

Sotomayor's Supreme Court Race Jurisprudence: "Fidelity to the Law"

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During the Senate confirmation hearings for Justice Sonia Sotomayor, concerns were persistently raised about her ability to be impartial. In this Essay, Professor Hernández argues that the Supreme Court's race-related jurisprudence illuminates Justice Sotomayor's continued commitment to her stated judicial philosophy of "fidelity to the law." The record suggests that Justice Sotomayor has not sought to unilaterally impose her own personal racial policy preferences, but has instead worked as a team player to scrupulously apply legal precedents, rules of standing, and congressional intent.

During the Senate confirmation hearings for Justice Sonia Sotomayor, concerns were persistently raised about her ability to be impartial given her statement, in a 2001 speech entitled "A Latina Judge's Voice," that she "would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."¹ In response, conservative pundit Rush Limbaugh and many others railed against her nomination, "proclaiming on talk radio broadcasts from coast-to-coast that she is a 'reverse-racist' and nothing less than 'anti-white.'"² Yet, when asked at the Senate confirmation hearings about her judicial philosophy, Justice Sotomayor succinctly stated that it is "[s]imple: fidelity to the law."³ The occasion of Justice Sotomayor's fifth anniversary on the Court provides us with an opportune moment to assess the early concern that she would be an inappropriate judicial activist, particularly with respect to

1. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

2. Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand At Work*, 30 CHICANA/O-LATINA/O L. REV. 97, 135 (2011).

3. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56940/html/CHRG-111shrg56940.htm> (statement of Sonia Sotomayor, J.).

race-related legal issues.⁴ A review of the record demonstrates Justice Sotomayor's continued commitment to her judicial philosophy of "fidelity to the law," which had also been her hallmark as a Second Circuit judge and district court judge.⁵ Indeed, before Justice Sotomayor was appointed to the Supreme Court, a Congressional Research Service analysis of her opinions as a federal judge concluded:

[T]he most consistent characteristic of Judge Sotomayor's approach as an appellate judge has been an adherence to the doctrine of *stare decisis* Other characteristics appear to include what many would describe as a careful application of particular facts at issue in a case and a dislike for situations in which the court might be seen as overstepping its judicial role.⁶

Similarly, *U.S. Law Week's* assessment of Judge Sotomayor's federal court opinions concluded, "Sotomayor's opinions steer a middle-of-the-road course in many instances, citing judicial precedent and doctrine in ways that tend to negate charges of judicial activism."⁷

In fact, in nine of the ten Supreme Court cases that I have identified and discuss herein as centrally implicating an aspect of racial justice, Justice Sotomayor has not been the principal author of either the majority opinion, a concurrence, or a dissenting opinion. The ten cases include three employment discrimination cases, two voting rights cases, an affirmative action case, two *Batson* juror challenges, one death penalty case, and one criminal trial error petition for certiorari. Justice Sotomayor's approximately ten percent lead authorship rate for majority or dissenting opinions in racial justice cases essentially parallels her lead authorship rate on majority or dissenting opinions generally.⁸ Moreover, Justice Sotomayor's authorship rate also aligns with the

4. See Johnson, *supra* note 2, at 135 (detailing the campaign against Justice Sotomayor for being anti-white and a racial extremist).

5. See ANNA C. HENNING & KENNETH R. THOMAS, CONG. RESEARCH SERV., JUDGE SONIA SOTOMAYOR: ANALYSIS OF SELECTED OPINIONS ii (June 19, 2009).

6. *Id.*

7. *Broad Judicial Role, but Also Restraint Show Up in Nominee Sotomayor's Opinions*, 77 U.S.L.WK. 2715 (May 26, 2009).

8. For overall statistics on opinion authorship, see Erin Miller et al., *SCOTUSblog FINAL Stats OT09*, SCOTUSBLOG 5 (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf>; *Stat Pack for October Term 2010*, SCOTUSBLOG 6 (June 28, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf; *Stat Pack for October Term 2011*, SCOTUSBLOG 5, 7 (Sept. 25, 2012),

general authorship rate of all the other Justices.⁹ It is true that the Chief Justice (or the most senior Justice voting in the majority) follows an informal protocol for selecting which Justice will author the majority opinion, doing so in consultation with the other Justices in ways that seek to balance the workload among all nine Justices.¹⁰ Yet any Supreme Court Justice with a distinctive perspective can file either a concurring opinion or dissenting opinion.¹¹ In five years on the Court, Justice Sotomayor has largely refrained from authoring concurring or dissenting opinions in racial justice cases. In other words, this fifth year anniversary finds Justice Sotomayor in the role of “team player” rather than racial maverick in each of the race cases in which she has voted. I use the term “team player” not only to emphasize how often Justice Sotomayor has chosen to join the opinions of her fellow Justices rather than strike out on her own with a separate concurrence or dissent, but also to describe how the issues she has raised during oral argument have frequently been incorporated by her fellow Justices as valuable contributions to the analysis of racial justice issues. Thus, her active role in questioning lawyers during oral arguments, which became apparent early in her tenure on the Court, cannot be equated with being an “activist” judge.¹² A close review of the case decisions and the

http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/SCOTUSblog_Stat_Pack_OT11_Updated1.pdf.

9. From 2009 to 2013, each Justice on the current Supreme Court has acted as the principal author of between nine and twelve percent of the majority opinions (with a further nine percent per curiam and with the exception of Justice Kagan, who joined the Court later than all the other Justices). Justice Scalia is the leader in authoring dissenting opinions, with seventeen percent of the total dissents, while Justice Sotomayor has only authored ten percent of the dissents and Justice Kennedy has authored five percent. *See* sources cited *supra* note 8.
10. Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1746-48 (2006).
11. Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEG. ANALYSIS 101 (2011).
12. A 2009 *National Law Journal* tally showed that Justice Sotomayor asked more questions during a two-week cycle of oral arguments than Chief Justice Roberts and Justice Alito at comparable periods in their first terms. Tony Mauro, *No Quiet Time for New Justice*, NAT'L L.J. (Nov. 16, 2009), <http://www.nationallawjournal.com/id=1202435464482>. Since that time, Justice Sotomayor has been among the top three questioners during oral argument but is often outpaced by the number of questions that Justice Scalia asks. *Oral Argument, Stat Pack October Term 2010*, SCOTUSBLOG (June 28, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_oral_arguments_OT10_final.pdf (showing that during October Term 2010, Justice Sotomayor was the third-most-active questioner after Justices Scalia and Breyer); *Oral Argument, Stat Pack October Term 2011*, SCOTUSBLOG (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_oral_arguments_OT11_final.pdf (showing that during October Term 2011, Justice Sotomayor was the

kinds of questions that Justice Sotomayor posed makes evident her “fidelity to the law” inasmuch as she has not sought the unilateral imposition of her own personal racial policy preferences but has instead worked as a team player to scrupulously apply legal precedents, rules of standing, and congressional intent.

I. SOTOMAYOR JOINING IN MAJORITY AND PER CURIAM OPINIONS

In *Lewis v. City of Chicago*,¹³ the City of Chicago administered a 1995 written exam to applicants seeking to work in the Chicago Fire Department. Those who scored between 89-100 were “well-qualified,” and these candidates would proceed to the next exam, which included a physical-abilities test, background check, medical exam, and drug test.¹⁴ Those who scored below the “well-qualified” benchmark (below 65) were notified of the failing score and would not be considered for a firefighter position.¹⁵ The scorers between 65-88 were “qualified,” but based on the City’s hiring needs and the number of “well-qualified” applicants, these applicants were not likely to be called for the second exam.¹⁶ In 1997, an African American applicant who scored in the “qualified” range was not allowed to proceed to the subsequent evaluations.¹⁷ Along with five other applicants, he filed a racial discrimination charge with the EEOC.¹⁸ Soon, the district court certified a class of more than 6,000 African Americans who also alleged that the 1995 scoring practice was an unlawful employment practice.¹⁹ The plaintiffs prevailed in district court, but the Seventh Circuit held that petitioners’ suit was untimely since “the earliest EEOC charge was filed more than 300 days after the only discriminatory act: sorting the scores into the ‘well-qualified,’ ‘qualified,’ and ‘not-qualified’ categories.”²⁰

second-most-active questioner after Justice Scalia); *Oral Argument, Stat Pack October Term 2012*, SCOTUSBLOG (June 27, 2013), http://scotusblog.com/wp-content/uploads/2013/06/argument-justices_OT12.pdf (showing that during October Term 2012, Justice Sotomayor was the most active questioner).

13. 560 U.S. 205 (2010).

14. *Id.* at 208.

15. *Id.*

16. *Id.* at 208-09.

17. *Id.* at 209.

18. *Id.*

19. *Id.*

20. *Id.* at 210 (quoting *Lewis v. City of Chicago*, 528 F.3d 488, 491 (7th Cir. 2008)).

Justice Sotomayor joined the majority in reversing the court of appeals' judgment. The Court disagreed with the Seventh Circuit's stance on a line of cases asserting that present effects of prior actions could not lead to Title VII liability.²¹ Instead, the Court held that those cases only established that a Title VII plaintiff must show a "present violation" of deliberate discrimination within the limitations period. For disparate impact claims such as the one presented by the African American applicants, the Court held that no such demonstration was necessary; it was permissible to file a claim within the prescribed statute of limitations period, counting from the later point in time when the employer actually made hiring decisions based on how the test scores were sorted.

During oral argument, Justice Sotomayor's primary inquiry in her questioning was statutory clarification. Her questions were not provocative, nor were they grounded in any racial commentary. She probed Title VII and sought to reach a conclusion consistent with existing precedent. Specifically, during oral argument Justice Sotomayor expressed concern over the language of section 703 in Title VII. She asked counsel for the petitioner for clarification as to what constitutes a "violation" under the statute and when the Title VII violation occurred.²²

During the respondent's argument, Sotomayor asked whether subsection (h) of the statute²³ would suggest that the act of making a hiring decision based on the examination constituted a violation under Title VII: "So why don't we look at subsection (h) . . . 'it shall be an unlawful employment practice for an employer to give and'—conjunctive—'and act upon the results.' . . . So when you hire, aren't you acting upon the results?"²⁴ Because the language of subsection (h) includes within the definition of an unlawful employment practice the act of giving a test *and acting* upon the results, that appears to imply that any employment decision based on the examination here would be a triggering event for the statute of limitations. Justice Sotomayor's inquiry is thus a traditional textual question.

21. *Id.* at 214-15.

22. Transcript of Oral Argument at 6, *Lewis v. City of Chicago*, 560 U.S. 205 (2010) (No. 08-974).

23. 42 U.S.C. § 2000e-2(h) (2006). This statute immunizes bona fide merit tests from the reach of Title VII unless they discriminate on the basis of race, color, religion, sex, or national origin.

24. Transcript of Oral Argument at 30, *Lewis*, 560 U.S. 205 (No. 08-974).

Justice Sotomayor then expanded on a hypothetical proffered by Justice Stevens comparing the case with the seminal *Griggs v. Duke Power Co.*²⁵ decision, in which the defendant's employment decisions were based on applicants having secured a high school diploma.²⁶ In *Griggs*, the Court did not measure the statute of limitations against the date when plaintiffs were supposed to have received their diplomas. Justice Sotomayor pressed counsel for the respondent as to how the case was distinguishable.²⁷ The questioning here suggests that Justice Sotomayor was trying to carefully square the facts with existing precedent within the confines of Title VII. She used this same approach to consider the topic of affirmative action in the *Fisher* case.

In *Fisher v. University of Texas at Austin*,²⁸ petitioner Abigail Fisher, a Caucasian applicant to the University of Texas at Austin, sued the university for rejecting her application in an admissions process that considered race. Petitioner alleged that the consideration of race in admissions violated the Equal Protection Clause. While the principle of considering race as a favorable factor in a university's admissions in efforts to achieve a more diverse student body was affirmed in both *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Court emphasized that the particular admissions process at the university was still subject to judicial review: "Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation."²⁹ A court must also carefully analyze evidence of how the practice actually works. Ultimately, the Court held that both lower courts "confined the strict scrutiny in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis."³⁰ The Court remanded and held that the court of appeals must "assess whether the University offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."³¹

Justice Sotomayor's questions during oral argument indicate a strong concern with judicial adherence to precedent: "So you don't want to overrule

25. 401 U.S. 424 (1971).

26. Transcript of Oral Argument at 34-35, *Lewis*, 560 U.S. 205 (No. 08-974).

27. *Id.*

28. 133 S. Ct. 2411 (2013).

29. *Id.* at 2419-20.

30. *Id.* at 2421.

31. *Id.* at 2422.

[*Grutter*]. You just want to gut it.”³² Here, Justice Sotomayor demonstrated concern that petitioner may be maneuvering to curtail or even overturn recently decided cases—certainly not bearing out Rush Limbaugh’s fear that Justice Sotomayor would conduct herself as an “anti-white reverse racist” if appointed to the Supreme Court.

This same concern with adherence to precedent is also seemingly threaded through Justice Sotomayor’s oral argument questions regarding standing. Specifically, Justice Sotomayor asked petitioner to explain how petitioner would even have standing to pursue this challenge, given that *Texas v. Lesage*³³ established that “mere use of race is not cognizable injury sufficient for standing.”³⁴ She continued to press counsel as to what relief petitioner was truly seeking, given that Fisher had already graduated.³⁵ Sotomayor repeated these questions during petitioner’s rebuttal, asking if petitioner was simply seeking a refund for her \$100 application fee.³⁶ This questioning on the issue of standing effectively cast doubt on petitioner’s true intention in bringing the challenge, which may have been to upend the Court’s jurisprudence on affirmative action.

Aside from her questions on standing, Justice Sotomayor also sought to clarify existing precedent, and particularly how to determine whether the university’s admissions process complied with *Grutter*. She asked petitioner whether the university’s study on minority students sufficiently demonstrated the need for diversity.³⁷ She questioned whether demographics dictate “critical mass” for a minority group and asked how, exactly, one would determine critical mass without turning the admissions process into a quota system.³⁸

Justice Sotomayor similarly sought clarification from the respondent, asking when courts should “stop deferring to the university’s judgment that race is still necessary.”³⁹ She reiterated that universities cannot set quotas and suggested that they instead conduct individualized determinations, noting that race would not be a decisive factor in this approach, given that no two applicants are identical.⁴⁰

32. Transcript of Oral Argument at 81, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

33. 528 U.S. 18 (1999).

34. Transcript of Oral Argument at 4, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

35. *Id.* at 5.

36. *Id.* at 74.

37. *Id.* at 10-11.

38. *Id.* at 14, 17-20.

39. *Id.* at 49.

40. *Id.* at 65-66.

Overall, Justice Sotomayor's questioning did not carry a tone of racial intervention, except to the extent that she did not want to disturb existing precedent on affirmative action. This was reinforced by her decision to join the majority opinion in remanding the case for a more exacting review of the university's admissions policy while leaving the precedents of *Bakke*, *Gratz*, and *Grutter* intact. In contrast, Justice Ginsburg wrote a critical dissent, giving great deference to the university and finding that its policy was consonant with the Harvard plan referenced in *Bakke*.⁴¹

In *Perry v. Perez*,⁴² Justice Sotomayor joined the per curiam opinion on how Texas, a "covered jurisdiction" under section 5 of the 1965 Voting Rights Act (VRA), was obligated to undergo preclearance by the United States District Court for the District of Columbia before initiating any changes to voting laws. Texas submitted its new electoral plans for preclearance, and the court did not grant the state's motion for summary judgment. Various plaintiffs brought suit in Texas, claiming that the new plans were unconstitutional and violated section 2 of the VRA because they diluted the voting strength of Latinos and African Americans, who accounted for three-quarters of Texas's population growth since 2000.⁴³ It was unlikely the new plans would be enacted in time for the 2012 Texas primaries, and the State's previous district lines could not be utilized due to the inconsistency with population growth and the Constitution's one-person, one-vote requirement. The district court devised interim plans, but Texas asked the Court to stay the interim plans pending an appeal, "arguing that they were unnecessarily inconsistent with the State's enacted plans."⁴⁴ The Supreme Court noted that the primary duty of the State includes redistricting, and the failure to enact a new plan to gain preclearance before an election does not require a court to take up the state legislature's responsibilities. Even if a census presents an "unwelcome obligation" of creating an interim plan, the plan in effect may give sufficient structure to the court's endeavor.⁴⁵ "To avoid being compelled to make such otherwise standardless decisions, a district court should take guidance from the State's recently enacted plan in drafting an interim plan."⁴⁶ While the district court held that it had given effect to many of the State's policy judgments, it also had a responsibility to follow neutral principles that advanced the collective public

41. *Fisher*, 133 S. Ct. at 2432 (Ginsburg, J., dissenting).

42. 132 S. Ct. 934 (2012).

43. *Id.* at 940.

44. *Id.*

45. *Id.*

46. *Id.* at 941.

good.⁴⁷ Ultimately here, the district court should not have cast aside the vital aid of a State's recently enacted plan. The Supreme Court held that it was unclear whether the district court followed the appropriate standards in drawing interim maps for the state election. The Court vacated the orders implementing the maps suggested by the district court and remanded the case.

During oral argument, Justice Sotomayor focused on the legal obligations to comply with the clear mandates of the VRA. She probed the appellants about the validity of asking for deference for their new map when it had not yet been pre-cleared.⁴⁸ She suggested that it was an attempt to abridge section 5 of the VRA.⁴⁹ She also asked how the district court erred in drawing an interim map, when the new map offered by the State of Texas was oddly shaped and rather gerrymandered.⁵⁰ She pressed appellants to explain how the district court's redrawing of the map violated the VRA or the Constitution.⁵¹ In sum, in *Perry*, Justice Sotomayor did not ask provocative questions based on themes of racial justice or injustice. Her primary focus was whether the district court exceeded its powers in drawing an interim map.

This same approach – careful text-based parsing of statutes and precedents without seeking to overstep the traditional role of judges – can also account for Justice Sotomayor's joining per curiam decisions in *Batson* juror challenges that allege bias in prosecutorial objections to particular black jurors. For instance, in *Thaler v. Haynes*,⁵² Anthony Haynes was tried for murder in a Texas state court where the prosecutor struck an African American juror from the juror pool. Respondent's attorney made a successful *Batson* objection, and the prosecutor offered a race-neutral explanation based on the juror's behavior during individual meetings. The prosecutor stated that the juror's demeanor was "somewhat humorous," not "serious," and that he believed she "had a predisposition" and would lack neutrality.⁵³ The judge stated that the prosecutor's rationale was "race-neutral" and denied the *Batson* objection. After trial, respondent was convicted and sentenced to death, his application for state habeas relief was denied, and the district court denied his federal habeas petition. A Fifth Circuit panel granted a certificate of appealability with respect to respondent's *Batson* objections and held that respondent was entitled to a

47. *Id.* at 943.

48. Transcript of Oral Argument at 4, *Perry*, 132 S. Ct. 934 (No. 11-713).

49. *Id.* at 6.

50. *Id.* at 19.

51. *Id.* at 19-20.

52. 559 U.S. 43 (2010).

53. *Id.* at 45.

new trial. The Supreme Court stressed that respondent “cannot obtain federal habeas relief under 28 U.S.C. § 2254(d)(1) unless he can show that the decision of the Texas Court of Criminal Appeals ‘was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.’”⁵⁴ Specifically, “where the explanation for a peremptory challenge is based on a prospective juror’s demeanor, the judge should take into account, among other things, any observations of the juror that the judge was able to make during the *voir dire*.”⁵⁵ The Court noted that *Batson* did not “hold that a demeanor-based explanation must be rejected if the judge did not observe . . . the juror’s demeanor.”⁵⁶ The Supreme Court reversed the lower court and held that on remand, the “Court of Appeals may consider whether the Texas Court of Criminal Appeals’ determination may be overcome under the federal habeas statute’s standard for reviewing a state court’s resolution of questions of fact.”⁵⁷

Similarly, in *Felkner v. Jackson*, Jackson was convicted for various sexual offenses by a California jury and raised a *Batson* objection, claiming that “the prosecutor exercised peremptory challenges to exclude black prospective jurors on account of their race.”⁵⁸ The prosecutor presented a race-neutral explanation for striking each of the jurors. Jackson renewed the claim on appeal and argued that the prosecutor’s explanations were pretextual based on a comparative juror analysis. Jackson argued that the prosecutor asked the white jurors follow-up questions about their education, but struck one black juror without inquiring about her degree in social work. The California Court of Appeal upheld the trial court’s denial of the *Batson* motion and allotted “great deference to the trial court’s ability to recognize bona fide reasons” and distinguish them from pre-textual ones.⁵⁹ When a respondent sought federal habeas relief, the district court noted that such relief “may not be granted unless the state court adjudication ‘resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’”⁶⁰ The district court denied the petition, and the Ninth Circuit reversed, concluding without further elaboration that “[t]he prosecutor’s proffered race-neutral bases for peremptorily striking the two African-

54. *Id.* at 47.

55. *Id.* at 48.

56. *Id.*

57. *Id.* at 49.

58. 131 S. Ct. 1305, 1305 (2011).

59. *Id.* at 1306-07.

60. *Id.* (quoting 28 U.S.C. § 2254(d)(2) (2012)).

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American jurors were not sufficient to counter the evidence of purposeful discrimination.”⁶¹ Finding the Ninth Circuit’s decision “as inexplicable as it is unexplained,” the Supreme Court reversed, holding that the *Batson* issue turned on a credibility evaluation and that the trial court’s determination must be deferred to and sustained.⁶² “Here the trial court credited the prosecutor’s race-neutral explanations, and the California Court of Appeal carefully reviewed the record at some length in upholding the trial court’s findings.”⁶³

While the anonymity of a per curiam decision does not permit the public to distinguish the particular perspective of any single Justice, *Thaler* and *Felkner* both reflect Justice Sotomayor’s characteristic preference for upholding lower court decisions that evince reasonable applications of clearly established law. Indeed, even when Justice Sotomayor has chosen to dissent in a race-related case, her oral argument questions have revealed a primary concern with judicial adherence to statutory and case law precedents.

II. SOTOMAYOR JOINING IN DISSENT

In *University of Texas Southwest Medical Center v. Nassar*,⁶⁴ Naiel Nassar, a Muslim medical doctor of Middle Eastern descent, was hired as part of the University’s faculty and as a staff physician at the Parkland Memorial Hospital, which was affiliated with the school. Respondent argued that his superior, the University’s Chief of Infectious Disease Medicine, was biased against him because of his religion and ethnic heritage, that he was consequently forced to resign his faculty post, and that the University’s successful efforts to deny him a job with Parkland Memorial Hospital as a staff physician were in retaliation for his complaints. Respondent raised two Title VII claims: a status-based discrimination claim under section 2000e-2(a) and a retaliation claim under section 2000e-3(a). The district court found in his favor on both counts, and the Fifth Circuit affirmed the retaliation claim but vacated the constructive discharge claim for insufficient evidence. The Supreme Court decided that a plaintiff making a retaliation claim under section 2000e-3(a) must establish that the alleged wrongful activity was a but-for cause of the unlawful retaliation by the employer.⁶⁵ While the Court inferred a congressional intent to prohibit retaliation within broadly worded antidiscrimination statutes, the

61. *Jackson v. Felkner*, 389 F. App’x 640, 641 (9th Cir. 2010).

62. *Felkner*, 131 S. Ct. at 1307.

63. *Id.*

64. 133 S. Ct. 2517 (2013).

65. *Id.* at 2533.

Court noted that in this instance, such an inference was inappropriate. The Court concluded that “Title VII retaliation claims must be proved according to traditional principles of but-for causation. . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer,”⁶⁶ rather than the more plaintiff-friendly motivating factor standard adopted in the lower court. The Supreme Court remanded the case for resolution by courts that were closer to the facts.⁶⁷

Justice Sotomayor joined the dissenting opinion, authored by Justice Ginsburg, which actually incorporated the issues that Justice Sotomayor raised during oral argument. Justice Sotomayor’s questions pertained solely to Supreme Court precedent, legislative intent, and legislative purpose. During oral argument, Justice Sotomayor challenged the petitioner’s argument that the *Price-Waterhouse* mixed-motive framework⁶⁸ does not apply in the context of retaliation claims under Title VII.⁶⁹ The Civil Rights Act of 1991 amended Title VII to permit the mixed-motive framework to be applied in employment discrimination cases. However, it did not specifically state that the same would apply for retaliation claims. Justice Sotomayor asked petitioner to consider *Jackson v. Birmingham Board of Education*,⁷⁰ which held that there was an implied retaliation cause of action under Title IX. Specifically, she asked whether the implied presumption of retaliation claims in federal discrimination statutes should command that the 1991 Act applies not just to employment discrimination claims but also to retaliation claims. The petitioner responded by arguing that Congress needed to directly speak to the issue of retaliation claims for it to include mixed-motive claims. Justice Sotomayor challenged the notion that Congress did not intend to include retaliation claims, asking the petitioner whether the legislative history weighed the negative consequences of extending mixed-motive treatment to retaliation cases.⁷¹ She argued that it was unlikely that Congress wanted to treat retaliation claims separately.

66. *Id.*

67. *Id.* at 2534.

68. This burden-shifting framework allows the plaintiff to bring an employment discrimination suit even if the employer had a legitimate reason for making an employment decision, provided that race, color, religion, sex, or national origin was a *motivating factor* for that decision. 42 U.S.C. § 2000e-2(m) (2006).

69. Transcript of Oral Argument at 24, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013) (No. 12-484).

70. 544 U.S. 167 (2005).

71. Transcript of Oral Argument at 8, 20, *Nassar*, 133 S. Ct. 2517 (No. 12-484).

In Justice Ginsburg's dissenting opinion, she too disapproves of the Court's conclusion that Congress sought to treat employment discrimination claims separately from retaliation claims.⁷² Like Justice Sotomayor's questions at oral argument, the dissenting opinion points to legislative history indicating that Congress saw both kinds of claims as an "unlawful employment practice."⁷³ Similarly, the dissent repeatedly invokes *Jackson* for the notion that retaliation is a "form of intentional [status-based] discrimination."⁷⁴ In sum, Justice Sotomayor's questioning at oral argument took an incisive look at Title VII, the legislative intent and purpose of the enactment of the 1991 Act, and the related precedents on discrimination cases. As such, though Sotomayor's lines of questioning may happen to favor the argument made by a plaintiff of color, they are fundamentally motivated by a broad-based concern with proper statutory interpretation which Justices Ginsburg, Breyer, and Kagan all shared in the dissenting opinion.

Similarly, in *Vance v. Ball State University*,⁷⁵ Justice Sotomayor again approached the racial justice claim before the Court from a perspective rooted in traditional judicial concerns and not racially radical politics. As in *Nassar*, Justice Sotomayor's concerns are not aberrant but are instead aligned with fellow dissenting Justices Ginsburg, Breyer, and Kagan. In *Vance*, the Court considered the question of who qualifies as a "supervisor" in a Title VII claim for workplace harassment. Because an employer's liability may be contingent on the status of the harasser, the employer is liable if the supervisor's harassment culminates in a tangible employment action. Vance, an African American worker for Dining Services at Ball State University, was promoted to full-time catering assistant. On several occasions, she complained of experiencing racial discrimination at the hands of a white employee, a woman who was not explicitly Vance's superior. The duties of the employee were vigorously disputed. The Seventh Circuit explained that the employee had no supervisory status, but the Supreme Court rejected the "supervisor" definition in the EEOC guidelines.⁷⁶ Noting that the term has various meanings in both law and colloquial use, the Supreme Court held that only if an employee is empowered to take tangible workplace actions against the alleged victim is he or she a supervisor for purposes of vicarious liability under Title VII. Here, the

72. *Nassar*, 133 S. Ct. at 2540-41 (Ginsburg, J., dissenting).

73. *Id.* at 2539.

74. *Id.* at 2542 (internal citations omitted).

75. 133 S. Ct. 2434 (2013).

76. *Id.* at 2443.

Court found no such empowerment of the employee and affirmed the district court's grant of summary judgment in favor of the University.

Justice Sotomayor joined the dissenting opinion authored by Justice Ginsburg. The dissent argued that the Court classified employees who control the daily schedules and assignments of others as falling outside of the supervisor category, "confining the category to those formally empowered to take tangible employment actions."⁷⁷ It further argued that the EEOC's definition had a ring of truth with powerful persuasive force. "As a precondition to vicarious employer liability, the EEOC explained, the harassing supervisor must wield authority of sufficient magnitude to enable the harassment."⁷⁸ As such, the dissenting opinion incorporates Justice Sotomayor's oral argument perspective that because the EEOC is charged with oversight of the implementation of Title VII, it should be afforded "more" deference.⁷⁹

In *Shelby County v. Holder*,⁸⁰ Justice Sotomayor was again part of an entire "team" of dissenting Justices who would have preferred to preserve the judgment of Congress in reenacting the preclearance requirement of the VRA as a justifiable remedy for ongoing voter discrimination in certain jurisdictions. In the case, Shelby County, a covered jurisdiction under the VRA, sued the Attorney General in the U.S. District Court for the District of Columbia claiming that sections 4(b) and 5 of the VRA were facially unconstitutional. The County sought a declaratory judgment and permanent injunction against the enforcement of these provisions. Both the district court and the U.S. Court of Appeals for the D.C. Circuit held that there was sufficient evidence reauthorizing section 5 and the section 4(b) coverage formula. The Supreme Court held that the VRA, applying at the time to only nine states, departed from general notions of state sovereignty by suspending any changes to state election law until the changes were pre-cleared by federal authority. It noted the dramatic movement away from discriminatory devices used against minority races in voting eligibility since the VRA's enactment. Congress reauthorized the VRA in 2006 even as it noted that "significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and

77. *Id.* at 2455 (Ginsburg, J., dissenting).

78. *Id.* at 2562.

79. Transcript of Oral Argument at 18, *Vance*, 133 S. Ct. 2434 (No. 11-556).

80. 133 S. Ct. 2612 (2013).

local elected offices.”⁸¹ The Court noted the forty-year national success in registering African American voters since the VRA’s enactment, and stressed that 2013 coverage was based on “decades-old data and eradicated [literacy testing] practices.”⁸² Ultimately, the Court held section 4(b) unconstitutional because “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.”⁸³ Reliance on section 4 coverage was irrational and there was no reason to “insulate the coverage formula from review merely because it was previously enacted 40 years ago.”⁸⁴ The Court issued no holding on section 5 itself, noting, “Congress may draft another formula based on current conditions.”⁸⁵

Justice Sotomayor was quite active during oral argument in the case and was highly critical of Shelby County’s facial challenge to the VRA’s preclearance requirement. Sotomayor noted that facial challenges are disfavored, and in any event, Alabama was rightly included among the states subject to preclearance—especially Shelby County, which she said was the “epitome of what caused the passage of this law to start with.”⁸⁶ She criticized what she viewed as an audacious request on the part of Shelby County, which was to ask the Court to ignore the county’s own dubious record on voter discrimination and to “look at everybody else’s.”⁸⁷ Justice Sotomayor explained that section 5 was intended to monitor and dismantle new forms of discriminatory practices that were being developed to disenfranchise voters.⁸⁸ She was not impressed with the equal footing doctrine, given that each state is different and has different needs.⁸⁹

While Justice Sotomayor was critical of Shelby County’s arguments, she did not add any controversial or inflammatory statements to the discussion. At most, she aimed to preserve the judgment of Congress in reenacting the preclearance requirement as a justifiable remedy for the continuing voter discrimination in certain jurisdictions. The most striking part of the questioning occurred when Justice Scalia labeled the preclearance requirement

81. 131 S. Ct. at 2625 (quoting § 2(b)(1), 120 Stat. 577).

82. *Id.* at 2626-27.

83. *Id.* at 2629.

84. *Id.* at 2630.

85. *Id.* at 2631.

86. Transcript of Oral Argument at 3-10, *Shelby Cnty. v. Holder*, 133 S. Ct. 2517 (2013) (No. 12-96).

87. *Id.* at 7.

88. *Id.* at 14.

89. *Id.* at 27.

a “racial entitlement.”⁹⁰ During Shelby County’s rebuttal, Justice Sotomayor asked whether counsel believed that the right to vote was a racial entitlement, drawing attention to Scalia’s provocative remarks.⁹¹ After counsel’s obvious “no,” she asked whether Shelby County believed that racial discrimination in voting had come to an end, to which counsel replied that he simply believed that the formula in the statute was not appropriate in light of current conditions.⁹² Justice Sotomayor continued by questioning counsel on voting rights statistics for Shelby County and Alabama.

Justice Ginsburg incorporated many of Justice Sotomayor’s concerns into her dissenting opinion. Justice Ginsburg surveyed the historical circumstances leading up to Congress’s determination in 2006 that the burdens imposed by the preclearance requirement were still justified by current needs in the reauthorization of the VRA.⁹³ She then discussed the legislative record, which she argued the Court had blatantly overlooked.⁹⁴ In addition, Justice Ginsburg discussed the new kinds of discrimination that continued to be identified and quashed by the preclearance requirement.⁹⁵ Finally, she reasserted Justice Sotomayor’s argument that Shelby County was the wrong party to bring this suit:

[T]he Court’s opinion in this case contains not a word explaining why Congress lacks the power to subject to preclearance the particular plaintiff that initiated this lawsuit—Shelby County, Alabama. The reason for the Court’s silence is apparent, for as applied to Shelby County, the VRA’s preclearance requirement is hardly contestable.⁹⁶

Given all the racial justice cases in which Justice Sotomayor is centrally situated as a “team player” in joining the opinions of her fellow Justices to support the strict adherence to *stare decisis*, it is especially pertinent to examine the one racial justice case in which she has taken on the role of authoring a dissenting opinion.

90. *Id.* at 47.

91. *Id.* at 64.

92. *Id.*

93. *Shelby*, 133 S. Ct. at 2645-46 (Ginsburg, J., dissenting).

94. *Id.* at 2644.

95. *Id.* at 2635.

96. *Id.* at 2645.

III. SOTOMAYOR AS AUTHOR OF OPINIONS DISSENTING FROM DENIAL OF CERTIORARI

*Buck v. Thaler*⁹⁷ stands out as the one race-related case in which Justice Sotomayor has been the principal author of an opinion. Yet even in the *Buck* dissent from the denial of certiorari, Justice Sotomayor does not speak alone, as Justice Kagan joins her dissent.

The petition concerned “bizarre and objective testimony” from a “defense expert.”⁹⁸ Petitioner was tried for capital murder and sentenced to death. A witness at the penalty phase of the capital trial testified that petitioner would not present a danger to society if given a noncapital sentence. The witness also added that members of petitioner’s race (African American) are more likely than the average person to commit a crime. If the prosecution had been responsible for presenting that testimony to the jury, the Supreme Court stated that this testimony would have provided a basis for reversal. When the defense counsel called the witness, he identified factors predictive of whether a person would constitute a continuing danger. With regard to race, he stated that “[i]t’s a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System,” and this testimony was presented to the jury.⁹⁹ The prosecutor asked the defense witness whether race increased the probability that petitioner would pose a future danger to society. While the witness’s “yes” answer was problematic, Justice Alito notes that the prosecutor “did not revisit the race-related testimony in closing or ask the jury to find future dangerousness based on Buck’s race.”¹⁰⁰ Comparing this case with others where the witness had testified, it was the defense counsel who elicited the race-related testimony on direct examination. Therefore, it was the only case where the responsibility for eliciting offensive testimony was on the defense. Justice Alito’s statement denying certiorari suggests that this distinction justifies the lower court’s refusal to reopen the judgment of conviction.

Justice Sotomayor’s dissenting opinion opens by stating, “Today the Court denies review of a death sentence marred by racial overtones and a record compromised by misleading remarks and omissions made by the State of Texas.”¹⁰¹ Yet, as evocative as that opening sentence is, its conclusion is firmly

97. 132 S. Ct. 32 (2011), *reh’g denied*, 132 S. Ct. 1085 (2012).

98. *Id.* at 33.

99. *Id.*

100. *Id.* at 34.

101. *Id.* at 35 (Sotomayor, J., dissenting from denial of certiorari).

rooted in the State Attorney General's own admissions regarding the past problematic introduction of race-elicited testimony from that same witness. Indeed, in five other capital cases where the very same expert witness testified regarding the presumed direct relationship between blackness and future dangerousness, the State confessed error and did not raise procedural defenses to the defendant's federal habeas petitions. State prosecutors had elicited comparable testimony from the witness in other cases, but only in this case did the State assert a procedural bar. Thus Justice Sotomayor's dissent states:

What we do know is that the State justified its assertions of a procedural defense in the District Court based on statements and omissions that were misleading. . . . Whether the District Court would accord any weight to the State's purported distinctions between Buck's case and the others is a question, which that court should decide in the first instance, based on an unobscured record.¹⁰²

In short, while *Buck* stands out as a case in which Justice Sotomayor makes statements that are emphatic in their repudiation of racial stereotyping in capital jury trials, her dissenting opinion is actually very much in line with all the other race opinions which she has joined. *Buck*, like all the other opinions analyzed here, addresses concerns clearly raised by litigators and the relevant legal precedents. Justice Sotomayor directly discusses race in *Buck* because the State Attorney General himself raised race as an issue his prosecutors needed to address in connection with the same expert witness in the case. Justice Sotomayor's objections are specific to the facts and defective procedures in the case before her.

This fundamental concern with how racial stereotypes can adversely affect the administration of justice also helps explain why Justice Sotomayor took the time to offer an explanatory statement about the legal prohibition against racially biased prosecutions in *Calhoun v. United States*, despite joining in the Court's unanimous denial of certiorari.¹⁰³ Indeed, Justice Sotomayor opens her statement with the clarification, "I write to dispel any doubt whether the Court's denial of certiorari should be understood to signal our tolerance of a federal prosecutor's racially charged remark. It should not."¹⁰⁴

Just as in the *Buck* case, *Calhoun* involved an allegation of a prosecution tainted by racism. In the *Calhoun* drug conspiracy trial, Calhoun denied having

¹⁰². *Id.* at 38.

¹⁰³. 133 S. Ct. 1136 (2013).

¹⁰⁴. *Id.*

any knowledge that the friend he had accompanied on a road trip had intended to purchase cocaine. In questioning the extent of Calhoun's knowledge, the prosecutor asked, "You've got African-Americans, you've got Hispanics, you've got a bag full of money. Does that tell you – a light bulb doesn't go off in your head and say, This is a drug deal?"¹⁰⁵ While Justice Sotomayor notes that the U.S. Solicitor General himself conceded that the "prosecutor's racial remark was unquestionably improper," she joins in the Court's denial of certiorari.¹⁰⁶ This is because Calhoun procedurally forfeited the argument that the prosecutor's remarks should lead to automatic reversal as a violation of the Constitution's prohibition against racially biased prosecutorial arguments when he failed to present the argument on appeal to the Fifth Circuit. Yet, because the prosecutor's conduct was unquestionably problematic and a violation of professional ethical standards, Justice Sotomayor wrote a clarifying statement to the denial of certiorari that stated in relevant part:

It is deeply disappointing to see a representative of the United States resort to this base tactic more than a decade into the 21st century. Such conduct diminishes the dignity of our criminal justice system and undermines respect for the rule of law. We expect the Government to seek justice, not to fan the flames of fear and prejudice. In discharging the duties of his office in this case, the Assistant United States Attorney for the Western District of Texas missed the mark. . . . I hope to never see a case like this again.¹⁰⁷

Thus, as has been consistent with Justice Sotomayor's record as a jurist, her intervention in *Calhoun* was meticulous in its application of the legal standard of review and simultaneously exacting in her assessment of the proper administration of justice. While it is rare to see a Justice issue a statement to a denial of certiorari she agrees with, Justice Sotomayor's articulated reasons for doing so in *Calhoun* are firmly rooted in an appropriate judicial concern with admonishing prosecutors who "attempt to substitute racial stereotype for evidence, and racial prejudice for reason."¹⁰⁸ In fact, Justice Breyer also chose to join Justice Sotomayor in this statement.

^{105.} *Id.*

^{106.} *Id.* at 1138.

^{107.} *Id.*

^{108.} *Id.* at 1137.

CONCLUSION

Justice Sotomayor, in cases pertaining to racial matters, has faithfully scrutinized the legal issues at hand without veering into the realm of racial commentary. Her reasoning comes in the form of classic statutory interpretation and adherence to existing precedent. Even where her views expressed at oral argument are within the minority of the Court, they tend to be fully adopted under the dissenting opinions of her fellow justices. Furthermore, when empirically compared with her fellow Justices, Justice Sotomayor's oral argument questioning rarely expresses her own views on policy, let alone the "anti-whiteness" Rush Limbaugh feared.¹⁰⁹ Instead, the vast majority of her questions concern narrow legal arguments.¹¹⁰ In short, a retrospective look on the occasion of this fifth-year anniversary shows that Sotomayor is the epitome of a careful and conscientious jurist, with a "fidelity to the law" in every sense of the word.

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Preferred citation: Tanya Katerí Hernández, *Sotomayor's Supreme Court Race Jurisprudence: "Fidelity to the Law,"* 123 YALE L.J. F. 479 (2014), <http://yalelawjournal.org/forum/sotomayors-supreme-court-race-jurisprudence>.

109. Cynthia Kelly Conlon & Julie M. Karaba, *May It Please the Court: Questions About Policy at Oral Argument*, 8 NW. J. L. & SOC. POL'Y 89, 103 (2012).

110. *Id.*