Our Current Supreme Court: Not Conservative, But Fractured

Cases Mentioned in the Presentation
(in order of appearance)

Gonzales v. Raich (2005) (Stephens)— held, over Justice Thomas' dissent, that a congressional law could forbid "window box" marijuana growing despite its legality under state law.

Lochner v. New York (1905) (Peckham) — a conservative-activist majority strikes down a state "maximum hours" law on the pretext that it violates "liberty . . . without due process of law."

Roe v. Wade (Blackmun) 1973)—a liberal-activist majority strikes down the abortion laws of all 50 state on the pretext that they violate "liberty . . . without due process of law."

Counterman v. Colorado (2023) (Kagan)—the court analyzes the "free speech" guarantee of the First Amendment using only cases from the era of liberal activist majorities.

Haaland v. Brackeen (2023) (Barrett)—the court extends Congress's power under the Commerce Clause to include home placement of Indian Children,

Bostock v. Clayton County (2020) (Gorsuch) - the court decides that discrimination "on the basis of sex" in the 1964 Civil Rights Act is not limited to men and women, but includes gender preference and identity.

NFIB v. Sebelius (2012) (Roberts)—one of three cases upholding the Affordable Care Act (Obamacare)

Health and Hospital Corp. of Marion County v. Talevski (2023) (Jackson)—further extends the force of Congress's spending power by giving the force of law to contract terms between the federal government and grantees.

303Creative v. Elenis.(2023) (Gorsuch)—applies liberal "free speech" precedents to uphold right of web designer not to design for same-sex weddings.

Sackett v. EPA (2023) (Alito), **Biden v. Nebraska** (Roberts) (2023), **NFIB v. Dept of Labor** (2022) (per curiam)—all examples of ensuring that executive branch agencies remain within the limits of authorizing legislation.

New York State Rifle and Pistol Assn. v. Bruen (2023) (Thomas)—declines to extend liberal activist "balancing tests" to the Second Amendment.

Students for Fair Admissions v. Harvard; **Students for Fair Admissions v. Univ. of North Carolina** (2023 (Roberts)—held that racial and ethnic discrimination in college admissions violates the Equal Protection Clause of the 14th Amendment ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

Current Members

John G. Roberts, Jr., Chief Justice of the United States,
was born in Buffalo, New York, January 27, 1955. He married Jane Sullivan in 1996 and they have two children - Josephine and Jack. He received an A.B. from Harvard College in 1976 and a J.D. from Harvard Law School in 1979. He served as a law clerk for Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit from 1979–1980, and as a law clerk for then-Associate Justice William H. Rehnquist of the Supreme Court of the United States during the 1980 Term. He served as a Special Assistant to the Attorney General of the United States from 1981–1982, Associate Counsel to President Ronald Reagan, White House Counsel's Office from 1982–1986, and as Principal Deputy Solicitor General from 1989–1993. From 1986–1989 and 1993–2003, he practiced law in Washington, D.C. He served as a Judge on the Court of Appeals for the District of Columbia Circuit from 2003–2005. Nominated as Chief Justice of the United States by President George W. Bush, he assumed that office on September 29, 2005.

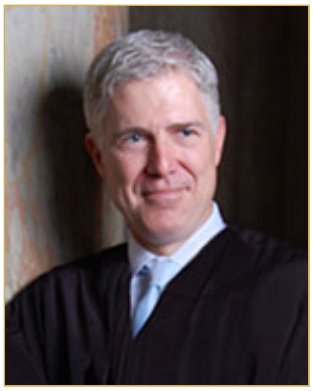
Clarence Thomas, Associate Justice,
was born in the Pinpoint community near Savannah, Georgia on June 23, 1948. He attended Conception Seminary from 1967-1968 and received an A.B., cum laude, from College of the Holy Cross in 1971 and a J.D. from Yale Law School in 1974. He was admitted to law practice in Missouri in 1974, and served as an Assistant Attorney General of Missouri, 1974-1977; an attorney with the Monsanto Company, 1977-1979; and Legislative Assistant to Senator John Danforth, 1979-1981. From 1981–1982 he served as Assistant Secretary for Civil Rights, U.S. Department of Education, and as Chairman of the U.S. Equal Employment Opportunity Commission, 1982-1990. From 1990–1991, he served as a Judge on the United States Court of Appeals for the District of Columbia Circuit. President Bush nominated him as an Associate Justice of the Supreme Court and he took his seat October 23, 1991. He married Virginia Lamp on May 30, 1987 and has one child, Jamal Adeen by a previous marriage.

Samuel A. Alito, Jr., Associate Justice,
was born in Trenton, New Jersey, on April 1, 1950. He married Martha-Ann Bomgardner in 1985, and has two children - Philip and Laura. He served as a law clerk for Leonard I. Garth of the United States Court of Appeals for the Third Circuit from 1976–1977. He served as an Assistant U.S. Attorney, District of New Jersey, 1977–1981, as Assistant to the Solicitor General, U.S. Department of Justice, 1981–1985, as Deputy Assistant Attorney General, U.S. Department of Justice, 1985–1987, and as U.S. Attorney, District of New Jersey, 1987–1990. He was appointed to the United States Court of Appeals for the Third Circuit in 1990. President George W. Bush nominated him as an Associate Justice of the Supreme Court, and he took his seat January 31, 2006.

Sonia Sotomayor, Associate Justice,
was born in Bronx, New York, on June 25, 1954. She earned a B.A. in 1976 from Princeton University, graduating summa cum laude and a member of Phi Beta Kappa and receiving the Pyne Prize, the highest academic honor Princeton awards to an undergraduate. In 1979, she earned a J.D. from Yale Law School where she served as an editor of the Yale Law Journal. She served as Assistant District Attorney in the New York County District Attorney's Office from 1979–1984. She then litigated international commercial matters in New York City at Pavia & Harcourt, where she served as an associate and then partner from 1984–1992. In 1991, President George H.W. Bush nominated her to the U.S. District Court, Southern District of New York, and she served in that role from 1992–1998.

In 1997, she was nominated by President Bill Clinton to the U.S. Court of Appeals f where she served from 1998–2009. President Barack Obama nominated her as an Supreme Court on May 26, 2009, and she assumed this role August 8, 2009.

Elena Kagan, Associate Justice,
was born in New York, New York, on April 28, 1960. She received an A.B. from Princeton in 1981, an M. Phil. from Oxford in 1983, and a J.D. from Harvard Law School in 1986. She clerked for Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit from 1986-1987 and for Justice Thurgood Marshall of the U.S. Supreme Court during the 1987 Term. After briefly practicing law at a Washington, D.C. law firm, she became a law professor, first at the University of Chicago Law School and later at Harvard Law School. She also served for four years in the Clinton Administration, as Associate Counsel to the President and then as Deputy Assistant to the President for Domestic Policy. Between 2003 and 2009, she served as the Dean of Harvard Law School. In 2009, President Obama nominated her as the Solicitor General of the United States. A year later, the President nominated her as an Associate Justice of the Supreme Court on May 10, 2010. She took her seat on August 7, 2010.



Neil M. Gorsuch, Associate Justice,
was born in Denver, Colorado, August 29, 1967. He and his wife Louise have two daughters. He received a B.A. from Columbia University, a J.D. from Harvard Law School, and a D.Phil. from Oxford University. He served as a law clerk to Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit, and as a law clerk to Justice Byron White and Justice Anthony M. Kennedy of the Supreme Court of the United States. From 1995–2005, he was in private practice, and from 2005–2006 he was Principal Deputy Associate Attorney General at the U.S. Department of Justice. He was appointed to the United States Court of Appeals for the Tenth Circuit in 2006. He served on the Standing Committee on Rules for Practice and Procedure of the U.S. Judicial Conference, and as chairman of the Advisory Committee on Rules of Appellate Procedure. He taught at the University of Colorado Law School. President Donald J. Trump nominated him as an Associate Justice of the Supreme Court, and he took his seat on April 10, 2017.

Brett M. Kavanaugh, Associate Justice,
was born in Washington, D.C., on February 12, 1965. He married Ashley Estes in 2004, and they have two daughters - Margaret and Liza. He received a B.A. from Yale College in 1987 and a J.D. from Yale Law School

in 1990. He served as a law clerk for Judge Walter Stapleton of the U.S. Court of Appeals for the Third Circuit from 1990-1991, for Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit from 1991-1992, and for Justice Anthony M. Kennedy of the U.S. Supreme Court during the 1993 Term. In 1992-1993, he was an attorney in the Office of the Solicitor General of the United States. From 1994 to 1997 and for a period in 1998, he was Associate Counsel in the Office of Independent Counsel. He was a partner at a Washington, D.C., law firm from 1997 to 1998 and again from 1999 to 2001. From 2001 to 2003, he was Associate Counsel and then Senior Associate Counsel to President George W. Bush. From 2003 to 2006, he was Assistant to the President and Staff Secretary for President Bush. He was appointed a Judge of the United States Court of Appeals for the District of Columbia Circuit in 2006. President Donald J. Trump nominated him as an Associate Justice of the Supreme Court, and he took his seat on October 6, 2018.

Amy Coney Barrett, Associate Justice,

was born in New Orleans, Louisiana, on January 28, 1972. She married Jesse M. Barrett in 1999, and they have seven children - Emma, Vivian, Tess, John Peter, Liam, Juliet, and Benjamin. She received a B.A. from Rhodes College in 1994 and a J.D. from Notre Dame Law School in 1997. She served as a law clerk for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit from 1997 to 1998, and for Justice Antonin Scalia of the Supreme Court of the United States during the 1998 Term. After two years in private law practice in Washington, D.C., she became a law professor, joining the faculty of Notre Dame Law School in 2002. She was appointed a Judge of the United States Court of Appeals for the Seventh Circuit in 2017. President Donald J. Trump nominated her as an Associate Justice of the Supreme Court, and she took her seat on October 27, 2020.

Ketanji Brown Jackson, Associate Justice,

was born in Washington, D.C., on September 14, 1970. She married Patrick Jackson in 1996, and they have two daughters. She received an A.B., magna cum laude, from Harvard-Radcliffe College in 1992, and a J.D., cum laude, from Harvard Law School in 1996. She served as a law clerk for Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts from 1996 to 1997, Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit from 1997 to 1998, and Justice Stephen G. Breyer of the Supreme Court of the United States during the 1999 Term. After three years in private practice, she worked as an attorney at

Supreme Court should recognize ‘diversity’ programs are about leftist politics, not education

- March 14, 2022
- Rob Natelson
- 0 comments

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The Supreme Court will soon decide whether universities may continue to discriminate by race and ethnicity (pdf). The court’s consolidated proceeding includes cases against

Harvard University, a private institution, and the University of North Carolina (UNC), a state institution.

The Harvard case arises under federal civil rights law and the UNC case under the Equal Protection Clause in the Constitution's 14th Amendment. This essay focuses on the UNC case.

UNC's discrimination is typical of state universities. It biases student admissions heavily against white and Asian-American applicants and favors African Americans, Hispanics, and American Indians.

UNC, like other universities, asserts that its discrimination is driven by educational needs. I believe that is a pretext. I believe such programs are driven principally by left-wing politics. If UNC wants to defend racial discrimination as educationally necessary, then it should be forced to pony up the proof—with real and quantified data. Not with anecdotes or politically driven "studies." The court should stop deferring to university bureaucrats on this point, as it did in a 2003 case (pdf).

The Strict Scrutiny Test

The Equal Protection Clause generally prohibits state institutions from discriminating based on race or ethnicity. The principal exception arises if the discrimination passes the "strict scrutiny" test. To survive "strict scrutiny," the institution must prove the following:

(1) The stated reason or goal is the true one, not a mere pretext.

(2) That reason or goal is "compelling"—not merely helpful or desirable.

(3) The discrimination is "necessary" or "narrowly tailored" to the compelling goal; in other words, there must be no other way to achieve the goal.

(4) The state institution bears the burden of proving each of the three foregoing.

What kind of goal is so "compelling" that a state entity may engage in racial discrimination? Possibly something at the level of national defense. Oddly enough, however, in its 2003 case the Supreme Court ruled that "the educational benefits of a diverse student body" qualify as "compelling." Yet the court did not require the universities to prove that "diversity" actually provided the purported "educational benefits." The court said it would defer to the universities' expertise on that subject.

However, the overwhelming evidence is that "diversity" discrimination is really about favoring left-leaning political groups and reducing the number of traditional and conservative students and staff.

There are at least six reasons for so concluding.

Reason #1: 'Diversity' Can Impede, as Well as Promote, Education

Any honest and experienced educator can tell you that ethnic or cultural diversity is a mixed blessing for student learning. Consider this simple illustration: A class consists of one third English speakers, one third Spanish speakers, and one third Korean speakers. This class is certainly "diverse." But its diversity renders it unteachable. For the class to function, the students need a common cultural reference—in this case, a common language. This is an extreme case, but it's not the only one. Cohorts of students with widely different levels of intelligence or educational preparation similarly lack the commonalities necessary to function as a class.

Cultural diversity also can impede education, particularly in basic courses. I learned this in my decades of teaching first-year law students. The American legal system is fundamentally English, so students from WASPish backgrounds begin at a different starting point than students from other cultural backgrounds. Indeed, those from some cultures (e.g., some American Indian tribes) flatly reject the adversarial process that forms a core part of our legal system.

In other contexts, we concede that diversity can hurt education and that common background can help. Consider the enviable records of women's colleges and historically black colleges. Notably, a 1990 Brookings Institute survey found that some of the nation's best-achieving public schools were successful partly because they served homogenous populations.

Of course, I'm not denying that diversity promotes education in some contexts (advanced literature courses, for example). Nor am I arguing for racial, ethnic, or cultural segregation. I'm pointing out that in education, "diversity" is a mixed bag. It certainly isn't a justifiable basis for the viciously unfair practice of racial and ethnic discrimination.

Reason #2: 'Diversity' Programs Are Politically Gerrymandered

There's another reason for concluding that "diversity" programs are about politics rather than education: They are structured in ways that show their professed purpose isn't their real purpose.

It's claimed that such programs promote viewpoint diversity. Then why don't they seek out political and religious conservatives and women with traditional values? Those views are underrepresented in university classrooms today.

It's claimed these programs seek applicants from traditionally marginalized sectors. Then why do they effectively discriminate *against* Mormons and Asian-Americans?

It's claimed that such programs seek a "critical mass" of significant demographic groups. Then why does a clear definition of "critical mass" always elude us?

There's only one coherent explanation for such programs, and that is political. They almost universally favor the following groups: African-Americans, Hispanics, Native Americans, LGBTQ people, and feminist women. What these groups have in common is that they all are major components in the base of the National Democratic Party.

Reason #3: Universities Reject Non-Discriminatory Ways of Achieving Diversity

The strict scrutiny test bars discrimination if there are other ways of achieving a "compelling" goal. But universities sometimes reject other methods and discriminate instead.

For example, in 1996 the University of Texas (UT) faced a court order to stop racial discrimination. It therefore adopted a program to build a diverse student body through non-discriminatory methods. In 2000, UT announced that its "enrollment levels for African American and Hispanic freshmen have returned to those of 1996."

But in 2003, when SCOTUS upheld some discrimination, the UT president immediately announced a return to discriminatory practices (pdf, pp. 2217–18). The most reasonable explanation is that those practices are part of a political spoils system.

Reason #4: Universities Frequently Discriminate Against Conservatives

Incidents of racial discrimination, like incidents of sexual harassment, can be part of a wider pattern. Understand the pattern, and you understand "diversity" discrimination.

Part of the wider pattern is bias against conservatives in hiring and promotion. At the administrative level, the current job description for a deanship at Albany State University in Georgia is typical. It says that the successful candidate must "infuse diversity, equity, and inclusion into all aspects of the position's responsibilities" (pdf). In other words, if you disagree with the left's DEI agenda, don't bother to apply. This assures that no honest conservatives are hired.

At the faculty level, any conservative or moderate professor (there are a few remaining) can regale you with anecdote after anecdote about how academic political discrimination works. Nor is the evidence merely anecdotal; empirical studies have documented the results (pdf).

Sometimes conservative applicants are excluded for trifling reasons. Sometimes more difficult promotion standards are imposed on conservatives. And as the academic careers of Ward Churchill and Elizabeth Warren demonstrate, when a professor is sufficiently politically correct, some universities seem to apply virtually no serious hiring or promotion standards at all.

Recently, discrimination against conservative staff has become more blatant. The latest edition of the Heartland Institute's Heath Care News (pdf) reports that the University of North Carolina-Chapel Hill medical school

has … revised guidelines for appointment, reappointment, and promotion of faculty that include diversity, equity, and inclusion (DEI) training and making a "positive contribution to DEI efforts." … [T]he staff has to accept subjective indoctrination in DEI and materially demonstrate acceptance of that doctrine through active participation in promoting it, such as through materials provided to students. … The university provides a nonexclusive list of activities an applicant could use on his or her curriculum vitae (C.V.) to demonstrate what it calls a "positive contribution" to the promotion of the DEI doctrine.

The National Association of Scholars has assembled a long list of university faculty who have been fired or persecuted for expressing "non-woke" political views.

Reason #5: Universities Gerrymander Programs to Serve Leftist Politics

Another part of their political pattern is how universities bias their programs and course curricula. When I taught at the University of Montana, it billed itself as the state's flagship liberal arts institution. But it focused far more heavily on leftist favorites such as "environmental studies" (which is technically not a liberal art at all) than on such traditional liberal arts programs as Greco-Roman classics. The law school (where I taught) devoted far more resources to lefty favorites such as environmental law and Indian Law than to courses of more value to most graduates, such as commercial law. Similarly, the law school's clinical program offered more opportunity for "progressive" activism than for conservative activism.

Featuring leftist programs and courses gives universities an excuse to hire more leftists. The University of California at Berkeley has created something called the Othering and Belonging Institute. Here is its current advertisement for new faculty (pdf):

The University of California, Berkeley invites applications for a full-time tenured faculty position as part of a campus-wide cluster hire in the area of Diversity and Democracy. The three areas of focal interest for this position are … 1) diversity and identity; 2) diversity, civil society and political action; or 3) legal or philosophical frameworks for diverse democracies. Special consideration will be given to candidates who work in one or more of the following areas: 1) the content and contestation [*sic*] of group identities; 2) the civic and political engagement of diverse populations within local, national, and transnational contexts; or 3) the normative or legal implications of racial and ethnic diversity within democratic societies.

How many conservatives do you think will apply for that position?

Sometimes universities create special "centers" so they can go outside the usual procedures to hire the politically correct. The University of Montana created a Center for the Rocky Mountain West to give jobs to former state and local politicians, all liberals. When Colorado's Democrat governor Bill Ritter decided not to run for a second term in 2010, Colorado State University erected a Center for the New Energy Economy and put Ritter in charge. Neither Ritter nor any of the politicians hired at the Center for the Rocky Mountain West had significant academic credentials.

Incidentally, don't be fooled by the line that in creating leftist programs universities are merely responding to student demand. University propaganda largely shapes student demand.

Reason #6: State Universities Serve as Leftist Political Action Centers

Still another part of the wider political pattern is that state universities often dedicate public resources to leftist causes. I've already noted the creation of special departments and centers. State universities also offer free facilities for "progressive" activities. When I was a visiting professor at the University of Utah, law school facilities regularly were used to facilitate ACLU and environmental lawsuits.

State universities often seek to pull public debate to the left. The University of Montana School of Forestry is a partner in the "Wilderness Connect" website—essentially a political platform promoting more government-controlled wilderness. The site extolls the "benefits" of wilderness, exhorts readers to support environmental organizations, and promotes the highly controversial view that government-controlled wilderness furthers economic growth.

Similarly, on Oct. 28, 2021, the same institution sponsored a program called "A Climate Conversation." You might expect a range of views, but that would be naïve: The only two invited commentators were both climate alarmists: former Vice President Al Gore and former Sen. Max Baucus (D-Mont.).

Constitutional Implications for 'Diversity' Discrimination

The overall picture strongly suggests university racial and ethnic discrimination is more about politics than education. Accordingly, the Supreme Court should apply the same strict scrutiny standards to that discrimination it applies in other cases of state racial discrimination. It should require UNC to prove that (1) the real and sole purpose of its "diversity" program is to promote education rather than political outcomes and that (2) the program does, in fact, measurably and significantly promote student academic improvement.