Clarence Thomas: A Fiercely Independent Mind and Originalist

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Biography

Sonia Sotomayor was born in the Bronx, New York City on June 25, 1954 to Puerto Rican immigrants, Juan Sotomayor and Celina Baez. Celina worked as a nurse, while Juan was a factory worker. The family lived in the city-owned housing projects, the Bronxdale Houses. Sotomayor was diagnosed with type-one diabetes when she was eight years old. She began taking daily insulin injections. One year later, when she was only nine years old, her father passed away from a heart attack. Her mother worked six days a week to support the family and to send the children to a private Catholic school. Sotomayor’s mother valued education. Sotomayor learned to speak English fluently. She attended Cardinal Spellman High School and graduated as class valedictorian in 1972. Sotomayor earned a full scholarship to Princeton University. She served as co-chairman of the Puerto Rican activist group and wrote her senior thesis on the life of Puerto Rican Munoz Marin and his support for Puerto Rican rights. Sotomayor graduated from Princeton, summa cum laude, in 1976. After graduating from Princeton, Sotomayor married her high school boyfriend, Kevin Edward Noonan. She earned a scholarship to Yale Law School, where she served as co-chair of the Latin American and Native American Students Association and was an editor for the Yale Law Journal. Sotomayor graduated from Yale Law School in 1979 and was admitted to the New York Bar in 1980.

2 Ibid.
3 Ibid.
4 Ibid.
6 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
12 Ibid.
13 Ibid.
PROFESSIONAL CAREER

After graduating from Yale Law School, Sotomayor was hired by Manhattan district attorney, Robert Morgenthau, to work as an assistant district attorney in New York City. Sotomayor began in the trial unit, where she assisted in one of her most memorable cases, “The Tarzan Murderer.” This case involved a burglar name Richard Maddicks. Maddicks would swing into apartment windows from rooftops to enter apartments and shoot and rob victims. Maddicks is currently serving 137 years to life. In 1984, Sotomayor joined the commercial litigation practice group, Pavoa & Harcourt in Manhattan. The firm focused on business and corporate law. Sotomayor made partner in 1988.

U.S DISTRICT COURT

In 1991, Sotomayor was nominated, on the recommendation of Senator Daniel Patrick Moynihan, by President George H.W. Bush to a judgeship on the United States District Court for the Southern District of New York. She was confirmed by the United States Senate on August 11, 1992. Sotomayor was the first Hispanic federal judge in New York and the youngest judge in the Southern District at the age of 40.

It was during her time on the District Court bench that Judge Sotomayor gained fame when she "saved" baseball by ending a baseball strike. In Silverman v. Major League Baseball

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15 Ibid.
16 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.
the owners of major league baseball teams approved a revenue-sharing plan that implemented a player’s salary cap. The owners and players negotiated through June of 1994 when the owners unilaterally decided to withhold $7.8 million that they were required to pay pursuant to the original agreement. On August 12, 1994, the players went on strike, which lasted until 1995, eliminating the 1994 World Series. The National Labor Relations Board filed an unfair labor practices complaint when the owners attempted to use replacement players while implementing a new collective bargaining agreement. On March 31, 1994, Judge Sotomayor issued a preliminary injunction against the owners that ordered them to restore free agency and arbitration. Consequently, the players returned and the strike was over.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Justice Sotomayor was nominated by President Bill Clinton to a seat on the U.S. Court of Appeals for the Second Circuit on June 25, 1997. On October 2, 1998, Sotomayor was confirmed by a 67-29 vote in the Senate. The delay may have been due to speculation in the media that President Clinton was nominating her into the Court of Appeals in order to appoint her to the United States Supreme Court when there was an opening. This would have given President Clinton the honor of appointing the first Hispanic judge to the Supreme Court.

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23 Id. at 1057.
24 Id.
25 Id.
26 Id. at 1056.
27 Id.
29 Ibid.
30 Ibid.
31 Ibid.
speculation may have led to attempts by Republicans to block the confirmation. Sotomayor served on the Second Circuit Court of Appeals for ten years. She heard more than 3,000 cases and authored about 380 majority opinion. A study of her opinions showed that she tended to be conservative in criminal cases and more liberal in cases concerning civil rights issues.

Five of Sotomayor's decisions were reviewed by the Supreme Court of the United States and three were overturned. In *Ricci v. DeStefano*, Sotomayor, sitting on a panel of three judges, upheld a rejection of a lawsuit by white firefighters, and one Hispanic firefighter, against the city of New Haven. The firefighters were denied promotions after a promotion examination yielded no black candidates. The city withdrew the test and the results due to concerns that the test itself had a disparate impact against minority test-takers. Eighteen firefighters, who passed the test, brought suit against the city claiming that they were denied promotions because of their race. The Court of Appeals for the Second Circuit found in favor of the city of New Haven and rejected the lawsuit. One month prior to Justice Sotomayor's confirmation hearings, the Supreme Court of the United States granted *Ricci* certiorari. The Supreme Court overturned the Second Circuit's ruling in a 5-4 decision, concluding that the cancellation of the promotions of the firefighters who passed the examination violated the Equal

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37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 93.
Protection Clause of the Fourteenth Amendment, as well as Title VII of the 1964 Civil Rights Act.\textsuperscript{43}

Judge Sotomayor made another ruling that affected professional sports, this time regarding the National Football League. In \textit{Clarett v. Nat'l Football League}\textsuperscript{44}, the National Football League appealed a summary judgment granted by the United States District Court for the Southern District of New York.\textsuperscript{45} The district court concluded that the National Football League’s eligibility rules violated antitrust laws.\textsuperscript{46} The rules require that a player wait at least three full football seasons after high school graduation before entering the National Football League draft.\textsuperscript{47} Judge Sotomayor ruled that federal law precluded the application of antitrust laws to the National Football League’s eligibility rules.\textsuperscript{48} The district court’s judgment was reversed and the case was remanded.\textsuperscript{49}

\textbf{THE SUPREME COURT OF THE UNITED STATES}

In 2009, President Barrack Obama nominated Sotomayor to serve on the Supreme Court of the United States, filling in the vacant seat left by of Justice Souter.\textsuperscript{50} On May 26, 2009, Justice Sotomayor was confirmed by the Senate on a 68-31 vote.\textsuperscript{51} Justice Sotomayor was the first Hispanic Supreme Court Justice and third female justice after Justice Sandra Day O’Connor and Justice Ruth Bader Ginsburg.\textsuperscript{52} Justice Sotomayor is serving her sixth year on the Supreme


\textsuperscript{44} \textit{Clarett v. Nat'l Football League}, 369 F.3d 124, 125 (2d Cir. 2004).

\textsuperscript{45} Id.

\textsuperscript{46} Id. at 129.

\textsuperscript{47} Id. at 132.

\textsuperscript{48} Id.

\textsuperscript{49} Id. at 145.


\textsuperscript{51} Ibid.

Court. During her years on the bench, Sotomayor has established herself as one of the more liberal judges on the bench.

The following will analyze ten of Justice Sotomayor’s opinions: three dissenting opinions, four majority opinions, and three concurring opinions.

**First Case Heard**

*Citizens United v. Federal Election Commission*

Justice Sonia Sotomayor’s first case heard on the United States Supreme Court was *Citizens United v. Federal Election Commission.* Although Sotomayor did not author an opinion in this case, this case is notable in that it is the first case she heard while sitting on the United States Supreme Court. During the second round of oral arguments, Justice Sotomayor sat on the bench for the first time. This case dealt with campaign financing and the First Amendment rights of corporations. The Court held that corporations have the same political speech rights as individuals under the First Amendment and could not be prohibited from making independent expenditures in political campaigns. The Court found no compelling government interest for preventing corporations from making independent expenditures. In *Citizens United*, the nonprofit organization, Citizens United, used its funds to create a documentary on Hilary Clinton. The documentary, titled “Hilary,” featured commentary urging voters not to vote for Hilary Clinton. Section 203 of the Bipartisan Campaign Reform Act (“BCRA”) prohibited independent expenditures by corporations or unions to fund “electioneering

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56 Id.
57 Id. at 887.
58 Id.
59 Id. at 892.
communications." The Supreme Court overturned the United States District Court for the District of Columbia’s ruling that Citizens United was prohibited from advertising the film “Hilary” under Section 203 of BCRA. The Supreme Court struck down the sections of the BCRA that prohibited corporations from making independent expenditures finding that the prohibition violated the First Amendment’s protection of free speech. Justice Sotomayor dissented from the majority. The dissent argued that the First Amendment rights were never intended, by the framers, to apply to corporations.

**Dissenting Opinions**

*Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*

In *Schuette v. Coalition to Defend Affirmative Action*, Michigan voters approved an amendment to the state’s constitution to prohibit “all sex- and race-based preferences in public education, public employment, and public contracting.” Consequently, a group of organizations and individuals brought suit against Michigan state officials. The group claimed that the amendment to the state constitution was a violation of the Equal Protection Clause. Bill Schuette, the attorney general of Michigan, was listed as the defendant.

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60 *Id.* at 895.
61 *Id.*
62 *Id.* at 928.
63 *Id.* at 929.
65 *Id.* at 1628.
66 *Id.* at 1623.
67 *Id.* at 1626.
The U.S District Court for the District of Eastern Michigan granted summary judgment in favor of the defendants. The United States Court of Appeals for the Sixth Circuit reversed the lower court’s decision, holding that the amendment was unconstitutional because of the unfair burden placed on persons who seek to have race considered as one of the numerous factors for admissions in universities.

The question presented in *Schuette* is whether an amendment to a state’s constitution to prohibit race- and sex-based preferential treatment and discrimination in public university admission decisions violated the Equal Protection Clause of the Fourteenth Amendment. In a 6-2 decision, with Justice Elena Kagan recused, a plurality reversed the Sixth Circuit’s judgment. In an opinion written by Justice Anthony Kennedy, the plurality held that the case was turned on whether the voters of a state can choose to prohibit the use of racial reference in the decisions of governmental bodies and not about the constitutionality of race-conscious admissions. The plurality goes on to say that it is not the court’s role to disempower the voters’ right to make certain choices stating that, “[t]here is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.”

Justice Sotomayor wrote a powerfully worded 58-page dissent, which was joined by Justice Ruth Bader Ginsburg. Justice Sotomayor argues that the amendment to Michigan’s state constitution places a burden on minority groups in violation of the the Equal Protection

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70 *Id.*
71 *Id.*
72 *Id.* at 1624.
73 *Id.* at 1638.
74 *Id.* at 1651.
Clause. Justice Sotomayor also refers to the Court's precedent of striking down laws that promoted the unequal treatment of minorities. Justice Sotomayor states that:

"The effect of §26 is that a white graduate of a public Michigan university who wishes to pass his historical privilege on to his children may freely lobby the board of that university in favor of an expanded legacy admissions policy, whereas a black Michigander who was denied the opportunity to attend that very university cannot lobby the board in favor of a policy that might give his children a chance that he never had and that they might never have absent that policy." 77

As a Bronx native born to immigrant parents and one of the two Justices of color on the Supreme Court bench, I believe Justice Sotomayor's own personal life experiences influenced her strong dissent in Schuette. Affirmative action programs in universities allow individuals of diverse and minority backgrounds to have an equal opportunity for admission. From Justice Sotomayor's dissenting opinion, it is evident that she is a firm believer in and supporter of affirmative action programs. Justice Sotomayor states that, "this Court has recognized that diversity in education is paramount. With good reason. Diversity ensures that the next generation moves beyond the stereotypes, the assumptions, and the superficial perceptions that students coming from less-heterogeneous communities may harbor, consciously or not, about people who do not look like them." 78

75 Id. at 1652.
77 Id. at 1662.
78 Id. at 1682.
CHAMBER OF COMMERCE OF U.S. V. WHITING

In Chamber of Commerce v. Whiting, the Supreme Court of the United States upheld an Arizona state law that allowed for the revocation of business licenses of state companies that knowingly hired undocumented workers. In this case, the Arizona state legislature passed the Legal Arizona Workers Act ("LAWA"), which provided for the suspension or revocation of the business licenses of state employers who knowingly or intentionally employ "unauthorized aliens." Various businesses and organizations, including Chamber of Commerce, challenged the enforceability of the statute claiming that Arizona violated the Supremacy Clause of the Constitution by passing its own immigration enforcement statute. Specifically, the law was preempted by the federal Immigration Reform and Control Act of 1986 ("IRCA"). The district court upheld the law. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. The Ninth Circuit held that the IRCA excepts "state licensing and similar laws" from preemptive reach thus LAW A was not preempted. The Supreme Court of the United States granted Certiorari to review.

The issue in the case is whether a state law that provided the revocation of business licenses of state companies that hired undocumented workers was preempted by the federal Immigration Reform and Control Act of 1986. The Chamber of Commerce argued that the legislative history made it clear that Congress intended the licensing exception to allow states to revoke licenses of those actors who violated immigration laws and that this determination was to

79 Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011).
80 Id. at 1970.
81 Id.
82 Id.
83 Id. at 1971.
84 Id. at 1977.
85 Id.
86 Id.
87 Id. at 1978.
be made by federal officials not state officials. In a 5-3 decision, with Justice Kagan recusing, the majority affirmed the lower court’s decision. In an opinion written by Chief Justice John Roberts, the majority stated that “Arizona’s licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.”

Justice Robert opines that, “authoritative statement is the statutory text, not the legislative history.”

Justice Sotomayor authored a dissent in which she states “in isolation, the text of IRCA’s saving clause provides no hint as to which type or types of licensing laws Congress had in mind.” She argues that the licensing exception of the IRCA is “hardly a paragon of textual clarity” and the Court should look to Congressional intent. Furthermore, Justice Sotomayor claims that the majority’s holding is inconsistent with the “comprehensive scheme” of the IRCA. Justice Sotomayor reads the licensing exception to permit States to “impose licensing sanctions following a final federal determination that a person has violated §1324a(a)(1)(A) by knowingly hiring, recruiting, or referring for a fee an unauthorized alien.” Under Justice Sotomayor’s construction of the licensing exception, LAWA “cannot escape pre-emption” because the LAWA’s “sanctions are not premised on a final federal determination that an employer has violated IRCA.”

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88 Id.
89 Id. at 1987.
91 Id. at 1980.
92 Id. at 1998.
93 Id.
94 Id.
95 Id. at 2004.
96 Id. at 2005.
I believe that Justice Sotomayor’s dissent in *Chamber of Commerce of U.S.* showcases her empathy towards undocumented immigrants. Having been born to two immigrant parents, it is no surprise that Justice Sotomayor’s opinions are consistent with defending the rights of immigrants and the protection of minority groups against oppression.

**Scialabba v. Cuellar de Osorio**

In *Scialabba v. Cuellar de Osorio*, the respondents are lawful permanent residents in the United States. The respondents applied for family-sponsored visas for their children but due to visa quotas and backlogs in the United States immigration system, the children had “aged out” of eligibility for derivative child-visas. The children had turned twenty-one before the visas were granted and consequently, the Board of Immigration Appeals converted their child-applications to adult-applications. The respondents brought suits in the United States District Court for the Southern District of California requesting that the Court order the Board of Immigration Appeals to use the children’s original filing date. The respondents argued that the Child Status Protection Act grants remedy to all minors who have “aged out” of the sponsoring petition by the time the visa becomes available. The district court denied their request holding that the relevant provision in the Child Status Protection Act only applies to children with an independent relationship with the original petitioning lawful permanent resident. In this case, the mother was the principal beneficiary of the visa petition and the child piggyback of the mother as a

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98 Id. at 2194.
99 Id. at 2194.
100 Id. at 2193.
101 Id.
102 Id.
The respondents appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The Ninth Circuit affirmed the lower court’s decision. The United States Supreme Court granted Certiorari.

In a 5-4 decision, Justice Kagan wrote the majority opinion holding that the Board of Immigration Appeals interpretation of the Child Status Protection Act as providing a remedy to “age-out” non-citizens who qualified or could have qualified as principal beneficiaries of a visa petition, rather than a derivative beneficiary piggy-backing on a parent, is a permissible construction of the statute. The majority accorded *Chevron* deference to the Board of Immigration Appeals interpretation of the statute.

Justice Sotomayor authored a dissent in which Justice Breyer joined and Justice Thomas joined in part. In her dissent, Justice Sotomayor does not find that the Board of Immigration Appeals’ interpretation permissible.

“In reaching this conclusion, the Court fails to follow a cardinal rule of statutory interpretation: When deciding whether Congress has “specifically addressed the question at issue,” thereby leaving no room for an agency to fill a statutory gap, courts must “interpret the statute ‘as a ... coherent regulatory scheme’ and ‘fit, if possible, all parts into [a] harmonious whole.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (citation omitted). Because the Court and the BIA ignore obvious ways in which § 1153(h)(3) can operate as a coherent whole and instead construe the

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103 *Id.*
105 *Id.*
106 *Id.* at 2197.
107 *Id.* at 2195.
statute as a self-contradiction that was broken from the moment Congress wrote it, I respectfully dissent.\textsuperscript{108}

Justice Sotomayor's dissenting opinion in \textit{Scialabba} is another example of her affinity to immigrant individuals. Her decisions are aligned with the protection of immigrant rights.

**MAJORITY OPINIONS**

\textbf{MOHAWK INDUSTRIES, INC. v. CARPENTER}

Justice Sotomayor wrote her first majority opinion in \textit{Mohawk Indus., Inc. v. Carpenter}.\textsuperscript{109} In \textit{Mohawk Indus., Inc.}, an employee made a complaint to the company's human resources department claiming that the company was employing "undocumented immigrants."\textsuperscript{110} The employee was directed to meet with a company lawyer.\textsuperscript{111} During the meeting, the lawyer allegedly pressured the employee to recant his statements.\textsuperscript{112} The employee was fired and claimed that it was because he failed to recant his statements.\textsuperscript{113} The employee brought claims against the company and during litigation requested information from the company regarding the meeting with the lawyer.\textsuperscript{114} The company claimed that the information was protected under attorney-client privilege.\textsuperscript{115} The District Court for the Northern District of Georgia granted the employee's motion to compel the company to produce the information and the company sought an interlocutory appeal.\textsuperscript{116} The United States Court of Appeals for the Eleventh Circuit

\textsuperscript{108} \textit{id.} at 2217.

\textsuperscript{109} \textit{Mohawk Industries, Inc. v. Carpenter}, 558 U.S. 100, 100 (2009).

\textsuperscript{110} \textit{id.} at 103.

\textsuperscript{111} \textit{id.} at 100.

\textsuperscript{112} \textit{id.}

\textsuperscript{113} \textit{id.} at 104.

\textsuperscript{114} \textit{id.}

\textsuperscript{115} \textit{id.}

\textsuperscript{116} \textit{id.}
dismissed the appeal and denied a writ. The Supreme Court of the United States granted certiorari.

The question presented in *Mohawk Indus., Inc.*, was whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine. Justice Sotomayor’s majority opinion, joined by the other eight justices, held that privilege-related disclosure orders does not qualify for immediate appeal under the collateral order doctrine. The Court reasoned that including privilege-related disclosure orders under collateral orders would burden the Courts of Appeals because it would delay the resolution of cases. Additionally, the majority reasoned that appeals occurring post judgment are sufficient to protect the rights of litigants.

Throughout the opinion, Justice Sonia Sotomayor used the term “undocumented immigrant” instead of “illegal immigrant.” It was the first time the term appeared in a Supreme Court opinion. From her very authored opinion, one can see the respect she has for immigrant persons.

**J.D.B. v. NORTH CAROLINA**

In *J.D.B.*, a 13 year-old seventh grade special education student was interrogated by a uniformed police officer. J.D.B. was escorted from his social studies classroom to a conference room where he was interviewed by a police officer, Assistant Principal, and an

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117 Id. at 105.
118 Id. at 106.
120 Id.
121 Id.
administrator behind closed doors. The school or authorities did not inform J.D.B.’s grandmother prior to the interview. J.D.B. was not read his Miranda rights at this time. The police officer questioned J.D.B. for about thirty to forty minutes regarding recent neighborhood break-ins. A digital camera matching the description of one that had gone missing during the break-ins earlier that week was found in J.D.B.’s school and seen in possession. J.D.B. initially denied any involvement claiming that he was in that neighborhood trying to earn some money by mowing lawns. The Assistant Principal pressured J.D.B. to “do the right thing” because the truth always comes out. The police officer warned J.D.B. that there was a possibility he could face juvenile detention which led to J.D.B.’s confession. J.D.B. was subsequently given his Miranda rights.

J.D.B. was charged with larceny and breaking and entering. During the trial, J.D.B. moved to suppress his confession and any evidence obtained as a result of the confession. J.D.B. argued that he was in custody during the interrogation and that the police officer had failed to read him his Miranda rights. The state trial court denied the motion to suppress the confession and evidence finding that J.D.B. was not in police custody at the time of the interrogation. The North Carolina Court of Appeals and the North Carolina Supreme Court

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124 Id. at 2399.
125 Id.
126 Id.
127 Id.
128 Id.
130 Id. at 2400.
131 Id.
132 Id.
133 Id.
134 Id.
136 Id. at 2401.
affirmed the state trial court’s decision.\textsuperscript{137} The North Carolina Supreme Court stated that age should not be taken into consideration when determining whether or not an individual is in custody for Miranda purposes.\textsuperscript{138} The Supreme Court of the United States granted Certiorari.

The issue in this case is “whether the \textit{Miranda} custody analysis includes considerations of a juvenile suspect’s age.”\textsuperscript{139} In a 5-4 decision, Justice Sotomayor wrote the opinion for the majority.\textsuperscript{140} The Court held that age is relevant in the Miranda custody analysis for juveniles. Justice Sotomayor states that, "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the \textit{Miranda} custody analysis."\textsuperscript{141} The majority reasoned that failing to incorporate age into custody analysis would “blind” themselves to reality and that judges and police officers are competent enough to evaluate the effect of age.\textsuperscript{142} The case was reversed. The decision in \textit{J.D.B.}, allows courts to factor in age when conducting a \textit{Miranda} custody analysis.

\textbf{\textit{MICHIGAN v. BRYANT}}

\textit{Michigan v. Bryant} is a case involving the Sixth Amendment’s right of confrontation.\textsuperscript{143} In \textit{Bryant}, the police responded to a gas station after a report of a shooting.\textsuperscript{144} The police found Anthony Covington suffering from a gunshot wound to his abdomen.\textsuperscript{145} Covington told the

\textsuperscript{137} \textit{Id}.  
\textsuperscript{138} \textit{Id}.  
\textsuperscript{139} \textit{Id}. at 2408.  
\textsuperscript{140} \textit{Id}.  
\textsuperscript{141} \textit{J.D.B. v. N. Carolina}, 131 S. Ct. 2394, 2408, 180 L. Ed. 2d 310 (U.S. 2011).  
\textsuperscript{142} \textit{Id}.  
\textsuperscript{144} \textit{Id}.  
police that the defendant, Richard "Rick" Bryant, had shot Covington through the door while Covington was on defendant's back porch.\textsuperscript{146} Covington described the defendant's physical appearance and disclosed the location of the defendant's home.\textsuperscript{147} Covington was transported to the hospital but died a few hours later.\textsuperscript{148} At trial, Covington's statements were admitted into evidence under the excited utterance hearsay exception.\textsuperscript{149} Bryant was found guilty of second-degree murder.\textsuperscript{150} On appeal, the Michigan Supreme Court reversed the trial court's decision, holding that the statements were testimonial and did not fall within the emergency exception in \textit{Davis v. Washington}.\textsuperscript{151}

The question presented in \textit{Bryant} is whether inquiries of victims concerning a perpetrator are non-testimonial if they objectively indicate that the purpose of the interrogation is to enable police assistance to meet an ongoing emergency.\textsuperscript{152} In a 6-2 decision, with Justice Kagan recusing, the majority reversed and remanded the lower court decision.\textsuperscript{153} Justice Sotomayor, joined by Justices Roberts, Kennedy, Breyer, and Alito, authored the majority opinion, holding that the description of the perpetrator and the location of the shooting were "not testimonial statements because they had a "primary purpose ... to enable police assistance to meet an ongoing emergency."\textsuperscript{154} Justice Sotomayor uses the primary purpose test which differentiates between statements made to the police because of an ongoing emergency verses statements made to gather facts for prosecution.\textsuperscript{155}

\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 136.
\textsuperscript{153} Id. at 378.
\textsuperscript{154} Id. at 351.
\textsuperscript{155} Id.
I believe that Justice Sotomayor's years as a prosecutor might have influenced her decisions in this case and other cases dealing with criminal procedure. This decision is favorable to prosecutors in that it essentially bypasses the Sixth Amendment's Confrontation Clause by allowing prosecutors to use a deceased person's statements. It provides another exception to hearsay that benefits the prosecution by allowing statements, which would otherwise be inadmissible, into evidence if a court finds that the primary purpose of the statements were made to the police because of an ongoing emergency.

**Moncrieffe v. Holder**

Justice Sotomayor wrote the majority opinion in *Moncrieffe v. Holder*. The opinion sought to resolve a conflict among the federal Courts of Appeals "with respect to whether a conviction under a statute that criminalizes conduct described by both §841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that "proscribes conduct punishable as a felony under" the CSA."**

Petitioner, Adrian Moncrieffe, a Jamaican citizen, was stopped in 2007. During the traffic stop, police found 1.3 grams of marijuana in Petitioner's car. Petitioner pled guilty to possession of marijuana with an intent to distribute, a violation of Ga. Code. Ann. § 16-13-30(j)(1) (2007). Pursuant to § 42-8-60(a) (1997), a state statute that authorizes more lenient treatment to first-time offenders, the Georgia state trial court refrained from imposing a

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156 133 S. Ct. 1678 (2012).
157 Moncrieffe, 133 S. Ct. at 1684.
158 Id. at 1683.
159 Id.
160 Id.
conviction.\textsuperscript{161} Instead, the trial court permitted Petitioner to complete five years of probation, after which the charge will be expunged.\textsuperscript{162}

The Federal Government sought to deport Petitioner, claiming that the Georgia conviction constituted an aggravated felony since possession of marijuana with intent to distribute, under the Controlled Substances Act, 21 U.S.C. § 841(a), was punishable by up to five years’ imprisonment.\textsuperscript{163} An immigration judge agreed and ordered Petitioner’s deportation. \textsuperscript{Id.}

The Board of Immigration Appeals affirmed on appeal, and the Court of Appeals denied Petitioner’s petition for review.\textsuperscript{164} The Court of Appeals reasoned that because the CSA’s felony provision takes precedent over any misdemeanor provision in a federal criminal prosecution, the state offense against Petitioner was “equivalent to a federal felony.”\textsuperscript{165}

\textbf{Concurring Opinions}

\textbf{United States v. Jones}

In \textit{United States v. Jones}, the United States Supreme Court held that the attachment of a Global Positioning System (“GPS”) tracking device to a vehicle and the use of GPS device to monitor a vehicle’s movements is a “search” within the meaning of the Fourth Amendment.\textsuperscript{166} In \textit{Jones}, the defendant, Antoine Jones, owned and operated a nightclub that came under investigation for narcotics trafficking.\textsuperscript{167} The police obtained a warrant authorizing the use of a GPS tracking device on Jones’ vehicle but installed the GPS after the expiration of the

\textsuperscript{161} Id.

\textsuperscript{162} Id. at 1683.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id. at 1683-84 (quoting Moncrieffe v. Holder, 662 F.3d 387, 392 (5th Cir. 2011)); 21 U.S.C. § 841(b)(1)(D)).

\textsuperscript{166} United States v. Jones, 132 S. Ct. 945, 946, 181 L. Ed. 2d 911 (2012).

\textsuperscript{167} Id.
warrant.\textsuperscript{168} The police monitored Jones’ Jeep for twenty-eight days.\textsuperscript{169} Jones was arrested and acquitted on all the charges except the conspiracy charge, which was subsequently retried.\textsuperscript{170} In January 2008, Jones was convicted of conspiracy to distribute and to possess with the intent to distribute five or more kilograms of cocaine and fifty or more grams of cocaine base.\textsuperscript{171}

During the trial, defense counsel filed motions to suppress the data obtained through the GPS.\textsuperscript{172} On appeal, Jones argued that the conviction should be overturned because his Fourth Amendment rights violated.\textsuperscript{173} Specifically, Jones contended that the use of the GPS tracker, without a valid warrant, was an unreasonable search under the Fourth Amendment.\textsuperscript{174} The United States Court of Appeals for the District of Columbia Circuit reversed the conviction, holding that the use of the GPS tracking device was a search and violated Jones’s “reasonable expectation of privacy.”\textsuperscript{175} The Supreme Court of the United States granted Certiorari.

The question presented in this case is whether the warrantless use of a tracking device on Jones’s vehicle to monitor its movements on public streets violated Jones’ Fourth Amendment rights.\textsuperscript{176} In a 9-0 decision, the Court found that this was a violation of the Jones’ Fourth Amendment.\textsuperscript{177} Although the decision was unanimous, the Court was divided in the analysis.\textsuperscript{178} Justice Antonin Scalia wrote the opinion for the majority concluding that the installation of the

\begin{itemize}
\item\textsuperscript{168} Id.
\item\textsuperscript{169} Id.
\item\textsuperscript{171} Id.
\item\textsuperscript{172} Id.
\item\textsuperscript{173} United States v. Maynard, 615 F.3d 544 (2010).
\item\textsuperscript{174} Id.
\item\textsuperscript{175} Id.
\item\textsuperscript{176} U.S. v. Jones, 132 S. Ct. 945, 947 (2012).
\item\textsuperscript{177} U.S. v. Jones, 132 S. Ct. 945, 954 (2012).
\item\textsuperscript{178} Id.
\end{itemize}
GPS onto the vehicle, which the Court considered to be an “effect” was a trespass of Jones’ personal effects to obtain information.\(^{179}\)

Justice Sotomayor wrote a concurring opinion emphasizing the need to apply the Kitt test to GPS monitoring that does not involve a trespassory installation.\(^{180}\) Justice Sotomayor goes beyond trespass and states that a Fourth Amendment search occurs whenever the government violates a subjective expectation of privacy that society recognizes as reasonable.\(^{181}\) Justice Sotomayor agreed with Justice Alito’s concurrence that long term monitoring in investigations of offenses impinges on expectations of privacy, but argues that even short-term monitoring may be subject to constitutional scrutiny because of “some unique attributes of GPS surveillance.”\(^{182}\)

**Michigan v. Bay Mills Indian Community**

In *Michigan v. Bay Mills Indian Community*,\(^{183}\) the Supreme Court of the United States held that tribal sovereign immunity prevented a state from suing a tribe in federal court in a case where tribal activity violated the Indian Gaming Regulatory Act outside of Indian lands.\(^{184}\) In *Bay Mills Indian Community*, Michigan and the Bay Mills Indian Community entered a compact that allowed the tribe to open a casino in the Upper Peninsula of Michigan.\(^{185}\) The Indian Gaming Regulatory Act allows an Indian tribe to operate a casino on Indian Lands.\(^{186}\) Bay Mills opened a second casino in Vanderbilt, Michigan on lands purchased with earnings from the
congressionally established land trust. The State of Michigan sued the tribe claiming that Bay Mills violated the Tribal-State compact and sought an injunction to enjoin the gaming activity under Indian Gaming Regulatory Act. The District Court granted the injunction. The United States Supreme Court of Appeals for the Sixth Circuit vacated the decision holding that tribal sovereignty immunity barred the suit and that the Indian Gaming Regulatory Act only authorized suits to "enjoin gaming activity located 'on Indian land,' whereas Michigan's complaint alleged the casino was outside such territory."

The issue here is whether a federal court has jurisdiction over tribal activity that violates the Indian Gaming Regulatory Act, but takes place outside of Indian Lands. The question before the Court is whether tribal sovereign immunity prevents the state from suing in federal court. In a 5-4 decision, the majority opinion, written by Justice Kagan, held that Indian tribes have sovereign immunity that is only revocable by Congressional action.

Justice Sotomayor filed a concurring opinion stating that, "[p]rinciples of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct."

“For two reasons, these goals are best served by recognizing sovereign immunity for Indian Tribes, including immunity for off-reservation conduct, except where Congress has expressly abrogated it. First, a legal rule that permitted States to sue Tribes, absent their consent, for commercial conduct would be anomalous in light of the existing prohibitions against Tribes' suing States in

187 Id. at 2027.
188 Id.
190 Id. at 2026.
192 Id. at 2039.
193 Id. at 2039.
like circumstances. Such disparate treatment of these two classes of domestic sovereigns would hardly signal the Federal Government's respect for tribal sovereignty. Second, Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal.”

Throughout her concurring opinion, Justice Sotomayor outlines the history and importance of respect for tribal sovereignty. Her concurrence in *Bay Mills Indian Community* is a testament the respect Justice Sotomayor accords to minority groups.

**ALLEYNE v. UNITED STATES**

In *Alleyne v. United States*, the United States Supreme Court decided that all of the facts that increase a mandatory minimum sentence must be submitted to a found true by a jury. In *Alleyne*, the robber of a convenience store, Allen Alleyne, was indicted for robbery and possessing a firearm. A jury convicted Alleyne on both counts. The mandatory minimum sentence was five years' imprisonment but would rise to seven years if the defendant was found to have “brandished” the firearm during the crime. During the trial, the judge found that Alleyne probably brandished the firearm, not the jury. Alleyne objected to the recommendation of a seven year minimum sentence claiming that the judge’s finding of the

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194 *Id.*
195 *Id.* at 2045.
198 *Id.*
199 *Id.*
brandishing of the firearm violated Alleyne’s Sixth Amendment right to a jury trial.\textsuperscript{201} Alleyne was sentenced to 130 months’ imprisonment.\textsuperscript{202} The United States District Court for the Eastern District of Virginia overruled the objection.\textsuperscript{203} The United States Court of Appeals for the Fourth Circuit affirmed.\textsuperscript{204}

In a 5-4 decision, the United States Supreme Court overruled \textit{Harris v. United States},\textsuperscript{205} which held that judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment.\textsuperscript{206} The majority held that an element of a crime, if that element increases the mandatory minimum punishment, must be submitted to the jury and found to be true beyond a reasonable doubt.\textsuperscript{207} The Supreme Court vacated and remanded the lower court’s decision.

Justice Sotomayor authored a concurring opinion that further discusses the overruling of \textit{Harris} and \textit{stare decisis}.\textsuperscript{208} Justice Sotomayor emphasizes the importance of \textit{stare decisis} but also the appropriateness of overturning decisions inconsistent with the shifting of jurisprudence.\textsuperscript{209}

\textbf{REVIEW}

A review of Justice Sotomayor’s opinions shows her compassion and empathy for minority groups and immigrants. Being a minority herself, as well as the first Hispanic Justice to sit on the United States Supreme Court, it comes as no surprise that she has become a defender...

\textsuperscript{201} Id.
\textsuperscript{202} Id. at 2156.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{206} \textit{Alleyne v. U.S.}, 133 S. Ct. 2151, 2163-64 (2013)
\textsuperscript{207} \textit{Alleyne v. U.S.}, 133 S. Ct. 2151, 2155 (2013).
\textsuperscript{208} \textit{Alleyne v. U.S.}, 133 S. Ct. 2151, 2156 (2013)
\textsuperscript{209} Id.
against minority oppression and a protector of immigrant rights. In cases involving criminal procedure, it seems that Justice Sotomayor is more inclined to rule more favorable to the prosecution’s side. This may be due to the fact that Justice Sotomayor spent her early professional years as an assistant district attorney. Overall, I believe that Justice Sotomayor’s opinion have been clear, well-worded, and true to her ideologies.