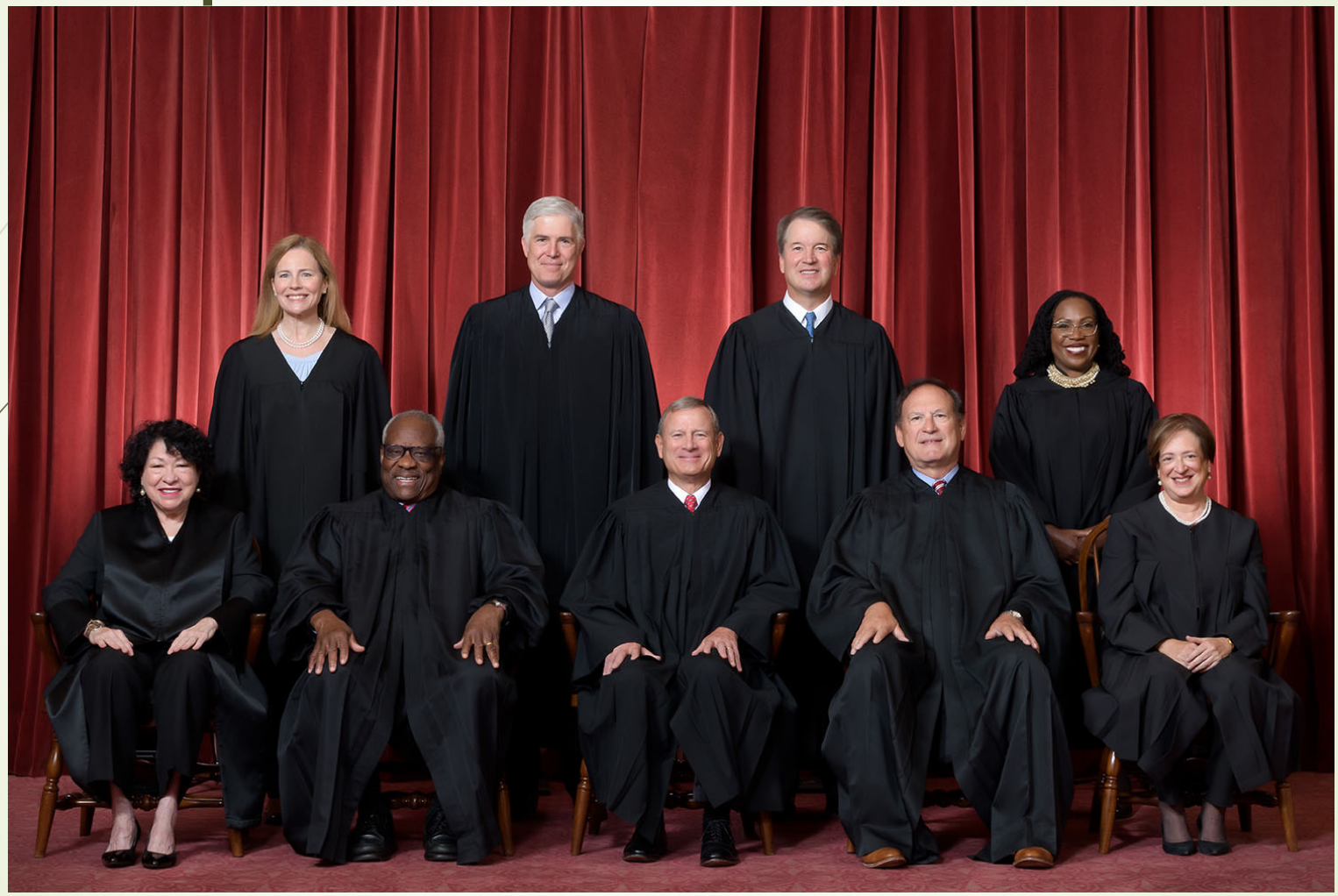
THE THIRD BRANCH:

The Supreme Court of the United States (SCOTUS) Week 4

Nils Pedersen & Joyce Francis

Fall 2022, Jefferson County Library

Supreme Court Justices – OT 2022



Ruth Marcus's Opinion Essay
"You thought the Supreme Court's last term was bad? Brace Yourself."

Source: https://www.washingtonpost.com/opinions/2022/09/30/supreme-court-term-conservative-targets

- *"The conservative wing has at times **displayed an unseemly haste** . . . **Nothing** in the behavior of the court's emboldened majority **suggests any inclination to pull back on the throttle."***
- *"…seized opportunities…to **reshape the law,**" often through "cert before judgment."*
  - *…reached out to decide a dispute about when the **Clean Water Act** applies to wetlands, even as the EPA rewrites its rules on that very issue."*
  - Agreed to consider a **Colorado wedding cake design/Gay Rights case**, even though state authorities had filed no complaint against the designer.
  - Took up affirmative action, "*although the **law in this area has been settled and there is no division among the lower courts**.*"
- **NOTE** - Granting certiorari before judgement by Court of Appeals is on the rise. 14 years→2019 = NONE, but 2019→present = 14 times. Source: https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment/

Ruth Marcus's Opinion Essay (cont.)

- *"…**Kavanaugh is the justice most likely to join Roberts in defecting from the conservative fold, but** Kavanaugh's approach has more often been to put a comforting gloss on the majority's version – and then sign on to it anyway."*
- *"…**overriding theme** of the coming term will be **race**…" –* **affirmative action cases** and *"the remaining shreds of the **Voting Rights Act**."*
- *The court is "**impatient…very convinced of its righteousness**."*
- *"…the conservative majority has demonstrated a consistent **willingness to employ decidedly unconservative means to achieve its desired result**."*
- *"…**I worry, for the court and for the country whose future it will shape**."*

A LOOK AHEAD

Supreme Court of the United States October Term 2022

SUPREME COURT INSTITUTE
GEORGETOWN UNIVERSITY LAW CENTER

Merrill v. Milligan

Q – Does Alabama's 2021 redistricting plan for its seven house seats violate s. 2 of the Voting Rights Act?

- AL's 2021 Congressional redistricting plan has one majority black district.
- Plaintiffs, black voters, allege that not having a second majority black district violates s. 2 of the voting rights act, which bars election practices that result in a denial or abridgement of the right to vote based on race.
- The District Court entered a preliminary injunction against the plan, finding that it likely violates s. 2 and ordered Alabama to draw a new map.
- The Supreme Court stayed the injunction by a 5-4 vote pending a decision on the merits, which is where we are now.
- This case was heard in the first week of October, right as the term started.

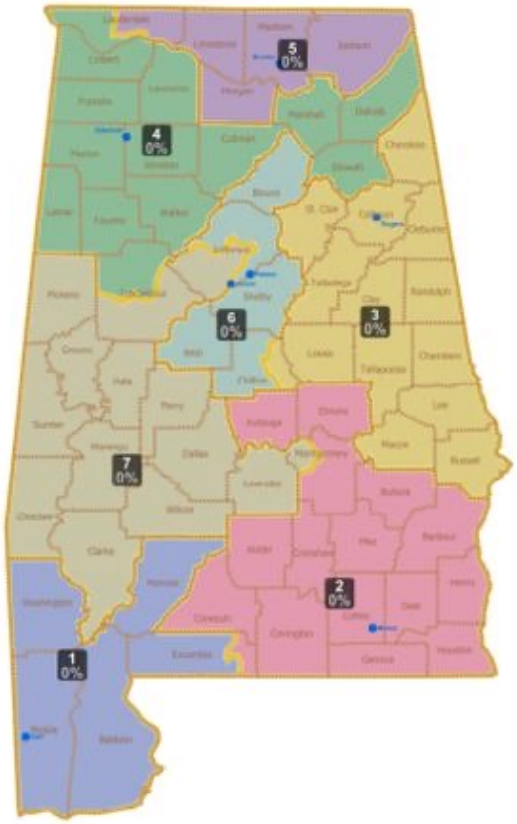
Merrill v. Milligan

Q – Does Alabama's 2021 redistricting plan for its seven house seats violate s. 2 of the Voting Rights Act?

- Alabama created the redistricting plan after the 2020 census. Roughly 27% of the state is Black, but only one district in the new plan is a majority-Black district.
- The state is asking to overturn the district court decision, arguing that ***the lower court's interpretation would itself require the state to discriminate based on race***.
- The challengers counter that if the justices accept the state's argument, it could "decimate minority representation across the country."
  - They argue that the state packed many Black voters into a single district in a part of Alabama known as the "Black Belt," an area running across the middle of the state and named for its black soil but also having a large Black population.
  - In that district, nearly 60% of registered voters are Black. The state's plan dispersed Black voters in the rest of the Black Belt into several other districts, each of which was made up of fewer than 31% Black voters.
- The effect of the map, they argue, is to minimize the number of districts in which Black voters can elect their chosen candidates. But the legislature could, and should, have created a second majority-Black district.

Merrill v. Milligan

- Alabama's congressional districts have had roughly the same configuration since 1993, with one majority-minority district out of its seven total districts (District 7).
- Data from the census showed that the racial diversity in the state had increased, with the portion of white residents having fallen from 68% to 64% over the prior ten years, while Alabama's Black population grew by 3.8 percent over the same period.



Merrill v. Milligan

Q – Does Alabama's 2021 redistricting plan for its seven house seats violate s. 2 of the Voting Rights Act

- A violation of s. 2 is established when the ***totality of the circumstances*** establishes that the political process is not equally open to minority voters in that they have less opportunity to participate and elect representatives of their choice.
- The leading case on this is ***Thornburg v. Gingles***, which identifies three preconditions for a claim of this type:
  - The minority group is sufficiently large and geographically compact to constitute a majority in a single member district;
  - The minority group is politically cohesive; and
  - The **white** majority votes sufficiently as a block to allow it to usually defeat the minority's preferred candidate.
- The first precondition is known as the "compactness" requirement and concerns whether a majority-minority district can be created. The second and third preconditions are collectively known as the "racially polarized voting" or "racial bloc voting" requirement, and they concern whether the voting patterns of the different racial groups are different from each other.

Merrill v. Milligan

Q – Does Alabama's 2021 redistricting plan for its seven house seats violate s. 2 of the Voting Rights Act

- The Gingles analysis was used by the district court and is at issue at the SCt.
- Alabama argues inter alia:
  - The challengers should also show that the state's redistricting plan diverges from 'neutrally drawn' redistricting plans, and
  - They must show that irregularities in the plan can **only be explained by racial discrimination**.
- This argument by AL seems clearly counter to the legislative intent of s. 2, and the SCt. has previously held that the section does **not** require actual proof of discriminatory intent.
- Alabama also argues that in the *Gingles* analysis, the challengers have to show that the minority group is sufficiently large and geographically compact to constitute a majority in a ***neutrally*** drawn plan, not just in challengers' illustrative plan.

Merrill v. Milligan

Q – Does Alabama's 2021 redistricting plan for its seven house seats violate s. 2 of the Voting Rights Act

- In other words, the state is arguing that for the challengers to win, they have to be able to show that in a ***racially neutral districting scheme, i.e. not considering race a factor at all in drawing lines***, they would have wound up with two districts, and not one.
- Challengers' response:
  - under current precedent, an intent to draw a majority-minority district does not trigger strict scrutiny;
  - The use of race as a predominant factor satisfies strict scrutiny when the districts are reasonably compact and conform to traditional districting principles; and
  - S. 2 does not require the state to adopt a plaintiff's illustrative districts, but could create a district in which a minority group is less than a majority but could elect the candidate of their choice through white cross-over voting.

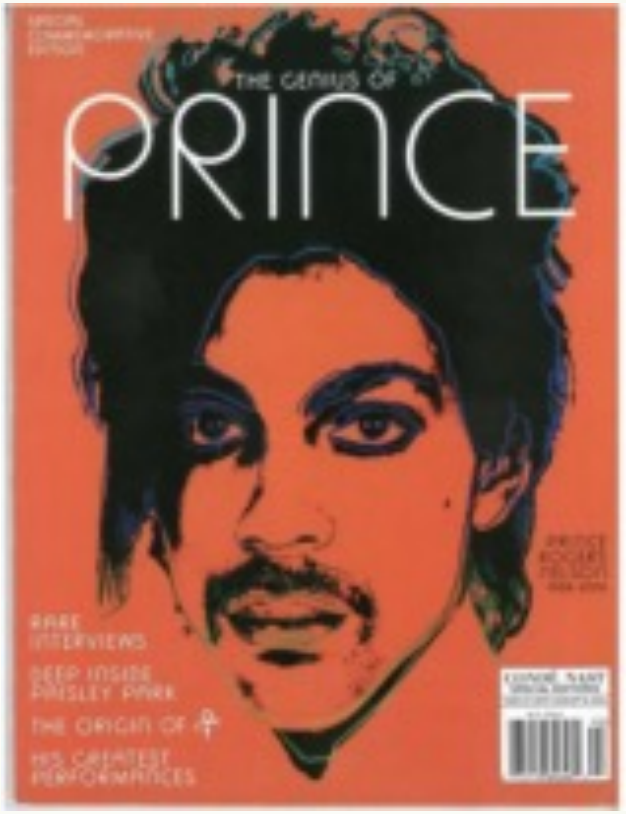
Merrill v. Milligan

Q – Does Alabama's 2021 redistricting plan for its seven house seats violate s. 2 of the Voting Rights Act

- Supreme Court oral argument:
  - J. Jackson pushed back against AL's argument, which is that S. 2 is "at war with itself and the Constitution" because requiring the state to create a majority-Black district would involve sorting voters based on race, which the 14th and 15th Amendments prohibit. Jackson pointed to what she described as the "race-conscious" goal of the drafters of the 14th Amendment. They were "trying to ensure that people who had been discriminated against … were actually brought equal to everyone else in society." "That's not a race-neutral or race-blind idea," Jackson concluded.
  - Js. Alito and Barrett picked up on the idea of needing a racially-neutral districting scheme to be illustrated by the challengers; Kavanaugh honed in on the question of whether a second majority-black district would be 'reasonably compact.'
- Prediction: 6-3 win for Alabama, with the court requiring modifying the Gingles test to require that illustrative redistricting maps be drawn racially neutral, making it much harder for challengers to establish a violation.

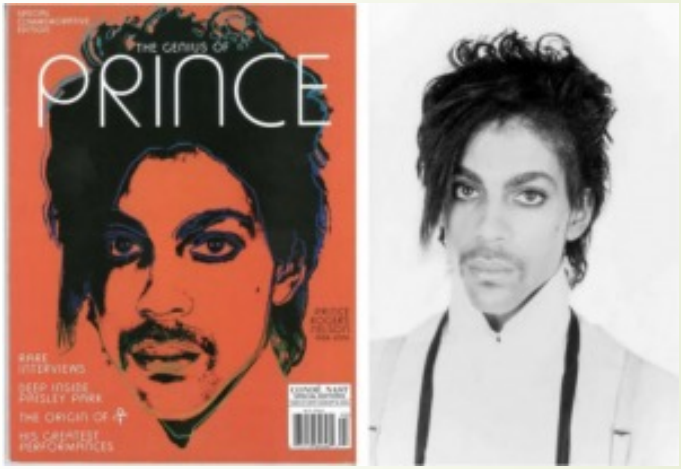
Andy Warhol Foundation v. Goldsmith

- The work on the right is an original photograph by Lynn Goldsmith from 1981.
- The work on the left was made by Vanity Fair & Andy Warhol (sort of) under license from Goldsmith in 1984.
- Conde Nast (owns Vanity Fair) used the 'Orange Prince' version on the left in a commemorative publication in 2016.



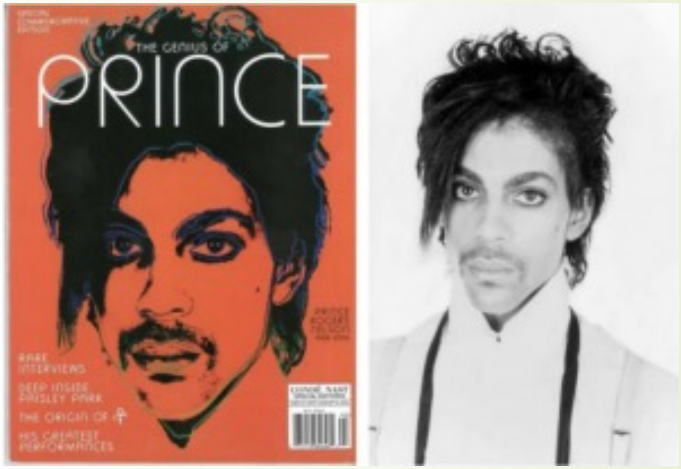
Andy Warhol Foundation v. Goldsmith

- The 2016 publication exceeded the license that was originally granted, which was just for the Vanity Fair article.
- Goldsmith sued the Andy Warhol Foundation, successor to Warhol's copyright in the Prince Series, for copyright infringement.
- The Foundation argues 'fair use' as a defense.
- The district court granted summary judgment for the Foundation, concluding that Warhol had "transformed" the original photograph by giving it a new "meaning and message."
- The U.S. Court of Appeals for the Second Circuit, holding that because the Prince Series remained "recognizably derived" from the original, it failed to transform and was thus not fair use.



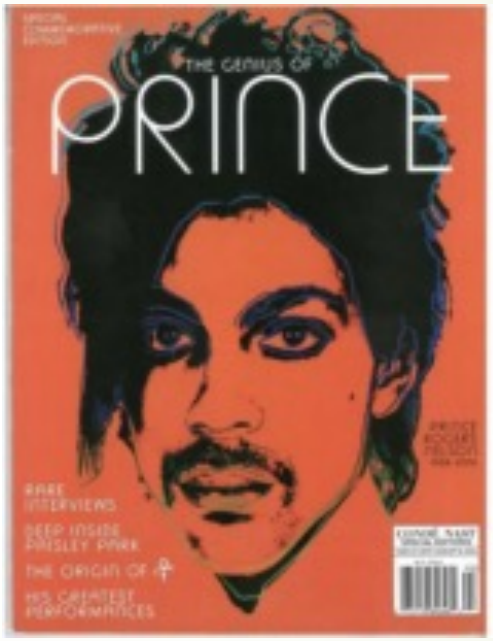
Andy Warhol Foundation v. Goldsmith

- **Fair use** is a copyright doctrine which permits limited use of copyrighted material without having to first acquire permission from the copyright holder.
- The doctrine is intended to balance the interests of copyright holders with the public interest in the wider distribution and use of creative works by allowing certain limited uses.
- Classic 'fair use' is for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. That is how I get away with copying both of these images here ☺.
- A recent and key consideration in 'fair use' analysis is whether the later work is 'transformative.' A transformative work transcends, or places in a new light, the underlying work on which it is based.



Andy Warhol Foundation v. Goldsmith

- Oral Argument was held October 12, with wide ranging discussion about what makes a work transformative.
- A pro-AWF decision could make it impossible for photographers to enforce licenses for artistic reproductions of the sort that Goldsmith originally sold to *Vanity Fair*.
- A less extreme opinion could find ***fair use*** in the fact that this was not just any artist's modification, but *Andy Warhol's* — but that risks furthering an already troubling trend in fair use cases — extending greater fair use solicitude to the well known and wealthy, and less to the poor and obscure.
- A pro-Goldsmith decision risks, as many amicus briefs have observed, "a whole generation of artists working today who will be chilled were this ruling to stand."



Moore v. Harper: More Redistricting…

- North Carolina gained a house seat after the 2020 census, so the Republican legislature redrew the electoral district maps.
- Lawsuits were filed in November 2021 claiming that the maps were both racially and partisan gerrymandered. While NC is 60% white and 40% minority, the redistricting gave Republicans 10 seats and Democrats 4. (In fact, according to Pew Research, the state is 41% R, 43% D, and 17% I.)
- The NC SCt finds that the maps are unconstitutional, orders them redrawn; the legislature's next attempt fails, a special master then redraws them and this revision is accepted by the Superior Court.
- The legislature then petitions SCOTUS to stay the new maps, which stay was denied as too close to an election; Alito, Thomas & Gorsuch dissent.
- The NC legislature asserts throughout this litigation the **Independent State Legislature** theory, which is based on the US Constitution's language:
  - "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof."

Independent State Legislature (ISL) Theory

- The Constitution delegates authority to regulate federal elections within a state to that state's "legislature."
- Traditionally, this is interpreted to refer to the legislative process used in the state as determined by that state's own constitution and laws.
- Advocates of ISL, however, interpret the constitution as limiting such authority to the state legislature **only**, so that the state's executive branch, judiciary, or other bodies have no powers of electoral oversight.
- Accordingly, in the event of a conflict between congressional election regulations enacted by a state's legislature and those derived from other sources of state law, ***that conflict must be resolved in favor of the state legislature's enactments***, even over the state's constitution or ballot initiatives that might modify a state constitution or decisions of the state's courts.
- Proponents of ISL further claim that adjudicating such purported conflicts is the province of the federal judiciary.

Moore v. Harper

- So how does the ISL affect this case?
- The argument is that under the ISL, the NC judiciary does not have the power to strike down the legislature's action in redrawing the districts, as the US constitution, they argue, says that only the legislature of the state can prescribe how elections are carried out. So all of the state courts' actions should have no effect.
- The general argument **against** ISL is that a state legislature, at the time of framing as an entity, was created and constrained by its constitution. It was widely understood that state courts have authority to enforce those constraints. The Elections Clause thus ***incorporates the understanding*** that a legislature cannot legislate in a way that violates its own constitution.
- Commentators seem to think that the ISL is a tough argument to sell to a majority of the SCt.
- There did however seem to be some consideration that a narrowly tailored decision in favor of the NC legislature could be produced given specific facts surrounding the NC constitution. Alito seems to be the one in NC's corner.

Haarland v. Brackeen and related cases involving the Indian Child Welfare Act

- Haaland v. Brackeen is brought by the states of Texas, Louisiana, and Indiana, and individual plaintiffs, and seeks to declare the Indian Child Welfare Act (ICWA) unconstitutional.
- The matter originally came up in Texas District Court on an adoption petition filed by Chad and Jennifer Brackeen. After their effort was challenged by the Navajo Tribe, the Brackeens brought suit in the U.S. District Court in Fort Worth. The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians intervened in the case. The U.S. District Court declared that the ICWA was unconstitutional and the case was appealed.
- The Fifth Circuit Court of Appeals held that parts of the law, that set federal standards for lower and state courts, were constitutional; but that the parts of the law that required state agencies to perform certain acts were unconstitutional as a violation of the Tenth Amendment.

Haarland v. Brackeen and related cases involving the Indian Child Welfare Act (ICWA)

- In 1978, the Congress enacted the ICWA to protect American Indian children from removal from their tribes to be adopted by non-Indians. As many as 35 percent of Indian children were being removed from their homes and being placed in non-Indian homes. This was often not in the best interest of the child, but part of a targeted process of assimilation.
- Congress established the following order of priorities for placing an Indian child who had to be removed from a home:
  - First, the child should be placed with a member of the child's extended family,
  - Second, the child could be placed with a family or foster home approved by the child's tribe, or
  - third, they could be placed with other Indian families or Indian foster homes.

Haarland v. Brackeen and related cases involving the Indian Child Welfare Act (ICWA)

- The Fifth Circuit Opinion (for review by SCOTUS) specifically finds:
  - the court unanimously ruled that at least one party had standing to bring the suit, and a majority held that Congress had the *authority* to enact the ICWA.
  - the "Indian child" classification does not violate 'equal protection.' (*US v. Antelope* had held "that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications.")
  - It did however find that the adoptive placement and preference for an "Indian foster home" violates equal protection.
  - The court also held that the ICWA's requirements for "active efforts," an expert witness, and recordkeeping requirements unconstitutionally 'commandeer' state actors, violating the *Tenth Amendment*. The commandeering doctrine says that 'The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program.'
  - These are the essential issues presented to SCOTUS and are set for oral argument November 9.

Abortion: Follow up re State Laws

- www.reproductiverights.org/maps/abortion-laws-by-state/

Affirmative Action

Students for Fair Admission v. Harvard
Students for Fair Admission v. UNC

PRECEDENTS BEING QUESTIONED:

- ***Grutter v. Bollinger*** (2003) – SCOTUS held that **universities and colleges MAY consider the race of an applicant** as a plus factor in admissions in order to further the **compelling interest in the educational benefits of a diverse student body**.
- ***Fisher v. University of Texas*** (AKA *Fisher II* – 2016) – SCOTUS summarized the educational **benefits of diversity** to include:
  - the **destruction of stereotypes**,
  - the promotion of **cross-racial understanding**,
  - the preparation of a student body for an **increasingly diverse workforce and society**, and
  - the cultivation of a set of **leaders with legitimacy in the eyes of the citizenry**.

Affirmative Action (cont.)

ORAL ARGUMENTS – **October 31**. The cases were originally merged, but Justice **Jackson recused herself from the Harvard case** because she had until recently served on Harvard's board of overseers. Thus, **the court separated the cases again, but they were heard on the same day**.

QUESTIONS:

- **Both Cases –** Should the Court **overrule *Grutter v. Bollinger*** and hold that **institutions of higher learning cannot use race as a plus factor in admissions**, as it violates the Equal Protection Clause of 14th Amendment and Title VI of the 1964 Civil Rights Act?
- **Harvard Case –** Is Harvard **violating Title VI** by **penalizing Asian-American applicants**, engaging in racial balancing, **overemphasizing race**, and rejecting workable race-neutral alternatives?
- **UNC Case** – Can UNC **reject a race-neutral alternative** because it would change the composition of the student body, **without proving that the alternative would cause a dramatic sacrifice** in academic quality or the educational benefits of overall student-body diversity?

Affirmative Action (cont.)

PETITIONER'S ARGUMENTS: ***Grutter* should be overturned** because:

- **Equal Protection Clause (14th Amendment) prohibits any use of race preference**, a theory encapsulated in Justice John Marshall Harlan's famous phrase from his dissent in *Plessy v. Ferguson* that our **"constitution is color-blind."** This argument was also used to win *Brown v. Board of Education* case, so petitioners argue, ***"If Brown is right, Grutter is wrong."***
- **Strict Scrutiny** – **Educational benefits of diversity does not satisfy strict scrutiny**, meaning necessary to achieve a "compelling state interest."
  - Diversity's educational benefits are **not compelling**
  - **False**ly based on idea that **race can serve as a proxy for students' experiences and views.**
  - States' experiences without racial preferences demonstrate that **diversity can be obtained by other means**
  - Affirmative action **inevitably harms other minority groups** – e.g. Jews & Asians

Affirmative Action (cont.)

UNIVERSITIES' ARGUMENTS

- It is **almost impossible to read the *Brown* decision** and come away with the view **that it established that the Constitution is color-blind**.
- Instead, its holding rested on its assessment that **segregation stigmatizes Black students as inferior**.
- **Originalist Argument** – In the immediate wake of the 14th Amendment's adoption, **Congress authorized race-conscious measures to benefit Black citizens**, including in the field of education.
- ***Stare Decisis*** – Petitioner offers **nothing to demonstrate** that there has been any **significant change in the law or the facts since *Grutter*** that would justify its overruling.

Affirmative Action (cont.)

PANEL'S ANALYSIS - Court is **likely to overrule *Grutter***, **but how** it chooses to do so could make a world of difference:

- **Benefits of Diversity** – If Court finds no compelling interest in the educational benefits of diversity (thereby overturning *Fisher II*), **other means of pursuing** that goal – e.g. reducing emphasis on legacy admission or standardized tests, increased emphasis on socioeconomic factors – **could be called into question.**
- **Focus on Race** – Court could overrule on **narrower grounds**, that a university **may not pursue diversity by using race** as a factor in admissions.

PANEL'S PREDICTION – Court will **condemn the express use of race** to further the benefits of educational diversity, **without calling into question other race-neutral approaches**.

Source: https://www.law.georgetown.edu/supreme-court-institute/wp-content/uploads/sites/13/2022/09/OT22-Term-Preview-Final.pdf

Affirmative Action (cont.)

PUBLIC OPINION – A national Pew Research Center poll in April found 74% of the public hostile to racial preferences, including:

Hispanics (68%)	Republicans (87%)
Asians (63%)	Democrats (62%)
Blacks (59%)	

GEORGE WILL – SCOTUS *"can bolster the wholesome belief held by a large, diverse American majority: that the nation's laws should be colorblind. Affirmation of this precept is urgently needed by a nation saturated with the racial obsessions that identity politics encourages, especially on campuses."*

ADAM CHILTON – *"If SFFA wins, universities will accelerate their abandonment of standardized tests (e.g., the SAT). This will help institutions hide discriminatory practices in an opaque 'holistic' process."*

Source: https://www.washingtonpost.com/opinions/2022/10/28/college-racial-discrimination-affirmative-action-supreme-court/

SAT Participation and Performance: Score Distributions by Subgroup

Data reflect SAT test activity for students who graduated high school in 2022. If a student took the SAT more than once, the most recent score is summarized.

	Total Students	Female	Male	American Indian	Asian	African American	Hispanic	Native Hawaiian	White	Two or More Races
Test Takers	90,642	45,504	44,938	1,212	4,217	9,980	7,564	66	62,358	2,390
Total Score										
1400–1600	4%	3%	5%	1%	25%	0%	1%	3%	4%	7%
1200–1390	13%	13%	14%	5%	22%	3%	7%	9%	15%	19%
1000–1190	30%	31%	29%	23%	25%	13%	22%	33%	34%	35%
800–990	37%	39%	35%	46%	21%	44%	45%	39%	36%	31%
600–790	16%	14%	18%	25%	7%	38%	24%	15%	11%	7%
400–590	0%	0%	0%	0%	0%	1%	0%	0%	0%	0%

Source: https://www.powerlineblog.com/archives/2022/10/the-daily-chart-group-disparities-in-education.php

1st Amendment – Compelled Speech
303 Creative LLC v. Elenis

QUESTION – Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the 1st Amendment.

"Congress shall make no law…abridging the freedom of speech..."

PRECEDENTS:

- ***Hurley v. Irish-Am LGB Group of Boston*** (1995) – SCOTUS ruled that requiring the St. Patrick's Day Parade to allow the LGB group to march with its own banner would force the organization to express a message it did not wish to convey Compelling speech is a violation of 1st amendment free speech.
- ***Masterpiece Cakeshop Ltd. V. CO Civil Rights Comm.*** (2018) – A similar case over baking a same-sex wedding cake, which CO found violated its Anti-Discrimination Act. SCOTUS skirted the 1st Amendment issue by ruling that the commission exhibited hostility to the baker's religious beliefs.

1st Amendment – Compelled Speech (cont.)

FACTS OF THE CASE:

- Petitioner is a **wedding website design company who wishes to design only for same-sex couples** (stating that on their website), as **gay marriage violates the petitioner's religious beliefs**.
- **Petitioner filed suit against CO** for its anti-discrimination act (CADA)
- Federal district court ruled for CO, and the **10th Circuit confirmed**.

PETITIONER'S ARGUMENTS:

- Because their website services are speech, **CADA's application compels them to create messages that are contrary to their views**.
- CADA's application **does not pass Strict Scrutiny**, as there is no evidence that same-sex couples lack access to wedding-website designers, no matter how unique.

1st Amendment – Compelled Speech (cont.)

DEFENDENT'S ARGUMENT – **CADA**'s prohibition on publishing discriminatory services **does not violate the Free Speech Clause because it prohibits only speech that promotes unlawful conduct**, and such speech is **not protected by the 1st Amendment.**

PANEL'S ANALYSIS – Difficulty is drawing **line between refusal to serve based on identity versus refusal to serve based on message.**

- **Precedent is unlikely to be determinative**.
- **More likely to guide the Court** is its assessment of:
  - the extent to which **petitioners' position undercuts traditional public-accommodations law** (if website designers are artists (message makers), what of chefs, tailors, jewelry makers, architects, etc.), and
  - the extent to which the **State's position has troubling consequences for free speech** (10th Circuit agreed that CADA compelled speech but not that this violated 1st Amendment).

1st Amendment – Compelled Speech (cont.)

PANEL'S PREDICTION – Colorado's biggest hurdle is overcoming:

- **Court's sympathy for persons who sincerely believe** that creating content celebrating same-sex marriages violates their religious beliefs, and
- Court's likely belief that **same-sex couples can readily find the services** they need from other commercial actors.

JOYCE'S QUESTION – If states can decide abortion guidelines, **why can't states decide where the line is between service and speech?**