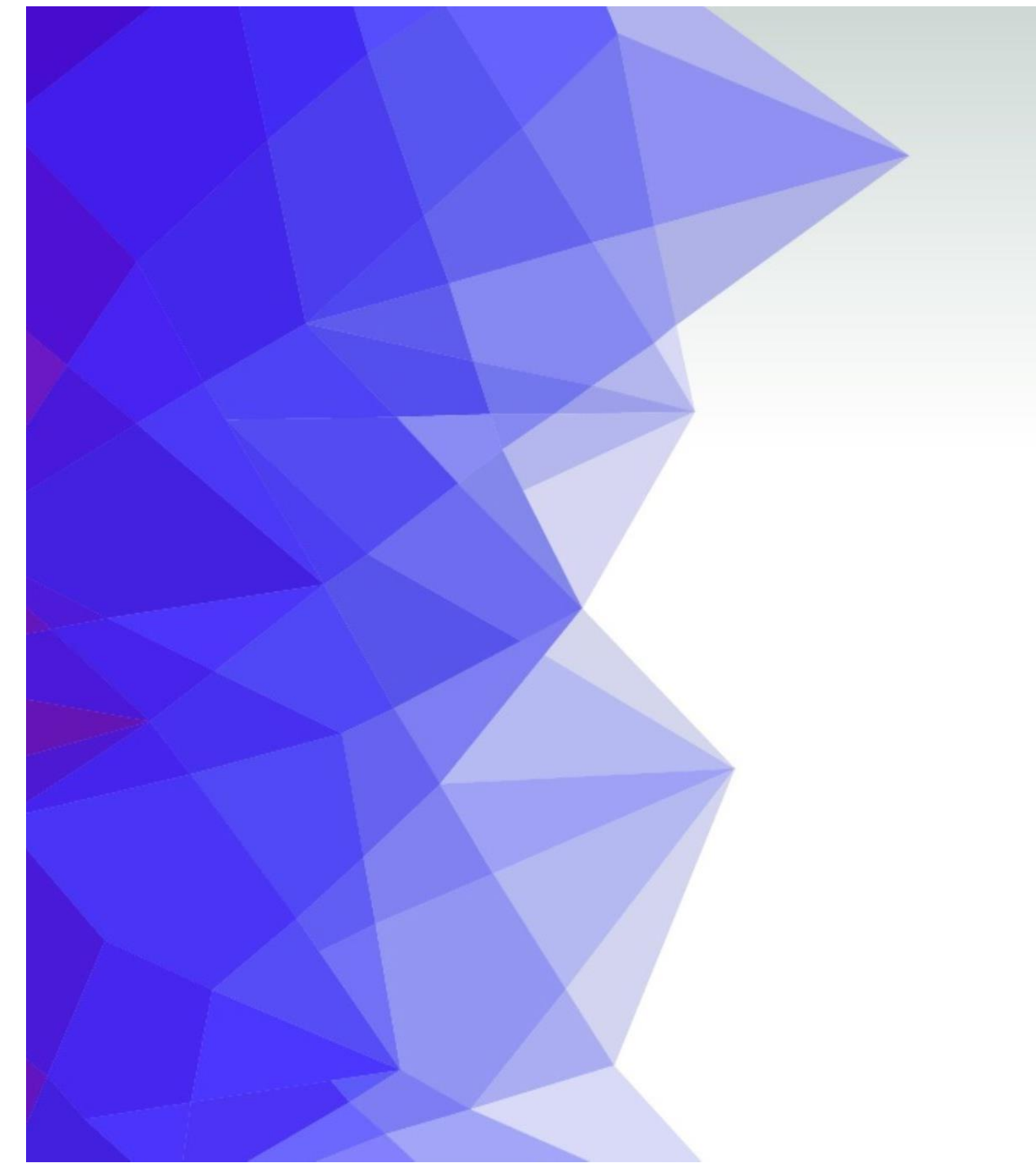


Race Matters: Black Lives in the Supreme Court 1788-2023

**Howard Tolley, Professor Emeritus U. Of Cincinnati
OLLI. Week 3 - October 3, 2023. 1969-2023**



Realignment to a Balanced Court 1969-2005

A. Nixon

1. Republican moderate Burger replaces liberal Republican Warren
2. Republican Liberal Blackmun appointed to replace Fortas after Democratic reject s2 Southern Conservatives
3. Moderate Democrat Powell
4. Conservative Republican Rehnquist

LBJ failed to replace Warren with Fortas prior to Nixon 1968 Presidential election win

B. Ford

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

C. . 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. Kennedy 97-0. Replace Powell as swing vote at center court after Robert Bork 1987 rejected 42-58

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

Realignment to a 6-3 Conservative Court

	Liberal	Moderate	Conservative*		
2005	4	2	3	CJ: Rehnquist/Roberts.	(Bush)
2006	4	1	4	O'Connor/Alito	(Bush)
				Souter/Sotomayor	(Obama)
				Stevens/Kagan	(Obama)
2017	4	0	5	Kennedy/Gorsuch	(Trump)
2018	4	0	5	Scalia/Kavanaugh (50-48)	(Trump)
2020	3	0	6	Ginsberg/Barrett	(Trump)
2022.	3	0	6	Breyer/Jackson	(Biden)

*Grossly oversimplified without regard for unanimous outcomes + lineups on different issues

Roberts'/Trump Court 2020-2023

<u>Roberts:</u> GW Bush (R, 2005), Male, Catholic, Harvard.	67	
<u>Thomas:</u> GHW Bush (R, 1991) M, Catholic, Yale, Georgia.	74	
<u>Breyer:</u> Clinton (D, 1994), Male, Jewish, Harvard, CA.	82.	Jackson Biden. 52
<u>Alito:</u> GW Bush (R, 2006), Male, Catholic, Yale, NJ.	74	
<u>Sotomayor:</u> Obama (D, 2009), Female, Catholic, Yale, NY.	68	
<u>Kagan:</u> Obama (D, 2010), F, Jewish, Harvard, NY.	62	
<u>Gorsuch:</u> Trump (R, 2017), M, Cath/Episc, Harvard, COL	56	
<u>Kavanaugh:</u> Trump (R, 2018), M, Catholic, Yale, DC.	57	
<u>Barrett:</u> Trump (R, 2020), F, Catholic, Notre Dame, Indiana	51	

2005-2023 Appointees

Photo 2021-2022

5 Republican, 3 Democratic

4 Harvard 3 Yale 1 Notre Dame

4 Men, 4 Women

6 White, 2 of color

6 Catholic, 1 Jew, 1 Protestant

3 replaced deceased justices

**6 previously clerked for a
justice**

**7 served as US appellate court
judges**



The New Chief

50 year old former Rehnquist law clerk groomed for the court as deputy solicitor general arguing 39 cases.

January 1992 Bush #1 nominated to DC Court of Appeals. Senate Judiciary Committee chair Biden declined to hold hearings and Clinton elected President in November.

Bush #2 2005 nominated him to succeed Rehnquist as Chief Justice.

Confirmed 78 yes + 22 Democrats no, including Obama



Special Role of the Chief Justice

- **US has had 17 Chief Justices, 46 Presidents**
Roberts excludes 12 Chiefs in his count of 101 associate justices (5 promoted)
Currently paid \$271,000, Associates receive \$258,000
- **As administrative head of the Judicial branch serves as Chief Executive Officer of the Judicial Conference overseeing lower federal courts**
- **Gives annual “State of Judiciary” report. Advocate for increased budget for pay, staff and facilities**
- **Presides over oral argument, meetings to decide cases and opinion assignments, and Senate trials to impeach a President.**
- **Rehnquist wore distinctive robe, Burger appointed to head Bicentennial Commission, Warren appointed to head Commission investigating Kennedy Assassination**

Standard of Review: Affirmative Action

When a court finds intentional race discrimination, a judge may order a color conscious remedy such as busing to end segregated schools. The Supreme Court also approved race conscious remedial practices by government agencies and private actors such as minority set asides in government contracts.

In *Bakke* and *Grutter v. Bollinger* by the narrowest of margins the court approved affirmative action by a state university seeking to promote racial diversity. That 5-4 decision revealed a sharp divide.

4 conservative Justices supported strict scrutiny finding all race preferences unconstitutional

4 liberal justices favored intermediate scrutiny approving temporary preferences for racial minorities.

1 centrist justice applying intermediate scrutiny approved affirmative action if accomplished without a rigid quota like the one experienced by Bakke. *Grutter* In 2003 O'Connor upheld the U of Michigan preference noting that affirmation action would no longer be needed in 25 years.

Affirmative Action

In Seattle and Louisville school boards that had for many years operated segregated schools decided to achieve racially diverse enrollments by requiring transfers.

Parents Involved in Community Schools v. Seattle School District No. 1

In a 2007 5-4 decision CJ Roberts applied strict scrutiny finding that diversity was not a compelling interest that justified the use of race in selecting students for admission to public schools and that doing so violated the Equal Protection Clause. Contrary to the 5-4 *Bakke* decision using intermediate scrutiny that would allow affirmative action, he reasoned that *Brown v Board of Education* required a color blind approach.

In June 2023 the court ruled 6-3 in *Students for Fair Admissions Inc. v. Harvard* overruling *Bakke* and *Grutter v Bollinger* thus ending court approved race based affirmative action in university admissions. Republicans charge that Kagan, Harvard's former law Dean, should have recused herself.

ADMISSIONS



Indigenous American Rights

***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.**

Elections: Congressional Voting Rights Act

Shelby County v. Holder, 2013 (5-4 decision)

Targeted States and localities do not need federal approval to change voting laws. Roberts. Reject Congressional data analysis. Voting Rights Act § 5 Ginsberg dissent

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

6/8/23 5-4. Alabama violated VRA §2 by diluting the power of Black voters in drawing a congressional voting map with only a single district in which they made up a majority when entitled to two. Roberts.

Voting Rights 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/202

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.

1. Kimbrough v. U.S. 2007. Ginsberg for majority including Roberts allows sentence less than the mandatory minimum for Black defendant convicted for possession of crack cocaine

2. Terry v. US. 2021 9-0 Thomas Uphold crack conviction despite continued sentencing disparity for Tier 1 offenses based on Congressional failure to remedy properly all of the disparity.

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.



Death Penalty

The Roberts' Court approved the Trump administration's extraordinary implementation of capital punishment in the months after Biden, an abolitionist, won the 2020 election.

In prior challenges to the death penalty, the court had disregarded clear statistical evidence that race matters in sentencing decisions that resulted in disparate penalties for black defendants.

Over the dissents of liberal justices, Roberts denied appeals for a stay of execution that would allow time for consideration of new evidence.

In Ohio strong Republican support for abolition may result in legislative repeal next year.

Qualified Immunity

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.

Police enjoy “qualified immunity” unless a victim can prove not only use of excessive force but also that the officer should have known that their conduct was illegal because it violated a "clearly established" prior court ruling that barred such conduct.

The conservative Cato Institute and Justice Clarence Thomas, as well as the liberal ACLU, NAACP and Justice Sotomayor all seek reconsideration of the doctrine. Nevertheless in October 2011 the court reaffirmed qualified immunity in unsigned opinions without hearing oral argument or any dissent that overturned lower court decisions from California and Oklahoma that had allowed a damages claim for use of lethal force.

Ethics: Senate Judiciary Committee Hearings

- 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 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.

Supreme Court Resources

Top Websites

<https://www.scotusblog.com> Latest updates, data, analysis

<https://www.oyez.org>. Case summaries, audio with photo of justice speaking

<https://www.supremecourt.gov> Briefs, Transcripts, Audio

“Supreme Court Shenanigans.” <https://www.youtube.com/watch?v=dDYFiq1l5Dg>

Merits Docket — Agenda Setting

- 7,000 to 8,000 appeals per year
 - *amicus curiae* friend of the court briefs
- Rule of 4: required to grant *certiorari*
- 63 Cases heard in person by April 2022 in 2021
Term begun on 1st Monday in Oct.
- 63 decisions issued by 6/30/22

Parents Involved in Community Schools v. Seattle School District No. 1

In Seattle and Louisville school boards that had for many years operated segregated schools switched to achieve racially diverse enrollments involving transfers challenged by a white student wanting to attend closer to home.

In a 5-4 2007 decision Justice Roberts applied strict scrutiny finding that diversity was not a compelling interest that justified the use of race in selecting students for admission to public schools and that doing so violated the Equal Protection Clause.

Contrary to the 5-4 *Bakke* decision using intermediate scrutiny that would allow affirmative action, he reasoned that *Brown v Board of Education* required a color blind approach.

Criminal Due Process

Kimbrough v US. 2007. 7-2.

Congress enacted a federal sentencing policy of punishing crimes involving crack cocaine at a 100-to-1 ratio compared to crimes involving powder cocaine. Sentencing guidelines prescribe the same sentence for a defendant convicted of dealing 500 grams of powder as they do for a defendant dealing only 5 grams of crack. Justice Ginsburg held that the Federal Sentencing Guidelines were advisory, upholding the trial court's imposition of a lighter sentence.

Vega v. Tekoh,

Alito opinion for 6-3 majority holds that “a violation of *Miranda* does not necessarily constitute a violation of the Constitution” denying the claim for damages against the government.