The Slave Court

By Bruce Laidlaw

During his four year tenure, President Trump made 234 lifetime judicial appointments including three to the United States Supreme Court. While president Biden can reverse some policies with the stroke of a pen, changing the judiciary is not so simple. The lifetime appointments can only be terminated by death, resignation or impeachment. The president is appointing a commission to review the federal judiciary. It may help that review to explore how the Supreme Court's decisions have shaped American History. A review of its decisions regarding race may be a good start. I have attempted a review that includes racial policies in effect when the court was created.

I found the Supreme Court was often mired in precedents that it tried to work around rather than overrule. At one point, the due process requirements of the constitution were held to protect slave ownership. At later points, "due process" was invoked to halt efforts to repair the damage caused by earlier decisions.

SELF EVIDENT TRUTHS

The preamble to the Declaration of Independence stated: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." But did the drafters really mean it? The principal drafter of the declaration, Thomas Jefferson, owned more than a hundred slaves and he was from the colony that was the birth place of slavery in America.

Eighty-one years after the Declaration of Independence, Chief Justice Taney found that the nation's founders didn't really mean it. In the infamous Dred Scott[1] case, Taney wrote a rambling opinion that treated Africans as creatures different from people. He found that Africans were inferior beings that the founding fathers did not intend to be accorded Life, Liberty and the pursuit of Happiness.

At Gettysburg, Abraham Lincoln stated that eighty-seven years earlier, the founding fathers had created a nation "conceived in liberty, and dedicated to the proposition that all men are created equal." But when it came time to draft our constitution in 1787, there were no words regarding that equality of men. Instead there were several provisions that recognized the existence of slavery although the word "slave" was never used.

Section 2 or Article I provided for legislative apportionment of the states based on the number of "free persons" plus three fifths of "other persons." The other persons were slaves. So states got partial credit in congressional apportionment based on the number of slaves.

In Section 2 of Article IV, the euphemism for slave was "Person held to Service or Labour." It provided that a slave could not throw off the burdens of slavery by escaping to a state that did not recognize slavery.

Section 9 of Article I denied Congress the ability to ban the importation of slaves until

1808. It states:

> The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

In 1789, the ten amendments of the Bill of Rights were added to the constitution and the right of liberty was mentioned in the Fifth Amendment. No person was to be "deprived of life, liberty, or property, without due process of law. . ." But that liberty was deemed to be applicable only to acts of the federal government. States were considered free to adopt laws enforcing slavery.

The United States Supreme Court was created by the 1787 constitution. It rendered its first decision in 1791. In 1803, by the opinion of Chief Justice John Marshall, the court assumed the role of reviewing and interpreting the Constitution. But at that point, there was little in the Constitution or 184 years of the history of slavery in America to give the court ammunition to rule on the legality of slavery. It is necessary to go back more than 400 years to understand what the Supreme Court faced when it first dealt with slavery.

COLONIAL HISTORY OF SLAVERY

The English colony of Virginia was settled in 1607. In August 1619, an English ship brought 20 Africans to Point Comfort on the Virginia Peninsula. They were traded for food. That began the history of slavery in America although the Africans were not initially considered slaves. The legal concept of owning another human being did not exist in England. The closest thing under English law was indentured servitude under which a person worked for a tradesman to earn his freedom from servitude. That is how some of the initial Africans earned their freedom. There are scattered court records of cases in which Virginia courts found that Africans performed sufficient labor to earn freedom. The early census records did not record the African population as slaves. Instead, they were listed as non Christians.

It would take 40 years for the status of the Africans to evolve to lifelong servitude. The Virginia legislation, the House of Burgesses, enacted a series of laws designed to preserve ownership of slaves. A 1662 law preserved ownership of slave offspring in the mother's master regardless of the father of the child.

> Whereas some doubts have arisen whether children got by any Englishman upon a Negro woman should be slave or free, be it therefore enacted and declared by this present Grand Assembly, that all children born in this country shall be held bond or free only according to the condition of the mother. . .

There was concern that a slave might be considered free if baptized as a Christian. A 1667 law addressed that issue.

> Whereas some doubts have risen whether children that are slaves by birth, and by the charity and piety of their owners made partakers of the blessed sacrament of

> baptism, should by virtue of their baptism be made free, it is enacted and declared by this Grand Assembly, and the authority thereof, that the conferring of baptism does not alter the condition of the person as to his bondage or freedom. . .

The penalties for misconduct by slaves were usually in the form of whipping or branding. So there was a concern for masters who happened to kill slaves while administering the penalties. That was addressed by a 1669 law:

> Whereas the only law in force for the punishment of refractory servants resisting their master, mistress, or overseer cannot be inflicted upon Negroes, nor the obstinacy of many of them be suppressed by other than violent means, be it enacted and declared by this Grand Assembly if any slave resists his master (or other by his master's order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accounted a felony, but the master (or that other person appointed by the master to punish him) be acquitted from molestation, since it cannot be presumed that premeditated malice (which alone makes murder a felony) should induce any man to destroy his own estate.[2]

A North Carolina case dealt with the assault conviction of a master who shot a slave woman resisting punishment. A jury found him guilty of assault and he was fined five dollars. On appeal, conviction was reluctantly overturned by a judge who found the master immune from prosecution.

> I repeat, that I would gladly have avoided this ungrateful question. But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be the imperative duty of the Judges to recognize the full dominion of the owner over the slave, except where the exercise of it is forbidden by statute. And this we do upon the ground, that this dominion is essential to the value of slaves as property, to the security of the master, and the public tranquillity, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.[3]

SLAVES AS PERSONAL PROPERTY

Slaves were considered personal property that could be bought and sold on the same basis as livestock. That is how Chief Justice Marshall treated them in his decision in The Antelope.[4] He was faced with the fate of Africans on a seized pirate ship. The Africans had themselves been seized by the pirates from ships of various countries whose citizens were claiming them. Marshall briefly addressed the legality of slavery:

> That it is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission. But from the earliest times war has existed, and war confers rights in which all have acquiesced. , , Slavery, then, has its

> origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful.

Marshall then ruled that the ownership of Africans should be divided up the same way one might divide up ownership of rustled cattle.

Although slavery remained legal in much of the new world, by 1839 most countries had banned the importation of additional slaves. Nonetheless, in 1839, about 500 Negroes who had been captured in Africa were brought to Havana, Cuba to be sold. Fifty-three of the Africans were purchased and placed on the ship Amistad to be taken to Cuban sugar plantations. The Africans then managed to free themselves from restraints and killed the ship's captain. They took over the ship and ordered the men who had bought them to sail them back to Africa. The buyers tricked them into believing they were sailing for Africa when they were sailing up the coast of the United States. The ship was then intercepted by the Coast Guard off of Connecticut and was brought to shore. Then claims were made for the ownership of the Amistad and the Africans.The claims for the ownership of the Africans were the subject of the Supreme Court decision in *The Amistad*, 40 U.S. 518, (1841). The decision hinged on the laws of Spain.

> It is plain beyond controversy, if we examine the evidence, that these Negroes never were the lawful slaves of Ruiz or Montez, or of any other Spanish subjects. They are natives of Africa, and were kidnaped there, and were unlawfully transported to Cuba, in violation of the laws and treaties of Spain, and the most solemn edicts and declarations of that government. By those laws, and treaties, and edicts, the African slave trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain, are declared to be free.

The Africans were ordered to be free and some were able to return to Africa.The remarkable feature of the opinion of Justice Story was that the Africans were described as people with rights instead of the equivalent of livestock. Since almost all slaves in the United States were either kidnaped Africans or the decedents of kidnaped Africans, the opinion might have been read as a condemnation of slavery. But it actually applied only to those currently being illegally imported. The opinion had no value as precedent.

Justice Taney made no such recognition of slaves as people with rights in the *Dred Scott* case.[5] Dred Scott filed suit in federal court to claim freedom from slavery. His master had taken him with him when traveling from a slave state to a non slave state. He claimed that freed him from the bonds of slavery, and the bonds could not be reimposed simply by his return to the slave state. Justice Taney's opinion ruled that the court had no jurisdiction to consider the claim, because Scott was not a citizen with a right to file suit. In an opinion that even cited the Magna Carta, Taney declared that drafters of the Constitution could not have considered Negroes to be citizens regardless of whether they were free or slaves.

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.

. . .

> [T]hey are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Finding persons of African descent were an inferior class of beings with no rights was not enough for Justice Taney. Although the determination that the court lacked jurisdiction should have ended consideration. He went on to declare that the act of Congress known as the Missouri Compromise was unconstitutional under the Fifth Amendment prohibition of depriving a person of property without due process of law. That deprivation allegedly would occur if a master brought a slave into a non slave state and thereby lost ownership of the person.

Justice Taney would remain Chief Justice until his death in 1863 gave Abraham Lincoln an opportunity to replace him on the court. His opinion in the Dred Scott case helped kindle the flames of unrest that led to the Civil War.

CONSTITUTIONAL AMENDMENTS

Following the civil war, the adoption of the Thirteenth Amendment to the Constitution abolished slavery. The Fourteenth Amendment made all persons born in the United States citizens and declared that they were entitled to equal protection of the laws. Both amendments gave the Congress authority to implement the terms by statute. That should have done away with the blight of the Dred Scott opinion. But the Supreme Court resisted.

The Congress enacted the Civil Rights Act of 1875 which banned racial discrimination regarding access to public accommodations. But the Supreme Court held the statute unconstitutional because it declared the amendments only gave the Congress authority to ban discrimination by state action not private conduct.[6] Justice John Marshall Harlan dissented from court's narrow reading of the amendments. He pointed out that the Court had never found such a limited view of congressional authority when it adopted laws relying on the fugitive slave provision of the constitution.

Plessy vs. Ferguson[7] presented the Court with an opportunity to employ its limited view of the Fourteenth Amenment because a state law clearly mandated unequal treatment based on race. The law required that trains have separate cars or compartments for blacks and whites and required that the passengers sit only in the area suited for their races. Eight of the justices found no fourteenth amendment violation.

> [W]e think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment. . .

Justice Harlan's dissent proved prophetic.

> 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. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race. In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case. . .
>
> State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races the continuance of which must do harm to all concerned.

The Plessy separate but equal decision of the court gave the court's blessing to state sponsored segregation. That would be the law of the land for 60 years. States used that authority to mandate segregation in everything from drinking fountains to, t0 public schools, even to marital sex.

The narrow interpretation the Supreme Court gave to the Fourteenth amendment left open the possibility of "appropriate" legislation protecting constitutional rights could be adopted under the Thirteenth Amendment's prohibition of slavery. That issue was raised in *Hodges v. United States*[8] (1906) where men were convicted of conspiring to deprive person of constitutional rights by using force and coercion to prevent black men from holding manufacturing employment

The majority opinion rejected the idea that legislation of anything other than preventing involuntary servitude was an appropriate area for legislation under the Thirteenth Amendment. Accordingly the convictions under a federal statute were dismissed. Justice Harlan, joined by Justice Day, dissented saying:

> As the nation has destroyed both slavery and involuntary servitude everywhere within the jurisdiction of the United States, and invested Congress with power, by appropriate legislation, to protect the freedom thus established against all the badges and incidents of slavery as it once existed, as the disability to make valid contracts for one's services was, as this Court has said, an inseparable incident of the institution of slavery which the Thirteenth Amendment destroyed, and as a combination or conspiracy to prevent citizens of African descent, solely because of their race, from making and performing such contracts, is thus in hostility to the rights and privileges that inhere in the freedom established by that Amendment, I am of opinion that the case is within section 5508, and that the judgment should be affirmed.

LEGISLATION BASED ON RACE OR NATIONAL ORIGIN

The 1922 opinion of Ozawa vs. United States[9] was based on a mixture of color, race and nationality. Mr. Ozawa sought citizenship under a naturalization provision for “free white persons.” Although he was white skinned, a lower court found him ineligible because he was of the “Japanese race.” In a unanimous opinion, the court held that “white” didn’t mean white. It meant Caucasian.

> Manifestly the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.

The court felt no need to define Caucasian although the word has no fixed meaning

The court’s decision in the 1944 *Korematsu* case[10] was anything but color blind. It would rank high in the Rogue’s Gallery of bad decisions if it had served as precedent for any other decision. Justice Hugo Black’s opinion affirmed the conviction of Mr. Korematsu for being in the exclusion zone for people of Japanese ancestry during the war. The opinion tried to dance around the legality of required confinement of persons of Japanese ancestry by limiting the opinion to exclusion rather than confinement. In truth, the only alternative to being in the exclusion zone was confinement in the internment camps. Justice Black objected to the dissenting opinions’ referencen to “concentration camps.” True, there were no gas chambers or crematory ovens, but the residents were imprisoned behind barbed wire with armed guards in towers.

> In dissent, Justice Murphy said:
>
> This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power," and falls into the ugly abyss of racism.

In a remarkable bit of legal gymnastics, on the same day, the court ordered the release of a Japanese prisoner from a camp. But it avoided a direct conflict with *Korematsu* by limiting its opinion to “an admittedly loyal citizen.”[11]

United States was also at war with Germany and Italy. But the Court’s *Korematsu* opinion did not address the inconsistency of imprisoning persons of Japanese ancestry while doing nothing to impair the freedom of persons of German or Italian ancestry. During the war, I witnessed treason by a German housekeeper when part of my mother's button collection spilled from her apron. She admitted to making shirts for German soldiers. There was no treason charge. She merely lost a customer.

The *Korematsu* case was never overruled by a decision of the court, only by history. In a recent opinion, Justice Roberts said: “Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and— to be clear— "has no place in law under the Constitution."[12]

THE FADING EFFECT OF PLESSY

The ghost of Justice Taney began to fade in the 1940s. *Morgan v. Virginia*[13] found a Virginia law that required the races be separated in all intrastate and interstate travel unconstitutional. It was constrained by the separate but equal rule of the Plessydecision.Therefore it did not rely on the Fourteenth Amendment. It based its opinion on the Constitution’s commerce clause.

In the 1948 case of *Shelley v. Kraemer,*[14] the court used a legal fiction to employ the Fourteenth Amendment to ban racial discrimination. In two cases the issue was the legality of restrictive deed covenants that banned real property ownership based on race. One covenant stated *“*This property shall not be used or occupied by any person or persons except those of the Caucasian race.” When a Negro family purchased the property, a Michigan court ordered the family to move from the property within ninety days. The Supreme Court ruled that the court order was a form of state action that brought into play the Fourteenth Amendment. It outlawed such covenants by saying they were legal, but unenforceable.

In 1954, the Court rejected the *Plessy* “separate but equal” doctrine for public schools. In *Brown v. Board of Education of Topeka,*[15] Chief Justice Warren stated:

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.

The ruling rejected the “separate but equal” only for public schools. A result was that some public schools were closed and replaced with private schools. More important, the decision did not outlaw other state imposed forms of segregation. I saw it first hand in 1958 when a friend and I helped my brother drive to flight training in Montgomery, Alabama. Our trip back to Detroit was by Greyhound bus. When we boarded the bus in Montgomery, we took seats near the front. Then the black passengers boarded and walked by us to the back of the bus. The same thing happened when we changed buses in Birmingham. The Ohio River had formed part of the Mason-Dixon line. After we crossed the river, the driver pulled over and the black passengers moved out of the back.

During his inauguration as Alabama governor in 1963, George Wallace declared: “In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny, and I say segregation now, segregation tomorrow, segregation forever.” In the 1968 candidacy for president,Wallace won the states of Arkansas, Mississippi, Alabama, Louisiana and Georgia.

In 1964, Mississippi governor Ross Barnett traveled to Ann Arbor, Michigan where I saw him give a speech to University of Michigan Law School students. In a crowded meeting hall, Governor Barnett spoke at length about the importance of segregation. In the front row of

students was Harry Edwards, the only black student at the Law School. Edwards asked the governor if all his points were based on the assumption that blacks were inferior. Edwards said that was true, and started to give case citations for decisions holding the blacks were inferior beings. But the chorus of boos made it impossible to hear his case citations.[16]

It would take federal legislation to fully eradicate the "separate but equal" legal basis for segregation. The Civil Rights Act of 1964 banned segregation in employment and public accommodations. Taking a clue from the 1883 dissent of Justice Harlan, Congress specified that the legislation was based on the authority granted by the commerce clause of the constitution. That was the basis for the court to uphold the law in *Heart of Atlanta Motel v. United States.*[17] In their concurring opinions, Justices Black and Douglas said they would have done away with the last vestiges of the 1883 Civil Rights Cases by holding that the Fourteenth Amendment could also be the basis for upholding the 1964 statute.

Heart of Atlanta Motel would not be the last time the Supreme Court would have to deal with "separate but equal" because the Civil Rights Act of 1964 did not deal with sex and marriage. In 1958 Virginia police raided the home of Richard and Mildred Loving, found the Lovings in bed and arrested them for violating Virginia's Racial Integrity Act of 1924 which made it a crime for whites and blacks to marry. The Lovings had been legally married in Washington, D.C., but the Virginia act declared that marriage invalid. When the conviction of the Lovings made it to the Supreme Court in 1967, the State of Virginia asserted the "separate but equal" rule under the Plessy opinion. Virginia asserted that blacks and whites were treated equally because both were subject to the same penalties. Since marriage discrimination was not banned by the 1964 Civil Rights Act, The Supreme Court was forced to invoke another exception to the Plessy rule and find that the anti-miscegenation law violated the Fourteenth Amendment.[18] The court's marriage exception to Plessy was asserted by the court forty-eight years later when it declared that bans on same sex marriage violated the Fourteenth Amendment.[19]

The Supreme Court has severely criticized the Plessy decision.[20] But it has never been able to bring itself to explicitly overrule it. From a constitutional standpoint, the separate but equal rule regarding the Fourteenth Amendment remains in effect except for education and marriage cases. In the Loving case, Justice Potter Stewart's concurring opinion stated "I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." However, the remaining eight justices did not adopt that view.

REPAIRING THE DAMAGE OF PLESSY

The obvious remedy for dealing with segregated school systems would be to order that them desegregated. But there was a major stumbling block when that was attempted in Detroit. In *Milliken v. Bradley,*[21] a federal court found that the Detroit School Board had intentionally established a segregated school student system. It determined that the segregation could not be remedied by redistricting only within the Detroit school district. Desegregation could only be accomplished by a distribution of students in Detroit and 53 surrounding school districts. To facilitate the distribution, the court ordered the Detroit school system to buy 295 school buses. Would students from the lily white suburb of Grosse Pointe really be bused to inner city Detroit schools? Justice Warren Burger and four other members of the Court said no.

Justice Burger's opinion found that an area-wide desegregation order could not be justified absent proof of intentional segregation by the suburban school districts. There could be no proof of such discrimination because the suburban districts did not have significant black populations to segregate. The flaw in that opinion is that it ignored the housing practices such as redlining, restrictive covenants and terror that confined most of the black population to Detroit. No students were bused in or out of Grosse Pointe or other suburban school districts. The population of Detroit dropped from 1,849,568 in 1950 to 670,031 in 2020. From fifth largest city in the country, Detroit fell to the twenty-fourth largest. Hundreds of Detroit schools were closed.[22]

Just as controversial as busing have been attempts to give minorities a preference that would relieve them of the burdens of discrinination "Affirmative action" can give the impression of negative action when it moves non minorities ahead in line. In the 1978 case of University of California v. Bakke, indicated that race and ethnicity could be considered when benefitting minorities.[23] But the court found that the University gave race too much consideration. A number of admissions to the medical school were reserved for minorities. That had the effect of a quota and the court found such quotas illegal. While it upheld a ban of the admission system, it reversed a lower court ban on even considering race in school admissions. That gave a small hint of what the court would find legal. It indicated it would approve of "an admission program where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process."

> The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. at 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

The justices wrote multiple opinions in the *Bakke case.* So it was hard to discern whether it was a majority or plurality decision.The Bolinger University of Michigan[24] opinions would attempt to further sort out the legality of affirmative action programs. In the 2003 case of *Gratz v. Bollinger*[25], Jennifer Gratz was found to have been unlawfully discriminated against because she was Caucasian. The University of Michigan literature school program employed an admission system that awarded points for a variety of factors. Persons of "underrepresented minorities" received an additional 20 points that would move them ahead in line of Ms. Gratz. An automatic point system proved too powerful a consideration for the Court. Its oppinion stated: "Because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted interest in diversity, the policy violates the Equal Protection Clause."

In *Grutter v. Bollinger* (2003)[26], the plaintiff claimed she was discriminated agaiinst in admission to the University of Michigan Law School because she was "white." From the evidence presented at a trial, the Supreme Court found that in trying to achieve diversity, race was only a "plus" to be considered. There was no point system that might be evidence of a quota which would be considered impermissible. Therefore, Ms. Grutter's was lawfully treated. The

decision can be considered as favoring a subjective admission review as opposed to the objective point system used in the Gratz case.

The Grutter opinion added a requirement that "race-conscious admission policies must be limited in time." But it accepted the university's pledge that it "will terminate its race-conscious admission's program as soon as practicable." It gave the university a bit of leeway. "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." The extent to which race can be considered a "plus" in college admissions may now be limited in ten states which have banned "affirmative action"

When I was admitted to the University's law school in 1963, the only black student was the above-mentioned Harry Edwards. But there was an affirmative action system of sorts. Some standards were eased to admit more female students. Six women were admitted, two of whom graduated. The program had a limited time. Within a few years the female law students outnumbered the men.

VOTING RIGHTS AND RACE

The Fifteenth Amendment to the Constitution was ratified in February of 1870. It states:

> SECTION. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION. 2. The Congress shall have power to enforce this article by appropriate legislation.

The Congress wasted little time in trying to enforce the article by appropriate means. Its Enforcement Act of May 31, 1870 made it a crime to prevent a person from voting because of his race. On January 30, 1873, William Garner, "a man of African decent" attempted to vote in a municipal election in Lexington, Kentucky. He was turned away because he could not prove he had paid the $1.50 capitation (poll tax). He couldn't prove that because he was denied the right to pay it because of his race. The voting registrar was then prosecuted for violating the Act of May 31, 1870. That prosecution made it to the decision of the Supreme Court on March 27, 1876. In U.S. v. Reese,[27] 92 U.S. 214, (1876) narrowly construed the Enforcement Act of May 31, 1870 and found it was not the "appropriate legislation" required by the Fifteenth Amendment and declared it unconstitutional.

Despite the rocky start, the Fifteenth Amendment enabled substantial voting by blacks. Former slaves were elected to Congress. But it was another story when Reconstruction ended and states were given a free hand in determining voter qualifications. There were many creative means for suppression of the black vote.

Louisiana responded to heavy black voter registration by adding a "grandfather clause" to the constitution. It required registrants to own property assessed at $300 and to have paid the taxes due on the property. It exempted persons entitled to vote on or before January 1, 1867, or the son or grandson of that person. Of course, that clause excluded everyone whose grandfather

had been a slave. In 1890, there were 130,344 black voters registered in Louisiana. After the adoption of the grandfather clause, that number dropped to 5,320.[28] When the grandfather clause was adopted, the governor did not mince words about its purpose.

> The white supremacy for which we have so long struggled at the cost of so much precious blood and treasure, is now crystallized into the Constitution as a fundamental part and parcel of that organic instrument, and that, too, by no subterfuge or other evasions. With this great principle thus firmly imbedded in the Constitution, and honestly enforced, there need be no longer any fear as to the honesty and purity of our future elections.

When the U.S. Supreme Court then declared such grandfather clauses to be in violation of the Fifteenth Amendment,[29] Louisiana needed a new tool for suppression of the black vote. It adopted a literacy requirement that went well beyond the ability to read and write. Its constitution was amended to require that to register to vote a person "shall be able to understand and give a reasonable interpretation of any section of either [the United States or Louisiana] Constitution when read to him by the registrar."

But the use of the constitutional interpretation test for voter suppression did not have the glory days until the 1950s because another creative voter suppression system blocked black voters. The white primary made it possible to keep anyone blacks would want to vote for off the ballots. Primary elections were run by the parties, not the state. Thus, the Democratic party maintained control by not allowing blacks to join. That system of voter suppression passed initial muster before the Supreme Court.[30] But the decision approving it was overruled, and, in *Smith v. Allwright* (1944), it was found to be a violation of the Fifteenth Amendment.[31]

Then the constitutional interpretation test became the primary tool for suppressing the black vote. Its backbone was that a voter registrar was the judge and jury of the test. The registrar could decide who would be tested, what questions to use and what answers were acceptable. In one case a black resident was asked to interpret the search and seizure language of the Fourth Amendment. A Louisiana registrar found the resident had flunked the interpretation test by responding: "(N)obody can just go into a person's house and take their belongings without a warrant from the law, and it had to specify in this warrant what they were to search and seize." A white resident passed the test when asked to interpret a provision in the Louisiana constitution with the response: "'FRDUM FOOF SPETGH."

A literacy test that did require constitutional interpretations received approval by the Supreme Court in *Lassiter v. Northampton County Board of Elections,* (1959)[32] The Supreme Court was spared of the task of dealing with the interpretation tests because literacy tests were banned by the Voting Rights Act of 1965 regardless of whether they included constitutional interpretations.

The poll tax emerged as a voter suppression tool shortly after the adoption of the Fifteenth Amendment. In a Supreme Court opinion that didn't mention the Fifteenth Amendment, *Breedlove v. Suttles*[33] (1937) found no problem in imposing a fee for the right to vote. On its face such a requirement would not appear to be a major impediment to voting, but its application could be another matter. A federal court found that in a Mississippi county 5,099 white residents were able to pay the poll tax, but none of 6,483 black residents managed to pay

the tax. The black residents were told they had to see the sheriff to pay the tax, and he was always unavailable. When one of the black residents went to the sheriff's office to pay, a deputy told him "that 'no nigger' could pay his poll tax there.[34]

The Twenty-fourth Amendment to Constitution which was adopted in 1964 banned poll taxes, but it only applied to federal elections. Poll taxes survived the Voting Rights Act of 1965, but were finally put to bed by Justice Douglas's opinion in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)[35]. Justice Douglas declared the poll taxes violated the due process clause of the Fourteenth Amendment.

THE VOTING RIGHTS ACT

The Voting Rights Act of 1965 attempted to end many of the creative discriminatory voting practices. The act and its amendments specifically outlawed the tests and devices that had been used to deter voting by minorities. It went a step further by a measure designed to prevent new discriminatory practices. Under that measure, nine states were required to receive Justice Department or court approval for new voting measures. The states subjected to the "preclearance" requirement were selected based on documented discriminatory practices. Preclearance was originally required for only five years. But it was extended several times by amendments, the last of which extended the requirement for twenty-five years starting in 2006.

South Carolina v. Katzenbach [36](1966) found that the Act was "appropriate legislation" under the Fifteenth Amendment. The opinion of Justice Warren stated:

> Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Regarding the need for preclearance, Warren's opinion stated:

> Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

Shelby County v. Holder[37] ruled that legislation that was "appropriate" under the Fifteenth Amendment in 1965 was not appropriate in 2013. In an opinion joined by four other justices, Chief Justice Roberts stated that "voting discrimination still exists; no one doubts that." But then he indicated times have changed.

> Nearly 50 years later, things have changed dramatically. Largely because of the Voting Rights Act, "[v]oter turnout and registration rates" in covered jurisdictions "now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."

The opinion didn't indicate what important voting policies had been thwarted by the preclearance requirement. But it found that it could no longer be considered appropriate without a congressional record showing the need for prior approval of voting changes in the affected states.

Justice Ginzberg was joined by three other justices in dissent. She pointed out that Justice Roberts conceded that voting discrimination existed:

> But the Court today terminates the remedy that proved to be best suited to block that discrimination. The Voting Rights Act of 1965 (VRA) has worked to combat voting discrimination where other remedies had been tried and failed. Particularly effective is the VRA's requirement of federal preclearance for all changes to voting laws in the regions of the country with the most aggravated records of rank discrimination against minority voting rights.

After the Shelby decision, new voter suppression tools were adopted including strict voter I.D. laws, purged registration rolls, and closing of polling places. The Roberts opinion left open the possibility of congressional approval of a preclearance system, but only if supported by a strong congressional record showing abuse by specific states. It remains to be seen whether recent suppression techniques were isolated to the states previously designated for preclearance in a new or amended voter rights act.

THE CONTINUING STRUGGLE

People can no longer be bought and sold as personal property. But a civil war and amendments to the Constitution have failed to destroy all remnants of slavery. The Constitution has been invoked to halt efforts to eliminate the burdens caused by slavery. Many laws have been proposed to make it more difficult to vote. Confederate flags were waved in the nation's capital during its recent invasion. The struggle continues.

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1. *Dred Scott v. Sandford*, 60 U.S. 393, (1857)

2. William Waller Hening, Statutes at Large; Being a Collection of all the Laws of Virginia (Richmond, Va, 1809-23), Vol. 11, pp. 170, 260, 266, 270.

3. *State v. Mann,* 13 N.C. 263, (1829)

4. *The Antelope*, 23 U.S. 66, 121 (1825)

5. *Dred Scott v. Sandford*, 60 U.S. 393, (1857)

6. *Civil Rights Cases*, 109 U.S. 3, (1883)

7. *Plessy vs. Ferguson,* 163 U.S. 537 (1896)

8. *Hodges v. United States*, 203 U.S. 1 (1906)

9. *Ozawa vs. United States*, 260 U.S. 178 (1922)

10. *Korematsu v. United States*, 323 U.S. 214 (1944)

11. *Ex parte Mitsuye Endo*, 323 U.S. 283, (1944)

12. *Trump v. Hawaii,* 138 S.Ct. 2392 (2018)

13. *Morgan v. Virginia*, 328 U.S. 373 (1946)

14. *Shelley v. Kraemer,* 334 U.S. 1 (1948)

15. *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954).

16. I was seated to the side of the hallroom. Harry Edwards would later become the chief judge of the U.S. Court of Appeals for the D.C. Circuit.

17. *Heart of Atlanta Motel, Inc. v. United States*, 379 US 241 (1964)

18. *Loving v. Virginia*, 87 S.Ct. 1817, 388 U.S. 1, 18 L.Ed.2d 1010, (1967)

19. *Obergefell v. Hodges*, 135 S.Ct. 2584, 576 U.S. 644, 192 L.Ed.2d 609, 83 U.S.L.W. 4592, (2015)

20. "While we think Plessy was wrong the day it was decided, see Plessy, supra, 163 U.S. at 552-564 (Harlan, J., dissenting), we must also recognize that the Plessy Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision [in Brown] to reexamine Plessy was, on this ground alone, not only justified but required. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)."

21. *Milliken v. Bradley*, 418 U.S. 717 (1974)

22. The elementary school my brothers, my sister and I attended was closed in 2010. The building has been maintained because of it historic architecture, but the interior has been gutted.

23. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Previously, the *Korematsu* case had allowed consideration of race and ethnicity when imprisoning persons.

24. Lee Bollinger had been the dean of the University of Michigan Law School and later became the president of the university. I only knew him as a speedy middle distance runner.

25. *Gratz v. Bollinger*, 539 U.S. 244 (2003)

26. *Grutter v. Bollinger*, 539 U.S. 306 (2003)

27. *U.S. v. Reese*, 92 U.S. 214 (1876)

28. *United States v. State of Louisiana*, 225 F.Supp. 353 (1963

29. *Guinn & Beal v. United States*, 238 U.S. 347 (1915)

30. *Grovey v. Townsend*, 295 U.S. 45 (1935)

31. *Smith v. Allwright*, 321 U.S. 649 (1944)

32. *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959)

33. *Breedlove v. Suttles*, 302 U.S. 277 (1937)

34. *United States v. Dogan*, 314 F.2d 767, (Cir. 1963)

35. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)

36. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)

37. *Shelby County v. Holder*, 570 U.S. 529 (2013)