

**Race Matters in the Supreme Court:
#2 1900-1969, Ideological reversals and politicization
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University of Cincinnati Professor Emeritus Howard Tolley**

On this Date in History

On September 26, 1963, the Alabama Supreme Court upheld the contempt conviction of Mary Hamilton, a Black activist arrested for a civil rights protest, demeaned in court by a white prosecutor. He refused her request to use the word "Miss" and insisted on calling her by her first name, a practice widely used in the South to demean Blacks. Addressed by her first name only, after white witnesses had been addressed as "Miss," Ms. Hamilton refused to answer and the Judge held her in contempt.

Ms. Hamilton served a five day jail sentence, refused to pay the fine and appealed to the all white Alabama Supreme Court that unanimously upheld her sentence. In 1964 by a vote of 6 to 3 the U.S. Supreme Court overturned her contempt citation. *A History of Racial Injustice Calendar 2023*. Equal Justice Initiative

I. Review of 1st Class

White Supremacy in Religion and Law. Linnaeus classification
Colonial era slavery. Virginia Laws and court rulings 1619 - 1776
US Declaration + Constitution institutionalized slavery
Pre Civil War White Supremacist Chief Justices Marshall + Taney. *Dred Scott*,
Amendments 13th-15th written to abolish White Supremacy + Incorporate Rights
Supreme Court 1870s evisceration of Amendments and Civil Rights Laws
Civil Rights Cases, private, not state action. *Plessy v Ferguson 1893*
Rights denied to native Americans and non-white immigrants.
Review Questions: 1. A, B, C 2. C 3. A, C, D 4. B, D

II. The Pre New Deal Fuller, and White Courts. 1900-1921

Judiciary Committee Hearings + Senate Confirmation

1. 17th Amendment ratified in 1912 provides for direct election of Senators by voters rather than by state legislatures as provided in Article I.
2. Democratic President Wilson segregated federal employees, nominated first Jewish Justice in 1916 Louis Brandeis; first ever Judiciary Committee hearings — he did not attend — and 4 month delay in confirmation vote, 47-22. Kentucky's James McReynolds immediately confirmed in 1914 on the day he appointed; anti-semitic refused to speak to Brandeis for three years as well as to Cardozo.
3. White supremacist Voter suppression 1915 Grandfather clause. Oklahoma Constitution required voters to pass a literacy test unless their grandfathers had voted. 8-0 finds 15th Amendment violation. *Guinn v. U.S.* New state law successfully maintained disenfranchisement of black voters.

III. The Taft Court. 1921-1930

A. Decisions Reaffirming White Supremacy

UU Chief Justice William Howard Taft Former US President + UC Law Dean. As governor in the Philippines praised for sponsoring mixed race social functions, but faulted for equal rights jurisprudence. Head, Tom. "10 Racist Supreme Court Rulings in US History." Thought Co, Aug. 29, 2020, [thoughtco.com/racist-supreme-court-rulings-721615](https://www.thoughtco.com/racist-supreme-court-rulings-721615).

1. *Lum v. Rice* (1927). Issue: Whether a U.S. citizen of Chinese ancestry, was denied equal protection of the law by exclusion from a white neighborhood school in Mississippi and assignment to a school that received "only children of the brown, yellow or black races." Taft for a unanimous court upholds the state's right to segregate based on *Stare decisis* following the *Plessy*, separate but equal precedent

"assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment.

2. *Ozawa v. United States* (1922) Sutherland for unanimous court. Immigrants from Japan are not white for purposes of naturalization under 1906 law limiting US citizenship to whites and African-Americans.

3. *United States v. Thind* (1923). Sutherland for unanimous court rules that South Asians are not white for purposes of naturalization. While Asian Indians were classified as Caucasians by anthropologists, people of Indian descent were not white by common American definition, and thus not eligible to citizenship. The decision began the process of retroactively stripping Indians of citizenship and land rights. The ruling also placated the Asiatic Exclusion League outrage at the "Turban Tide." Twelve years later, Thind was granted citizenship because he was a U.S. Army veteran. The U.S. discontinued the denaturalization process, and lower courts split on whether South Asians were white. The 1980 census included first listing for South Asian identification.

B. NAACP Successes

1. Holmes for a unanimous court in 1927 finds Texas white primary a 14th Amendment violation. New state law successfully maintained disenfranchisement of black voters until 1944 8-1 decision finds white primary violates 15th Amendment

2. Republican President Herbert Hoover's 1930 nomination of John Parker of North Carolina lost 39-41 after opposition from organized labor and NAACP

IV. The Switch in Time that Saved Nine

A. 1932 -1937 Political Realignment

1. FDR defeats Hoover and Democrats take both houses of Congress to launch New Deal economic remedies for the great depression with legislation that the Supreme Court conservative majority found unconstitutional.

2. 4 Horsemen (Sutherland, Van Devanter, Butler, MacReynolds) joined by Chief Justice **Hughes** and Roberts vs. 3 Musketeers (Brandeis, Cardozo, Stone)

3. Legal Rationale limiting government's regulatory powers.

- a. Property rights expressly guaranteed by 5th Amendment against US and incorporated via the 14th Amendment as binding on the states
 - b. The right of contract though not expressly guaranteed, so fundamental a liberty that must be inviolable and added as a matter of substantive “due process”
4. Critique of Judicial Activism:
 Illegitimate, counter majoritarian rulings by unelected Judges with life tenure that strike down laws adopted by elected officials in other branches of government, blocking a policy and mandating an alternative based on judges’ policy preference. Representative democracy depends on Judicial Restraint.

B. Conservative and liberal values/policy preferences

Issue	Liberal	Conservative
<u>Civil Rights</u> 1st Am Speech, Press, Religion Criminal due process Equal Protection	Limited Government Judicial Activism	Government Regulation Judicial Restraint
<u>Economic Rights</u> Property, Minimum Wage Unions, Labor v Management Health Care, Environment	Government Regulation Judicial Restraint	Limited Government Judicial Activism

C. End of the “Second American Republic.” (1868-1937)

1. **Roosevelt** court packing effort repudiated by leaders of both parties.
2. In 1937 Hughes and Roberts join 5-4 decisions upholding constitutionality of Congressional power to regulate corporations and the economy. *Wickard v Filburn* 1942 Dayton OH farmer prohibited from growing wheat for family consumption. Unanimous
3. 1930s Supreme Court rulings that uphold enhanced national power to regulate private economic activity establish reversible precedent without more enduring Constitutional amendments to resolve the post civil war dispute over corporate rights. **MAGA**
4. In just four years between 1937 and 1941 FDR fills eight Supreme Court vacancies with pro New Deal Democratic justices promising Judicial restraint and elevates a ninth, Republican Harlan Stone, to become Chief Justice.

III. The Hughes and Vinson Courts 1930-1953

A. New Support for Due Process and Equal Protection

1. *Powell v. Alabama* 1932 The Scottsboro boys. Sutherland 7-2 reverses the conviction and death penalty sentences of nine young black men denied lawyers in prosecution for rape of two white girls. Holds the 6th Amendment right to counsel binding on states only in capital cases. Years later accusers recant and state issues pardons

2. School Segregation. NAACP Legal Defense Fund attack on *Plessy*
 - a. Hughes 6-2 holds Missouri violated 14th Amendment by denying law school admission to a black applicant. State responds by creating separate black law school. *Gaines* 1938
 - b. 1950 unanimous court finds in favor of Thurgood Marshall for NAACP that Texas law school for blacks named after him unequal to U. Of Texas law school. *Sweatt v. Painter*
 - c. 1950 unanimous decision requiring equal treatment of black grad student forced to sit outside classroom door, dine at separate table, self segregate in library. *McLaurin v. Okla.*
3. Housing *Shelley v. Kraemer*, 334 U.S. 1 (1948), held that racially restrictive housing covenants cannot legally be enforced.
4. Poll Tax Upheld by the Supreme Court 1937 and 1951 until abolished by 24th Amendment in 1964

B. Infamous WW II Decisions Denying Equal Protection to Japanese Americans

1. *Hirabayashi v. United States* (1943) Japanese-American U. of Washington Student convicted for violating curfew and defying removal order, sentenced to detention at Catalina camp outside Tucson. Stone in 6-3 decision upholds conviction and FDR Executive Order establishing internment camps supported by former prosecutor California Republican Governor Earl Warren.
2. *Korematsu v. U.S.* 1944. Former KKK member Alabama's Hugo Black 6-3 majority upholds detention applying a two part strict scrutiny test of a "suspect classification" based on race and national origin. Reasons first
 - a. that U.S. had a compelling interest during wartime emergency and
 - b. that relocation was the least restrictive means.

Three dissenters decry unconstitutional violation of equal protection.
3. Restitution 40 years later — 1988 Civil Liberties Act provided 82,219 former camp inmates (or, in the case of a death, their heirs) received reparations. Acting Solicitor General in 2011 files Justice Department Admission of error: "suppressed critical evidence" in both cases. Convictions overturned in lower courts. Chief Justice Roberts in *Trump v Hawaii* 2018 Muslim travel ban case repudiates 1940s decision as overruled in court of history.

V. The Warren Court 1953-1969

- A. Composition. Never more than 3 Republicans, by 1969 Warren the only Republican, 8 Ds
 1. Chief Justice a former prosecutor/district attorney, California governor, prospective Republican Presidential contender who 1952 Presidential candidate Eisenhower promised to appoint to first Supreme Court vacancy. When Chief Justice Vinson died, Eisenhower gave **Warren** a recess appointment in October 1953 prior to Senate confirmation in March 1954 after he had been on the court nearly five months. Paul Moke, *Earl Warren and the Struggle for Justice*. 2015

2. FDR Democratic appointees *William Douglas* and Alabama's *Hugo Black* unforeseen liberal antagonist of conservative Independent *Felix Frankfurter* of Massachusetts.
3. Truman appointed 4 Democrats: Chief Justice Vinson, Burton, *Clark* and Minton
4. Eisenhower 4 appointees Republicans *Warren, Harlan, Whitaker*, and Democrat *Brennan*. Eisenhower later lamented appointments of Warren and N.J. Democratic Judge William Brennan "one of the biggest damn fool mistakes I ever made"
5. JFK. Democrats Byron White and Arthur Goldberg
6. LBJ. Democrats Abe Fortas + Thurgood Marshall, first African American Justice

B. *Brown v Board of Education*. 1954.

1. Thurgood Marshall's NAACP LDF strategic appeal 14th Amendment equal protection from 4 states with segregated schools consolidated with an independent 5th Amendments due process appeal from Washington DC.
2. Vinson Court divided in 1953 and ordered re-argument on issues framed by Frankfurter. In 1954 Warren successfully achieved unanimity for an opinion overturning *Plessy* by holding that separate facilities are inherently unequal citing social science research demonstrating negative impact on children's self esteem. In DC case, court holds that 5th Amendment due process guarantee binding on U.S. includes the same 14th Amendment "equal protection" guarantee binding on states.
3. Conservatives decry reliance on sociology and psychology rather than law; black separatists reject finding that separate minority institutions invariably inferior. HBCUs

C. With All Deliberate Speed.

1. After argument a year later to address implementation and remedial desegregation measures, court directs action "with all deliberate speed" in *Brown II*, 1955.
2. 1956, 19 Senators and 77 members of the House of Representatives signed the "Southern Manifesto," a resolution condemning *Brown* as a "a clear abuse of judicial power" and encouraged states to resist implementing its mandates. Dante Fascell only one of seven Democrats from Florida who refused to sign. Later southern calls to impeach Warren.
3. In 1957 Little Rock Arkansas school Board admitted nine blacks, but Gov. Faubus ordered National Guard to maintain order by preventing their entry. President Eisenhower dispatched the 101st Airborne to enforce the *Brown* decision. Federal Marshalls intervened when James Meredith sought to enter the University of Mississippi. In 1963, President John F. Kennedy federalized National Guard troops and deployed them to the University of Alabama to force its **desegregation**.
4. Virginia school district that was one of the five systems directly subject to the court's ruling in *Brown* responded by closing all of its public schools so white children could attend segregated private academies.
5. In case after case a shrinking majority of the Justices struck down Southern efforts to perpetuate school segregation leading to disputed court mandates for costly busing of minority students beyond neighborhood schools.
6. The court found some Northern school districts had deliberately constructed schools in segregated residential neighborhoods and made pupil assignments amounting to *de jure*

segregation by law in violation of the Equal Protection clause. Cross district busing disputed.

D. Civil Rights Protests

1. 1950s Montgomery Bus Boycott, Lunch counter sit ins, Freedom Rides.
2. 1963 Birmingham church bombing kills 4 girls attending Sunday school, MLK and John Lewis lead 1965 Selma march, Black Muslims Malcolm X, Black Panthers separatism
3. **March on Washington 1964**
4. Urban violence Watts 1965, Newark and Detroit 1967

E. Supreme Court

1. **1960** *Boynton v. Virginia* 7-2 Black declared the segregation of interstate transportation facilities unconstitutional
2. 1966 *Brown v. La.* 5-4 reverse conviction for Library sit in
3. 1966 *Adderly v. Fla.* 5-4 uphold conviction for protest outside county jail. White switched
4. 1967 *Loving v. Va.* unanimous ruling that laws banning interracial marriage unconstitutional. Strict Scrutiny of a. Race based classification. b. Fundamental right. "Incorporation plus" required as Bill of Rights does not include a right to marry.

F. Congressional Response

1. 1964 Civil Rights Act, ends Jim Crow in restaurants, hotels, transportation
Heart of Atlanta Motel v. US, challenge to the constitutionality of 1964 Civil Rights Act. The Supreme Court unanimously held that the the Constitution's Commerce Clause empowered Congress to regulate private economic activity
2. 1965 Voting Rights Act impacts North + South, Section 2 bars all discriminatory laws ends literacy tests required in half the states, upheld by the Court in 1959 requires ballots in multiple languages, Section 5 pre-clearance review by US of changes impacting minority voting rights.
3. 1968 Fair Housing Act

G. Due Process, whether black or white, in Arrest, Interrogation, Trial and Punishment

1. Pre- Warren: Selective incorporation of Bill of Rights. *Palko* 1937, Cardozo's short list does not include 5th Amendment guarantee against double jeopardy in state court.
2. 1960s explosion of criminal defendant's rights in state courts through selective incorporation of most 4th, 5th and 6th Amendment guarantees via the 14th Amendment due process clause.
 - a. *Gideon*. Black transforms his 1940s dissent in a majority opinion establishing 6th/14th Amendment right to counsel not only in death penalty cases but in all state criminal trials. Black favored total incorporation of the entire Bill of Rights.
 - b. *Miranda v. Arizona* 1966 Warren 5-4 overturns conviction based on confession of kidnapping and rape as 5th/14th Amendment violation of guarantee against self incrimination for failure to advise the accused of rights prior to interrogation. As Chief Justice Warren invalidated investigatory procedures he had employed as a California prosecutor.
3. *Terry v Ohio*. 1967, 8-1. White Cleveland police officer took interest in three black men, suspected they were "casing" a store to rob, stopped and frisked them, obtained a

conviction for carrying a concealed weapon. Warren for 8 Justices, including Thurgood Marshall, found reasonable to protect officer's safety a frisk without more probable cause that did not violate the 4th/14th guarantee against unreasonable search and seizure. Douglas dissent. Critics decry giving police broad discretion leading to frequent stops and pat downs in minority communities.

VI. Finale: Burger, Rehnquist, Roberts Republican Courts 1969 - 2023 in third class.

1. **Homework:** "Supreme Court Shenanigans" a 12 minute cartoon video on YouTube <https://m.youtube.com/watch?v=dDYFiq115Dg>

2. Race on the 2023-2024 October Docket

Alexander v. South Carolina State Conference of the NAACP scheduled for argument on Wednesday October 11, 2023. The case concerns a challenge to the congressional redistricting plan that the South Carolina legislature enacted after the 2020 census. Audio recording posted on the day of argument at https://www.supremecourt.gov/oral_arguments/argument_audio/2023

Lesson 2. Multiple Choice Questions. Select all possible correct responses

Q. 1. Chief Justice William Howard Taft

- A. attended First Unitarian Church in Cincinnati while serving as a law school dean
- B. as US administrator in the Philippines required segregation of non-white civil servants
- C. in his 1927 opinion *Lum v. Rice* followed the *Plessy v Ferguson* precedent, *stare decisis*, upholding local official's refusal to admit a Chinese girl to a nearby white school
- D. provided effective court leadership in assuring equal protection for racial minorities

Q. 2. President Franklin D. Roosevelt

- A. following initial setbacks to his New Deal successfully packed the court with Democrats committed to upholding Congressional authority to regulate the economy.
- B. won a still celebrated victory for national security in the court's WWII *Korematsu* decision upholding his executive order protecting the West Coast from a Japanese invasion
- C. elevated a Republican Associate Justice to become Chief Justice
- D. denounced Judicial Activism by conservative Justices who legislated from the bench by substituting their economic policy preferences for the regulations adopted by the people's elected representatives.

Q. 3. Chief Justice Earl Warren

- A. when he retired from the court was the only remaining Republican Justice
- B. issued rulings on the rights of criminal defendants consistent with his former practice as a prosecutor in California
- C. was denounced by conservatives as a judicial activist for invalidating innumerable state laws as violations of the equal protection clause
- D. in the 1964 *Heart of Atlanta Motel* decision practiced judicial restraint by upholding Congressional authority

