THE THIRD BRANCH:
The Supreme Court of the United States (SCOTUS)
Week 2

Nils Pedersen & Joyce Francis

Fall 2023, Jefferson County Library

JUSTICES OF THE U.S. SUPREME COURT

October Term 2021

October Term 2022 & 2023

STUDENT DEBT RELIEF

HISTORY:

- After 9/11 - Congress passed the **HEROES Act, giving the Secretary of Education the power to respond to a "national emergency"** by "waiv[ing] or modify[ing] any statutory or regulatory provision" governing the student-loan programs **so that borrowers are not "placed in a worse position financially" because of the national emergency.**
- March, 2020 - The SecEd **suspended both federal-student-loan repayments**, as well as accrual of interest.
- August, 2022 – Biden announced **plan to forgive ~$430 billion**:
  - $10,000 relief to borrowers with current income <$125,000
  - $20,000 relief to borrowers who had received Pell Grants (offered to low-income students)

STUDENT DEBT RELIEF – Case #1
Department of Education v. Brown

TEXAS RESPONDENTS – Argued HEROES Act does not authorize such a debt-relief plan.

- **Myra Brown** was not eligible for student-debt relief because her student loans were not federal, but held by commercial lenders.
- **Alexander Taylor** was eligible for the $10K relief but not the $20K, as he did not receive a Pell Grant.

U.S. DISTRICT COURT – Agreed with Brown/Taylor that the program was an unconstitutional exercise of legislative power vested in congress and issued a nationwide injunction (pending appeal to the 5th Circuit, which had declined to freeze injunction). Both lower courts granted Brown & Taylor standing.

SUPREME COURT – 12 days after the Court accepted the *Biden v. Nebraska* case, it fast-tracked this case (Cert before Judgement) to consider the two cases at the same time.

STUDENT DEBT RELIEF – Case #1 (cont)

Department of Education v. Brown

LEGAL QUESTIONS:

- **Standing** – Do Brown & Taylor have Article III standing to challenge the plan?
- **Merit** – Is the plan an unconstitutional exercise of legislative power by the Depart of Education?

RESPONDENTS' ARGUMENT – The Biden administration did not follow proper procedures when it enacted the plan. They **should have had an opportunity to submit comments on the plan in which they would have urged the government to enact a different/more expansive plan which might have benefitted them**, thus they were harmed.

STUDENT DEBT RELIEF – Case #1 (cont)

Department of Education v. Brown

SCOTUS RULING - Unanimous decision written by Alito:

- **Brown and Taylor lacked standing**, failed to offer convincing connection between the plan and injury to them
- Judgment of the TX District Court is **vacated with costs**,
- 5th Circuit is instructed to **dismiss the appeal**
- **Brown & Taylor are ordered to pay $3,760.13** to the Department of Education

Supreme Court of the United States

No. 22–535

DEPARTMENT OF EDUCATION, ET AL.,

Petitioners

v.

MYRA BROWN, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the United States District Court for the Northern District of Texas is vacated with costs, and the case is remanded to the United States Court of Appeals for the Fifth Circuit with instructions to dismiss.

IT IS FURTHER ORDERED that the petitioners, Department of Education, et al., recover from Myra Brown, et al., Three Thousand Seven Hundred Sixty Dollars and Thirteen Cents ($3,760.13) for costs herein expended.

June 30, 2023

Printing of joint appendix: $3,760.13

A True copy SCOTT S. HARRIS
Clerk of the Supreme Court of the United States

STUDENT DEBT RELIEF – Case #1 (cont)
Department of Education v. Brown

- **WHY TAKE THE CASE?**
  - **Soften Blow from *Biden v. Missouri* decision** issued on the same day?
  - **Message to 5th Circuit?** – 3rd time this term that SCOTUS overturned 5th Circuit decisions based on standing.
- **WHY $3,760.13?** – No clue!

STUDENT DEBT RELIEF – Case #2

Biden v. Nebraska

RESPONDENTS – Nebraska & 5 other states with Republican attorneys general challenged the loan forgiveness plan, arguing that it **violated the separation of powers and the Administrative Procedures Act**.

DISTRICT COURT – Dismissed the challenge, finding that the **states lacked standing** to sue.

8th CIRCUIT – **Accepted the states' appeal (thereby validating standing)** and enjoined the forgiveness program pending action by SCOTUS on petition for Cert before Judgment.

QUESTIONS:

- Do Nebraska and other states have **judicial standing** to challenge?
- Does the program **exceed the statutory authority** of the SecEd **or violate the Administrative Procedure Act?**

STUDENT DEBT RELIEF – Case #2 (cont.)

Biden v. Nebraska

SCOTUS RULING – 6:3 decision written by Roberts (Kagan dissented, joined by Sotomayor & Jackson):

- **Missouri has standing** (and thus so do 5 others) because MOHELA (a non--profit government corporation created by Missouri to service loans) stands to lose ~$44 million a year in fees, and the **harm to MOHELA in the performance of its public function is an injury to Missouri itself**.
- **SecED's authorization** to "waive or modify" **does not extend to canceling $430 billion in loan principal.**
- **Invoking the "Major Questions Doctrine,"** (more coming soon in Nils's review of EPA case) Roberts argued that, **if Congress wanted to give an administrative agency the power to make decisions of vast economic or political significance, it must have clearly said so.**

STUDENT DEBT RELIEF – Case #2 (cont.)
Biden v. Nebraska

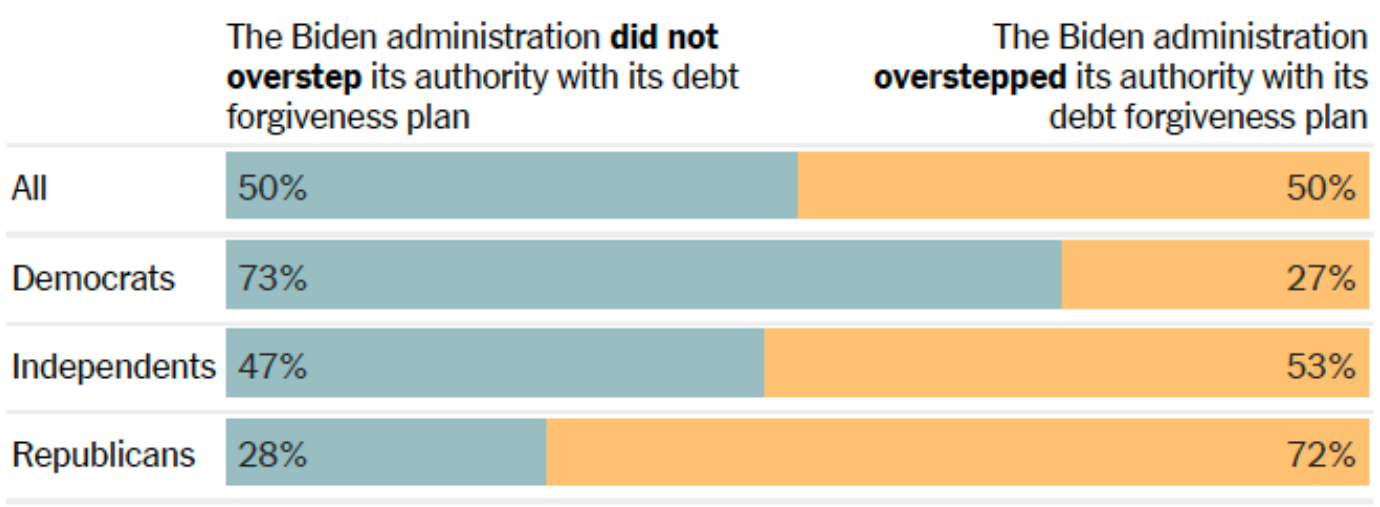
KAGAN'S DISSENT (joined by Sotomayor & Jackson):

- The majority's ruling **reflects "the Court's own concerns over the exercise of administrative power."**
- The Court's reliance on **the "major questions doctrine" overrules Congress's decisions about when and how to delegate.**
- "And that is **a major problem, not just for governance, but for democracy** too," because when the Court steps in, it "becomes the arbiter – indeed, the maker – of national policy."

STUDENT DEBT RELIEF – Case #2 (cont.)

Biden v. Nebraska

Where the public stands



Question wording: The Biden administration announced plans to give up to $20,000 in student loan forgiveness to people who make less than $125,000 a year. Some people think that the Biden administration overstepped its authority with this debt forgiveness plan. Other people disagree and think the Biden administration did not overstep its authority. What do you think? | Source: SCOTUSPoll

The New York Times | https://nyti.ms/43xL9Bt

STUDENT DEBT RELIEF – Case #2 (cont.)

Biden v. Nebraska

ALARM BELLS FROM COURT WATCHERS:

- *"Welcome to year three of a constitutional revolution…The next item on the conservative bloc's radical agenda is a **wholesale assault on the administrative state."***
  Dahlia Lithwick & Mark Joseph Stern in *Slate*
- *"By gutting regulators, and knowing our gridlocked Congress won't pick up the slack, **these unelected justices will be executing their own 'power grab.'"***
  Aaron Tang in *Politico*
- *"Ruling creates open season on programs like Medicare & Social Security through **government by injunction**."*

Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, UT at Austin School of Law
American Constitution Society – SCOTUS Review OT 2022
https://www.youtube.com/watch?v=_5UbR-o9rTE
08:20→15:30

Allen (formerly 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, alleged 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 Federal 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 US Supreme Court stayed the injunction by a 5-4 vote pending a decision on the merits.
- This case was heard in the first week of October, right as the term started.

Allen v. Milligan

- Alabama created the redistricting plan after the 2020 census. Roughly 27% of the state is Black, but only one district out of seven in the 2020 plan is majority-Black.
- The state asked to overturn the district court decision, arguing that ***the lower court's interpretation would itself require the state to discriminate based on race***.
- The plaintiff/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 and that the legislature could, and should, have created a second majority-Black district.

Allen 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.

Allen v. Milligan

Our Question again: 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 (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 (>700k people in a 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.

Allen v. Milligan

- The **Gingles** analysis was used by the district court and is at issue at the SCt.
- **Alabama** argues inter alia (among other things):
  - The challengers should **also** have to show that the state's redistricting plan **diverges from 'neutrally drawn' redistricting plans**, and
  - They must also 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 <u>neutrally</u> drawn plan, not just in challengers' illustrative plan***.

Allen v. Milligan

- So for the challengers to win, according to Alabama, 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 also conform to *traditional districting principles;* and
  - S. 2 does not require the state to adopt a plaintiff's illustrative districts, so it could create a district in which a minority group is *less* than a majority but where the candidate of their choice might be elected through white cross-over voting.

Allen v. Milligan

- 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.**"
  - 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.'
- **My earlier 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.

Allen v. Milligan

Supreme Court's Actual Decision (I was wrong!):

- The Court ruled **5–4** that Alabama's districts **likely violated the VRA**, upheld the District Court injunction that required Alabama to create an additional majority-minority district, and held that Section 2 of the VRA is constitutional in the redistricting context.
- The decision was an alignment of (perhaps) the more moderate conservatives (Roberts and Kavanaugh) with the 'liberal' justices, Sotomayor, Kagan and Jackson.

Allen v. Milligan

Roberts:

- Roberts rejected two of the state's arguments regarding the Gingles framework.
- One, that the maps that the challengers offered fell short because they failed to keep the Gulf Coast region, in the southwest part of the state, in the same district. "Only two witnesses testified that the Gulf Coast was" the kind of "community of interest" that should be preserved in the same district. The challengers' maps "joined together a different community of interest called the Black Belt," an area with a large number of rural Black voters, many of whom are the descendants of former enslaved persons.
- Roberts next dismissed the state's argument that the challengers' maps, unlike the state's maps, fail to retain the "core" of the previous maps. The Supreme Court, he stressed, "has never held that a State's adherence to a previously used districting plan can defeat a" Section 2 claim. Otherwise, he said, states could "immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan."

Allen v. Milligan

Roberts:

- The real issue before the court, Roberts explained, was "Alabama's attempt to remake our §2 jurisprudence anew" by focusing on ***computer-generated maps*** that are created **without considering race at all**. But **that single-minded focus on the computer-generated maps – the so-called "race-neutral benchmark" – is inconsistent with the VRA's requirement that courts look at the entirety of the circumstances**,
- Roberts also pushed back against the argument that a race-neutral benchmark should be used because case law "inevitably" requires states to ensure that the number of majority-minority districts is representative of the state's demographics. **Section 2 creates no such obligation, Roberts said, and limitations imposed by the Gingles framework have meant that, in recent years, Section 2 lawsuits have rarely been successful. The "exacting requirements" of Section 2, Roberts said, "limit judicial intervention to 'those instances of intensive racial politics' where the 'excessive role [of race] in the electoral process … den[ies] minority voters equal opportunity to participate."**
- Roberts rejected the state's contention that the challengers should be required to show that any differences between the state's plan and any race-neutral benchmarks can only be explained by racial discrimination. **Both the court's own cases and Congress "clearly" declined to require an intent to discriminate as a condition for liability** under Section 2, he explained.

Allen v. Milligan

Kavanaugh:

Joined in Roberts' opinion except for one section of the opinion.

Thomas:

Dissented and was joined by Alito, Gorsuch and Barrett:

'These cases "are yet another installment in the 'disastrous misadventure' of this Court's voting rights jurisprudence" ' the opinion starts.

Significance:

This case is an example of the ongoing debate of the legitimacy of considering race in public life. There is a group at the SCt that clearly believes that race should, pretty much, never be allowed to be a consideration by government, even when government is attempting to *correct* racial discrimination. In this case at least, Jackson's view that you can't address a problem of racial discrimination without considering race won out.

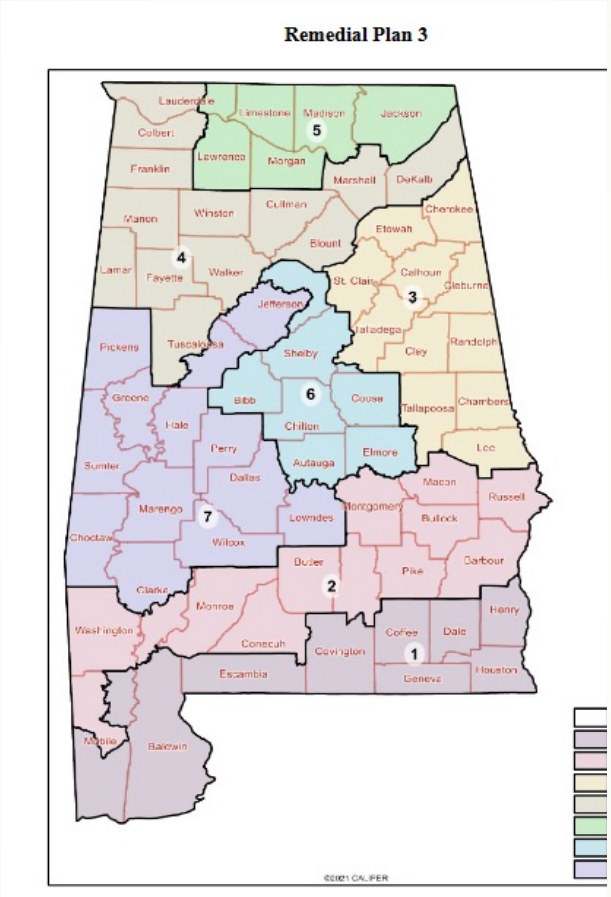
Allen v. Milligan

Aftermath

- On June 12,the Supreme Court lifted the stay on the district court's decision.
- On June 15, the Alabama Attorney General's office informed the District Court that the Legislature would draft and pass a new congressional district map by July 21. (The defendants had asserted that any map must be in place by October 1, a month prior to Alabama's candidate filing deadline for the 2024 general elections.)
- In July 2023, the Alabama legislature created a new redistricting map that still had only one black-majority district, while raising the proportion of blacks of voting age in a second district. This map was approved by Alabama Governor Kay Ivey. Democratic lawmakers criticized the map for failing to meet the two black-majority district requirement.
- The district court rejected the new maps on September 5, ruling that they were "deeply troubled" by the legislature's failure to follow the court order, and assigned a special master to redraw new districts.
- The special master submitted three options for redistricting that includes the required two black-majority districts by September 25, 2023, to be reviewed by the three-judge panel. The judges' panel selected one of these for their approval on October 5.
- Alabama attorney general Steve Marshall had filed for an emergency stay of the rejection of the legislatures revised maps to the U.S. Supreme Court, but the Court denied the request on September 26, 2023. Marshall then dismissed the state's remaining appeal to the Supreme Court against the district court's order on September 29, while the state's lawyers argued to the district court that the special master's proposed maps were racial gerrymanders.

Allen v. Milligan

- Remedial Plan 3 was chosen by the District Court
- 2nd: BVAP of 48.7%
- 7th BVAP of 51.9%
- July map: 7th has BVAP of 50.65% and a 2nd district with a BVAP of less than 40%



AFFIRMATIVE ACTION

Students for Fair Admission v. Harvard & UNC

PETITIONER: SFFA is a non-profit organization whose stated purpose is **"to defend human and civil rights secured by law**, including the right of individuals to equal protection under the law." SFFA alleged that:

- **Harvard's use of race** as an admission factor violates title VI of the 1964 Civil Rights act by **discriminating against Asian American applicants** in favor of white applicants, and
- **UNC's use of race** as an admission **violates the 14th Amendment** (equal protection).

LOWER COURTS:

- In both cases, the **district courts ruled for the universities**.
- **Harvard's case was affirmed by 1st Circuit. SCOTUS accepted SFFA's appeal and took the UNC case from the 4th Circuit as "cert before judgment."**

AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. Harvard & UNC

LEGAL QUESTIONS:

- **May institutions of higher education use race as a factor in admissions? If so,**
  - **does Harvard College's race-conscious admission process violate Title VI of the Civil Rights Act of 1964?**
  - **does UNC's race-conscious admission process violate the 14th Amendment?**

REPONDENTS: Both schools **acknowledge using race** as one of many factors in admission but argue that their **processes adhere to the requirements outlined in the Supreme Court's decision in *Grutter v. Bollinger*.**

AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. Harvard & UNC

SCOTUS HISTORY ON RACE:

- **1896 – *Plessy v. Ferguson*** – 8:1 decision **codifying the *"separate but equal"* doctrine**, fostering Jim Crow laws for the next half-century. Lone voice John Marshall Harlan dissented, *"Our constitution is color-blind, and neither knows nor tolerates classes among citizens."*
- ***1954 – Brown v. Board of Education*** – Unanimous decision that *"racial segregation in* [public, K→12] *education was inherently unequal,"* thus violating the Equal Protection Clause and therefore unconstitutional
- **1976 – *Runyon v. McCrary*** – Barred racial segregation in <u>private</u> (K→12) schools

AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. Harvard & UNC

SCOTUS HISTORY ON RACE (cont.):

- **1978 – *Regents of the University of California v. Bakke* –** Upheld affirmative action (race one of several factors) in college admission policy while declaring racial quotas impermissible.
- **2003 – *Grutter v. Bollinger* – Sandra Day O'Connor** wrote opinion affirming *Bakke* (above) and student body diversity as "*a compelling state interest*" but warning that, **in 25 years, *"the use of racial preferences will no longer be necessary to further the interest"* of diversity.**

AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. Harvard & UNC

SCOTUS RULING – 6:3 (UNC) & 6:2 (Harvard) decision written by Roberts (Sotomayor, Kagan & Jackson [UNC] dissenting)

- **Value of diversity appeals are too vague and rely on stereotyping** (assume all identity group members share same perspectives)
- ***"College admissions are zero-sum"*** so advantages to one group come at the expense of others.
- Preferences **lack a *"logical end point"*** suggested by O'Connor
- Colleges MAY consider an applicant's explanation of how race influenced their character in a way that would have a concrete effect on the university, but a **student *"must be treated…as an individual, not on the basis of race."***

AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. Harvard & UNC

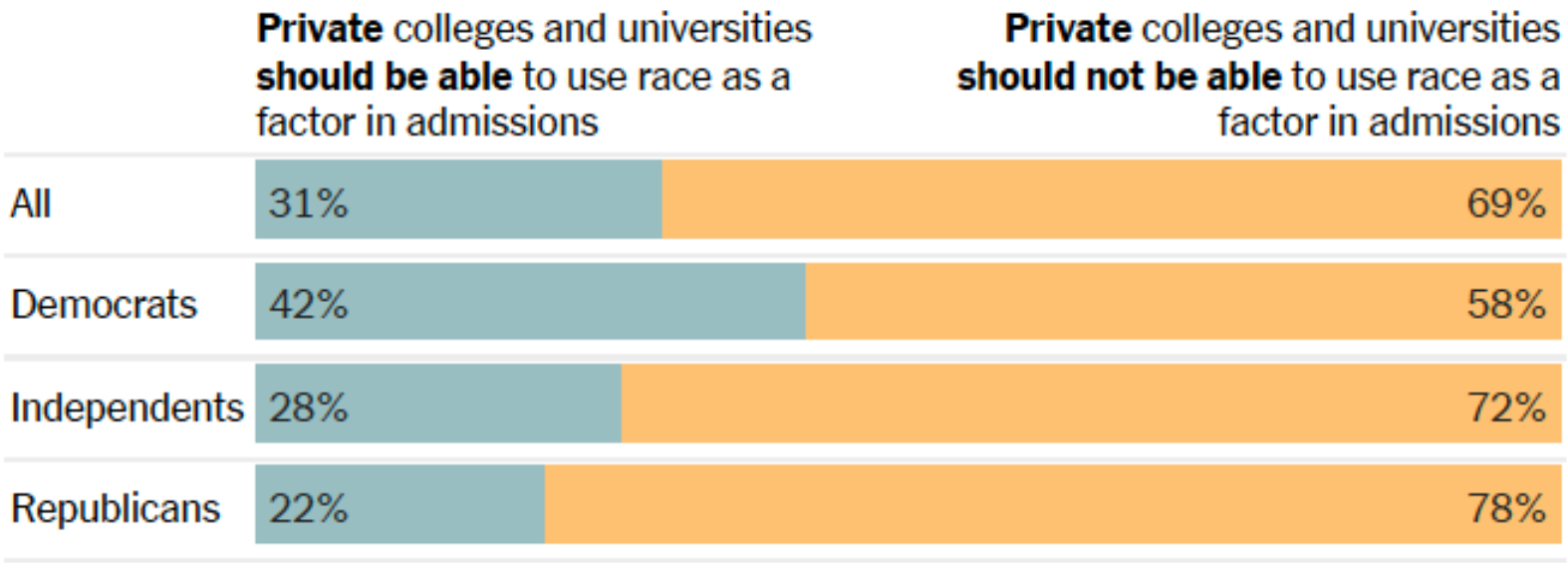
DISSENT:

- **Sotomayor** - a self-identified "*perfect affirmative action baby*" – said the decision ***"cement[ed] a superficial rule of colorblindness as a constitutional principle in an endemically segregated society."***
- **Jackson** opined that the decision ***"fails to acknowledge the well-documented intergenerational transmission of inequality that still plagues our citizenry."***

AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. Harvard

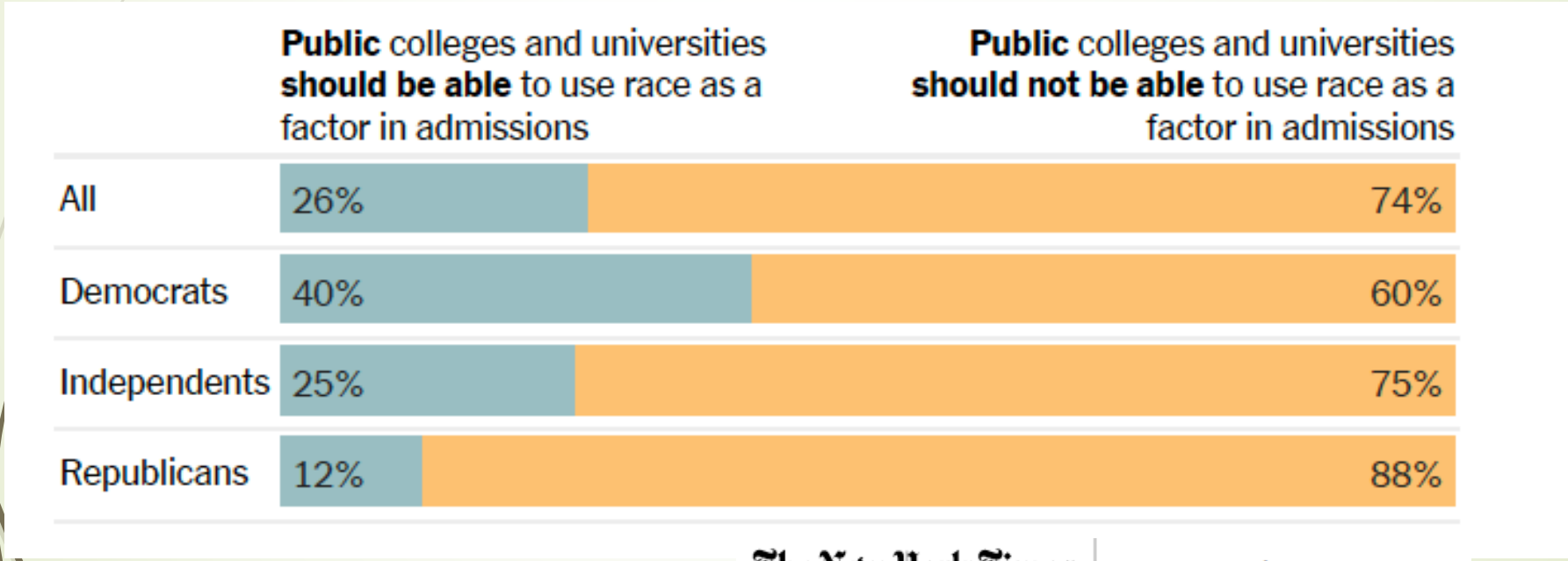
Where the public stands on <u>private</u> colleges and universities



AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. UNC

Where the public stands on <u>public</u> colleges and universities:



AFFIRMATIVE ACTION (cont.)

Students for Fair Admission v. Harvard & UNC

COURT WATCHER CRITIQUE:

"Ruling disregarded long precedents…Court is untethered to the record of lower courts."

Debo Adegbile, Partner & Chair of the Anti-Discrimination Practice
Commissioner for the U.S. Civil Rights Commission
American Constitution Society – SCOTUS Review OT 2022
https://www.youtube.com/watch?v=_5UbR-o9rTE

1:21:47→1:29:00

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 in 2021 claim that the maps were both **racially** and **partisan gerrymandered**. While NC is 60% white and 40% minority (1.5:1), the redistricting gave Republicans 10 seats and Democrats 4 (2.5:1). (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 under the North Carolina constitution**, and orders them redrawn; the legislature's next attempt fails, a special master then redraws them and this revision is accepted by the NC Superior Court.
- The **NC legislature** then petitions SCOTUS to stay the new maps, which stay was denied as too close to an election (Alito, Thomas & Gorsuch dissent), asserting the **Independent State Legislature** theory, which is based on the **U.S.** 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 and interpreted under 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 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 only.

Moore v. Harper

- Under the ISL, the NC judiciary does not have the power to strike down the legislature's action in redrawing the districts. The NC state courts' actions should have no effect.
- The general argument **against** ISL is that a state legislature, at the time of framing it as an entity, was created and constrained by its constitution. It was widely understood at the time that state courts have authority to enforce those constraints. The Elections Clause of the US Constitution thus incorporates the understanding that **a legislature cannot legislate in a way that violates its own constitution**.
- Commentators did seem to think that the ISL would be 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 seemed to be the one in NC's corner.

Moore v. Harper

- At oral argument last December, observers thought that the ISL theory was rejected by the three liberal justices (Sotomayor, Kagan, and Jackson) along with Chief Justice Roberts and Justices Kavanaugh and Barrett. Roberts was thought to be looking to overturn the North Carolina Court decision in a way that did not embrace ISL. Alito, Thomas, and Gorsuch appeared to embrace concepts of the ISL.
- **But wait!** In the November '22 elections, Republicans gained a 5-2 majority on the NC Supreme court, and in February 2023 they agreed to reconsider the prior NC SCt's ruling; by April 2023, the North Carolina Supreme Court **reversed** the previous ruling, stating that **under the state's constitution, the judiciary branch cannot override the districting set out by the state legislature**. With the NC SCt thus reversing itself, **the case should be moot**. (Moot: made abstract or purely academic.)
- **May 12, 2023:** Some urged the Supreme Court to go ahead and decide the case, so the Court heard argument on whether it has the power to reach a decision.

Moore v. Harper

- **Decision(s):**
  - In June 2023, the Supreme Court ruled in a 6–3 decision that **the Elections Clause does not give state legislatures sole power over elections, rejecting independent state legislature theory**.
  - The opinion is by **Roberts**, joined by Kagan, Sotomayor, Kavanaugh, Barrett, and Jackson.
  - **Roberts** first goes through a long technical discussion why they still have jurisdiction over the case; in short, while the NC SCt reversed the prior NC SCt ruling, they did not actually overturn the case, just change the rule from the case. Thus, the US SCt still has jurisdiction over the case because its judgement can affect an outcome in that case regarding which maps are in place. Although partisan gerrymandering claims are no longer viable under the North Carolina Constitution, the North Carolina Supreme Court did nothing to alter the effect of the judgment in the earlier case enjoining the use of the 2021 maps. As a result, the legislative defendants' path to complete relief runs through the Supreme Court and it still has jurisdiction.

Moore v. Harper

- **Decision(s):**
  - **Roberts** then proceeds to dismiss the Independent Legislature Theory:

"**The Elections Clause does not vest exclusive and independent authority in state legislatures to set the rules regarding federal elections**. *Marbury* v. *Madison,* … proclaimed this Court's authority to invalidate laws that violate the Federal Constitution. But *Marbury* did not invent the concept of judicial review. **State courts had already begun to impose restraints on state legislatures, even before the Constitutional Convention, and the practice continued to mature during the founding era.** … the concept of judicial review was so entrenched by the time the Court decided *Marbury* that Chief Justice **Marshall referred to it as one of society's "fundamental principles." The Elections Clause does not carve out an exception to that fundamental principle.** When state legislatures prescribe the rules concerning federal elections, they remain subject to the ordinary exercise of state judicial review.

Moore v. Harper

- **Decision(s):**
  - Roberts went on to cite a number of cases in which the Supreme Court had in fact found that state legislatures were under the constraints of their constitutions and state referendums even when acting under their authority under the elections clause of the constitution.
  - **'Historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. Two state constitutional provisions adopted shortly after the founding expressly constrained state legislative action under the Elections Clause… In addition, multiple state constitutions at the time of the founding regulated the "manner" of federal elections by requiring that "elections shall be by ballot."'**
  - 'Although the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, federal courts must not abandon their duty to exercise judicial review. This Court has an obligation to ensure that state court interpretations of state law do not evade federal law.'

Moore v. Harper

- **Decision(s):**
  - The dissent by Thomas was focused on the taking of the case, as they thought the case was moot.

Ongoing…

Redistricting after 2020 Census (from the Brennan Center and SCOTUS Blog):

- As of July, litigation has also resulted in redrawn legislative and/or congressional maps in Alaska, Maryland, New York, Ohio, and South Carolina.
- Congressional maps are also expected to be redrawn in time for the 2024 election in Louisiana after a federal court found that the maps adopted by the state's legislature violate Section 2 of the Voting Rights Act, though an appeal is ongoing with respect to the Louisiana map.
- A federal court has also ordered South Carolina to redraw its congressional map after finding that the configuration of one district was an unconstitutional racial gerrymander. However, the deadline for adopting a new map is not until 30 days after the Supreme Court adjudicates an ongoing appeal of the case. Because a decision in the South Carolina appeal may not come until the summer of 2024, it is unclear whether it will be possible to implement a new map for the 2024 election cycle. Oral argument was heard last week.

Preview of Cases for Week 3

INDIAN CHILD WELFARE ACT

- *Haarland v. Brackeen*

SCOPE OF WATERS OF THE U.S.

- *Sackett v. EPA*

TIME OFF FOR THE SABBATH

- *Groff v. DeJoy*

FREE SPEECH EXCEPTIONS TO NONDISCRIMINATION LAW

- *303 Creative LLC v. Elenis*

Hope to see you next week!