep in mind the links between life and the law.

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73. *Id.* at 2404.

74. *Id.* at 2407.

75. *Id.*

76. *Id.* at 2403 n.9.