

Has the Supreme Court Been More a Friend or Foe to African Americans?

Michael J. Klarman

According to conventional wisdom, the U.S. Supreme Court heroically defends unpopular religious and racial minority groups from majoritarian oppression. As Justice Hugo Black stated in a landmark 1940 decision, the Court protects the rights of the “helpless, weak . . . or . . . non-conforming victims of prejudice.” This view, however, is deeply flawed: a quick review of American history reveals that the Court, more often than not, has been a regressive force on racial issues.

Before the Civil War, the Court upheld federal fugitive slave laws against substantial constitutional challenges, and it invalidated the laws of Northern states that were designed to protect free blacks from kidnapping by slave catchers. In the infamous *Dred Scott* decision of 1857, the Court voided an effort by Congress to restrict the spread of slavery into federal territories, and it denied that even free blacks possessed any rights “which the white man was bound to respect.” After the Civil War, the Court relied on legal technicalities to free the perpetrators of white-on-black lynchings and racial massacres, and it invalidated a federal law designed to secure blacks equal access to public accommodations. Well into the twentieth century, the Court mostly sustained the constitutionality of state-mandated racial segregation and various Southern state measures for disenfranchising African Americans.

The long history of the Court’s complicity in racial oppression is often hidden behind the ro-

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romantic image of the Court as savior of African Americans that derives largely from *Brown v. Board of Education* and its immediate progeny. To be sure, the Court's epic 1954 ruling, which invalidated state-mandated segregation in public schools, was of enormous symbolic importance to blacks – “the greatest victory for the Negro people since the Emancipation Proclamation,” according to many contemporary black newspapers. By making Jim Crow seem more vulnerable, *Brown* raised the hopes and expectations of black Americans and helped catalyze the transformative racial change accomplished by the civil rights movement of the 1960s.

Yet one should not exaggerate the importance of the Court's contribution to racial progress. The *Brown* decision itself reflected social and political change as much as it caused them. The ruling would not have been possible without the tremendous impetus for progressive racial change provided by World War II. The war's anti-Fascist ideology, the battlefield contributions of African American soldiers, the growing political power of blacks that resulted from their mass migration from the rural South to the urban North, and the Cold War imperative for racial change that followed the war (that is, the perceived need for Americans to counteract Soviet racial propaganda by dismantling Jim Crow) all laid the groundwork for the Court's decision. In their internal deliberations in *Brown*, the justices candidly noted their amazement at the progressive racial change of the preceding decade, commenting on the “spectacular” advances and the “constant progress” being made.

Moreover, the Court followed its bold pronouncement in *Brown* with a remedial decree so weak and vacillating that it probably encouraged white Southerners to believe that the justices could be intim-

idated into backing down. Then, after *Brown II*, the Court essentially vacated the field of school desegregation for the better part of a decade – with one notable exception, in which the Court was confronted with outright defiance by a Southern governor. The justices apparently had concluded that they had no further constructive role to play until national public opinion, the president, and Congress rallied behind the Court's decisions. No such show of support was immediately forthcoming. As a result, as late as 1964 – a full decade after *Brown* – only one or two Southern black children in a hundred attended a desegregated school.

As the direct action phase of the civil rights movement – sit-ins, freedom rides, and street demonstrations – swept the nation in the early 1960s, the justices began to reassert themselves, both with regard to school desegregation and other racial issues. In 1963, the Court warned that the desegregation context had been “significantly altered” since 1954/1955 and that desegregation plans that “eight years ago might have been deemed sufficient” were no longer so. In 1964, the justices ruled that closing public schools to avoid court-ordered desegregation was unconstitutional, and in 1968, they held that the constitutionality of school desegregation plans depended on whether they produced meaningful integration, not just formal desegregation. During the 1960s, the Court also went to great lengths to overturn the criminal convictions of sit-in demonstrators, created new constitutional law to protect the NAACP from legal harassment by Southern states, expanded the range of private actors subject to the Fourteenth Amendment's antidiscrimination command, and upheld broad exercises of congressional power on behalf of civil rights.

Furthermore, the justices of the Warren Court revolutionized the rights of criminal defendants (who were disproportionately members of racial minority groups), and they transformed the law of federal courts in an effort to prevent Southern states from nullifying the constitutional rights of civil rights protesters. For a short decade, the Court came about as close as it ever has to actualizing its romantic image as a protector of racial minorities.

Then, just as the civil rights movement reached its zenith, shifting social and political conditions disrupted racial progress. Opinion polls had ranked civil rights foremost on the nation's political agenda from Summer 1963 through Spring 1965, but the war in Vietnam then displaced it. Moreover, as civil rights leaders shifted their focus to the North and broadened their objectives to include economic redistribution, many previously sympathetic whites withdrew their support. Less than six weeks after President Lyndon Johnson signed the Voting Rights Act into law in Summer 1965, a devastating race riot swept through the Watts neighborhood of Los Angeles, killing thirty-four people; it served as a harbinger of dozens of other race riots in that decade. By the mid- to late 1960s, black nationalism, which often eschewed racial integration as a goal and nonviolence as a tactic, was sowing divisions within civil rights organizations and souring many white Americans on racial reform. "We shall overcome" proved to be a far more appealing message to most whites than "burn, baby, burn."

Indeed, white voter backlash was already beginning to manifest itself in national politics. In 1964, the Republican Party nominated Senator Barry Goldwater, a vocal opponent of that year's Civil Rights Act, as its presidential candidate. Goldwater's nomination accelerated a

national political realignment, as five Deep South states voted Republican for the first time since Reconstruction, while blacks deserted the party of Lincoln in droves. By 1966, a racial backlash among whites was also evident in the North, as urban race riots, proposals for fair housing legislation, and black demands for economic empowerment sundered the civil rights coalition. In 1968, Republican candidate Richard M. Nixon won the presidency on a platform emphasizing law and order, a relaxed pace for school desegregation in the South, and neighborhood schools (that is, no busing) in the North. Ninety-seven percent of blacks voted for Democrat Hubert Humphrey that year, but only 35 percent of whites did so. The 14 percent of voters who supported the third-party bid of the notoriously racist George Wallace provided a temptation for the Republican Party to move even further to the right on race issues in the future. Nixon's victory at the polls translated directly into changes in the Court's racial jurisprudence: he appointed four new justices during his first term.

In its initial rulings on school desegregation, however, the Burger Court, so named for Chief Justice Warren Burger, who was appointed by Nixon during his first year in office, continued to push aggressively for change. When the Court declared in 1969 that desegregation extensions would no longer be granted to school districts, Nixon privately raged at "the Court's naive stupidity," and he denounced the justices as "irresponsible ... clowns." As late as 1971, the Court unanimously sustained student busing as a remedy for school segregation and approved the imposition of sweeping desegregation orders upon proof of fairly minimal constitutional violations.

Yet the Court quickly drew the line at a school district's boundaries. In 1974,

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the Court decided its most important school desegregation case since *Brown*. In *Milliken v. Bradley*, by a five-to-four vote, the justices barred the inclusion of largely white suburbs within an urban school desegregation decree, absent proof that school district lines had been racially gerrymandered. As a result, federal courts were disabled from accomplishing meaningful school desegregation in most cities, where white residents had recently flocked to the suburbs. Nixon's appointees comprised four of the five justices in the majority in *Milliken*. The Warren Court almost certainly would have decided differently the issue of interdistrict busing orders. Whether it could have made such a ruling stick in light of hostile public opinion is another question.

On another racial issue of critical importance, the Burger Court ruled in *Washington v. Davis* (1976) that laws making no racial classification would receive heightened judicial scrutiny only if they were illicitly *motivated*; showing that a law simply had a disproportionately burdensome *impact* on racial minorities was deemed insufficient to establish a violation of the Equal Protection Clause. To illustrate the consequences of this ruling, consider the dispute over the vastly disparate punishments prescribed by federal law for possession of crack and powder cocaine. Under federal sentencing guidelines, possession of five grams of crack is punished the same as possession of five *hundred* grams of powder cocaine. It turns out that 90 percent of crack defendants are black, while three quarters of powder defendants are white. Yet, under *Washington v. Davis*, lower courts have generally ruled that this enormous racial disparity does not violate the Equal Protection Clause because challengers have been unable to

show that a racially discriminatory motive underlay the disparate penalties.

In the famous *Bakke* decision of 1978, the Burger Court issued another landmark ruling on race that pointed in the same direction: affirmative action – that is, the use of racial preferences to advantage traditionally disfavored racial minorities – was subject to the same strict judicial scrutiny as was traditional Jim Crow legislation. Conservative justices, then and since, have read the Fourteenth Amendment, which was adopted in order to protect the newly freed slaves from racial discrimination with regard to their civil rights, as a mandate of government color blindness. The Court's overall record on race-based affirmative action has been mixed since *Bakke*. The conservative justices have almost invariably voted to invalidate such programs, while the liberal justices have almost always voted to sustain them. Individual case outcomes generally have been determined by the votes of swing justices – first, Lewis Powell, and then Sandra Day O'Connor. But the Court has invalidated more affirmative action programs than it has sustained.

The conservative justices' hostility to affirmative action reflects a constitutional double standard. These are the same justices who ordinarily – for example, in cases involving abortion, gay rights, or physician-assisted suicide – profess commitments to judicial restraint, democratic decision-making, respect for states rights, and an interpretive methodology of textualism and originalism. Yet all these considerations point in the direction of permitting race-based affirmative action. To strike down affirmative action programs is for unelected judges to invalidate the policy preferences of state and local governments on a thin constitutional basis. The text of the Fourteenth Amendment says nothing

about government color blindness – indeed, it doesn't even mention race – and the original understanding of those who adopted and ratified the amendment was plainly not a mandate of color blindness. The Framers of the Fourteenth Amendment (and their constituents) were too racist to require government to eschew all racial classifications. They thought that laws disenfranchising blacks, excluding them from jury service, segregating them in schools, and forbidding interracial marriage were plainly constitutional.

The Rehnquist Court – named for William H. Rehnquist, who was promoted from Associate to Chief Justice in 1986 – pretty consistently ruled against the interests of racial minorities, though most of its decisions were narrowly divided along partisan political lines. Since Presidents Reagan and Bush appointed five new justices to the Court between 1981 and 1991, the conservatives have enjoyed a secure majority on most racial issues (though, interestingly, not on other constitutional issues, such as abortion, gay rights, the death penalty, or the separation of church and state). By 1991, the last ten appointments to the Court had been made by Republican presidents, none of whom won much more than 10 percent of the black vote at the polls.

It was the Rehnquist-led conservatives who sounded the death knell for court-ordered school desegregation. In a case from Oklahoma City in 1991, a narrowly divided Court ruled that once a school board had complied in good faith for a “reasonable period of time” with a desegregation order, and the vestiges of past discrimination had been eliminated “to the extent practicable,” the school district was entitled to be released from federal supervision. If terminating a de-

segregation decree under these conditions resulted in increased school segregation, then private housing preferences were probably the cause, according to the conservative majority, and responsibility could not be ascribed to the state. In short, these justices' patience for court-ordered school desegregation had run out.

In 1995, the conservative justices indicated that their tolerance for remedial alternatives to busing had also run thin. In a five-to-four decision, the Court forbade the use of magnet school programs for the purpose of enticing suburban whites into racially integrated urban schools and imposed virtually insurmountable hurdles to judicially mandated increases in educational funding as a remedy for school segregation.

In addition to curbing court-ordered school desegregation and race-based affirmative action, the Rehnquist Court's conservative majority inaugurated a new strand of constitutional jurisprudence that called into question the permissibility of legislative districts that were gerrymandered to enhance the prospects of minority racial groups electing representatives of their own choice. In a series of five-to-four decisions, the Court ruled that the Fourteenth Amendment presumptively bars such districts when the predominant motive behind their creation was racial. As with the conservative justices' posture toward affirmative action, these decisions are difficult to reconcile with the original understanding of the Fourteenth Amendment, which plainly did not protect political rights such as voting. Moreover, these rulings stand in stark contrast with the conservative justices' insistence that *political* gerrymandering is a nonjusticiable political question.

Perhaps most disturbing, the Rehnquist Court proved largely indifferent to race discrimination in the criminal jus-

Michael J.
Klarman

tice system. In *McCleskey v. Kemp* (1987), the conservative justices narrowly rejected an equal-protection challenge to the discriminatory administration of the death penalty in Georgia. Specifically, according to a study that the justices stipulated to be valid for purposes of the case, defendants who murdered whites were 4.3 times more likely to receive the death penalty than were those who murdered blacks. In essence, Georgia was undervaluing the lives of its black citizens, by declining to enforce capital punishment as vigorously when blacks were murdered as when whites were. Rejecting the challenge, the Court observed that race discrimination could not possibly be entirely eliminated from the administration of the death penalty so long as actors integral to the system – such as prosecutors and jurors – exercised significant discretion. The majority also noted that similar racial disparities existed throughout the criminal justice system, which meant that vindicating McCleskey’s claim would have had potentially enormous consequences. (One may be pardoned for wondering why this observation did not make McCleskey’s claim more compelling rather than less so.)

Similarly, in *United States v. Armstrong* (1996), the Court imposed a virtually insurmountable hurdle for defendants who alleged racially selective prosecution. Before black defendants could gain discovery – access to the prosecutor’s files – on such claims, they had to demonstrate that similarly situated whites had not been prosecuted. Yet this was the very point on which discovery was sought. Although the justices in cases that challenged the constitutionality of minority voting districts had frowned on the assumption that blacks and whites generally have different political preferences (which might warrant creating

majority-black districts), *Armstrong* rejected the lower court’s assumption that all crimes are equally likely to be committed by members of all races. The fact that in the preceding year this particular U.S. attorney’s office had prosecuted twenty-four blacks and not a single white for crack distribution did not establish the prima facie case of selective prosecution that was necessary to justify an order for discovery. The vote in *Armstrong* was eight-to-one, which suggests that even today’s liberal justices are less sensitive to racial discrimination in the criminal justice system than were their predecessors on the Warren Court.

In 2007, another slim conservative majority brought the Court’s racial jurisprudence full circle from *Brown*. The Court had ruled in 1954 that state-mandated racial segregation in schools violated the Fourteenth Amendment. In 2007, the conservative majority ruled that for school districts to take the race of students into account in order to promote racial *integration* also violated the Fourteenth Amendment.

The majority in *Parents Involved* (2007) spoke of the constitutional mandate of color blindness without offering any textual or historical argument in support (probably because, as already noted, no convincing arguments of these sorts exist). Instead, the conservatives relied most heavily on *Brown* and, extraordinarily, on the NAACP’s arguments to the Court in *Brown* – an unusual source of constitutional interpretation, to say the least. *Brown*, of course, need not be read to forbid all government racial classifications; it can just as easily be interpreted to forbid only those racial classifications adopted for the purpose, or having the effect, of disadvantaging historically oppressed racial minorities. It is true that the NAACP argued in *Brown* for

a constitutional mandate of color blindness, but that is not what the Court gave it. The justices in 1954 were too wary of calling into question antimiscegenation laws – an especially explosive political issue at the time – to insist on government color blindness across the board. Moreover, the conservative justices in *Parents Involved* took the NAACP's *Brown* argument badly out of context: the NAACP had argued for government color blindness during an era of formal Jim Crow. To portray the NAACP as repudiating race-conscious government measures designed to remedy past discrimination at a time when nobody could have dreamed of legislatures adopting such measures smacks of disingenuousness.

What lessons might one draw from this brief excursion through the last fifty years of the Supreme Court's racial jurisprudence? Let me suggest three. First, the composition of the Court matters. Second, politics matters because it influences the composition of the Court. Third, the justices broadly reflect the political and social climate of their eras; none of the Court's race rulings during the last half-century has veered far from dominant public opinion.

Regarding Lesson One, most of the Court's prominent race rulings since 1970 have been five-to-four decisions. Had there been one more liberal justice on the Court, many of these cases likely would have been decided differently. It was not predestined that the Court would reject race-based affirmative action, terminate the school desegregation project, or reject the argument that the Constitution bars racially disparate impacts regardless of discriminatory motive. Constitutional interpretation involves judicial discretion; judicial discretion reflects political ideology; and

conservative justices tend, unsurprisingly, to subscribe to the conservative racial ideology of the party that appointed them. That ideology embraces a narrow, formalist conception of what counts as race discrimination; abhors the use of racial preferences, whether benignly motivated or not; and deems this nation's ugly history of white supremacy as something more to be repudiated than remedied.

With regard to Lesson Two, while the political composition of the U.S. Supreme Court is partly fortuitous, the victories of the conservative bloc of justices on race issues since 1970 have predominantly been a function of politics. Between 1968 and 2008, Republicans controlled the presidency for twenty-eight years, Democrats for only twelve. Of the fourteen appointments made to the Supreme Court between 1969 and 2006, twelve were made by Republican presidents, most of whom prided themselves on their conservative politics. Because constitutional interpretation is so inextricably fused with politics, it should come as no surprise that justices appointed by presidents for whom very few black people voted would decide race-inflected cases in ways that contravened the preferences of most African Americans.

As to Lesson Three, one has to wonder how much difference it would have made had the liberal justices triumphed on some of these racial issues. Public opposition to court-ordered busing was so intense by the early 1970s – think of the 1974 anti-busing riots in Boston, the so-called cradle of abolitionism – that a contrary decision in *Milliken* might have either spawned a constitutional amendment to overturn the ruling or inspired massive defiance. A conservative majority of justices has succeeded in invalidating most affirmative action plans reach-

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ing the Court, but even when the liberals have scored an occasional triumph, as with the University of Michigan Law School case in 2003, that result has been overturned at the polls, as most Americans seem inclined to support referenda forbidding “benign” racial preferences. The Court’s conservative racial rulings in the criminal procedure context mirror well the starkly retributive turn in penology that began in the 1970s. Finally, by the time the Court, in 2007, invalidated race-based pupil assignment policies in grade schools that were designed to promote integration, only 5 or 10 percent of all school districts employed such policies; most of the country had already given up on racial integration.

In sum, while the last forty years of conservative hegemony on the Court has yielded racially regressive results pretty much across the board, one should not absolve the larger society that the Court serves of responsibility for such outcomes. The Supreme Court mirrors society at least as much as it shapes it. The conservative justices could not have foisted such a regressive racial jurisprudence on the American people without their acquiescence.