United States v. Nixon

Facts of the Case:

A grand jury returned indictments against seven of President Richard Nixon's closest aides in the Watergate affair. The special prosecutor appointed by Nixon and the defendants sought audio tapes of conversations recorded by Nixon in the Oval Office. Nixon asserted that he was immune from the subpoena claiming "executive privilege," which is the right to withhold information from other government branches to preserve confidential communications within the executive branch or to secure the national interest. Decided together with Nixon v. United States.

Question:

Is the President's right to safeguard certain information, using his "executive privilege" confidentiality power, entirely immune from judicial review?

Conclusion:

No. The Court held that neither the doctrine of separation of powers, nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified, presidential privilege. The Court granted that there was a limited executive privilege in areas of military or diplomatic affairs, but gave preference to "the fundamental demands of due process of law in the fair administration of justice." Therefore, the president must obey the subpoena and produce the tapes and documents. Nixon resigned shortly after the release of the tapes.

United States v. Nixon, 418 U.S. 683 (1974), was a landmark United States Supreme Court decision. It was a unanimous 8-0 ruling involving President Richard Nixon and was important to the late stages of the Watergate scandal. It is considered a crucial precedent limiting the power of any U.S. president… Associate Justice William Rehnquist, a Nixon appointee, recused himself as he had a prior association with the Nixon administration.[1][2]

Background

The Watergate scandal started in the 1972 presidential campaign between Democratic Senator George McGovern of South Dakota and the Republican President Richard Nixon. On June 17, before the election Nixon won, five burglars broke into Democratic headquarters located in the Watergate building complex in Washington, D.C.

Nixon appointed Archibald Cox to the position of special prosecutor, charged with investigating the break-in, but then fired Cox in the Saturday Night Massacre. However, public outrage forced Nixon to appoint a new special prosecutor, Leon Jaworski, who was charged with conducting the Watergate investigation for the government.

In April 1974, Jaworski obtained a subpoena ordering Nixon to release certain tapes and papers related to specific meetings between the President and those indicted by the grand jury. Those tapes and the conversations they revealed were believed to contain damaging evidence involving the indicted men and perhaps the President himself.

Hoping Jaworski and the public would be satisfied, Nixon turned over edited transcripts of forty-three conversations, including portions of twenty conversations demanded by the subpoena. James D. St. Clair, Nixon's attorney, then requested Judge John Sirica of the U.S. District Court for the District of Columbia

to quash the subpoena. Sirica denied St. Clair's motion and ordered the president to turn the tapes over by May 31.

Both St. Clair and Jaworski appealed directly to the Supreme Court which heard arguments on July 8. St. Clair argued the matter should not be subject to "judicial resolution" since the matter was a dispute within the executive branch. The branch should resolve the dispute itself. Also, he claimed Special Prosecutor Jaworski had not proven the requested materials were absolutely necessary for the trial of the seven men. Besides, he claimed Nixon had an absolute executive privilege to protect communications "between high Government officials and those who advise and assist them" in carrying out their duties.

Less than three weeks later the Court issued its decision. The justices struggled to write an opinion that all eight could agree to. The stakes were so high, in that the tapes most likely contained evidence of criminal wrongdoing by the President and his men, that they wanted no dissent. All contributed to the opinion and Chief Justice Burger delivered the unanimous decision. After ruling that the Court could indeed resolve the matter and that Jaworski had proven a "sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment," the Court went to the main issue of executive privilege. The Court rejected Nixon's claim to "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." [US v. Nixon]

Nixon and the Supreme Court

In the presidential campaign of 1968, Richard Nixon promised to reshape the Supreme Court. The Court under Chief Justice Earl Warren had taken what many, including Nixon, felt was a liberal turn, being too sympathetic to defendants in the criminal justice system. Determined to move the Court toward his more conservative views, Nixon appointed four justices including, upon Warren's retirement, Chief Justice Warren E. Burger in 1969. Burger had been a hard-line, tough-on-criminals judge in the U.S. Circuit Court of Appeals for the District of Columbia. Nixon also appointed Harry A. Blackmun in 1970, and Lewis F. Powell, Jr., and William H. Rehnquist, both in 1971.

Nixon's presidency saw more legal confrontations with the Court over presidential powers than any other administration. Although four justices were his appointees, Nixon was dealt a series of setbacks from the Court in the 1970s. In *United States v. U.S. District Court* (1972) the Court rejected 8-0 Nixon's claim of presidential power to carry out electronic surveillance (wire-tapping) without a court warrant in order to investigate suspected subversive activities.

During his presidency, Nixon had claimed broad authority to impound funds provided by Congress. In 1975, the Court in Train v. City of New York ruled unanimously that Nixon had overstepped his authority when he had refused to distribute $18 billion in state aid under the Water Pollution Control Act of 1972.

Plessy v. Ferguson

Facts of the Case:

The state of Louisiana enacted a law that required separate railway cars for blacks and whites. In 1892, Homer Adolph Plessy--who was seven-eighths Caucasian--took a seat in a "whites only" car of a Louisiana train. He refused to move to the car reserved for blacks and was arrested.

Question:

Is Louisiana's law mandating racial segregation on its trains an unconstitutional infringement on both the privileges and immunities and the equal protection clauses of the Fourteenth Amendment?

Conclusion:

No, the state law is within constitutional boundaries. The majority, in an opinion authored by Justice Henry Billings Brown, upheld state-imposed racial segregation. The justices based their decision on the separate-but-equal doctrine, that separate facilities for blacks and whites satisfied the Fourteenth Amendment so long as they were equal. (The phrase, "separate but equal" was not part of the opinion.) Justice Brown conceded that the 14th amendment intended to establish absolute equality for the races before the law. But Brown noted that "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races unsatisfactory to either." In short, segregation does not in itself constitute unlawful discrimination.

Plessy v. Ferguson, 163 U.S. 537 (1896), is a landmark United States Supreme Court decision in the jurisprudence of the United States, upholding the constitutionality of racial segregation even in public accommodations (particularly railroads), under the doctrine of "separate but equal".

The decision was handed down by a vote of 7 to 1 (Justice David Josiah Brewer did not participate in the decision), with the majority opinion written by Justice Henry Billings Brown and the dissent written by Justice John Marshall Harlan. "Separate but equal" remained standard doctrine in U.S. law until its repudiation in the 1954 Supreme Court decision *Brown v. Board of Education*.

After the high court ruled, the New Orleans Comité des Citoyens (Committee of Citizens) that had brought the suit and that had arranged for Homer Plessy's arrest in order to challenge Louisiana's segregation law, replied, “We, as freemen, still believe that we were right and our cause is sacred.”[1]

Background

After the American Civil War in 1865, during the period known as Reconstruction, the government was able to provide some protection for the civil rights of the newly-freed slaves. But when Reconstruction ended with the Compromise of 1877 and federal troops were withdrawn, southern state governments began passing Jim Crow laws that prohibited blacks from using the same public accommodations as whites.

The Thirteenth Amendment served to abolish slavery and involuntary servitude, except as a punishment for crime. Under the meaning of the Thirteenth Amendment, the term "slavery" implies involuntary servitude or a state of bondage and the ownership of human beings as property. That term implies the control of the labor and services of one person for the benefit of another and the absence of a legal rights regarding the disposal of one's own person, property and services. According to the Slaughterhouse Cases, the Thirteenth Amendment was intended primarily to abolish slavery as it had been previously known in

the United States at the time, and that it equally forbade involuntary servitude. It was intimated, however, in that case that the Amendment was regarded at the time as insufficient to protect former slaves from certain laws which had been enacted in the Southern States, imposing upon them onerous disabilities and burdens and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value. The Fourteenth Amendment was devised to meet this exigency.

The Supreme Court had ruled, in the *Civil Rights Cases* (1883), that the Fourteenth Amendment applied only to the actions of government, not to those of private individuals, and consequently did not protect persons against individuals or private entities who violated their civil rights. In particular, the Court invalidated most of the Civil Rights Act of 1875, a law passed by the United States Congress to protect blacks from private acts of discrimination.

In 1890, the State of Louisiana passed Act 111 that required separate accommodations for African Americans and Whites on railroads, including separate railway cars, though it specified that the accommodations must be kept "equal". Concerned, several African Americans (including Louisiana's former governor P.B.S. Pinchback) and Whites in New Orleans formed an association, the Citizens' Committee to Test the Separate Car Act, dedicated to the repeal of that law. They raised $1412.70 ($33716.44 in 2008 USD) which they offered to the then-famous author and Radical Republican jurist, Albion W. Tourgée, to serve as lead counsel for their test case. Tourgée agreed to do it for free. Later, they enlisted Homer Plessy, who was one-eighth black (an octoroon in the now-antiquated parlance), to take part in an act of planned civil disobedience. The plan was for Plessy to be thrown off the railway car and arrested[2] not for vagrancy, which would not have led to a challenge that could reach the Supreme Court, but for violating the Separate Car Act, which could and did lead to a challenge with the high court.

The Committee hired a detective to ensure that Plessy was arrested for violating the Separate Car Act, which the Citizen's Committee wanted to challenge with the goal of having it overturned. They chose Plessy because, with his light skin color, he could buy a first class train ticket and, at the same time, be arrested when he announced, while sitting on board the train, that he had an African-American ancestor. For the Committee, this was a deliberate attempt to exploit the lack of clear racial definition in either science or law so as to argue that segregation by race was an "unreasonable" use of state power.

The intellectual roots of *Plessy v. Ferguson* were in part tied to the scientific racism of the era. However, the popular support for the decision was more likely a result of the racist beliefs held by most whites at the time.[3]

The case

Marker placed at Press and Royal Streets on February 12, 2009 commemorating the planned arrest of Homer Plessy June 7, 1892 for violating the Louisiana 1890 Separate Car Act.

On June 7, 1892, Homer Plessy boarded a car of the East Louisiana Railroad that was designated for use by white patrons only. Although Plessy was born a free person and was one-eighth black and seven-eighths white, under a Louisiana law enacted in 1890, he was classified as Black, and thus required to sit in the "colored" car. When, in an act of planned disobedience, Plessy refused to leave the white car and move to the colored car, he was arrested and jailed.

This was an act of civil disobedience carried out by the Comité des Citoyens (Committee of Citizens) made up of the educated Free People of Color in New Orleans. Committee members were Arthur Esteves, C.C. Antoine, Firmin Chrisophe, C.G. Johnston, Paul Bonseigneur, Laurent Auguste, Rudolph B. Baquie, Rudolphe L. Desdunes, Louis A. Martinet, Numa E. Mansion, L.J. Joubert, Frank Hall, Noel Bachus, George Geddes and A.E. P. Albert

In his case, *Homer Adolph Plessy v. The State of Louisiana*, Plessy argued that the East Louisiana Railroad had denied him his rights under the Thirteenth and Fourteenth Amendments of the United States Constitution. However, the judge presiding over his case, John Howard Ferguson, ruled that Louisiana had the right to regulate railroad companies as long as they operated within state boundaries. Plessy sought a writ of prohibition.

The Committee of Citizens took Plessy's appeal to the Supreme Court of Louisiana where he again found an unreceptive ear, as the state Supreme Court upheld Judge Ferguson's ruling. Undaunted, the Committee appealed to the United States Supreme Court in 1896. Two legal briefs were submitted on Plessy's behalf. One was signed by Albion W. Tourgée and James C. Walker and the other by Samuel F. Phillips and his legal partner F. D. McKenney. Oral arguments were held before the Supreme Court on April 13, 1896. Tourgée and Phillips appeared in the courtroom to speak on behalf of Plessy. It would become one of the most famous decisions in American history because, for the first time, it established that racial segregation was protected by federal law.

The decision

In a 7 to 1 decision in which Justice David Josiah Brewer did not participate,[4] the Court rejected Plessy's arguments based on the Fourteenth Amendment, seeing no way in which the Louisiana statute violated it. In addition, the majority of the Court rejected the view that the Louisiana law implied any inferiority of blacks, in violation of the Fourteenth Amendment. Instead, it contended that the law separated the two races as a matter of public policy.

When summarizing, Justice Brown declared, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

While the Court did not find a difference in quality between the whites-only and blacks-only railway cars, this was manifestly untrue in the case of most other separate facilities, such as public toilets and cafés, where the facilities designated for blacks were poorer than those designated for whites.[*citation needed*]

Justice John Marshall Harlan, a former slave owner who decried the excesses of the Ku Klux Klan, wrote a scathing dissent in which he predicted the court's decision would become as infamous as that in *Dred Scott v. Sandford*. Harlan went on to say:

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

New Orleans historian Keith Weldon Medley, author of *We As Freemen: Plessy v. Ferguson, The Fight Against Legal Segregation*, said the words in Justice Harlan's "Great Dissent" originated with papers filed with the court by "The Citizen's Committee".[5]

The case helped cement the legal foundation for the doctrine of separate but equal, the idea that segregation based on classifications was legal as long as facilities were of equal quality. However, Southern state governments refused to provide blacks with genuinely equal facilities and resources in the years after the Plessy decision. The states not only separated races but, in actuality, ensured differences in quality.[*citation needed*] In January 1897, Homer Plessy pled guilty to the violation and paid the fine.

Influence of Plessy v. Ferguson

Plessy legitimized the move towards segregation practices begun earlier in the South. Along with Booker T. Washington's Atlanta Compromise address, delivered the previous year, which accepted black social isolation from white society, *Plessy* provided an impetus for further segregation laws. In the ensuing decades, segregation statutes proliferated, reaching even to the federal government in Washington, D.C., which re-segregated during Woodrow Wilson's administration in the 1910s.

William Rehnquist wrote a memo called "A Random Thought on the Segregation Cases" when he was a law clerk in 1952, during early deliberations that led to the *Brown v. Board of Education* decision. In his memo, Rehnquist argued that "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues but I think *Plessy v. Ferguson* was right and should be reaffirmed." He continued, "To the argument… that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."[

Brown v Board of Education

Facts of the Case:

Black children were denied admission to public schools attended by white children under laws requiring or permitting segregation according to the races. The white and black schools approached equality in terms of buildings, curricula, qualifications, and teacher salaries. This case was decided together with Briggs v. Elliott and Davis v. County School Board of Prince Edward County.

Question:

Does the segregation of children in public schools solely on the basis of race deprive the minority children of the equal protection of the laws guaranteed by the 14th Amendment?

Conclusion:

Yes. Despite the equalization of the schools by "objective" factors, intangible issues foster and maintain inequality. Racial segregation in public education has a detrimental effect on minority children because it is interpreted as a sign of inferiority. The long-held doctrine that separate facilities were permissible provided they were equal was rejected. Separate but equal is inherently unequal in the context of public education. The unanimous opinion sounded the death-knell for all forms of state-maintained racial separation.

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954),[1] was a landmark decision of the United States Supreme Court that declared state laws establishing separate public schools for black and white students denied black children equal educational opportunities. The decision overturned earlier rulings going back to *Plessy v. Ferguson* in 1896. Handed down on May 17, 1954, the Warren Court's unanimous (9–0) decision stated that "separate educational facilities are inherently unequal." As a result, de jure racial segregation was ruled a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. This victory paved the way for integration and the civil rights movement.[2]

Background

For much of the ninety years preceding the *Brown* case, race relations in the U.S. had been dominated by racial segregation. This policy had been endorsed in 1896 by the United States Supreme Court case of *Plessy v. Ferguson*, which held that as long as the separate facilities for the separate races were "equal," segregation did not violate the Fourteenth Amendment ("no State shall... deny to any person... the equal protection of the laws.").

The plaintiffs in *Brown* asserted that this system of racial separation, while masquerading as providing separate but relatively equal treatment of both white and black Americans, instead perpetuated inferior accommodations, services, and treatment for black Americans. Racial segregation in education varied widely from the 17 states that required racial segregation to the 16 that prohibited it. *Brown* was influenced by UNESCO's 1950 Statement, signed by a wide variety of internationally renowned scholars, titled *The Race Question*.[3] This declaration denounced previous attempts at scientifically justifying racism as well as morally condemning racism. Another work that the Supreme Court cited was Gunnar Myrdal's *An American Dilemma: The Negro Problem and Modern Democracy* (1944). Myrdal had been a signatory of the UNESCO declaration. The research performed by the educational psychologists Kenneth B. Clark and Mamie Phipps Clark also influenced the Court's decision.[4] The Clarks' "doll test" studies presented substantial arguments to the Supreme Court about how segregation had an impact on black schoolchildren's mental status.[5]

Brown v. Board of Education

In 1951, a class action suit was filed against the Board of Education of the City of Topeka, Kansas in the U.S. District Court for the District of Kansas. The plaintiffs were thirteen Topeka parents on behalf of their twenty children.[6]

The suit called for the school district to reverse its policy of racial segregation. Separate elementary schools were operated by the Topeka Board of Education under an 1879 Kansas law, which permitted (but did not require) districts to maintain separate elementary school facilities for black and white students in twelve communities with populations over 15,000. The plaintiffs had been recruited by the leadership of the Topeka NAACP. Notable among the Topeka NAACP leaders were the chairman McKinley Burnett; Charles Scott, one of three serving as legal counsel for the chapter; and Lucinda Todd.

The named plaintiff, Oliver L. Brown, was a parent, a welder in the shops of the Santa Fe Railroad, an assistant pastor at his local church, and an African American.[7] He was convinced to join the lawsuit by Scott, a childhood friend. Brown's daughter Linda, a third grader, had to walk six blocks to her school bus stop to ride to Monroe Elementary, her segregated black school one mile (1.6 km) away, while Sumner Elementary, a white school, was seven blocks from her house.[8][9]

As directed by the NAACP leadership, the parents each attempted to enroll their children in the closest neighborhood school in the fall of 1951. They were each refused enrollment and directed to the segregated schools. Linda Brown Thompson later recalled the experience in a 2004 PBS documentary:

> . . . well. like I say, we lived in an integrated neighborhood and I had all of these playmates of different nationalities. And so when I found out that day that I might be able to go to their school, I was just thrilled, you know. And I remember walking over to Sumner school with my dad that day and going up the steps of the school and the school looked so big to a smaller child. And I remember going inside and my dad spoke with someone and then he went into the inner office with the principal and they left me out . . . to sit outside with the secretary. And while he was in the inner office, I could hear voices and hear his voice raised, you know, as the conversation went on. And then he immediately came out of the office, took me by the hand and we walked home from the school. I just couldn't understand what was happening because I was so sure that I was going to go to school with Mona and Guinevere, Wanda, and all of my playmates.[10]

The Kansas case, "Oliver Brown et al. v. The Board of Education of Topeka, Kansas," was named after Oliver Brown as a legal strategy to have a man at the head of the roster. Also, it was felt by lawyers with the National Chapter of the NAACP, that having Mr. Brown at the head of the roster would be better received by the U.S. Supreme Court Justices because Mr. Brown had an intact, complete family, as opposed to someone who was a single parent head of household[*citation needed*]. The thirteen plaintiffs were: Oliver Brown, Darlene Brown, Lena Carper, Sadie Emmanuel, Marguerite Emerson, Shirley Fleming, Zelma Henderson, Shirley Hodison, Maude Lawton, Alma Lewis, Iona Richardson, and Lucinda Todd.[11][12] The last surviving plaintiff, Zelma Henderson, died in Topeka, on May 20, 2008, at the age of 88.[13][14]

The District Court ruled in favor of the Board of Education, citing the U.S. Supreme Court precedent set in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which had upheld a state law requiring "separate but equal" segregated facilities for blacks and whites in railway cars.[15] The three-judge District Court panel found that segregation in public education has a detrimental effect upon negro children, but denied relief on the ground that the negro and white schools in Topeka were substantially equal with respect to buildings, transportation, curricular, and educational qualifications of teachers.[16]

Unanimous opinion and key holding

The majority of justices in support of desegregation spent much effort convincing those that initially dissented to join an unanimous opinion. Even though the legal effect would be same for a majority versus unanimous decision, it was felt that it was vital to not have a dissent which could be relied upon by opponents of desegregation as a legitimizing counterargument. The efforts succeeded and the decision was indeed a unanimous 9-0 opinion.

The key holding of the Court was that, even if segregated black and white schools were of equal quality in facilities and teachers, segregation by itself was harmful to black students and unconstitutional. They found that a significant psychological and social disadvantage was given to black children from the nature of segregation itself. This aspect was vital because the question was not whether the schools were "equal", which under *Plessy* they nominally should have been, but whether the doctrine of *separate* was constitutional. The justices answered with a strong "no":

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does...

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system...

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Local outcomes

The Topeka middle schools had been integrated since 1941. Topeka High School was integrated from its inception in 1871 and its sports teams from 1949 on.[18] The Kansas law permitting segregated schools allowed them only "below the high school level."[19]

Soon after the district court decision, election outcomes and the political climate in Topeka changed. The Board of Education of Topeka began to end segregation in the Topeka elementary schools in August 1953, integrating two attendance districts. All the Topeka elementary schools were changed to neighborhood attendance centers in January 1956, although existing students were allowed to continue attending their prior assigned schools at their option.[20][21][22] Plaintiff Zelma Henderson, in a 2004 interview, recalled that no demonstrations or tumult accompanied desegregation in Topeka's schools:

> "They accepted it," she said. "It wasn't too long until they integrated the teachers and principals."[23]

The Topeka Public Schools administration building is named in honor of McKinley Burnett, NAACP chapter president who organized the case.

Monroe Elementary was designated a U.S. National Historic Site unit of the National Park Service on October 26, 1992.

Social implications

Not everyone accepted the *Brown v. Board of Education* decision. In Virginia, Senator Harry F. Byrd, Sr. organized the Massive Resistance movement that included the closing of schools rather than desegregating them.[24] See, for example, The Southern Manifesto. For more implications of the *Brown* decision, see Desegregation.

In 1957, Arkansas Governor Orval Faubus called out his state's National Guard to block black students' entry to Little Rock High School. President Dwight Eisenhower responded by deploying elements of the 101st Airborne Division from Fort Campbell, Kentucky, to Arkansas and by federalizing Faubus' National Guard.[25]

Also in 1957, Florida's response was mixed. Its legislature passed an Interposition Resolution denouncing the decision and declaring it null and void. But Florida Governor Thomas LeRoy Collins, though joining in the protest against the court decision, refused to sign it arguing that the attempt to overturn the ruling must be done in legal methods.

In 1963, Alabama Gov. George Wallace personally blocked the door to Foster Auditorium at the University of Alabama to prevent the enrollment of two black students. This became the infamous Stand in the Schoolhouse Door[26] where Wallace personally backed his "segregation now, segregation tomorrow, segregation forever" policy that he had stated in his 1963 inaugural address.[27] He moved aside only when confronted General Henry Graham of the Alabama National Guard, who was ordered by President John F. Kennedy to intervene.

Backlash and scientific racism

The intellectual roots of *Plessy v. Ferguson*, the landmark United States Supreme Court decision upholding the constitutionality of racial segregation in 1896 under the doctrine of "separate but equal" were, in part, tied to the scientific racism of the era.[28][29] However, the popular support for the decision was more likely a result of the racist beliefs held by many whites at the time.[30] In deciding *Brown v. Board of Education*, the Supreme Court rejected the ideas of scientific racists about the need for segregation, especially in schools. The Court buttressed its holding by citing (in footnote 11) social science research about the harms to black children caused by segregated schools.

Both scholarly and popular ideas of scientific racism played an important role in the attack and backlash that followed the *Brown* decision.[30] The *Mankind Quarterly* is a journal that has published scientific racism. It was founded in 1960, in part in response to the *Brown* decision.[31][32] Many of the publication's contributors, publishers, and Board of Directors espouse academic hereditarianism. The publication is widely criticized for its extremist politics, antisemitic bent and its support for scientific racism.[33]

Miranda v. Arizona

Facts of the Case:

The Court was called upon to consider the constitutionality of a number of instances, ruled on jointly, in which defendants were questioned "while in custody or otherwise deprived of [their] freedom in any significant way." In Vignera v. New York, the petitioner was questioned by police, made oral admissions, and signed an inculpatory statement all without being notified of his right to counsel. Similarly, in Westover v. United States, the petitioner was arrested by the FBI, interrogated, and made to sign statements without being notified of his right to counsel. Lastly, in California v. Stewart, local police held and interrogated the defendant for five days without notification of his right to counsel. In all these cases, suspects were questioned by police officers, detectives, or prosecuting attorneys in rooms that cut them off from the outside world. In none of the cases were suspects given warnings of their rights at the outset of their interrogation.

Question:

Does the police practice of interrogating individuals without notifiying them of their right to counsel and their protection against self-incrimination violate the Fifth Amendment?

Conclusion:

The Court held that prosecutors could not use statements stemming from custodial interrogation of defendants unless they demonstrated the use of procedural safeguards "effective to secure the privilege against self-incrimination." The Court noted that "the modern practice of in-custody interrogation is psychologically rather than physically oriented" and that "the blood of the accused is not the only hallmark of an unconstitutional inquisition." The Court specifically outlined the necessary aspects of police warnings to suspects, including warnings of the right to remain silent and the right to have counsel present during interrogations.

Miranda v. Arizona (consolidated with ***Westover v. United States***, ***Vignera v. New York***, and ***California v. Stewart***), 384 U.S. 436 (1966), was a landmark 5-4 decision of the United States Supreme Court which was argued February 28–March 1, 1966 and decided June 13, 1966. The Court held that both inculpatory and exculpatory statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to questioning by police, and that the defendant not only understood these rights, but voluntarily waived them.

Background

The legal aid movement

During the 1960s, a movement which provided defendants with legal aid emerged from the collective efforts of various bar associations.

In the civil realm, it led to the creation of the Legal Services Corporation under the Great Society program of Lyndon Baines Johnson. *Escobedo v. Illinois*, a case which closely foreshadowed *Miranda*, provided for the presence of counsel during police interrogation. This concept extended to a concern over police interrogation practices, which were considered by many to be barbaric and unjust. Coercive interrogation tactics were known in period slang as the "third degree."

Arrest and conviction

In March 1963, Ernesto Arturo Miranda (born in Mesa, Arizona in 1941, and died in Phoenix, Arizona in 1976) was arrested for robbery. He later confessed to raping an 18 year old woman two days previously. At trial, prosecutors offered not only his confession as evidence (over objection) but also the victim's positive identification of Miranda as her assailant. Miranda was convicted of rape and kidnapping and sentenced to 20 to 30 years imprisonment on each charge, with sentences to run concurrently. Miranda's court-appointed lawyer, John J. Flynn, appealed to the Arizona Supreme Court which affirmed the trial court's decision. In affirming, the Arizona Supreme Court emphasized heavily the fact that Miranda did not specifically request an attorney.

Decision

Chief Justice Earl Warren, a former prosecutor, delivered the opinion of the Court, ruling that due to the coercive nature of the custodial interrogation by police (Warren cited several police training manuals which had not been provided in the arguments), no confession could be admissible under the Fifth Amendment self-incrimination clause and Sixth Amendment right to an attorney unless a suspect had been made aware of his/her rights and the suspect had then waived them. Thus, Miranda's conviction was overturned.

> The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in the court of law; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him[1].

The Court also made clear what had to happen if the suspect chose to exercise his rights:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease ... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

Effects of the decision

Miranda was retried, and this time the prosecution did not use the confession but called witnesses and used other evidence. Miranda was convicted in 1967 and sentenced to serve 20 to 30 years. He was paroled in 1972. After his release, he returned to his old neighborhood and made a modest living autographing police officers' "Miranda cards" (containing the text of the warning, for reading to arrestees). He was stabbed to death during an argument in a bar on January 31, 1976.[2]

Following the *Miranda* decision, the nation's police departments were required to inform arrested persons of their rights under the ruling, termed a Miranda warning.

The *Miranda* decision was widely criticized when it came down, as many felt it was unfair to inform suspected criminals of their rights, as outlined in the decision. Richard M. Nixon and other conservatives denounced *Miranda* for undermining the efficiency of the police, and argued the ruling would contribute to an increase in crime. Nixon, upon becoming President, promised to appoint judges who would be "strict constructionists" and who would exercise judicial restraint. Many supporters of law enforcement were angered by the decision's negative view of police officers. The federal Omnibus Crime Control and Safe Streets Act of 1968 purported to overrule *Miranda* for federal criminal cases and restore the "totality of the circumstances" test that had prevailed previous to *Miranda*. The validity of this provision of the law, which is still codified at 18 U.S. Code 3501, was not ruled on for another 30 years because the Justice Department never attempted to rely on it to support the introduction of a confession into evidence at any criminal trial. *Miranda* was undermined by several subsequent decisions which seemed to grant several exceptions to the "Miranda warnings," undermining its claim to be a necessary corollary of the Fifth Amendment.

As the years wore on however, *Miranda* grew to be familiar and widely accepted. Due to the prevalence of American television police dramas made since that decision in which the police read suspects their "Miranda rights," it has become an expected element of arrest procedure. Americans began to feel that the warnings contributed to the legitimacy of police interrogations. In the actual practice, it was found many suspects waived their Miranda rights and confessed anyway.

The Miranda Warnings

The suspect must be properly advised of their Miranda rights. The constitutional rights safeguarded by Miranda are the Sixth Amendment right to counsel and the Fifth Amendment right against compelled self incrimination. The Sixth Amendment right to counsel means that the suspect has the right to consult with an attorney before questioning begins and have an attorney present during the interrogation. The Fifth Amendment right against compelled self incrimination is the right to remain silent - the right to refuse to answer questions or to otherwise communicate information. Therefore, before any interrogation begins, the police must advise the suspect that they have (1) the right to remain silent; (2) that anything the suspect says can be used against him; (3) that the suspect has the right to have an attorney present before and during the questioning and (4) the suspect has the right to have a "free" attorney appointed to represent them before and during the questioning if the suspect cannot afford to hire an attorney.[29] There is no precise language that must be used in advising a suspect of their Miranda rights.[30] The point is that whatever language is used the substance of the rights outlined above must be communicated to the suspect.[31] The suspect may be advised of their rights orally or in writing.[32]

The Supreme Court has resisted efforts to require officers to more fully advise suspects of their rights. For example, the police are not required to advise the suspect that they can stop the interrogation at any time, that the decision to exercise right cannot be used against the suspect, or that they have a right to talk to a lawyer before being asked any questions. Nor have the courts required to explain the rights. For example, the standard Miranda right to counsel states *You have a right to have an attorney present during the questioning*. Police are not required to explain that this right is not merely a right to have a lawyer present while the suspect is being questioned. The right to counsel includes:

- the right to talk to a lawyer before deciding whether to talk to police,
- if the defendant decides to talk to the police, the right to consult with a lawyer before being interrogated, or
- the right to talk to an attorney while talking to police.[33]

It is important to reemphasize that the duty to warn only arose when police officers conduct custodial interrogations. The constitution does not require that a defendant be advised of the Miranda rights as part

of the arrest procedure, or once officer has probable cause to arrest, or if the defendant has become a suspect of the focus of an investigation, Custody and interrogation are the events that trigger the duty to warn.

Assertion

If the defendant asserts his right to remain silent all interrogation must immediately stop and the police may not resume the interrogation unless the police have "scrupulously honored" the defendant's assertion and obtain a valid waiver before resuming the interrogation.[43] In determining whether the police "scrupulously honored" the assertion the courts apply a totality of the circumstances test. The most important factors are the length of time between termination of original interrogation and commencement of the second and a fresh set of Miranda warnings before resumption of interrogation.

The consequences of assertion of Fifth Amendment right to counsel are stricter.[44] The police must immediately cease all interrogation and the police cannot reinitiate interrogation unless counsel is present (merely consulting with counsel is insufficient) or the defendant of his own volition contacts the police.[45] If the defendant does reinitiate contact, a valid waiver must be obtained before interrogation may resume.

Exceptions

Assuming that the six factors are present, the Miranda rule would apply unless the prosecution can establish that the statement falls within an exception to the Miranda rule.[46] The three exceptions are (1) the routine booking question exception[47] (2) the jail house informant exception and (3) the public safety exception.[48] Arguably only the last is a true exception–the first two can better be viewed as consistent with the Miranda factors. For example, questions that are routinely asked as part of the administrative process of arrest and custodial commitment are not considered "interrogation" under Miranda because they are not intended or likely to produce incriminating responses. Nonetheless, all three circumstances are treated as exceptions to the rule. The jail house informant exception applies to situations where the suspect does not know that he is speaking to a state-agent; either a police officer posing as a fellow inmate, a cellmate working as an agent for the state or a family member or friend who has agreed to cooperate with the state in obtaining incriminating information.[49] The window of opportunity for the exception is small. Once the suspect is formally charged, the Sixth Amendment right to counsel would attach and surreptitious interrogation would be prohibited.[50] The public safety exception applies where circumstances present a clear and present danger to the public's safety and the officers have reason to believe that the suspect has information that can end the emergency.[51]

Consequences of Violation

Assuming that a Miranda violation occurred - the six factors are present and no exception applies - the statement will be subject to suppression under the Miranda exclusionary rule.[52] That is, if the defendant objects or files a motion to suppress, the exclusionary rule would prohibit the prosecution from offering the statement as proof of guilt. However, the statement can be used to impeach the defendant's testimony.[53] Further, the fruit of the poisonous tree doctrine does not apply.[54] Since the fruit of the poisonous tree doctrine does not apply to Miranda violations, the exclusionary rule exceptions, attenuation, independent source and inevitable discovery, do not come into play. Therefore, derivative evidence would be fully admissible. For example, the police continue with a custodial interrogation after the suspect has asserted his right to silence. During his post-assertion statement the suspect tells the police the location of the gun he used in the murder. Following this information the police find the gun. Forensic testing identify the gun as the murder weapon and fingerprints lifted from the gun match the suspect's. The contents of the Miranda defective statement could not be offered by the prosecution as substantive evidence, but the gun itself and all related forensic evidence would not be subject to suppression.

Regents of the University of California v. Bakke

Facts of the Case:

Allan Bakke, a thirty-five-year-old white man, had twice applied for admission to the University of California Medical School at Davis. He was rejected both times. The school reserved sixteen places in each entering class of one hundred for "qualified" minorities, as part of the university's affirmative action program, in an effort to redress longstanding, unfair minority exclusions from the medical profession. Bakke's qualifications (college GPA and test scores) exceeded those of any of the minority students admitted in the two years Bakke's applications were rejected. Bakke contended, first in the California courts, then in the Supreme Court, that he was excluded from admission solely on the basis of race.

Question:

Did the University of California violate the Fourteenth Amendment's equal protection clause, and the Civil Rights Act of 1964, by practicing an affirmative action policy that resulted in the repeated rejection of Bakke's application for admission to its medical school?

Conclusion:

No and yes. There was no single majority opinion. Four of the justices contended that any racial quota system supported by government violated the Civil Rights Act of 1964. Justice Lewis F. Powell, Jr., agreed, casting the deciding vote ordering the medical school to admit Bakke. However, in his opinion, Powell argued that the rigid use of racial quotas as employed at the school violated the equal protection clause of the Fourteenth Amendment. The remaining four justices held that the use of race as a criterion in admissions decisions in higher education was constitutionally permissible. Powell joined that opinion as well, contending that the use of race was permissible as one of several admission criteria. So, the Court managed to minimize white opposition to the goal of equality (by finding for Bakke) while extending gains for racial minorities through affirmative action.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) was a landmark decision of the Supreme Court of the United States on affirmative action. It bars quota systems in college admissions but affirms the constitutionality of affirmative action programs.

Allan Bakke, a white male, applied to University of California, Davis School of Medicine in 1973 and 1974, but was rejected in both years, although "special applicants" were admitted with significantly lower academic scores than Bakke's. These special applicants were admitted under provisions either for members of a "minority groups" such as (Blacks or Hispanics, or as "economically and/or educationally disadvantaged" - but although many disadvantaged Caucasians had applied under this second provision, none had been successful.

After his second rejection, Bakke filed an action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment

The court ruled in Bakke's favor on June 23, 1978 but the decision was split 5-4.

Case

The Medical School of the University of California at Davis had two admissions programs for the entering class of 100 students - the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall under-graduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he or she was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), the rating being based on the interviewers' summaries, overall grade point average, science courses grade point average, Medical College Admission Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score."

The full admissions committee then made offers of admission on the basis of their review of the applicants' files and their scores, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program.

The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (Blacks, Hispanics, Asians, Native Americans). If an applicant of a minority group was found to be "disadvantaged," he or she would be rated in a manner similar to the one employed by the general admissions committee.

Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made.

No disadvantaged Caucasians were admitted under the special program, though many applied. Allan Bakke, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected because no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years special applicants were admitted with significantly lower scores than Bakke's.

After his second rejection, Bakke filed an action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and 601 of Title VI of the Civil Rights Act of 1964 (which provides that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance). UC Davis Medical School counter-claimed for a declaration that its special admissions program was lawful.

The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that UC Davis Medical School could not take race into account in making admissions

decisions, the court declared the program violated the Federal and State Constitutions and Title VI. The court did not order Bakke's admission, however, because there was no proof at trial that he would have been admitted but for the special program. The California Supreme Court, applying a strict scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical facility, and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds, the court held that UC Davis Medical School's special admissions program violated the Equal Protection Clause. Because the Medical School could not satisfy its burden of demonstrating that, absent the special program, Bakke would not have been admitted, the court ordered his admission to the Medical School.[1] Bakke began his studies at the University of California Medical School at Davis in fall of 1978, graduated in 1982, and later served as a resident at the prestigious Mayo Clinic in Rochester, Minnesota.

Decision

The court ruled 5-4 in Bakke's favor on June 23, 1978. Justice Lewis Powell delivered the opinion of the court that race could be only one of numerous factors used by discriminatory boards, such as those of college admissions. Powell found that quotas insulated minority applicants from competition with the regular applicants and were thus unconstitutional because they discriminated against non-minority applicants. Powell however stated that universities could use race as a plus factor. He cited the Harvard College Admissions Program which had been filed as an *amicus curiae* as an example of a constitutionally valid affirmative action program which took into account all of an applicant's qualities including race in a "holistic review".

The decision was split with four justices firmly against all use of race in admissions processes, four justices for the use of race in university admissions, and Justice Powell, who was against the UC Davis Medical School quota system of admission, but found that universities were allowed to use race as a factor in admission. Title VI of the civil rights statute prohibits racial discrimination in any institution that receives federal funding. Justices Burger, Stewart, Rehnquist, and Stevens supported a strict interpretation and, thus, ruled in favor of Bakke. Justices Brennan, Marshall, Blackmun, and White, however, disagreed with a rigid and literal interpretation of Title VI. The nature of this split opinion created controversy over whether Powell's opinion was binding. However, in 2003, in *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Supreme Court affirmed Powell's opinion, rejecting "quotas", but allowing race to be one "factor" in college admissions to meet the compelling interest of diversity.

Adarand Constructors, Inc. v. *Peña*

Facts of the Case:

In 1995, the U.S. Supreme Court, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, held that strict scrutiny governs whether race-based classifications violate the equal protection component of the Fifth Amendment's Due Process Clause (Adarand I). The Court then remanded the case for a determination whether the race-based components of the U.S. Department of Transportation's (DOT) Disadvantaged Business Enterprise (DBE) program could withstand this standard of review. Ultimately, the Court remanded Adarand for a second time for a determination on the merits consistent with Adarand I. When the Court of Appeals held, that by virtue of a new regulatory framework under which the DOT's state and local DBE program now operated, that program passed constitutional muster, the Court again certiorari to decide whether the Court of Appeals misapplied the strict scrutiny standard announced in Adarand I.

Question:

Did the Court of Appeals misapply the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination? Is the U.S. Department of Transportation's current Disadvantaged Business Enterprise program narrowly tailored to serve a compelling governmental interest?

Conclusion:

In a per curiam opinion, the Court dismissed the writ of certiorari as improvidently granted. After Adarand asserted that it was only challenging the rules pertaining to the direct procurement of DOT funds for highway construction on federal lands rather than any part of the DOT's DBE program as it pertained to state and local procurement, the Court concluded that the posture of the case had changed. The Court reasoned that such a shift required dismissal as it had not been addressed whether the various race-based programs applicable to such direct procurement could satisfy strict scrutiny and that reaching the merits of such a challenge would require a threshold examination whether the company had standing to challenge such direct-procurement provisions, which was not in the writ of certiorari.

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), is a United States Supreme Court case which held that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under a standard of "strict scrutiny," the highest level of Supreme Court review (such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests). Justice Sandra Day O'Connor wrote the majority opinion of the Court, which effectively overturned *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in which the Court had created a two tiered system for analyzing racial classifications.

Background

Many contracts that are let by agencies of the United States federal government contain financial incentives for the prime contractor to employ subcontractors that are owned or controlled by “socially and economically disadvantaged individuals.” The US Small Business Administration certifies certain businesses as disadvantaged. This usually means that the business is owned by racial or ethnic minority groups or by women. In this particular case the contract stated that “...the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities...”

The facts

In 1989 the US Department of Transportation (DOT) awarded a highway construction contract in Colorado to Mountain Gravel and Construction Company. Mountain Gravel solicited bids for a subcontract for guardrails along the highway. The lowest bid was submitted by Adarand Constructors, with a higher bid being submitted by Gonzales Construction. However, Gonzales Construction had been certified by the Small Business Administration as a disadvantaged business, and thus Mountain Gravel awarded the subcontract to Gonzales, due to financial incentives in the Mountain Gravel's contract for employing disadvantaged businesses. Adarand filed suit in federal court against DOT, arguing that the subcontracting incentive clause, or bonus, that caused Adarand to lose a subcontract was unconstitutional. The federal district court and circuit court ruled in favor of DOT and against Adarand, which then appealed to the US Supreme Court. The case was docketed as Adarand Constructors, Inc. v. Federico Peña, Secretary of Transportation, et al., because Federico Peña was the US Secretary of Transportation at that time. Mountain States Legal Foundation represented Adarand Constructors.

The question to be decided

Is the presumption of disadvantage based on race alone, and consequent allocation of favored treatment, a discriminatory practice that violates the equal protection clause of the 14th Amendment as well as the Due Process clause of the 5th Amendment?

Aftermath

On September 5, 2005, the U.S. Commission on Civil Rights issued a report finding that, ten years after the *Adarand* decision, federal agencies still largely fail to comply with the rule in *Adarand*. Specifically, the Commission found that the Departments of Defense, Transportation, Education, Energy, Housing and Urban Development, State, and the Small Business Administration, do not seriously consider race-neutral alternatives before implementing race-conscious federal procurement programs. The Commission found that such consideration is required by the strict scrutiny standard under *Adarand* and Court decisions. Commissioner Michael Yaki dissented from the Commission's report, arguing that the Commission was taking a "radical step backwards" from the "race-progressive policies" of the past.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), argued 17 Jan. 1995, decided 12 June by vote of 5 to 4; O'Connor for the Court, Scalia, Kennedy, Thomas concurring, Stevens, Ginsburg, and Souter in dissent. During the 1960s and 1970s state and federal governments undertook a host of what came to be known as affirmative- action programs. The goal of such programs was to make it easier for minorities to overcome past discrimination based on segregation.

The Supreme Court in Fullilove v. Klutznick (1989) sustained a 1977 law that provided a 10 percent "set aside" for minority business enterprises. The 1977 act was the first federal statute since the Freedman's Bureau Act of 1866 to contain an explicitly race- conscious classification. The Court's decision had a substantial impact, leading to the passage of a host of federal legislation. At the same time, the Court refused to extend the same authority to local and state governments to build such programs, and in the same year they decided *Fullilove*, the justices struck down a Richmond, Virginia, program that set aside 30 percent of construction funds for minority contractors. In Richmond v. J. A. Croson Co., the justices concluded that such local programs deserved the most rigorous judicial scrutiny, when race was involved. A year later, the High Court decided the case of Metro Broadcasting v. *FCC*, in which a bare majority of the Court, headed by Justice William J. Brennan, Jr., upheld a federal program to increase black ownership of broadcast licenses. Among other things, the Court confirmed that federal set- aside programs were not required to be tested under the strict scrutiny standard applied to local and state governments. In essence, the federal government had a special dispensation when it came to making

color- conscious preferences.

The impact of the federal set- aside programs was pervasive and substantial. In 1994, for example, about $10billion was at play. Among such programs spawned in the wake of *Fullilove* was one involving the Small Business Administration and the Department of Transportation. It provided financial incentives to government contractors that gave at least 10 percent of their business to minority subcontractors. Randy Pech was the white owner of Adarand Constructors, Inc. of Colorado Springs, Colorado. Adarand made the low bid on a guardrail project in the San Juan National Forest, but the subcontract went instead to a Hispanic- owned company. Pech then brought suit against the Department of Transportation and its head, Federico Peña, claiming that the subcontracting policy violated constitutional guarantees of equal protection and due process. A federal district court and a court of appeals rebuffed these claims on the grounds that the federal government could invoke race- based affirmative- action programs that were not subject to strict scrutiny.

The justices, however, reversed course and remanded the case back to the lower court for additional review. In doing so, the somewhat fragmented majority decided that strict scrutiny should be applied to race- conscious affirmative- action programs. Justice Sandra Day O'Connor, writing for the majority, placed federal set- aside programs on the same constitutional plane with local and state efforts. That meant, according to O'Connor, that all government classification by race "should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed" (p. 227). To be constitutional, measure based on racial classifications had to be narrowly tailored and had to further a compelling government interest. Justice Antonin Scalia went even further than O'Connor, noting his belief that the program could never withstand strict scrutiny. "In the eyes of the government," Scalia wrote, " we are just one race here. It is American" (p. 239). Justice Clarence Thomas, in another concurring opinion, described such programs as patronizing and paternalistic measures that prevented blacks from competing on terms that could prove their real worth.

The dissenters, led by Justice John Paul Stevens, insisted that the nation's unhappy history of race relations required the federal government to take remedial action. Justice Ruth Bader Ginsburg's dissent took specific exception to Scalia and Thomas by arguing that a carefully designed affirmative- action program could work well within the confines of the Equal Protection Clause of the Fourteenth Amendment. In any case, Ginsberg insisted, the responsibility for crafting such plans rested with legislative bodies, and she chided the majority, which usually paid homage to the primacy of Congress, for failing to do so in this instance.

The Court's action did explicitly overrule *Metro Broadcasting*, but it did not overturn the Small Business Administrative program. The case went back to the lower courts to determine whether the program violated the very demanding strict scrutiny test. Still, the message from the Court about affirmative action was that for any program to have a chance of passing constitutional muster it had to be narrowly tailored and it had to apply to individuals who were victims of past discrimination rather than simply helping any and all minorities.

United States v. Virginia

Facts of the Case:

The Virginia Military Institute (VMI) boasted a long and proud tradition as Virginia's only exclusively male public undergraduate higher learning institution. The United States brought suit against Virginia and VMI alleging that the school's male-only admissions policy was unconstitutional insofar as it violated the Fourteenth Amendment's equal protection clause. On appeal from a District Court ruling favoring VMI, the Fourth Circuit reversed. It found VMI's admissions policy to be unconstitutional. Virginia, in response to the Fourth Circuit's reversal, proposed to create the Virginia Women's Institute for Leadership (VWIL) as a parallel program for women. On appeal from the District Court's affirmation of the plan, the Fourth Circuit ruled that despite the difference in prestige between the VMI and VWIL, the two programs would offer "substantively comparable" educational benefits. The United States appealed to the Supreme Court.

Question:

Does Virginia's creation of a women's-only academy, as a comparable program to a male-only academy, satisfy the Fourteenth Amendment's Equal Protection Clause?

Conclusion:

No. In a 7-to-1 decision, the Court held that VMI's male-only admissions policy was unconstitutional. Because it failed to show "exceedingly persuasive justification" for VMI's gender-biased admissions policy, Virginia violated the Fourteenth Amendment's equal protection clause. Virginia failed to support its claim that single-sex education contributes to educational diversity because it did not show that VMI's male-only admissions policy was created or maintained in order to further educational diversity. Furthermore, Virginia's VWIL could not offer women the same benefits as VMI offered men. The VWIL would not provide women with the same rigorous military training, faculty, courses, facilities, financial opportunities, or alumni reputation and connections that VMI affords its male cadets. Finally, the Fourth Circuit's "substantive comparability" between VMI and VWIL was misplaced. The Court held that the Fourth Circuit's "substantive comparability" standard was a displacement of the Court's more exacting standard, requiring that "all gender-based classifications today" be evaluated with "heightened scrutiny." When evaluated with such "heightened scrutiny," Virginia's plan to create the VWIL would not provide women with the same opportunities as VMI provides its men and so it failed to meet requirements of the equal protection clause. [NOTE: Justice Ginsberg's announcement of the Court's opinion (below) may be considered an address to the American public. It is a plain-spoken and forceful summary of the majority position.]

United States v. Virginia, 518 U.S. 515 (1996), is a case in which the Supreme Court of the United States struck down the Virginia Military Institute's long-standing male-only admission policy in a 7-1 decision. (Justice Clarence Thomas recused himself from the case, presumably because his son was enrolled at VMI at the time.)

Writing for the majority, Justice Ruth Bader Ginsburg stated that because VMI failed to show "exceedingly persuasive justification" for its sex-biased admissions policy, it violated the Fourteenth Amendment's equal protection clause. In an attempt to satisfy equal protection requirements, the state of Virginia had proposed a so-called "separate but equal" parallel program for women, called the Virginia Women's Institute for Leadership (VWIL), located at Mary Baldwin College, a private liberal arts women's college.

However, Justice Ginsburg held that the VWIL would not provide women with the same type of rigorous military training, facilities, courses, faculty, financial opportunities, and/or alumni reputation and

connections that VMI affords male cadets, a decision evocative of *Sweatt v. Painter*, when the Court ruled in 1946 that segregated law schools in Texas were unconstitutional, since a newly-formed black law school clearly did not provide the same benefits to its students as the state's prestigious and long-maintained white law school.

Chief Justice Rehnquist wrote a concurrence agreeing to strike down the male-only admissions policy of the Virginia Military Institute, as violative of the Fourteenth Amendment's Equal Protection Clause.[1][2] However, he declined to join the majority opinion's bases for using the Fourteenth Amendment, writing: "Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an equal protection violation."[2] This rationale supported separate but equal facilities separated on the basis of gender: "it is not the 'exclusion of women' that violates the Equal Protection Clause, but the maintenance of an all-men school without providing any -- much less a comparable -- institution for women... It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber."[2]

Justice Scalia's lone dissent argued that the standard applied by the majority was closer to a strict scrutiny standard than the intermediate scrutiny standard applied to previous cases involving equal protection based on sex. Notably, however the opinion for the Court eschewed either standard; its language did not comport with the "important governmental interest" formula used in prior intermediate scrutiny cases. Scalia argued that "if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review."

Justice Thomas did not participate because his son was attending the Virginia Military Institute at the time.

With the VMI decision, the high court effectively struck down any law which, as Justice Ginsburg wrote, "denies to women, simply because they are women, full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society."

Following the ruling, VMI contemplated going private to exempt itself from the 14th Amendment, and thus this ruling. The Department of Defense warned the school that it would withdraw all ROTC programs from the school if this privatization took place. As a result of the DOD action, Congress amended 10 USC 2111a, to prohibit the military from withdrawing or diminishing any ROTC program at one of the six senior military colleges, including VMI. However, VMI's Board of Visitors had already voted 8-7 to admit women and did not revisit the issue after the law was amended.

VMI was the last all-male public school in the United States

Roe v. Wade

Facts of the Case:

Roe, a Texas resident, sought to terminate her pregnancy by abortion. Texas law prohibited abortions except to save the pregnant woman's life. After granting certiorari, the Court heard arguments twice. The first time, Roe's attorney -- Sarah Weddington -- could not locate the constitutional hook of her argument for Justice Potter Stewart. Her opponent -- Jay Floyd -- misfired from the start. Weddington sharpened her constitutional argument in the second round. Her new opponent -- Robert Flowers -- came under strong questioning from Justices Potter Stewart and Thurgood Marshall.

Question:

Does the Constitution embrace a woman's right to terminate her pregnancy by abortion?

Conclusion:

The Court held that a woman's right to an abortion fell within the right to privacy (recognized in Griswold v. Connecticut) protected by the Fourteenth Amendment. The decision gave a woman total autonomy over the pregnancy during the first trimester and defined different levels of state interest for the second and third trimesters. As a result, the laws of 46 states were affected by the Court's ruling.

Roe v. Wade, 410 U.S. 113 (1973),[1] a landmark case decided by the United States Supreme Court on the issue of abortion, is one of the most controversial and politically significant cases in U.S. Supreme Court history.

The Court held that a woman may abort her pregnancy for any reason, up until the "point at which the fetus becomes 'viable.'" The Court defined viability as the potential "to live outside the mother's womb, albeit with artificial aid," adding that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[2] The Court said that, after viability, abortion must be available when needed to protect a woman's health, as defined in the companion case of *Doe v. Bolton*.[3] The Court rested these conclusions on a constitutional right to privacy emanating from the Due Process Clause of the Fourteenth Amendment, also known as substantive due process.

In disallowing many state and federal restrictions on abortion in the United States,[4] *Roe v. Wade* prompted a national debate that continues today, about issues including whether and to what extent abortion should be legal, who should decide the legality of abortion, what methods the Supreme Court should use in constitutional adjudication, and what the role should be of religious and moral views in the political sphere. *Roe v. Wade* reshaped national politics, dividing much of the nation into pro-*Roe* (mostly pro-choice) and anti-*Roe* (mostly pro-life) camps, while activating grassroots movements on both sides.

History of the case

In September 1969, while working as a carnival side-show barker, Norma L. McCorvey discovered she was pregnant. She returned to Dallas, TX, where friends advised her to assert that she had been raped, because then she could obtain a legal abortion (with the understanding that Texas's anti-abortion laws allowed abortion in the cases of rape and incest). However, this scheme failed, as there was no police report documenting the alleged rape. She attempted to obtain an illegal abortion, but found the site shuttered, closed down by the police. Eventually, she was referred to attorneys Linda Coffee and Sarah Weddington. [5]

In 1970, attorneys Linda Coffee and Sarah Weddington filed suit in a U.S. District Court in Texas on behalf of Norma L. McCorvey (under the alias Jane Roe). At the time, McCorvey was no longer claiming her pregnancy was the result of rape, but she later acknowledged she had lied earlier about having been raped.[6][7] The defendant in the case was Dallas County District Attorney Henry Wade, representing the State of Texas. Although McCorvey was still hoping the courts would rule in her favor in time for her to end her unwanted pregnancy, she told her attorneys, "Let's do it for other women." [8]

"Rape" is not mentioned anywhere in the court documents and was never a consideration in *Roe v. Wade*.[9] Norma McCorvey's affidavit does not include the word "rape".[10]

The district court ruled in McCorvey's favor on the merits, but declined to grant an injunction against the enforcement of the laws barring abortion.[11] The district court's decision was based upon the Ninth Amendment, and the court also relied upon a concurring opinion by Justice Arthur Goldberg in the 1965 Supreme Court case of *Griswold v. Connecticut*, regarding a right to use contraceptives. Few state laws proscribed contraceptives in 1965 when the *Griswold* case was decided, whereas abortion was widely proscribed by state laws in the early 1970s.[12]

Roe v. Wade ultimately reached the U.S. Supreme Court on appeal. Following a first round of arguments, Justice Harry Blackmun drafted a preliminary opinion that emphasized what he saw as the Texas law's vagueness.[13] Justices William Rehnquist and Lewis F. Powell, Jr. joined the Supreme Court too late to hear the first round of arguments. Therefore, Chief Justice Warren Burger proposed that the case be reargued; this took place on October 11, 1972. Weddington continued to represent *Roe*, and Texas Assistant Attorney General Robert C. Flowers stepped in to replace Wade. Justice William O. Douglas threatened to write a dissent from the reargument order, but was coaxed out of the action by his colleagues, and his dissent was merely mentioned in the reargument order without further statement or opinion.[14]

Supreme Court decision

Harry Blackmun wrote the Court's opinion.

The court issued its decision on January 22, 1973, with a 7 to 2 majority vote in favor of McCorvey. Burger and Douglas' concurring opinion and White's dissenting opinion were issued separately, in the companion case of *Doe v. Bolton*.

The *Roe* Court deemed abortion a fundamental right under the United States Constitution, thereby subjecting all laws attempting to restrict it to the standard of strict scrutiny. Although abortion is still considered a fundamental right, subsequent cases, notably *Planned Parenthood v. Casey*, *Stenberg v. Carhart*, and *Gonzales v. Carhart* have affected the legal standard.

The opinion of the *Roe* Court, written by Justice Harry Blackmun, declined to adopt the district court's Ninth Amendment rationale, and instead asserted that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Douglas, in his concurring opinion from the companion case *Doe v. Bolton*, stated more emphatically that, "The Ninth Amendment obviously does not create federally enforceable rights." Thus, the *Roe* majority rested its opinion squarely on the Constitution's due process clause.

Justiciability

An aspect of the decision that attracted comparatively little attention was the Court's disposition of the issues of standing and mootness. Under the traditional interpretation of these rules, Jane Roe's appeal was "moot" because she had already given birth to her child and thus would not be affected by the ruling; she also lacked "standing" to assert the rights of other pregnant women.[29] As she did not present an "actual case or controversy" (a grievance and a demand for relief), any opinion issued by the Supreme Court would constitute an advisory opinion, a practice in which the Court traditionally did not engage.

The Court concluded that the case came within an established exception to the rule; one that allowed consideration of an issue that was "capable of repetition, yet evading review." This phrase had been coined in 1911 by Justice Joseph McKenna.[30] Blackmun's opinion quoted McKenna, and noted that pregnancy would normally conclude more quickly than an appellate process: "If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied."

Dissents

Byron White was the senior dissenting justice White asserted that the Court "values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries." Despite White suggesting he "might agree" with the Court's values and priorities, he wrote that he saw "no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States." White criticized the Court for involving itself in this issue by creating "a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it." He would have left this issue, for the most part, "with the people and to the political processes the people have devised to govern their affairs."

Controversy

Some pro-life supporters argue that all nine justices in *Roe* failed to adequately recognize that life begins at fertilization (also referred to as conception) and should therefore be protected by the Constitution;[31] the dissenting justices in *Roe* instead wrote that decisions about abortion "should be left with the people and to the political processes the people have devised to govern their affairs."[3] Other pro-life supporters argue that, in the absence of definite knowledge of when life begins, it is best to avoid the risk of doing harm.[32] Every year on the anniversary of the decision, pro-life supporters demonstrate outside the Supreme Court Building in Washington, D.C. in the March for Life.[33][34][35]

Advocates of *Roe* describe it as vital to preservation of women's rights, personal freedom, and privacy. Denying the abortion right has been equated to compulsory motherhood, and some scholars (not including any member of the Supreme Court) have argued that abortion bans therefore violate the Thirteenth Amendment:

> “When women are compelled to carry and bear children, they are subjected to 'involuntary servitude' in violation of the Thirteenth Amendment….[E]ven if the woman has stipulated to have consented to the risk of pregnancy, that does not permit the state to force her to remain pregnant.[36]”

Opponents of *Roe* have objected that the decision lacks a valid constitutional foundation. Like the dissenters in *Roe*, they have maintained that the Constitution is silent on the issue, and that proper solutions to the question would best be found via state legislatures and the democratic process, rather than through an all-encompassing ruling from the Supreme Court. Supporters of *Roe* contend that the decision

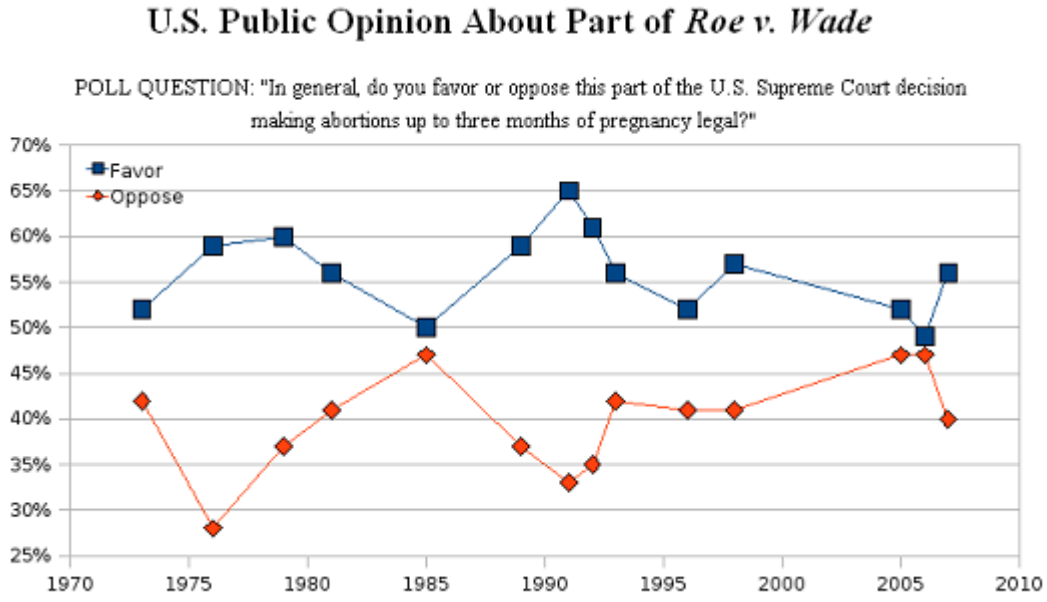
has a valid constitutional foundation, or contend that justification for the result in *Roe* could be found in the Constitution but not in the articles referenced in the decision.[36][37]

At a rally for *Roe v. Wade*, on the anniversary of the decision. Albert Wynn and Planned Parenthood president Gloria Feldt, in front of the Supreme Court steps

In response to *Roe v. Wade*, most states enacted or attempted to enact laws limiting or regulating abortion, such as laws requiring parental consent for minors to obtain abortions, parental notification laws, spousal mutual consent laws, spousal notification laws, laws requiring abortions to be performed in hospitals but not clinics, laws barring state funding for abortions, laws banning intact dilation and extraction (also known as partial-birth abortion), laws requiring waiting periods before abortion, or laws mandating women read certain types of literature before choosing an abortion.[38] Congress in 1976 passed the Hyde Amendment, barring federal funding of abortions for poor women through the Medicaid program. The Supreme Court struck down several state restrictions on abortions in a long series of cases stretching from the mid-1970s to the late 1980s, but upheld restrictions on funding, including the Hyde Amendment, in the case of *Harris v. McRae* (1980).[39]

The most prominent organized groups that mobilized in response to *Roe* are the National Abortion Rights Action League on the pro-choice side, and the National Right to Life Committee on the pro-life side. The late Harry Blackmun, author of the *Roe* opinion, was a determined advocate for the decision. Others have joined him in support of *Roe*, including Judith Jarvis Thomson, who before the decision had offered an influential defense of abortion.[40]

Roe remains controversial. Polls show continued division about its landmark rulings, and about the decision as a whole.



Regarding the *Roe* decision as a whole, more Americans support it than support overturning it.[66] When pollsters describe various regulations that *Roe* prevents legislatures from enacting, support for *Roe* drops.

Gregg v. Georgia

Facts of the Case:

A jury found Gregg guilty of armed robbery and murder and sentenced him to death. On appeal, the Georgia Supreme Court affirmed the death sentence except as to its imposition for the robbery conviction. Gregg challenged his remaining death sentence for murder, claiming that his capital sentence was a "cruel and unusual" punishment that violated the Eighth and Fourteenth Amendments.

This case is one of the five "Death Penalty Cases" along with *Jurek v. Texas*, *Roberts v. Louisiana*, *Proffitt v. Florida*, and *Woodson v. North Carolina*.

Question:

Is the imposition of the death sentence prohibited under the Eighth and Fourteenth Amendments as "cruel and unusual" punishment?

Conclusion:

No. In a 7-to-2 decision, the Court held that a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances. In extreme criminal cases, such as when a defendant has been convicted of deliberately killing another, the careful and judicious use of the death penalty may be appropriate if carefully employed. Georgia's death penalty statute assures the judicious and careful use of the death penalty by requiring a bifurcated proceeding where the trial and sentencing are conducted separately, specific jury findings as to the severity of the crime and the nature of the defendant, and a comparison of each capital sentence's circumstances with other similar cases. Moreover, the Court was not prepared to overrule the Georgia legislature's finding that capital punishment serves as a useful deterrent to future capital crimes and an appropriate means of social retribution against its most serious offenders.

Gregg v. Georgia, *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*, 428 U.S. 153 (1976), reaffirmed the Supreme Court's acceptance of the use of the death penalty in the United States, upholding, in particular, the death sentence imposed on Troy Leon Gregg. In its 1972 decision in *Furman v. Georgia* 408 U.S. 238 (1972), the Supreme Court had imposed a *de facto* moratorium on the death penalty. In response legislatures in many states retooled the procedures used to impose the death penalty to conform to the *Furman* decision. These ***July 2 Cases***, as a leading scholar refers to them[1], set forth the two main features these capital sentencing procedures must employ in order to comport with the Eighth Amendment bar on "cruel and unusual punishments".

Justice Potter Stewart had remarked that the death penalty was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." In the *July 2 Cases*, the Court set out two broad guidelines that legislatures must follow in order to craft a constitutional capital sentencing scheme. First, the scheme must provide objective criteria to direct and limit the sentencing discretion. The objectiveness of these criteria must in turn be ensured by appellate review of all death sentences. Second, the scheme must allow the sentencer (whether judge or jury) to take into account the character and record of an individual defendant. In *Gregg*, *Proffitt*, and *Jurek*, the Court found that the capital sentencing schemes of Georgia, Florida, and Texas, respectively, met these criteria. In *Woodson* and *Roberts*, the Court found that the sentencing schemes of North Carolina and Louisiana did not.

The *July 2 Cases* mark the beginning of the United States's modern legal conversation about the death penalty. Major subsequent developments include forbidding the death penalty for rape (*Coker v. Georgia*), restricting the death penalty in cases of felony murder (*Enmund v. Florida*), exempting the

mentally handicapped (*Atkins v. Virginia*) and juvenile murderers (*Roper v. Simmons*) from the death penalty, removing virtually all limitations on the presentation of mitigating evidence (*Lockett v. Ohio*, *Holmes v. South Carolina*), requiring precision in the definition of aggravating factors (*Godfrey v. Georgia*, *Walton v. Arizona*), and requiring the jury to decide whether aggravating factors have been proved beyond a reasonable doubt (*Ring v. Arizona*).

In the *July 2 Cases*, the Court's goal was to provide guidance to states in the wake of *Furman*. In *Furman* only one basic idea could command a majority vote of the Justices: capital punishment, as then practiced in the United States, was cruel and unusual punishment because there were no rational standards that determined when it was imposed and when it was not. The question the Court resolved in these cases was not whether the death sentence imposed on each of the individual defendants was cruel, but rather whether the process by which those sentences were imposed was rational and objectively reviewable.

By way of background, all five cases share the same basic procedural history. The named defendant[2] had been convicted of murder and sentenced to death. The respective state supreme court[3] had upheld the death sentence. The defendants then asked the U.S. Supreme Court to review their death sentence, and it agreed to do so.

Capital punishment is not cruel and unusual

The defendants in each of the five cases urged the Court to go farther than it had in *Furman* by holding once and for all that capital punishment was cruel and unusual punishment that violated the Eighth Amendment. However the Court responded that "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*." Both Congress and 35 states had complied with the Court's dictates in *Furman* by either specifying factors to be weighed and procedures to be followed when imposing a death sentence, or dictating that the death penalty would be mandatory for specific crimes. Furthermore, a referendum in California had overturned the California Supreme Court's earlier decision (*California v. Anderson*) holding that the death penalty violated the California constitution. The fact that juries remained willing to impose the death penalty also contributed to the Court's conclusion that American society did not believe in 1976 that the death penalty was in all circumstances a cruel and unusual punishment.

The Court also found that the death penalty "comports with the basic concept of human dignity at the core of the [Eighth] Amendment". The death penalty serves two principal social purposes—retribution and deterrence. "In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct". But this outrage must be expressed in an ordered fashion, for America is a society of laws. Retribution is consistent with human dignity, because society believes that "certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death". And although it is difficult to determine statistically how much crime the death penalty actually deters, the Court found that in 1976 there was "no convincing empirical evidence" supporting either the view that the death penalty is an effective deterrent to crime or the opposite view. Still, the Court could not completely discount the possibility that for certain "carefully contemplated murderers", "the possible penalty of death may well enter into the cold calculus that precedes the decision to act".

Finally, the Court considered whether the death penalty is "disproportionate in relation to the crime for which it is imposed". Although death is severe and irrevocable, the Court could not say that death was always disproportionate to the crime of deliberately taking human life. "It is an extreme sanction, suitable to the most extreme of crimes".

Toward constitutional sentencing procedures

The proposition that the death penalty was not always cruel and unusual punishment was just the beginning of the discussion. *Furman* had held that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." The question the Court confronted in these five cases was whether the procedures crafted by Georgia, Florida, Texas, North Carolina, and Louisiana adequately minimized that risk. In all five cases, the Court's primary focus was on the jury.

Although in most criminal cases the judge decides and imposes the sentence, "[j]ury sentencing has been considered desirable in capital cases in order to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." The drafters of the Model Penal Code concluded that the now-familiar bifurcated procedure, in which the jury first considers the question of guilt without regard to punishment, and then determines whether the punishment should be death or life imprisonment, is the preferable model. This was the model that the Court approved in these cases—although it tacitly approved a model without any jury involvement in the sentencing process, an approval that persisted until 2002's *Ring v. Arizona*.

The drawback of having juries rather than judges fix the penalty in capital cases is the risk that they will have no frame of reference for imposing the death penalty in a rational manner. Although this problem may not be totally correctible, the Court trusted that the guidance given the jury by the aggravating factors or other special-verdict questions would assist it in deciding on a sentence. The drafters of the Model Penal Code "concluded that it is within the realm of possibility to point to the main circumstances of aggravation and mitigation that should be weighed and weighed against each other when they are presented in a concrete case." For the Court, these factors adequately guarded against the risk of arbitrary imposition of the death sentence.

Every death sentence involves first an **eligibility** determination and then a **selection** of an eligible defendant for the death penalty. A defendant is eligible for the death penalty once the jury has concluded that he is a member of that narrow class of criminal defendants who have committed the most morally outrageous of crimes. An eligible defendant is then selected for the death penalty after the sentencer takes into account mitigating evidence about the character and record of the defendant in order to decide whether that individual is worthy of a death sentence. With *Gregg* and the companion cases, the Court approved three different schemes that had sufficiently narrow eligibility criteria and at the same time sufficiently broad discretion in selection. By contrast, the two schemes the Court disapproved had overly broad eligibility criteria and then no discretion in sentencing.

Appellate review

In addition to jury sentencing through the guidance of aggravating factors, a constitutional capital sentencing scheme must provide for appellate review of the death sentence, typically by the state's supreme court. This review must not be a rubber stamp; there must be evidence in the state's decisional law that the court takes seriously its responsibility to ensure that the sentence imposed was not arbitrary.

[edit] Historical disapproval of mandatory death sentences

The Court approved the capital sentencing procedures created by Georgia, Florida, and Texas in the wake of *Furman* because each of them shared two important features. First, they created a discrete and narrow

category of offenders who were eligible for the death penalty. Second, they gave the sentencer objective factors to apply when exercising discretion in capital sentencing.

North Carolina and Louisiana responded to *Furman* in a markedly different way. Rather than taking up the Model Penal Code's suggestion, or defining capital murder in a very narrow way, they simply made the death penalty the only punishment available for first-degree murder. Although Louisiana defined that crime more narrowly than North Carolina did, both definitions suffered from the same two flaws. First, their eligibility criteria were too broad because all those convicted of first-degree murder were automatically eligible for the death penalty. Second, they eliminated any discretion in capital sentencing, thus severing the link between the sentiment of the community and the penal system, an important reason for maintaining the death penalty in the United States.

The Court was determined to simultaneously save capital punishment in the United States and impose some reasoned basis for carrying it out. That reasoning flows from the Eighth Amendment's cruel and unusual punishment clause. Although capital punishment is not per se cruel and unusual, it must still be carried out in a manner consistent with the evolving standards of decency that mark the progress of a maturing society. In the Court's view, the country's history with capital punishment suggests that those evolving standards of decency could not tolerate a return to the mandatory death penalty for murder that had prevailed in medieval England.

In medieval England, the penalty for a vast number of serious crimes, including murder, was death. This rule traveled with the colonists to America, and was the law in all states at the time the Eighth Amendment was adopted in 1791. By then, however, a problem with the common-law mandatory death penalty had crept into the legal system. If the jury has only two options—convicting a defendant of murder, where the penalty is death, or acquitting the defendant outright—it has no vehicle to express the sentiment that the defendant should be punished *somehow*, but not executed. Faced with this dilemma, some juries would acquit the defendant in order to spare his life. Of course, this meant that an obviously guilty person would go free.

To mitigate the harshness of the common-law rule, Pennsylvania divided murder into "degrees" in 1794. First-degree murder, a capital crime, was limited to all "willful, deliberate, and premeditated" murders. All other murder was second-degree murder, and not a capital crime. This development eased the tension created by the common-law mandatory death penalty, but some juries still refused to convict defendants who were clearly guilty of first-degree murder because that crime carried a mandatory death penalty.

Recognizing that juries in capital cases found discretion in sentencing desirable, Tennessee, Alabama, and Louisiana afforded their juries this discretion in the 1840s. Finally, the jury could respond to mitigating factors about the crime or the criminal and withhold the death penalty even for convicted first-degree murderers. This development spread, and by 1900 23 states and the federal government had discretionary sentencing in capital cases. Fourteen more states followed in the first two decades of the 20th century, and by 1963 all death-penalty jurisdictions employed discretionary sentencing. In particular, North Carolina enacted a discretionary sentencing law in 1949.

Mandatory death penalties contradict Furman

In light of the historical rejection of the mandatory death penalty in the United States, the Court ruled that for North Carolina and Louisiana to revert to mandatory death penalties for first-degree murder violated the Eighth Amendment as interpreted in *Furman*. This was so even though Louisiana had defined first-degree murder somewhat more narrowly than North Carolina had, although not as narrowly as Texas's crime of capital murder.