CRITICAL RACE JUDGMENTS

By re-writing U.S. Supreme Court opinions that implicate critical dimensions of racial justice, *Critical Race Judgments* demonstrates that it's possible to be judge and a critical race theorist. Specific issues covered in these cases include the death penalty, employment, voting, policing, education, the environment, justice, housing, immigration, sexual orientation, segregation, and mass incarceration. While some rewritten cases – *Plessy v. Ferguson* (which constitutionalized Jim Crow) and *Korematsu v. United States* (which constitutionalized internment) – originally focused on race, many of the rewritten opinions – *Lawrence v. Texas* (which constitutionalized sodomy laws) and *Roe v. Wade* (which constitutionalized a woman's right to choose) – are used to incorporate racial justice principles in novel and important ways. This work is essential for everyone who needs to understand why critical race theory must be deployed in constitutional law to uphold and advance racial justice principles that are foundational to U.S. democracy.

Bennett Capers is a Professor of Law at Fordham Law School, where he is also the Director of the Center on Race, Law, and Justice. He is the author of *The Prosecutor's Turn* (Metropolitan Books). His commentary and op-eds have appeared in the *New York Times*, *Washington Post*, and other journals.

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Critical Race Judgments

RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW

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Devon Carbado is the Honorable Harry Pregerson Professor of Law at UCLA School of Law and the former Associate Vice Chancellor of BruinX for Equity, Diversity and Inclusion. He is the author of *Acting White? Rethinking Race in "Post-Racial" America* (Oxford University Press) (with Mitu Gulati) and the editor of several volumes, including *Race Law Stories* (Foundation Press) (with Rachel Moran), *The Long Walk to Freedom: Runaway Slave Narratives* (Beacon Press) (with Donald Weise), and *Time on Two Crosses: The Collective Writings of Bayard Rustin* (Cleis Press) (with Donald Weise).

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CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW

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Foreword

Erwin Chemerinsky
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Robert F. Kennedy is often quoted as saying, "Some men see things as they are, and say why. I dream of things that never were, and say why not." This wonderful volume of essays does exactly that: it imagines things that never were and tells us how different and better our country could have been. If only we had justices who used the lens of Critical Race Theory, constitutional law and many areas of statutory law would have been vastly different and we would live in a more just and equal society.

In some instances, the essays are about how terribly misguided decisions – such as *Plessy v. Ferguson*,[1] *Korematsu v. United States*,[2] and *McCleskey v. Kemp*[3] – could have been written to come to totally different conclusions. In some instances, the essays are about how judicial opinions that came to a progressive result – such as *Loving v. Virginia*,[4] *Roe v. Wade*,[5] and *Lawrence v. Texas*,[6] – could have been improved. The sum of this work is to provide a very different vision for American law.

But what these essays don't answer because it was not their assignment is Bobby Kennedy's question of why not. Why has our Supreme Court been such a failure when it comes to issues of race throughout American history? One thing that unites the essays in this book is their documenting that the Supreme Court overall has had a dismal record – and that is a very generous characterization – with regard to race and equality throughout American history. From 1787, when the Constitution was ratified, until 1865, when the Thirteenth Amendment was adopted, not a single Supreme Court decision protected the rights of slaves or chipped away at the

[1] 163 U.S. 537 (1896) (upholding "separate but equal").
[2] 323 U.S. 214 (1944) (upholding the evacuation of Japanese-Americans during World War II).
[3] 481 U.S. 279 (1987) (rejecting a challenge to the death penalty based on its racially discriminatory impact).
[4] 388 U.S. 1 (1967) (declaring unconstitutional a state law prohibiting interracial marriage).
[5] 410 U.S. 113 (1973) (upholding a woman's constitutional right to abortion).
[6] 539 U.S. 558 (2003) (declaring unconstitutional a state law prohibiting private adult consensual same-sex sexual activity).

institution of slavery. The Court, in decisions such as *Prigg v. Pennsylvania*[7] and *Dred Scott v. Sanford*,[8] aggressively protected the rights of slave owners.

From 1896 until 1954, a period of 58 years, the Court articulated and implemented the doctrine of "separate but equal" that sanctioned apartheid in much of the United States. And it was not for many years after that until state-mandated segregation ended. Nor has the Court's performance in recent years been admirable. The Court dramatically limited the scope of equal protection in cases like *Washington v. Davis*[9] in its requirement for proof of discriminatory intent to establish race discrimination. And in *Shelby County v. Holder*, the Court for the first time in over a century and a half declared unconstitutional a civil rights statute, invalidating crucial provisions of the Voting Rights Act of 1965.[10]

The essays in this book require consideration of why the Supreme Court has done so poorly on issues of race. A large part of the answer certainly must be racism. A central teaching of Critical Race Theory is how racism is deeply embedded in American society and its legal and social structures. The essays in this book show how a different America could have been constructed. Critical Race Theory also teaches us of the importance of implicit biases and these too have infected Supreme Court decisions throughout American history.

This collection of essays demands that we reflect on the many Supreme Court cases that are discussed and understand why the Constitution and the Court have failed so dismally in combating racism. One must hope that this understanding, and that these essays, can provide a basis for a much better path for the future.

First, as we look back at the cases discussed in this book, we must be cognizant, at least at times, that the essays are the beneficiaries of hindsight. That is in no way to excuse the failings of the Court, but it is to say that there are times when hindsight makes evident things that might not have been recognized at the time of the decision. Derrick Bell's dissent to *Brown v. Board of Education*,[11] which begins this book, is a powerful example of that.

Professor Bell and I had many occasions to discuss *Brown*. On the occasion of the fiftieth anniversary of *Brown v. Board of Education*, Professor Bell and I were opposing counsel in a moot court on *Brown* at American University Law School.[12] Professor Bell's position was not that the Court should have upheld laws requiring segregation, but rather that the quest to desegregate schools was futile and therefore

[7] 41 U.S. (16 Pet.) 539 (1842) (declaring unconstitutional a state law that prohibited removing an escaped slave by force or violence).
[8] 60 U.S. (19 How.) 393 (1857) (holding that slaves are property and not citizens, and declaring the Missouri Compromise unconstitutional as a taking of property from slaveowners).
[9] 426 U.S. 229 (1976) (requiring proof of discriminatory intent to establish a racial classification).
[10] 570 U.S. 529 (2013) (declaring unconstitutional preclearance requirements of the Voting Rights Act of 1965).
[11] 347 U.S. 483 (1954) (declaring separate, but equal in education to violate equal protection).
[12] Stephen J. Wermiel, Brown v. Board of Education: *A Moot Court Argument*, 52 Am. Univ. L. Rev. 1343 (2003).

misguided. Our moot court actually continued a discussion we began when I was a student in his course on Race, Racism, and American law in the Spring of 1978, and a conversation that we had for the rest of his life about what the Court should have done in *Brown* and with regard to public schools.

Professor Bell's view that desegregation of schools was an impossible quest certainly and tragically has been shown to be correct. But I don't think the Court could have known this futility in 1954. The Court could not have known the extent of the massive resistance, the degree of white flight to suburban and private schools, and the Supreme Court's own abandonment of desegregation in decisions like *Milliken v. Bradley*[13] and *Parents Involved in Community Schools v. Seattle School District No. 1*.[14]

Essays like Professor Bell's, and others in this book, force us to think about if we knew then what we know now, what would we do differently. Professor Khiara Bridges offers a different and far better opinion for *Muller v. Oregon*, where the Supreme Court upheld a maximum hour law for women employees.[15] At the time, *Muller* was hailed as a progressive victory in an era of a Court that was invalidating laws to protect employees, but in hindsight its approach focusing on the inherent frailty of women and the need to protect their reproductive capacity is profoundly sexist and offensive. Professor Melissa Murray offers an approach to *Roe v. Wade*[16] that would have provided a far stronger foundation for abortion rights and that benefits from the knowledge of what has occurred over the last half century.

Second, and closely related, we must understand the decisions in the context of the pressures of their times. To be clear, looking at cases in this way provides an understanding, never an excuse for bad decisions. A number of years ago, I participated in a moot court that Harvard Professor Charles Ogletree held on whether *Dred Scott* was inevitable. One of the judges on the panel, Sixth Circuit Judge Damon Keith, in his comments after the argument, forcefully answered this question: the Court's decision was wrong and inexcusable at its time and we should have expected more and better from the justices. In fact, the dissents in many of the cases show that the better view was known at the time and unfortunately rejected. Professor Robert Chang's essay on *Korematsu v. United States* echoes some of the points made in the dissenting opinions of Justices Robert Jackson and Frank Murphy, who clearly saw the terrible error of the Court's ruling.[17]

Professor Paul Butler's essay offers a very different and far better approach to the Court's decision in *Terry v. Ohio*, which upheld the ability of the police to stop and frisk individuals if there is "reasonable suspicion."[18] *Terry* is a wrong decision that

[13] 418 U.S. 717 (1974) (limiting interdistrict remedies for school segregation).
[14] 551 U.S. 701 (2007) (limiting voluntary desegregation orders by school boards).
[15] 208 U.S. 412 (1908).
[16] 410 U.S. 113 (1973).
[17] 323 U.S. 214 (1944) (Jackson, J., dissenting; Murphy, J., dissenting).
[18] 392 U.S. 1 (1968).

contributed greatly to racialized policing in the United States. But what is often overlooked is that *Terry v. Ohio* was an 8–1 decision handed down by the Supreme Court in 1968 when there was the most liberal group of justices of any time in American history. The majority opinion in *Terry* was written by Chief Justice Earl Warren and was joined by liberal luminaries such as William Brennan and Thurgood Marshall; only Justice William Douglas dissented.

Understanding the case requires reflecting on how such a liberal Court could render such a bad decision empowering the police.[19] The racial consequences of the Court's holding in *Terry* clearly were foreseeable. The NAACP Legal Defense Fund in its "friend of the court" brief in *Terry v. Ohio* addressed the racial consequences of allowing police stops and frisks: "The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged."[20]

Terry v. Ohio was decided in 1968. It was an extraordinarily tense time in the United States and the social unrest, and the underlying social concern about crime and social order, likely affected the justices.[21] This was the year that Martin Luther King, Jr. and Bobby Kennedy were assassinated. There was great concern about crime and violence in the United States in the late 1960s. Shortly before the Court decided *Terry*, President Lyndon Johnson had created a President's Commission on Law Enforcement and Administration of Justice, chaired by Attorney General Nicholas Katzenbach. This was a reaction to the perception that crime was out of control. 1968 was the year that Richard Nixon ran for President, largely on a platform of what he called "law and order" and explicitly against the Warren Court and its decisions. 1968 was a year in the midst of racial violence in the United States. In 1965, there was a riot in Los Angeles in the Watts area. In the summer of 1967, just before the Supreme Court's oral arguments in *Terry* and its companion cases, riots occurred in Newark, in Detroit, and in other cities. More riots followed, including after the assassination of Dr. Martin Luther King, Jr., on April 4, 1968. It was in this context that the Supreme Court considered and decided *Terry v. Ohio*.

The Court also may have been reacting to the great criticism of its earlier decisions, expanding rights of criminal defendants, such as *Mapp v. Ohio*[22] and *Miranda v. Arizona*.[23] The justices were repeatedly attacked for handcuffing the police and being soft on criminals. Likely they just weren't willing to take another step to significantly limit law enforcement in light of this. Again, this is not to excuse the decision, but to understand how it came about.

[19] I examine this question, and *Terry v. Ohio*, in detail in Erwin Chemerinsky, Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights (2021).

[20] Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae at 3, *Terry*, 392 *U.S. 1 (No. 67)*, 1967 WL 113672, at *3.

[21] Devon Carbado powerfully makes this point in Devon W. Carbado, *From Stop and Frisk to Shoot to Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. Rev. 1508, 1528 (2017).

[22] 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states).

[23] 384 U.S. 436 (1966) (requiring police administer warnings before in-custodial interrogation).

Understanding decisions in the context of their times also provides a basis for thinking about *Brown v. Board of Education* and again Professor Bell's essay about it. As Professor Bell rightly pointed out, nowhere in *Brown* does the Court explain why "separate but equal" is inherently inimical to the Fourteenth Amendment's promise of equal protection of the law. I share his sense that this should have been an essential part of the Court's decision. Instead, the Court in *Brown* focused narrowly on why segregation of schools violates equal protection. Chief Justice Warren surely wrote the opinion this way to get a unanimous opinion. William Douglas wrote in his autobiography that had *Brown* been decided the year before, in 1953 when it was first argued, it would have been 5–4 to affirm *Plessy v. Ferguson* and the doctrine of separate but equal.[24] The Court in 1954 could not have gotten unanimity to the opinion Professor Bell rightly said was essential. Would it have been better for the Court to have issued such an opinion even if it was not unanimous? Would it have been better to forego unanimity the following year so as to prescribe immediate remedies for segregation rather than its amorphous command to desegregate with "all deliberate speed"? Justice John Paul Stevens later said that he felt the Court gave up too much for the sake of unanimity in *Brown*.[25] Yet, I also understand why Chief Justice Warren felt that unanimity was essential for a decision of this magnitude. It is a difficult and unanswerable question, but it requires looking at the Court in the context of the pressures, including internal ones among the justices, that it faced.

Third, the decisions discussed in this book must be understood as a reflection of the justices and their values and life experiences. One of the central teachings of Critical Race Theory is that there is no such thing as "objective" law. Supreme Court decisions are entirely a product of who is on the Court and what they believe. Although Supreme Court nominees are fond of uttering platitudes at their confirmation hearings like, "Justices are just umpires calling balls and strikes" and "Justices just apply the law, they don't make it," we all know that they are utter nonsense. Why did Republican Senators block the confirmation of Chief Judge Merrick Garland and rush through the confirmation of Judge Amy Coney Barrett? It is because they, like everyone, know that the identity of the justices and their ideology and values make all of the difference in Supreme Court decisions.

In all of American history, there have been only three individuals of color to serve on the Supreme Court, two Black justices and one Latina justice. There have been just five women on the Supreme Court. Overall, the justices have come from very privileged backgrounds and all obviously were very successful before their nomination to the Supreme Court. Some justices – like James Clark McReynolds – were openly racist and anti-Semitic. Many were stunningly insensitive to the racial dimensions of their decisions. For example, Fourth Amendment decisions like

[24] William O. Douglas, The Court Years, 1939–1975 113 (1980).
[25] John Paul Stevens, Five Chiefs (2011).

Whren v. United States[26] (discussed by Devon Carbado and Jonathan Feingold) and *Illinois v. Wardlow*[27] (discussed by Song Richardson) essentially give the police the ability to stop any person at any time, which inevitably is done in a racialized manner. But the Court's opinions are seemingly oblivious to this reality. The requirement for proof of discriminatory intent in cases like *Washington v. Davis* (discussed by Kimberlé Williams Crenshaw) and *McCleskey v. Kemp* (discussed by Mario Barnes) reflects a Court's majority that shows little understanding of the problems of implicit bias or of proving discriminatory intent.

Focusing on the identity of the justices as the reason for the decisions is important in reminding us how different it could have been and how easily it might have been that many of the opinions could have been written like the ones presented in this book. There is a temptation to regard history as having been inevitable rather than contingent on circumstances and events. What if Bobby Kennedy had not been assassinated in June 1968 and he, rather than Richard Nixon, appointed four justices between 1969 and 1971? Or what if Hubert Humphrey had won that election? Many of the cases discussed in this book would have come out differently. In the area of public schools, *San Antonio Board of Education v. Rodriguez*,[28] discussed by Professor Rachel Moran in her essay, and *Milliken v. Bradley*,[29] discussed by Professor Michelle Adams, surely would have been decided differently. Both were 5–4 rulings, with the majority comprised of Potter Stewart joined by the four Nixon appointees – Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. These decisions, which did a great deal to institutionalize separate and unequal schools, instead would have had the Court taking major steps towards ensuring equal educational opportunity. The Court would have held that disparities in school funding violate equal protection and that courts may impose inter-district remedies for school segregation.

Or what if Al Gore had been elected President in 2000 rather than George W. Bush? If there had not been the "butterfly ballot" in Florida, it would have happened. He likely then would have been President in 2005 and would have replaced William Rehnquist and Sandra Day O'Connor. How different constitutional law would be with liberal or even relatively moderate justices rather than John Roberts and Samuel Alito. And what if Hillary Clinton rather than Donald Trump had been elected in 2016 and she had been able to replace Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg?

Between 1960 and 2020, there have been thirty-two years with Republican Presidents and twenty-eight years with Democratic Presidents. In 2024, it will be

[26] 517 U.S. 806 (1996) (motivation of police officer is irrelevant if there is reasonable suspicion or probable cause).

[27] 528 U.S. 119 (2000) (reasonable suspicion existed when a person walked the other way from a police officer).

[28] 411 U.S. 1 (1973) (holding disparities in school funding do not violate equal protection).

[29] 418 U.S. 717 (1974) (holding that courts generally cannot impose inter-district remedies for school segregation).

exactly even in this regard. But since 1960, Republican Presidents have put fifteen justices on the Court and Democratic Presidents only eight. A great deal of that is the accident of history as to when vacancies on the Supreme Court have occurred, as well as Republican machinations in blocking Garland and rushing through Barrett. In other words, the decisions discussed in this book were not an historical inevitability. They were entirely a product of who was on the Court when they were decided.

In conclusion, as I reflect on this wonderful book, it made me think about why we should care so much about the Supreme Court. I have spent my career teaching its decisions, writing about them, and occasionally arguing there, and find that increasingly I am asking myself that question. The Court has failed so miserably on issues of race, and much else.[30] The composition of the current Court – and what it is likely to be for many years to come – is a cause for despair. Amy Coney Barrett was 48 years old when she was confirmed as a justice in 2020. If she remains on the Court until she is 87, the age at which Justice Ruth Bader Ginsburg died, Barrett will be a justice until the year 2059.

The essays in this book and the cases they discuss show why we spend so much time focused on the Supreme Court. Its decisions affect all of us, often in the most important and intimate aspects of our lives. Its decisions profoundly shape our society, for ill in cases like *Dred Scott* and *Plessy*, and for good, in cases like *Brown* and *Roe* and *Lawrence*. This book challenges us to imagine what our world would have been like with a different group of justices, ones far more conscious of racism and ones that benefited from the wisdom of Critical Race Theory. It would have been – and it could have and should have been – such a better world.

[30] *See* Erwin Chemerinsky, The Case Against the Supreme Court (2014).