**The Politics Classroom**
**Host:** Professor Floros
Ep. 2023.12: Racism is Over – SCOTUS
**In the Classroom**: Professor Evan McKenzie, UIC Political Science

**Professor Floros:** In the United States, the Supreme Court term runs from October to June, with the most controversial and consequential decisions released in the last days of June. This term was no different. So today, I've invited back Professor Evan McKenzie to help make sense of some of those cases. So, let's get started in The Politics Classroom recorded on July 12, 2023.

**Intro Music**: Three Goddesses by Third Age

Welcome to The Politics Classroom, a podcast of UIC Radio. I'm Professor Kate Floros, a Clinical Associate Professor of Political Science at the University of Illinois at Chicago. I'm thrilled to welcome Professor Evan McKenzie back to The Classroom to discuss some recent Supreme Court decisions.

Professor McKenzie received his bachelor's degree in political science and his law degree at UCLA and his PhD at the University of Southern California. He is a Professor of Political Science at UIC and associated faculty at the UIC School of Law. He teaches courses in American politics, urban politics, judicial process, and constitutional law. He has joined me in The Politics Classroom on multiple previous occasions, and I'm grateful that he made the time to speak with me today.

Professor Evan McKenzie, welcome to The Politics Classroom!

[00:01:39] **Professor Evan McKenzie:** Oh, thanks very much for having me. I really appreciate it.

[00:01:42] **Professor Floros:** I'm really excited to talk to you about multiple cases today, but before we get into actual cases, I wanted to start with a little bit of a bigger picture and the personnel of the court.

**Ketanji Brown Jackson**

[00:01:53] **Professor Floros:** So, this was the first term in which Justice Ketanji Brown Jackson served, and she's the first African American woman on the court. She joins Clarence Thomas, which is the first time there have been two African Americans on the court at the same time. Ideologically, they couldn't be any more different, but can you give us a quick overview of what her presence on the court looked like this year?

[00:02:20] **Professor Evan McKenzie:** Well, yeah, sure. She, she's replacing Justice Breyer. And so that changes the balance of the court a little bit, I think, ideologically, because Breyer was kind of a centrist Democrat, and often, you know, is kind of a middle of the road justice on many issues.

And it appears that she is not that sort of person, that she's a much more, she's much more like Sotomayor, for example. Up until recently, Justice Sotomayor has been regarded as the most liberal or democratic or progressive justice on the court. And it may be that Jackson is more like her, or maybe even a little bit more to the left.

And so that changes the ideological balance of the court. It doesn't change the count on the court because it's an overwhelmingly Republican court, you know, with six Republican justices and five of them really hard right. The other thing is that, as you said, you could say she's a bit of a, a polar opposite of, of Clarence Thomas because he's the other African American justice, and he's about as far to the right as you can get. And so she has a kind of credibility on some of these issues such as the affirmative action cases that they decided where she, she can be very outspoken and speak from her own experience, uh, as he's always, he's always doing.

He's always, you know, whining and complaining about the way, you know, affirmative action affected his life. And even though he got every, every conceivable benefit from the policy, but then he says, oh, it's bad because people didn't, you know, really appreciate how much, how hard I worked or how smart I am, et cetera. She's speaking to this, what Sotomayor has done as well, speaking as people who, who benefited from policies that the right wing of the court wants to do away with, and are, and they are doing away with them.

So, that's really something, and also she writes strong dissents. And I think the terminology and the forcefulness of her dissents carries over into the news media. So when she used the term, uh, "let them eat cake obliviousness," you know, (both laugh) for the Supreme Court, uh, the decision in the affirmative action case, that's a very punchy line that was quoted a lot. So, she's not stodgy, you know. She's got some bite and some, I guess, awareness of how ordinary people will perceive it, how the media will perceive it, that lets her, her views kind of shine through and get picked up in the news media. That's the way it looks to me.

[00:04:37] **Professor Floros:** Okay.

[00:04:38] **Professor Evan McKenzie:** One thing I would say though is she writes really good dissents, but by definition, when you write a dissent, you lost.

[00:04:44] **Professor Floros:** Right. (laughing)

[00:04:45] **Professor Evan McKenzie:** Yeah, and you don't win by losing. And I see in the news media all this, "Oh, look, it's going to be great. She's going to write these great dissents." What's so great about being stuck writing dissents?

[00:04:53] **Professor Floros:** Yeah.

[00:04:54] **Professor Evan McKenzie:** That means you're losing, you know, you don't, look, you don't win by losing, but you know, down the road, maybe they'll become more influential.

**Getting to the Court**

[00:05:01] **Professor Floros:** Okay. And so again, before we get onto the cases, let's talk a little bit about how these cases get to the court. And so claimants have to petition for writ of certiori?

[00:05:14] **Professor Evan McKenzie:** Certiorari.

[00:05:15] **Professor Floros:** Yeah, there you go. (laughing)

[00:05:16] **Professor Evan McKenzie:** Right.

[00:05:17] **Professor Floros:** Can you talk about that process and then how the justices decide whether or not to take a case?

[00:05:23] **Professor Evan McKenzie:** Well, I think it's really important to understand something. You know, when we political scientists, as you know, we talk about, we use the term agenda setting that institutions always have some kind of agenda setting procedure, Congress, the president, the United Nations, whatever, which is the some power to dis-, to control what matters they take up and the order in which they take them up. And the Supreme Court is a unique institution in our federal system of courts in that they have virtually total control over their own agenda. The district courts, they have to take, you know, whatever, a case is filed, they have to hear it.

The courts of appeal, the intermediate circuit courts of appeal, you know, everyone has a right to one appeal. And so they handle appeals and they don't really set their own agenda. The U. S. Supreme Court sets its own agenda, and since 1925 at least, they basically, except for a very tiny number of cases, uh, called original jurisdiction cases that we don't have to get into, it's one or two per term, you know.

They decide on their own what they're going to hear and what they're not going to hear, and no one can make them hear a case, and no one can prevent them from hearing a case, in essence, unless Congress takes away their jurisdiction. And they do this using two rules. One is called Rule 10. Which is a rule that simply says we, the Supreme Court, take cases that are, the circuits are in conflict, the state Supreme Courts are in conflict over an issue, or they're brand new issues, they're extremely important new issues that have to be decided, and then they, they vote, they apply that rule using something called the Rule of Four, which is very simple.

If four of them vote to hear a case based on the petitions for writ of certiorari, which are reviewed by law clerks, if four of them want to hear it, they hear the case. Okay.

And no one can say, well, wait a minute, that Rule 10 doesn't really apply that you didn't, it doesn't matter. If four of them want to hear it, they hear it.

And that's, what's to me, so striking about this court. I mean, they are so focused on certain types of cases. And the other thing that's remarkable about it is that because there are only three members of the court who were appointed by Democrats, that three is less than four, right? Okay. What that means is that the, the so called progressive or liberal or democratic justices have no control over the agenda of the court at all. The agenda of the court is 100% set by the six Republican justices. And that is really, uh, striking. It's not just that they have the edge in voting. They have total control over what cases the Supreme Court will and won't hear. Cause even if three justices want to hear it, that's not enough. They've got to have a Republican on their side. And I just thought it would be worth mentioning. Republicans have controlled the Supreme Court continuously for 53 years, since 1970.

[00:08:05] **Professor Floros:** Yikes.

[00:08:06] **Professor Evan McKenzie:** There have always been at least five members of the Supreme Court since 1970 that were Republicans. 53 years. And every Chief Justice of the Supreme Court since 1953, that's 70 years ago, has been appointed by a Republican president. This isn't new that the Supreme Court controls, that is controlled by Republicans, but it, it is unusual to have it be 6-3, because when it's 5-4, then, you know, you have some agenda, uh, control, and you only need one, maybe, justice to agree with you.

Right now, this is a, a really, a court that is controlled by the far right, and not just Republicans, there are five of them are, are really quite remarkably ideological.

[00:08:48] **Professor Floros:** So, what kind of cases might Democratic appointed justices want to hear that this court doesn't?

[00:08:56] **Professor Evan McKenzie:** There's certain things that this, this court has decided are kind of off limits to the courts. And one of them we're going to talk about, I think, in the Allen v. Milligan. This court has put off limits the, a lot of questions involving what we call partisan gerrymandering. And that's a real serious issue. Basically, you know, they're trying to get the federal courts out of the business, they almost put state courts out of the business, of ruling on the question of partisan gerrymandering.

I think that if we had a more balanced court that there are many situations where they would have taken up those cases on reapportionment. The rights of the accused. The constitutionality of certain punishment methods, like death penalty methods, and this sort of thing. There's a lot of things that they would take up.

Obviously, they've taken abortion off. They've overruled abortion rights. These are issues where a more Democratically-controlled court would have been scrutinizing what's going on in the states. And now they've just taken it completely off the table.

[00:09:48] **Professor Floros:** Yeah. Okay, let's move on to some cases. And I thought, you know, there are actually not as many cases before the court as there used to be, but there are certainly plenty worth talking about. And we don't have enough time today to go over all of them, and so I'm hoping to bring you back later. But I wanted to focus on cases that had some either direct or indirect association with policies and laws regarding, that affect race.

**Allen v. Milligan (Voting Rights)**

[00:10:16] **Professor Floros:** So, I want to start first with voting rights cases. And you mentioned Allen versus Milligan, which dealt with Section 2 of the 1965 Voting Rights Act. Section 2 prohibits voting procedures that discriminate based on race, including diluting the vote of racialized groups. So in this case, after the 2020 census, Alabama redistricted its congressional districts and created new election maps. And they have seven districts, but while 27% of Alabama's population is Black, Black voters were either packed into one congressional district in the Black Belt or the rest of the African American population of the Black Belt was split among different majority white districts. So, those challenging Alabama's map said that given the population of African Americans in the state that there should be two Black-majority districts rather than the one that the legislature have been drawn.

So, in a 5 to 4 decision, the court agreed that the redistricting map that the Alabama legislature came up with likely violates Section 2 of the Voting Rights Act. So, A, did I get any of that wrong, and B, is the 5-4 decision in favor upholding Section 2? Talk about the importance of that.

[00:11:41] **Professor Evan McKenzie:** Yeah, well, you didn't get anything wrong.

[00:11:44] **Professor Floros:** Okay, good.

[00:11:45] **Professor Evan McKenzie:** But I think to understand this, you have to go back and look at the actual laws in question and a little bit of the history of this. Okay?

[00:11:52] **Professor Floros:** Great.

[00:11:53] **Professor Evan McKenzie:** So, first, it starts with the 15th Amendment. The 15th Amendment was passed after the Civil War. And it says that "the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude."

Okay, that was, that's, that's in the 1860s. But then what happened was, a long time ago, the Supreme Court decided a case called City of Mobile versus Borden. Let me, let

me back up even a little bit further. Congress then passed the Voting Rights Act. That was in the 1960s. And it has this section that you talked about, in which they're trying to implement the 15th Amendment, and they're saying that, what we call vote dilution laws, essentially, are illegal. Laws that are intended to weaken, uh, in this case, the votes, the votes of Black voters, which is what this thing did, you know. The Black voters are 27% of the state's population and they packed them into one district and took the remainder and, as they say, cracked them.

We call it in political science, as you know, we call this packing and cracking where you, where you pack a minority group into a small number of districts and then whatever's left over, you dilute them and crack them and spread them over other districts so they have no influence. That's what they did here. This is packing and cracking.

So, Section 2 of the Voting Rights Act from 1960s is an attempt to implement this. Then, along came a decision of the Supreme Court in which they said, the Supreme Court, I won't go into the details, but basically an older Supreme Court said, "Wait a minute, you know, if you can show that the state intended to dilute Black votes, that's wrong, but if it, if the law is a neutral and it just had the effect of diluting the black votes, that's not good enough." So that's when Congress got into the act. Okay. And Congress, it was in 1982, and I think this is important to understand this. This was signed by Ronald Reagan. This provision that we're talking about was signed into effect by Ronald Reagan.

Essentially, they tried to, to try to implement some kind of fairness here so that minorities, particularly Black voters could not be sorted out in this manner and have the legislature say, "Well, you can't prove we intended to do that." Right? So the Supreme Court then made a decision. And this is the decision that was the basis for the one we're talking about.

It was an application of this previous decision. Which is what they call the Gingles Test. It was Thornburg versus Gingles. It was 1986. And it was when the constitutionality of this law, Reagan signed, was challenged in court. Now the Gingles Test is what was applied in this case that we are here talking about, Allen versus Milligan.

And they said that there are, the way we determine whether the legislature has done something wrong is by looking at three things. It's the three part Gingles test. One is what's called compactness, meaning that the group, we're talking about Black voters here, that the group is sufficiently large and compact to constitute a majority in a single member district. In other words, that there's enough of them and they're close enough together that they could easily go into a district or one or more districts, but they're together. They're cohesive. They're living in the same area, approximately.

And then second is that they are politically, is the group politically cohesive? In other words, because that's, that goes to the question whether the legislature is trying to break up a group because of their political views. And the third is racial block voting. Is

the idea here that, at work, to prevent them from exercising their right to vote essentially in the same direction?

And then you use the totality of the circumstances to determine whether, at the end, have they tried to diminish the ability of a minority group to elect candidates of their choice as a group. In other words, they're there, they would, if they're spread across districts, they might be a majority in two or three districts and they'd have political impact. And if the point of what the legislature is doing is breaking that up, so they dilute their votes, which is what they did here, then that violates the Gingles test.

So what happened here was, this is an application of the Gingles test, and the question was, did the lower courts do this correctly? And ultimately, the five person majority, which includes the three Democrats and Roberts and Kavanaugh, said, "Yeah, the lower court did it right." Now, there's just one thing I want to point out about this. It's really significant.

This is the second time this case came up before the court. Okay. (Professor Floros agrees) And the first time was back in 2021. Well, that's a year before the last congressional election, wasn't it? Right. (Professor Floros agrees) Before the last national election. In 2021, the facts were the same as they are now.

[00:16:21] **Professor Floros:** Right.

[00:16:21] **Professor Evan McKenzie:** Right. And, and, and it turns out that the legislature did violate the Gingles test. They did violate Section 2, but guess what? The Supreme Court decided back in 2021 that they could go ahead and use that map, even though the lower court had already said it violated Section 2. And even though now we know the lower court was right, they were allowed to use that map. And as a result, the Republicans won six out of seven districts in Alabama.

Now, you know how close the House of Representatives is?

[00:16:52] **Professor Floros:** Three votes, right?

[00:16:53] **Professor Evan McKenzie:** Yeah. It's really close. Yeah.

[00:16:55] **Professor Floros:** Yeah.

[00:16:55] **Professor Evan McKenzie:** And so you see, this is a very consequential. The decision to let them use that map in the last election was a consequential one. So we know in the news media, they're all going, "Oh, hooray, look, you know, look at the court, how reasonable they were." Oh, really? Well, they allowed this map, which is illegal, they allow this illegal map to be used in the last election to the benefit of the Republican party.

[00:17:16] **Professor Floros:** And what was the justification for that?

[00:17:18] **Professor Evan McKenzie:** The main issue here was whether there was sufficient proof at the time that it was clear that the vote dilution claim was going to prevail. How clear was it?

[00:17:29] **Professor Floros:** So they needed an election to prove that the vote was diluted (Professor McKenzie laughs) to support the claim that the vote would be diluted.

[00:17:37] **Professor Evan McKenzie:** Yeah, "We're not going to rush ahead and prejudge the case. We, you know, this is a very close, we've got to really think this over and hear full briefing and argument and amicus curiae briefs. We can't really make that determination now." So they went ahead and let the Republicans benefit from it at the time when it counted in the 2022 election. Now they control the House of Representatives and partly as a result of that. And, you know, the other thing is that, that these things have repercussions, these decisions, you know, and, um, if the Supreme Court had spoken out at that time, it might have affected consideration of other pending maps. And that's kind of speculation, but if the Supreme Court says, "Wait a minute, you clearly, no, we're going to stop that because we think it's pretty clear that you violated the Section 2,' that might have affected the determination of other cases and other legislative decisions around the country. Of course, well, you know, like I said, we're never going to know.

[00:18:24] **Professor Floros:** Yeah.

[00:18:25] **Professor Evan McKenzie:** That's the back-, I just wanted to give some backdrop to this section.

[00:18:28] **Professor Floros:** Okay, so this is also in the wake of the Shelby County versus Holder decision in 2013, which gutted Section 5 of the Voting Rights Act, which required states that had a history of discrimination, they needed to have any election law changes pre-cleared by the U. S. Justice Department before those could go into effect. And the court at that point, also with the majority decision written by Chief Justice John Roberts, said that the formula for determining who needed to get their laws pre-cleared was outdated, and so therefore, he threw out pre-clearance. Now, Congress could have come in with something else and has not yet done that.

But, so, what is the difference between, I mean, because a lot of people expected that, uh, Roberts would vote the other way on this and that, that the Section 2 would be diminished. So, can you explain the difference between these two sections that led to this different outcome?

[00:19:35] **Professor Evan McKenzie:** The way I see it, there was an existing test. This test I just described, that, that's an existing, that's been on the books for a long time. I think what Roberts was saying in his opinion is it's pretty clear that the lower court

applied that test correctly. I mean, they, and they did. You know, they, they did. The lower court, two of the, they use three-judge panels on these reapportionment cases. Three, (unintelligible) two of them were appointed by Trump. I mean, this was not some sort of, you know, uh, outlandish interpretation or application. I think it was pretty clear that the law was applied correctly. And, and, and so he went along with it. Now, could he have done something more dramatic? Could he have had enough votes to throw out this whole application of Section 2? That would have been a really, really big deal.

The other issue is that you see with him is this belief that, "Aren't we done with this stuff yet?" You know, you see the same thing in the, in the, um,

[00:20:31] **Professor Floros:** Affirmative action

[00:20:32] **Professor Evan McKenzie:** Affirmative action case, where he kind of impatiently says, "You know, well, you know, are we done with this stuff? You know, are we done with this, this whole racial thing, you know, uh, you know, saying about racial discrimination, are we, are we done having laws about that yet?" I'm speculating again, but

[00:20:46] **Professor Floros:** Sure

[00:20:47] **Professor Evan McKenzie:** Maybe the facts say something to Roberts, like, it's pretty simple, isn't it?

[00:20:52] **Professor Floros:** Yeah.

[00:20:52] **Professor Evan McKenzie:** 27% of the state's population is set up in such a way that there's no way they can ever elect more than one representative out of seven. That's, that's pretty stark, isn't it?

[00:21:05] **Professor Floros:** Yeah, but, but if I remember, so you, we talked last summer after last, last term's decisions, and there were multiple cases, I believe, in which the established tests, they threw them out.

[00:21:20] **Professor Evan McKenzie:** Right.

[00:21:20] **Professor Floros:** Right. So they could have done that here.

[00:21:25] **Professor Evan McKenzie:** They could have, but I, but apparently Kavanaugh was not on board with doing that either.

[00:21:29] **Professor Floros:** Ah, okay.

[00:21:30] **Professor Evan McKenzie:** You know, because this, because Kavanaugh voted with Roberts and, um, the three Democrats. So I'm not sure they really had the votes to do that, you know.

[00:21:38] **Professor Floros:** Mm hmm. Okay, final question about this case is that the decision was that this map "likely violated" Section 2.

[00:21:48] **Professor Evan McKenzie:** Mm hmm.

[00:21:49] **Professor Floros:** Does that mean there's still room for interpretation? Like, what does that mean? Did it or did it not violate it?

[00:21:56] **Professor Evan McKenzie:** Well, this is the way appellate courts usually work. This is not unusual.

[00:22:01] **Professor Floros:** Okay.

[00:22:02] **Professor Evan McKenzie:** They rarely sort of enter judgments themselves. They interpret the law in such a way that when they send it back to the lower courts, the lower courts have to do it the way they said. Now, in this case, the lower court got it right, and they're basically saying the lower court got it right, but they're not entering a judgment themselves. They're sending it back down for the lower court to enter. That's called remanding. That's what they're doing.

[00:22:25] **Professor Floros:** And so the expectation is, is that the lower court will just reinstate its decision and that will be like, it did violate, (Professor McKenzie agrees) and okay. Okay, good.

So, there were a lot of concurring in parts, dissenting in parts, et cetera. Do you want to say anything about the dissents in this case?

[00:22:44] **Professor Evan McKenzie:** Well, yeah, uh, what I, you see, what I see particularly is, is Thomas and Alito, because their, their position is that laws that take race into account in some explicit manner, uh, in other words, laws that are designed to protect or equalize in any way the standing, the treatment of African Americans, or in some cases other minority groups, are per se bad. They seem to be believers in this colorblind constitution thing, and it pops up in their dissents. Where he says, you know, that in the case of Section 2, it should only apply, like, to laws that prevent Black people from literally voting.

You know, like if you have a law that says Black people can't vote or makes it hard for them to vote, that might be one thing, but to just talk about what their relative strength ought to be, that's, that's up to the legislature to draw the districts however they want.

[00:23:35] **Professor Floros:** Okay.

[00:23:36] **Professor Evan McKenzie:** See, so that's, this is the kind of thing that you see again with the affirmative action cases and other things where you take race into account in a way to try to promote equity, some kind of equity, and they're almost always against it.

[00:23:47] **Professor Floros:** Okay, let's take a quick break. You're listening to Professor Floros in The Politics Classroom, a podcast of UIC Radio.

**Swampy Lands by Adam Saban**

[00:24:28] **Professor Floros:** Welcome back to The Politics Classroom, a podcast of UIC Radio. I'm Professor Floros, and I'm speaking with Professor Evan McKenzie about recent Supreme Court decisions.

**Moore v. Harper (Independent State Legislature "Theory")**

[00:24:39] **Professor Floros:** Well, uh, there's another voting rights case that came up, and this is Moore v. Harper, and this revolved around this so-called Independent State Legislature Theory, which argues that the U. S. Constitution invests sole power in state legislatures to set election laws and therefore state courts cannot overturn laws based on interpretation of the state constitution. So, this was a case in North Carolina about another gerrymandered election map. This time, I believe on partisan terms, not racial, but the North Carolina Supreme Court threw the map out saying that it violated North Carolina's constitution and replaced it with court drawn maps. So, in a 6-3 decision, the court rejected the Independent State Legislature Theory and said that state courts do have a role in determining whether state election laws conform with the state constitution.

So, basically, state legislatures don't have free reign over election laws. This doesn't seem super controversial that it would need to be decided in a case. So what, what am I missing here?

[00:26:03] **Professor Evan McKenzie:** Okay, let me just again, go back and put a little historical context on this. There's nothing in the U. S. Constitution really that supports this Independent State Legislature Theory. It was essentially invented by Chief Justice Rehnquist in Bush versus Gore when he said, he was complaining about the actions of the Florida Supreme Court, and he invoked this Independent State Legislature doctrine by saying they can't overrule their own legislature. But in essence, it goes like this.

There's a provision in the Constitution, it's Article I, Section 4, which says "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof." By the legislature thereof. And then it goes on to say, but Congress can also regulate the other aspects of it as well.

And then on presidential elections, and this is why many people were so worried about this case, cause it also, there's a parallel provision where it talks about the electoral college. And it says, "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors." Okay. So what happened here is that Republicans started to, because they control so many state legislatures around the country, began to say, "Well, it's just says the legislature; doesn't say anything about the courts. So they began to say, you know, the state legislature's decision on elections is final, meaning their decisions can't even be reviewed by courts.

This is, now. (both laugh) This is a very extreme view of that, that we don't have judicial review of the decisions of legislatures about elections? So, that's the final word? And then in 2019 was this decision Rucho versus Common Cause in which the, the Supreme Court, this Supreme Court said the federal courts cannot uh, consider claims of partisan gerrymandering. In other words, when a state legislature, or however they do it in a given state, when the state draws up its legislative map, federal courts can't come in and say, 'Hey, you know what? You favored the Republicans too much. Or you favored the Democrats too much."

Partisan, now racial gerrymandering, yes, but not based on the, on the party. But what they said in that decision was, "This is fine because the state courts can do it." See, they said that we don't, we don't need to be in that business because the state courts can do that. So, now along comes this decision in which the Republicans say, let's knock the state courts out of it as well.

Let's have no judicial review of partisan gerrymandering. And then every decision they make, no matter how bad the map is in terms of a partisan gerrymandering, there will be no review of it at all. And the next step from that would have been state legislatures would have had the final say on presidential elections.

This is the thing that, partly the theory that some of Trump's people were putting forward that, "Well, you know, the Arizona state legislature, the Michigan state, they can, they can just throw out the votes of the people and say the election was done wrong and Trump won." That's really where this was headed down the road was toward state legislatures being the final rule, and, and you would have potentially permanent minority rule in the country through Republican state legislatures.

So in this case, the Supreme Court said, "Yes, it's true that the Constitution talks about legislatures, but legislatures, that doesn't mean they're exempt from judicial review." The "ordinary scope of judicial review" is what they talked about, that they basically rejected the Independent State Legislature Theory, which says that they're not subject to judicial review. And of course, yes, they are. And it's six to three, but no-, (laughing) there's three justices on the other side of this decision.

[00:29:43] **Professor Floros:** I was going to ask about that. What do they think?

[00:29:46] **Professor Evan McKenzie:** It's complicated because there was a standing issue here, or excuse me, a mootness issue here.

[00:29:51] **Professor Floros:** Okay.

[00:29:52] **Professor Evan McKenzie:** Because one thing that, you know, in your summary, there's one more thing I would add to that.

[00:29:56] **Professor Floros:** Okay.

[00:29:57] **Professor Evan McKenzie:** The composition of the North Carolina Supreme Court changed during the pendency of all this. And at one point they said, "Uh, no, you know, we really can't make a decision." They essentially agreed with the Independent State Legislature Theory. They said, "You know, we really can't make a decision." And so Alito and Thomas are saying, "Okay, well, you know, this is, this case is moot because lower court has basically said, 'We're not going to make this decision anyway.'"

And what Roberts is saying, the other justices are saying, well, essentially the North Carolina Supreme Court is mistaken. That is not what the law is. They, they didn't have to make a ruling on, on that, that aspect of a North Carolina law. So, they didn't formally make a ruling on it cause they didn't need to really.

But implicitly they are saying this theory is wrong. There has to be judicial review of state legislatures' decisions about drawing legislative maps. Otherwise, any map they draw is valid as long as it was done by the legislature. And keep in mind, state legislatures draw the maps for their own districts.

[00:30:59] **Professor Floros:** Right. (laughing)

[00:31:01] **Professor Evan McKenzie:** You know?

[00:31:01] **Professor Floros:** Yeah.

[00:31:02] **Professor Evan McKenzie:** That was. You know, early on when the Supreme Court was, uh, Mapp versus Ohio and, and, uh, Reynolds, uh, these other cases, uh, from the sixties, they said, "Look, if there's no judicial review," because they used to say these, these are non-justiciable cases because it's a legislative decision, well, if there's no judicial review, that means the voters can be permanently disenfranchised.

You could be 70% of the state, but if you have an entrenched rural majority or whatever it might be in the state legislature, they can just perpetuate themselves in office forever by drawing the districts any way they want. There has to be judicial review of reapportionment. There has to be. Otherwise, one party can entrench itself in power and be a permanent minority.

[00:31:46] **Professor Floros:** Okay. So is this the last we'll hear of Independent State Legislature, or could the presidential electors question still arise even given this decision?

[00:32:01] **Professor Evan McKenzie:** Well, I'd like to think that we're done with this, this crazy notion that we don't have judicial review of this particular little tiny class of incredibly important legislative decisions, you know. I'd like to think that, but, you know, it gets down to the Rule of Four. The scary part about this is that I'd say there are three, there are potentially three votes on the Supreme Court for the Independent State Legislature Theory. You know, and many people were worried about Kavanaugh, you know, would Kavanaugh go, and, and so the, it, it would appear that for now it's off the table, but four justices can bring it back.

[00:32:41] **Professor Floros:** Right. Okay.

[00:32:42] **Professor Evan McKenzie:** And, and this gets down to the one last point that, you know, Republicans have, have understood for a long time how important the Supreme Court is. And for some reason until recently, maybe, maybe, uh, Democratic voters just don't seem to get it or many of them don't seem to get it, you know? And so, you know, we, we're in this position where once again, Jill Stein voters in 2016 are the gift that keeps on giving to the Republican party. You know, Trump got three appointments to the Supreme Court.

[00:33:11] **Professor Floros:** Well, that was also Mitch McConnell, right? Two of those arguably should have been Democratic picks, but okay.

[00:33:17] **Professor Evan McKenzie:** Oh yeah, but you know, I mean, that's what happened. Uh, I don't know whether Kennedy would have retired and you know, there's, we can go on and on about this, but the point is they had the power to make those appointments and the Supreme Court is very salient to a lot of Republican voters and it has not been to Democratic voters.

[00:33:35] **Professor Floros:** Let's take another break. I'm Professor Floros and you're listening to The Politics Classroom, a podcast of UIC Radio.

**Swampy Lands by Adam Saban**

[00:34:13] **Professor Floros:** You're listening to Professor Floros in The Politics Classroom, a podcast of UIC Radio. I'm joined in the classroom by Evan McKenzie, a Professor of Political Science at UIC.

**Students for Fair Admissions v. Harvard/UNC (Affirmative action)**

[00:34:25] **Professor Floros:** Okay, staying on or moving back to, I guess, the race issue. Let's talk about the affirmative action decisions.

Okay. So, Students for Fair Admissions versus Harvard and versus the University of North Carolina. And the reason they were split is because Justice Jackson had to recuse herself from the Harvard case because she was on their board of trustees, but they wanted her to be able to sit on the North Carolina case. But I understand that the opinion covers both of them?

[00:34:54] **Professor Evan McKenzie:** Yes, that's correct.

[00:34:55] **Professor Floros:** Okay. So, since 1978, the court has held that race can be used as one factor among many in college admissions decisions. And so, these cases, 6 to 3 in North Carolina and 6 to 2 in Harvard, the court ruled that the use of race in admissions, even as a factor among many, violates the Equal Protection Clause of the 14th Amendment, and while race can be used to determine individual admission, like somebody overcame racism to be where they are, that, that was okay, but students as a group cannot get any additional benefit just because of their race. So, first of all, can we go back and just quickly review the Equal Protection Clause, and historically what that has meant for, uh, American law.

[00:35:51] **Professor Evan McKenzie:** Yeah, the Equal Protection Clause is, uh, part of the 14th Amendment, like the 15th Amendment, passed after the Civil War.

And, um, it provides that no state, and this applies to the federal government as well by later decision, no state can deny any citizens the equal protection of the laws on the basis of their race, uh, national origin, et cetera. And so, it's intended to prevent government-sponsored discrimination.

[00:36:19] **Professor Floros:** Okay.

[00:36:20] **Professor Evan McKenzie:** And then there are many other statutes that have, it has, it has an implementation provision in it, a section that says that Congress can implement this by legislation, which of course they have done in many different laws pertaining to housing, to education and employment. And this is what has led to these principles that we've known as affirmative action, where governments and businesses are taking affirmative steps to try to rectify previous inequalities that have lasted for decades or centuries.

[00:36:51] **Professor Floros:** Okay, so if, if it was put in place after the Civil War and has been used to kind of rectify historical wrongs, in college admissions, though, the Supreme Court explicitly said, even previously, that the interest of the college had to be about creating a diverse class, and that was all well and good, and it could not be to right past historical wrongs. So, why was that okay in other areas, but not college admissions, or am I misunderstanding that?

[00:37:24] **Professor Evan McKenzie:** The way I would look at it is in terms of how the Supreme Court makes these decisions. When race is considered a suspect, what's

called a suspect classification. So, any laws that are passed or institutional policies that are explicitly racial in nature are subjected to what's called strict scrutiny.

[00:37:42] **Professor Floros:** Okay.

[00:37:43] **Professor Evan McKenzie:** So when courts look at them, like an ordinary law that says you can't park on the sidewalk or something applies to everybody, that just has to have a rational basis. In other words, it's just any rational relationship to any legitimate state interest and it's okay. It's just a, they have to be, long as it's not wild and crazy and irrational. But if it implicates race, if it treats people differently on the basis of race, then these laws and policies have to be, um, they're judged by what's called strict scrutiny, which means that they have to be essentially necessary to advancing a compelling state interest, something really important.

And in the old cases, uh, the Bakke case, which is 1978, which is out of California, they said that, um, schools do have a compelling interest in getting the, the educational benefits of having a diverse student body. That's what you were saying. (laughing) But everyone understands that, I mean, the real underlying purpose of here of this is to equalize educational opportunity.

Who wrote the decision? Lewis Powell, a Republican, and all these decisions have been written by Republicans. And so they, you know, what we're overturning here is decades of Republican jurisprudence.

[00:38:53] **Professor Floros:** Okay.

[00:38:54] **Professor Evan McKenzie:** But, but they rationalize it in terms of the importance of a diverse student body and that states and institutions have a compelling interest in having a diverse student body, which benefits everybody. What they can't do is have quotas or a point systems where races, and that's the, uh, the, the Grutter versus Bollinger, a second decision that was out 2003, where the Supreme Court said, "Well, you know," they reaffirmed the basic fact from the Bakke that yes, you can take race into account. Again, written by Republicans.

You can take it into account as a factor, but you can't give it numbers. You can't say, it's a, you get X number of points for being of this race or that race. But they said that you can consider race as long as it was done in a narrowly tailored and individualized way. So, the idea was that race is one factor among many that can be explicitly taken into account in evaluating individuals for the purpose of creating a diverse student body.

[00:39:57] **Professor Floros:** Okay.

[00:39:57] **Professor Evan McKenzie:** Which is still viewed as a compelling state interest. And the other interesting thing that, this is Justice O'Connor, again, you know, these Republicans, so they're busy overturning decisions by Republicans that are now deemed too extreme for them. She said, this is a quotation, "25 years from now, the use

of racial preferences will no longer be necessary to further the interest approved today."

So she, (both laugh) she said, yeah.

[00:40:22] **Professor Floros:** Yeah. Racism will be solved in 25 years.

[00:40:25] **Professor Evan McKenzie:** 25 years. She had the, fortunately she had access to that information.

[00:40:29] **Professor Floros:** Yeah.

[00:40:29] **Professor Evan McKenzie:** It was going to be 25 years. No more, no less.

[00:40:31] **Professor Floros:** Yeah.

[00:40:32] **Professor Evan McKenzie:** Uh, and it would be, racism would be gone. And this is a thing that Roberts, uh, you know, is obsessed with the idea that, "Aren't we done with this yet?"

[00:40:39] **Professor Floros:** Yeah.

[00:40:39] **Professor Evan McKenzie:** "Are we finished with this yet? What's the end date? What's the end time? How long are we going to be, you know, worrying about all this race stuff, you know?"

[00:40:46] **Professor Floros:** Okay. Well, so wait. If previous courts had said it can be used in individualized cases, what are they claiming that Harvard and North Carolina were doing wrong?

[00:40:56] **Professor Evan McKenzie:** Yeah. Now this is, this is, that is the key question and I'm really glad you phrased it that way because that is absolutely the key question. If you read the dissents, and if you just look at what they did, essentially they overruled their previous jurisprudence without saying so.

[00:41:11] **Professor Floros:** Oh, okay.

[00:41:12] **Professor Evan McKenzie:** Because Harvard and the University of North Carolina did apply the previous law exactly as they were supposed to have done. There was no point system, there was no quota system, and they, they were taking it into account in an individualized way as one factor among many to create a diverse student body. They knew what they were supposed to do. They had the lawyers, just like UIC does, the U of I does. They knew what they were doing and they were applying it correctly.

What the Supreme Court said was, without saying so, the way you did it is unconstitutional because you took race into account at all. And if you read through the decision, they act as if, as you read through, particularly everything written by, by Thomas, as if the only thing they considered

[00:41:58] **Professor Floros:** Right

[00:41:58] **Professor Evan McKenzie:** Was race

[00:41:59] **Professor Floros:** Right.

[00:42:00] **Professor Evan McKenzie:** I mean, and this is pointed out in the dissents, you know, that they have mischaracterized, this is one of the things that Ja-, that, uh, Ketanji Brown Jackson said that, you know, that basically they're talking about a policy they made up. They, they're overruling a policy they made up. This is not what these institutions were doing.

[00:42:16] **Professor Floros:** Okay

[00:42:16] **Professor Evan McKenzie:** They were not using points, they were not using it as a, they had no quotas. They had none of that. They took it into account, race into account among many other factors, but effectively they've overruled the previous jurisprudence, but they didn't apparently did not want to say. So.

[00:42:31] **Professor Floros:** Okay, I guess I'm just not under-. So, so then Harvard and North Carolina don't need to do anything differently because?

[00:42:39] **Professor Evan McKenzie:** Yeah, they, no, they do. They've been, they've been told they did it wrong. I mean, what I'm saying is, what they did was carefully drafted by lawyers to comply with decades of previous decisions. And they were, they were doing it correctly. These are two elite institutions with exceptional legal staffs. They knew they were trying to do this correctly and they did. But what you have now is a new standard where essentially Robert says, well, you know, uh, this is the part I think you mentioned at the beginning. This is such a weird sentence or phrase where he says, "Schools can consider an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, if the student is to get any benefit from that essay," where they talk about how race affected their life, "the benefit has to be tied to that student's courage and determination." It cannot be tied to, uh, the fact that they are Black or whatever.

So, so, so they can say, this is so wild, they can say in the essay, "You know, being Black, uh, I encountered discrimination." And the university can say, "Yeah, you know, and, and that's, you're the sort of person we'd like to have in our class." They have to find something in the essay where the student said, "You know, that made me a very determined person." (Professor Floros laughs in disbelief) And then they, then they say, "Oh, well, we accepted the person because they're determined, not because of

anything having to do with their race because they're telling us that, you know, it's just coincidentally happened that because they had to overcome racial discrimination, they became a determined person. We're looking for determined people to put in our entering class." See, so, he says, uh, programs like the ones used by Harvard, etc. have, he says, "Have concluded wrongly that the touchstone of an individual's identity is not the challenges bested, skills built, or lessons learned, but the color of their skin. Our constitutional history does not tolerate that choice."

So even though these two elite institutions were taking everything into account, just like they were told to, they concluded that, well, race is just, you know, they're really, it's really all about race. Yeah, it's really, that's the deciding factor. Well, there was no evidence that that was true.

[00:45:01] **Professor Floros:** All right. So, if that is not how colleges were making a decision, why might we expect this to have a negative impact on the actual admissions decisions?

[00:45:17] **Professor Evan McKenzie:** Yeah, you know, the, I think the impact of this is really an interesting question. Um, you know, they, in California, state of California, they outlawed educational and other forms of affirmative action a long time ago.

[00:45:28] **Professor Floros:** Yeah.

[00:45:28] **Professor Evan McKenzie:** And I've seen different reports on this, but I think the consensus is that it has changed the, it has reduced the, uh, uh, number of applicants like African American applicants at, at the top institutions in the UC system and probably led them to be either accepted or to apply to institutions that are a little farther down the educational pecking order. And that is the concern.

[00:45:53] **Professor Floros:** That it will dissuade people from applying? (Professor McKenzie agrees) Okay. Okay.

[00:45:58] **Professor Evan McKenzie:** Yeah. And, and now, but if you think about it, I've also heard university admissions people talk about this, where I also hear people saying, "Well, you know, don't give up on the idea that, that we can find ways to diversify our classes at any of the institutions. Don't give up on that because if the applicants are there and it's a question of how you rationalize the acceptance." Well, if the students you want to accept, I don't know, maybe it can still be done. I, I think the problem is with the applicant pool, though. I mean, I think university officials can probably still, you know, find ways to, because that, in the example we just went through, the same student could be accepted under a different rationale, you know?

[00:46:46] **Professor Floros:** Yeah.

[00:46:47] **Professor Evan McKenzie:** But I think it does, it very well may change the applicant pool. The other thing about this, because it's following on with what I think,

Thomas's opinion was kind of interesting in this in which he said that he, again, you know, he talks about his own experience a lot, feeling that, and he, he essentially says that these programs don't increase, in his view, the overall number of minority students in college. They just cause them to "placing them some into more competitive institutions than they otherwise would have attended, where they may be less likely to succeed." And so he says, and even if they do succeed, they may be harmed by the stigma that the Affirmative Action Program created, because he's, he's really bitter about that. He feels that he has been stigmatized by this. So, I guess by logic, you know, he should have not gone to Yale Law School. He should have gone to, you know, someplace else. And then he, he wouldn't be so bitter or something.

[00:47:46] **Professor Floros:** He also probably wouldn't be a Supreme Court judge, because going to Yale Law School opened up doors that he wouldn't have had if he had gone to Podunk Law School.

[00:47:55] **Professor Evan McKenzie:** Right, and that's the thing about it. That's, that's one of the critical, and these arguments were all made, you know, that minority applicants need to get access to elite institutions in part to meet the same kinds of people, to meet the movers and shakers in their state or in the country. And if they're excluded from those circles, it's, it's classic elite theory. You know, like, uh, that we study in political science, that, that people meet each other in educational institutions, form relationships, and they have connections throughout their lives that, that move them into the "higher circles of society," as Domhoff calls it, you know?

[00:48:31] **Professor Floros:** Yeah.

[00:48:31] **Professor Evan McKenzie:** And that is why, you know, Justice, Justices Sotomayor and Kagan and Jackson were so irate about this decision, and so, that it's so damaging to the, the ability of, of minority, young minority students to move into positions of power and authority at big law firms, at government agencies, at big corporations, because they, the imprimatur of these institutions helps, would help them.

[00:48:56] **Professor Floros:** Yeah. So, UIC is a minority-serving institution, therefore qualifies for money that non-minority-serving institutions do not qualify for. Does this ruling have any impact on the federal government's ability to provide different funding opportunities for minority-serving institutions that other universities don't have access to? Because that is making decisions based on race.

[00:49:30] **Professor Evan McKenzie:** I've been wondering about that. You know, I think this is a really good question. What is the potential reach of this decision? I'd have to say I think it's possible that it has a broader reach. Here's what I know for sure. First, the decision by its terms is limited to the question of college admissions. That is what it is limited to, the admissions of students and the whole question of creating a diverse class and is that a compelling interest. However, the people who promote, who set up these little groups that promote these things, that find these plaintiffs, that put them

forward for these test cases, they have their eyes set on a much, much broader horizon. They want to eliminate affirmative action in employment by corporations, by government, by everything. They want to eliminate race based affirmative action in hiring entirely. They, I'm sure they want to eliminate it in housing, and these are major areas of our lives.

They have much broader targets. And there are many programs like one you talked about that UIC has, as, subscribes to. There are a number of programs that have a racial or ethnic qualification system of some sort or another, certain resources that are available. Well, they're, they're targeting all that.

Just like, just like the people who were, managed to strike down, get Roe versus Wade struck down, their next target is going to be contraception. We already know that. They're already doing it. And we talked about that, you know, in a previous episode, uh, time I was here. And they are now going down the line to that next frontier for them, which is to, to eliminate all race-based benefit type programs that emanate from any level of government or even private institutions. That is where they are going.

Now, whether they're going to be able to get there or not, I don't know, but that is where they are headed. And, you know, it may, it may be really decided by who gets the next appointments to the Supreme Court and who, who steps down. Does Thomas step down? Does Biden or some Democrat get to replace him? I mean, you know, it's, it's going to come down to that sort of thing.

[00:51:31] **Professor Floros:** And a lot of these folks were put on the court at very young ages, and so unless something happens unexpectedly, they're going to be here for a while.

**Summary of affirmative action decision**

[00:51:50] **Professor Floros:** So basically, to summarize, racism is over, and the historical effects of racism are also no longer felt in society. And everyone already has a level playing field, so no special treatment is needed.

[00:52:09] **Professor Evan McKenzie:** Yes, and according to this majority, Roberts especially, they are now saying they are the ones who are standing up for the Equal Protection Clause.

[00:52:18] **Professor Floros:** Right.

[00:52:18] **Professor Evan McKenzie:** They are the spokespeople for racial equality. See, because they want a colorblind society. In fact, from their standpoint, we're basically there because 25 years, remember the 25 years, right? So, we're already at a colorblind society. And they really do buy these old arguments that we used to hear that affirmative action is paternalistic and, and that sort of thing. And I think by those arguments, so, you know, they are now in their view, standing up for having a

colorblind society. They're constantly quoting Martin Luther King, you know, as if they were the, the ones who, you know, who really stood for racial equality.

[00:52:57] **Professor Floros:** And what was the, um, was the phrase that you mentioned from Justice Jackson about. At the very beginning, you said, she said something that got a lot of play in the press about elite.

[00:53:09] **Professor Evan McKenzie:** Let me read a, I got a couple of quotations for the opinion. It's really good.

[00:53:13] **Professor Floros:** Okay.

[00:53:14] **Professor Evan McKenzie:** She said, uh, "History speaks and in some form it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark." And then she said, "With 'let them eat cake' obliviousness today, the majority pulls the ripcord and announces colorblindness for all by legal fiat." But she said, but doing that doesn't change life, doesn't change anyone's life.

It's just, it's a legal fiat that they've made. And she takes on Justice Thomas. They, they really went at it. I mean, he spends several pages in his dissent attacking her. I mean, in his concurring opinion, attacking her dissent. And she said, he's "responding to a dissent that I did not write, in order to assail an admissions program that is not the one the university has crafted." (Professor Floros laughs)

Because that's really the way it's at, (Professor McKenzie laughs) you know. And, uh, she said he, "He ignited too many straw men to list or fully extinguish here." (Both laugh heartily)

[00:54:19] **Professor Floros:** Yeah

[00:54:20] **Professor Evan McKenzie:** It's really, it's really guys, so I was saying, it's really pithy writing and, uh, you know, and she, she did quite a job with the dissent, and, you know, I really, we love to read these things and when they resonate with us and I think it really did. So.

[00:54:33] **Professor Floros:** Yeah, and so clearly these justices do not live in any kind of real America, you know, like today. Okay. Anyhow, that's a whole nother question, but it just seems very elitist to imagine that there are not barriers to overcome still.

[00:54:57] **Professor Evan McKenzie:** Yes, it does. And it, it does. And they, that's the oblivious-, obliviousness.

[00:55:02] **Professor Floros:** Right.

[00:55:02] **Professor Evan McKenzie:** They, they just, they've decided to tune this out. Is it because they are following a legal doctrine or is this really consistent with what we hear from the Republican party about these issues across the board, from, from members of Congress, members of the Senate, state legislatures. This is all behind us now. They vehemently opposed to these programs forever. And, you know, the justices can say what they want, you know, about applying the Equal Protection Clause and so forth, but this goes to some really, really fundamental social and political issues that have divided the society for hundreds of years. And the fact that the Supreme Court wants to pretend that it's over doesn't mean that it is.

That's in part, one of Jackson's main points. You can, you can pretend that this is behind us, but it isn't. And it's just not true.

[00:55:48] **Professor Floros:** Yeah. Okay. Well, we have only scratched the surface of what we could have talked about, but we're gonna have to wrap it up there for today. Hopefully you'll be able to come back another time and talk about some other incredibly consequential decisions.

But in the meantime, Professor Evan McKenzie, thank you so much for joining me in The Politics Classroom.

[00:56:07] **Professor Evan McKenzie:** Oh, it's been my pleasure. Happy to do it anytime.

[00:56:10] **Professor Floros:** Great.

Professor Evan McKenzie is a professor of political science at UIC and affiliated faculty at the UIC School of Law. Professor McKenzie has agreed to return to The Politics Classroom to discuss other cases from this Supreme Court term later this summer, so stay tuned.

Thanks for joining me in The Politics Classroom, a podcast of UIC Radio. I'm Professor Floros, and I'd love to hear from you if you have any suggestions for future topics or guests. You can provide that feedback at thepoliticsclassroom.org. If you appreciated the information in today's episode, please share it with a friend. I'm trying to get the word out about the show, and I would love your help. Thank you.

I'm headed out of the country, but I'll be back in two weeks with another episode. However, that's all I've got for this week. Class dismissed.

**Outro music**: Three Goddesses by Third Age