

Race Matters in the Supreme Court
#3 1969-2023, Republican Chiefs—Burger, Rehnquist,
Roberts UC/OSU OLLI October 3, 2023 2:15 EDT
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Homework: “Supreme Court Shenanigans” a 12 minute cartoon video on YouTube <https://m.youtube.com/watch?v=dDYF1q115Dg>

On this Date in History

On October 3, 1912, Frank Wigfall, a Black man who had been threatened with mob violence at a Wyoming jail, was moved to the state penitentiary for “safe keeping” where he was soon lynched by 100 white prisoners one of them producing a rope to hang him from the balcony inside the state penitentiary. Mr. Wigfall had been accused of assaulting a white woman. The white inmates had been shouting their intentions to lynch Mr. Wigfall from their cells all morning, but the prison provided no security No one was held accountable for the lynching although it was widely known which prison officials and prisoners were culpable. Over 6,500 Black women, men, and children were victims of racial terror lynching in the U.S. between 1865-1950. A History of Racial Injustice Calendar 2023. Equal Justice Initiative

I. Review of 2nd Class

Conservative justices who practiced restraint by allowing race discrimination actively made law from the bench by striking down economic regulations; created contract rights. Senate refused to confirm Parker based on NAACP and labor union objections; Democrats maintained supermajority in Congress and the Supreme Court 1937-1969. LBJ appointed first African American Justice, Thurgood Marshall

WW II Japanese internment Korematsu case creates double standard in equal protection cases with strict scrutiny mandated only for racial discrimination.

1954 *Brown v Board of Education* overruled *Plessy*, followed by 1956 *Gayle v Browder* finding segregated bus seating in Montgomery an equal protection violation.

Prince Edward County Virginia shut down public schools to avoid integration, defying *Brown* but then lost in subsequent litigation. 200 Florida A&M students protested at Leon County Jail, 32 lost appeal for trespass convictions 5-4 in Supreme Court *Black v. Douglas*

Court decisions protecting Voting rights and desegregated schools popularized racial justice but changed little until Congress legislated and the President enforced.

Activism — when court mandates new rules such as the Miranda Warnings, lawmaking Restraint — when court upholds a civil rights law, deference to elected representatives

Review Questions Answered: 1. A, C 2. A, C, D. 3. A, C, D

II. Partisan Confirmations in Shift to Republican Control. 1969-2023

A. Nixon

1. LBJ failed to replace Warren with Fortas prior to Nixon 1968 Presidential election win Southern strategy commitments to appoint strict constructionist, law and order judges
2. Nixon appoints Burger to succeed Warren, but NAACP successfully opposes Southern nominees Haynesworth and Carswell, resulting in Blackmun appointment. Moved left.
3. Nixon appoints Virginia Democrat Lewis Powell (89-1) whose moderation became central.
4. Arizona's William Rehnquist, DOJ, approved 66-26. Challenged for 1950s clerk memo endorsing *Plessy* in *Brown* and after allegedly intimidating black and Hispanic voters in 1962 by challenging qualifications in minority polling places

B. Ford

1. Republican John Paul Stevens. 1975. 96-0. Emerged as leader of the court's liberals

C. Carter — No vacancies 1977-1981 D. Reagan

1. Sandra Day O'Connor. 1981 Arizona legislator. 99-0
2. Rehnquist to succeed Burger as Chief Justice 1986 66-33
3. Scalia 1986. 98-0 to Burger's seat
4. Robert Bork 1987 rejected 42-58 to succeed centrist Powell, based in part on writings critical of precedent holding racist restrictive covenant's unenforceable.
5. Kennedy 97-0. Replace Powell as swing vote at center court

E. George H.W. Bush

1. David Souter, New Hampshire 1990 90-9. Joined liberal wing
2. Clarence Thomas, 1991 52-48 succeed Thurgood Marshall

F. Clinton

1. R. B. Ginsburg, 1993, 96-3
2. Steven Breyer, 1994, 87-9

G. George W. Bush

1. John Roberts. 2005. 78-22 Chief Justice to succeed Rehnquist
2. Samuel Alito. 2005 58-42 to replace O'Connor

H. Obama

1. Sonia Sotomayor 2009. 68-31 Puerto Rican born parents
 2. Elena Kagan. 2010. 63-37. Former law school dean and DOJ official
 3. Merrick Garland 2016. Rejected without a Senate hearing or vote.
- Shenanigans

I. Trump

1. Neil Gorsuch. 2017. 54-45
2. Bret Kavanaugh 2018 50-48. replaced centrist Kennedy
3. Amy Coney Barrett 2020 52-48 to replace Ginsburg

J. Biden

1. Ketanji Brown Jackson, 53-44

III. Affirmative Action or Reverse Discrimination?

A. *Bakke v California*. 1978 White applicant with high test scores challenged rejection.

1. Four liberal Justices favored preferential admission for minorities as a color conscious remedy subject to heightened but not strict scrutiny standard of equal protection analysis. a. Significant, not compelling state interest b. Closely related means, not least restrictive

2. Four conservative Justices applying strict scrutiny find reverse discrimination against whites by the state in violation of 14th Amendment.

3. Justice Powell's solo opinion held for Bakke applying the liberal heightened scrutiny approach that accepted diverse enrollment as a. legitimate but b. quotas unconstitutional

4. in later cases *sub silentio* undermined *Bakke's* authority as a precedent that allowed undergraduate colleges and professional schools to consider race as one but not the controlling factor in admissions decisions.

5. U of Michigan: *Gratz v Bollinger* Undergrad NO. *Grutter v Bollinger* Law School OK, O'Connor forecasts ongoing need for up to 25 years of affirmative action.

6. 2023 Harvard and U of North Carolina. Roberts for 6-3 majority overrules *Bakke*, ending affirmative action.

7. In [City of Sherrill v. Oneida Indian Nation of N.Y.](#), the court denied a claim by the Oneida Nation that it should not have to pay taxes on land that once belonged to it as part of a sovereign reservation but that had been sold to the state in 1805 — in violation of a federal treaty — and then, in the late 1990s, reacquired. Writing the majority opinion (Justice Ruth Bader Ginsburg citing the Doctrine of Discovery in a footnote argued that the tribe could not “unilaterally revive its ancient sovereignty, in whole or in part” since it “long ago relinquished reins of

government and cannot regain them through open-market purchases from current titleholders.”

8. *Haaland v. Brackeen* 2023. Barrett opinion finds constitutional the Indian Child Welfare Act’s requirements that Native American children be placed in tribal families rejecting the state’s equal protection clause claim and the state’s right to legislate family law adoption policy.

B. Minority Set Asides

1. *Steelworkers v Weber* 1979 black quota voluntarily accepted by union and Kaiser Aluminum

White employee claims violation of Title VII of 1964 Civil Rights Act disallowing “preferential treatment to . . . any group because of the race . . . of such individual or group on account of an imbalance which may exist . . .”

Justice Brennan for five allows preferential treatment finding “ironic indeed” if 1964 civil rights act would prohibit ”all voluntary private, race-conscious efforts to abolish traditional patterns of discrimination.”

Burger and Rehnquist dissent objecting to majority rewriting the law and burdening innocent employees.

2. *Fullilove v. Klutznik*

Congress set aside 10% of a \$4 billion public works program for “minority business enterprise” (MBE) with at least 50% ownership by black, Hispanic, Oriental, Indian Americans, Eskimos and Aleuts. Burger finds no 5th Amendment equal protection violation by U.S. for temporary “narrowly tailored” measure designed to remedy past wrongs as 14th Amendment empowers Congress to do.

Stewart (from Cincinnati) dissent finds racist, invidious discrimination similar to *Plessy*, and Stevens deplored legislative process dominated by self interested Black Caucus.

D. *Adarand Contractors v. Pena*. 1995 5-4

Justice O'Connor with fellow Reagan appointees Scalia, Kennedy and Chief Justice Rehnquist effectively overrule *Fullilove* applying strictest scrutiny to find minority set asides unconstitutional, diversity not a sufficient justification. Thomas and Scalia concurrence goes further to find racial classification can never pass the compelling interest test.

Stevens, Souter, Ginsburg and Bryer dissent.

IV. Voting Rights

A. *Gomillion v. Lightfoot*. 1960 Racial Gerrymander. Warren Court Unanimous

1. Blacks outnumbered whites four to one in Tuskegee Alabama. In order to maintain white control as black voter registration increased, the state legislature changed the city's boundaries from a square to a 28 sided figure that left black voters outside the municipal boundaries. <https://aaregistry.org/story/the-supreme-court-hears-gomillion-v-lightfoot/> Frankfurter finds 15th Amendment violation based on intent to disenfranchise blacks.

B. 1965 Voting Rights Act

Section 2 is a general provision that prohibits every state and local government from imposing any voting law that discriminates based on race or language.

Section 4(b), contains a coverage formula that determines which jurisdictions are subjected to pre-clearance based on their histories of discrimination in voting

Section 5 pre-clearance requirement, prohibits certain jurisdictions from implementing any change affecting voting without receiving pre-approval from the U.S. attorney general or the U.S. District Court for D.C. that the change does not discriminate against protected minorities

C. *Mobile v. Bolden*. 1980. 4-2-3

1. All white three member city council challenged by black voters

seeking single member district elections that would result in minority representation.

2. Stewart plurality opinion for four justices rejects the claim, finding no **intentional** discrimination despite the result D. Strengthened Voting Rights Act

1982 Congress strengthened Section 2 of the Voting Rights Act with amendments changing the prohibition against "discriminatory intent" to creation of "discriminatory results".

“As a young assistant in the Department of Justice during the Reagan administration, Roberts waged a months-long crusade against strengthening the Voting Rights Act when it was set for reauthorization in 1982. Roberts lost that battle, but not before authoring dozens of memos warning that Congress should not make claims of racial discrimination in voting cases "too easy to prove.” NPR. Nina Totenberg: As Concerns About Voting Build, The Supreme Court Refuses To Step In

E. 2006

Roberts' first year as chief justice. Court said that federal courts should be wary of intervening in elections at the last minute because disturbing the status quo can lead to confusion among voters that may deter them from turning out.

F. *Shelby v. Holder*. 2013. 5-4.

1. Roberts holds Section 4(b) unconstitutional because the coverage formula is based on data over 40 years old, making it no longer responsive to current needs and therefore an impermissible burden on the constitutional principles of federalism and equal sovereignty of the states. Roberts said that because "the conditions that originally justified these measures no longer characterize voting" in states and cities with a history of discriminating against Black voters, those jurisdictions could now be trusted to pass new voting regulations and create new congressional districts without fear of discrimination.

2. States and localities previously subject to pre-clearance review purge voting roles, close polling places in minority communities and impose stricter voter id requirements that result in suppression of black voting rights.

G. Brnovich v. Democratic National Committee, 2021. Arizona did not violate VRA §2's general prohibition by outlawing **ballot collection** and banning out-of-precinct voting. 6-3 Alito upholds Arizona voting rules that discount the votes of those who vote at the wrong precinct and that make it a crime for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot.

H. Gerrymanders

Lower courts found Southern state legislatures engaged in racial discrimination when creating new election districts after the 2020 census, but the Supreme Court allowed their use in the 2022 mid-terms to avoid last minute confusion. Alabama and other state legislatures continued to defy lower court orders to create fair districts resulting in Supreme Court intervention to assure fair districting done by the courts in time for the 2024 election.

6/8/23 5-4. Alabama violated VRA §2 by diluting the power of Black voters by repeatedly ignoring the court and drawing a congressional voting map with only a single district in which they made up a majority when entitled to two. Roberts for the majority joined by Kavanaugh and 3 liberal Justices. Gorsuch dissent.

I. *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/202

J. 2020 Election Litigation in a pandemic

1. Emergency appeals from lower federal court decisions requiring states to extend voting deadlines, expand absentee balloting opportunities, open more polling locations, count ballots received after election day, and more. Summary judgment by the Supreme Court without normal briefing, oral argument, or detailed opinion rationale. Shadow Docket
2. Primary Election season.
By July According to Hasen's [Election Law Blog](#), there have been 163 election-related lawsuits filed in 41 states and Washington DC in response to the coronavirus alone. April 5-4 decision reversing lower court order for Wisconsin to accept absentee ballots. Similar outcome in Texas, Alabama and Florida
3. October Last minute decisions.
North Carolina + Pennsylvania, yes. Wisconsin to extended timeline for receiving and counting ballots in those states. In each case, Democrats backed the extensions and Republicans opposed them. All three states have Democratic governors and legislatures controlled by the GOP.
Trump claims election stolen — 10,000 vote margin in Arizona

V. Criminal Prosecution

A. Criminal Code

1. *Coates v. Cincinnati*. 1971 Ordinance makes it unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Ruled and unconstitutional violation of procedural due process — void for vagueness. Stewart 5-3

B. War on Drugs

Mass incarceration in the U.S., highest in the world five fold increase in prison population in 50 years. US 335 million people, over 2 million in prison, China 1.4 billion people. 1.6 million in prison

Mandatory Minimum sentences for crack cocaine drug possession and sale 100 times higher than for powdered cocaine disproportionately resulting in lengthy jail terms for black men separated from their families.

Kimbrough v. U.S. 2007. Black defendant convicted for possession of crack cocaine sentenced to less than the mandatory minimum required by the sentencing commission based on trial court's use of discretion to remedy the 100 to 1 disparity in minimum sentence for powder rather than cocaine resulting in harsher treatment of racial minorities. Ginsburg for 7 including Republicans Roberts, Stevens, Kennedy and Souter allows discretion to disregard "advisory" guidelines.

Terry v. US. 2021 9-0 Thomas Uphold crack conviction despite continued sentencing disparity for Tier 1 offenses based on Congressional failure to expressly include amendments made to Tiers 2 + 3 for possession of larger quantities. Sotomayor concurs with call for Congress to act.

C. Guns

2008. *DC v Heller*. 5-4.

Scalia finds 2nd Amendment Right to keep private weapon at home while acknowledging constitutionality of reasonable limits TBA. Follow up decisions extended 2d Amendment limits to state and local gun regulations.

2022 *New York State Rifle & Pistol Association Inc. v. Bruen*

New York prohibits its citizens from carrying a handgun outside the home without a license, and only grants licenses to those who satisfy the government that they have "proper cause" to carry a firearm.

6-3 Justice Thomas. No such limit found in US history or tradition. Lower courts invalidate laws denying gun rights to abusive husbands, and felons based on 18th Century practice.

D. Search and Seizure

Torres v. Madrid. 2002 “What does “seizure” mean?”

1. Woman on drugs fleeing plain clothes police she mistook for carjackers shot twice while driving to avoid final arrest the following day.

- Issue: Whether an unsuccessful attempt to detain a suspect by use of physical force is a “seizure” within the meaning of the Fourth Amendment, as found by Justice Scalia in a unanimous decision (*Hoari*) followed by the U.S or whether physical force must be successful in detaining a suspect to constitute a “seizure,”
- 18th Century authors of the 4th Amendment understood seizure to include unsuccessful attempts, but 20th Century understanding requires actual custody. Textualism, Originalism and *stare decisis* respect for precedent result finding constitutional violation.

2. Writing for unanimous court Justice Breyer in *U.S. v. Cooley 2021*, held that tribal police on a reservation can arrest and search people who are not Native American when there is probable cause to suspect them of a federal or state crime. A police officer of the Crow tribe on a reservation in Montana arrested Cooley for drug crimes and the Supreme Court rejected his appeal of a conviction in federal court based on a 1981 precedent granting tribes jurisdiction over non-members whose conduct “threatens” or “has some direct effect” on the tribe’s political integrity, economic security, or health and welfare.

E. Juries

1. *Duncan v. Louisiana*. 1968. White for a 7-2 majority overturns conviction of black Louisiana teen based on denial of trial by jury made binding on the states by incorporation of the 6th Amendment guarantee into the 14th’s due process clause.
2. *Swain v. Alabama*. 1965 Black defendant sentenced to death by all white jury in county that 26% black but had no black trial jurors in

18 years. Prosecutor used peremptory challenges to strike all eight blacks in the jury pool. White for 6-3 majority finds insufficient evidence to establish invidious discrimination in violation of 14th Amendment.

3. *Batson v. Kentucky*, 1986. Powell for a 7 member majority including Republicans Blackmun, Souter and O'Connor overrules *Swain* holding that prosecutor's use of peremptory challenge to strike prospective black jurors without showing cause a denial of equal protection. Subsequent rulings extended to civil litigation.

F.. Death Penalty

1. 5th and 14th Amendments provide life can be taken with due process, 8th Amendment forbids cruel and unusual punishment.
2. *Coker v. Georgia* 1976. NAACP challenges death penalty for rape as equal protection violation based on data showing primarily black defendants receive capital punishment. Court rules death for rape excessive in violation of 8th Amendment but finds no 14th Amendment equal protection violation.
3. *McClesky v. Kemp*. 1987 NAACP offers data from Baldus study showing death penalty four times more likely if the victim is white rather than black. Powell opinion upholds the sentence 5-4.
4. 2020-2021 Death Penalty Emergency Appeals Unsigned *per curiam* decisions denying stay of 13 federal executions over dissents of Justices Sotomayor and Breyer seeking oral argument on the merits.
5. LAPD Chokehold:

From 1975 to 1983 16 people, including 12 African-Americans, had been killed by the LAPD using chokeholds. Summary Execution or Extra Judicial Killing under international law.

Los Angeles v. Lyons. 1976 5-4 opinion by White dismisses claim for injunction against future police use of chokeholds brought by black motorist rendered unconscious by white officers.

G. Immunity

1. Citizens may bring a civil action claiming damages from a state agent for deprivation of rights under 42 U.S.C. § 1983 originally codified in the 1871 civil rights act.
2. In *Bivens v. Six Unknown Armed Agents*, 1971, (Brennan 6-3) the Supreme Court determined that a citizen could claim damages against the U.S. Narcotics Bureau for violating the 4th Amendment guarantee against unreasonable searches and seizures despite the absence of a statute.
3. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Powell 8-0 grants prosecutors absolute immunity.
4. Other government officials given qualified immunity as provided in *Harlow v. Fitzgerald* 1982 8-1 opinion by Powell: "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."
5. The qualified immunity doctrine, as applied to police, initially asks two questions: Did police use excessive force, and if they did, should they have known that their conduct was illegal because it violated a "clearly established" prior court ruling that barred such conduct?
6. In an unsigned June 2020 order, the court declined to hear cases seeking reexamination of the doctrine of "qualified immunity." Justice Clarence Thomas dissented. Sotomayor also seeks

reconsideration as do the conservative Cato Institute and liberal ACLU and NAACP.

7. *Lombardo v St. Louis*. Petition for certiorari filed in September 2020 repeatedly discussed without a grant. 3 Republican appeals court judges deny relief to family of black man killed in custody by 6 police in 2015 by granting immunity. 5 Reuters journalists won Pulitzer Prize for data analysis of judicial failure to hold police accountable.

8. *Hernandez v Mesa*. 2019. 5-4 Border agent fired into Mexico killing a 15 year old. Alito for majority holds *Bivens* does not allow family in Mexico to claim damages. Ginsberg dissent.

Ethics

1. 1978 Ethics in Government Act. Annual Reports Thomas/Crowe. Gorsuch
2. 28 USC section 455. Recusal Act
Democrats fault a. Scalia (VP Cheney) Thomas. (Jan. 6 Wife Ginny).
Republicans fault Ginsburg for anti Trump bias, Kagan for role in Harvard case, denounce Senator Schumer for threatening Gorsuch and Kavanaugh. Sotomayor
3. May 2022 Courthouse Ethics and Transparency Act. Disclose stocks within 45 days
4. 1973 Code of Conduct for US Judges of the US Judicial

Roberts declines invitation to appear at Senate Judiciary Committee hearings claiming separation of powers concern. Extensive investigation of leaked draft abortion opinion, little or no effort to improve accountability for ethical misconduct, leaving preparation of a code for the Justices to Congress — subject to Supreme Court determination of its constitutionality.

Court's public approval rating steadily drops as media reports continue to reveal improper conduct.

V. Conclusion. Judgment after 50 years

Historic Blunders Dred Scott

Civil Rights Cases Plessy v Ferguson

Korematsu

Historic Achievements

Brown v Board of Education

Heart of Atlanta Motel

Loving v. Virginia

Bakke?

Review Questions Lesson 3.

1. Single choice

During the Republican Nixon administration.

- A. the President only appointed Republicans (4) to the Supreme Court
- B. the Democrats successfully blocked two of the President's Republican nominees.
- C. Chief Justice Burger and Associate Justice Harry Blackmun were such like minded conservatives they became known as the Minnesota Twins.
- D. William Rehnquist's prior experience as a law clerk to Justice Jackson in the 1950s helped him win confirmation in the Senate.

2. Single choice

When a white petitioner Alan Bakke challenged the constitutionality of a medical school admission affirmative action program that favored black applicants, what standard of review did the court apply?

- A. Applying **strict scrutiny** the court invalidated the practice for failing to meet a compelling interest with the least restrictive means.

- B. Applying a **heightened scrutiny** test the controlling court opinion found the school had a significant interest in promoting racial diversity but had not used an unacceptable quota.
- C. Applying a **rational basis** test the court upheld the school policy based on its having a legitimate goal and used reasonable means.
- D. None of the above.

3. Single choice

In the 2013 *Shelby v. Holder* decision Chief Justice Roberts reasoned that

- A. Congressional power to protect voting rights was limited to **intentional** race discrimination and could not regulate changes to voting laws that had only a **disparate impact**.
- B. Congress had not properly reviewed the latest election outcomes before extending the pre-clearance review obligations imposed by the amended 1965 Voting Rights Act and so targeted voting districts no longer required US approval to modify their laws.
- C. race conscious remedies violated the Constitution's equal protection clause
- D. All of the above