History and Future of the Supreme Court

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Supreme Since 1790

The Supreme Court appointed by George Washington had one Chief Justice and five Associate Justices. In a letter to John Rutledge, Washington stated he regarded “the due administration of justice as the strongest cement of good government. I have considered the first organization of the Judicial Department as essential to the happiness of our Citizens, and to the stability of our political system.” He was selecting men of the “fittest Characters to expound the laws and dispense justice.”

Every president since has had the duty to appoint knowledgeable people of the highest character from John Jay to Thurgood Marshall to Sandra Day O’Connor to Louis Brandeis to Antonin Scalia to Ruth Bader Ginsburg to Ketanji Brown Jackson.

The Post takes on the topic of “How Supreme Court diversity has shaped American life.” Photographs and summaries of important cases encourage students to think about ways in which American society has changed since 1790. The You and Your Rights activity provides a summary of Supreme Court cases pertaining to students, bringing the law and Court closer to their lives.

Just as the hearings for Judge Ketanji Brown Jackson were closing, Bob Woodward and Robert Acosta published the content of 29 text messages between the wife of Justice Clarence Thomas, Virginia “Ginni” Thomas, and Trump White House Chief of Staff Mark Meadows. She urged him to continue to dispute the election results in demanding terms. Questions about the influence of spouses and recusal from hearings came forward.

Recusal from cases being heard by the Court is not a new idea. And it is an important one to consider in order to maintain the integrity and impartiality of the Court’s decisions. Students will read and consider the reasons for recusal and whether SCOTUS needs a code of conduct to guide it.

George Washington sent the same letter of invitation to the five men he had chosen to appoint as Associate Justices of the Supreme Court. Only one declined. He stated his expectations: “Considering the Judicial System as the chief Pillar upon which our national Government must rest, I have thought it my duty to nominate, for the high Offices in that department, such men as I conceived would give dignity and lustre to our National Character; and I flatter myself that the love which you bear to our Country, and a desire to promote general happiness, will lead you to a ready acceptance of the enclosed Commission, which is accompanied with such Laws as have passed relative to your Office.”
Judicious Findings

Find the 21 terms associated with the Judicial Branch. In addition, four Supreme Court justices who were “firsts” are to be located among the letters. (Use name in boldface.) The words will be found reading right to left, left to right, up and down, and on the diagonal.

Below is the list of words and names you are to find.

Argue
Amicus
Appeal
Case
Certiorari
Confirm
Democracy
Dissent
Hear
Idea
Judge
Judicial
Jury
Justice
Law
Majority
Nominate
Review
Ruling
Tort
Trial

Sandra Day O’Connor
John Jay
Thurgood Marshall
William Howard Taft

Did you find any additional words?
List them.
Students and Supreme Court Cases Defining and Protecting Their Rights

The decisions of the Supreme Court have an important impact on society, not just on the individuals who bring the cases before the Court. Their decisions have influenced school students as early as 1940 and as recently as 2021. From cases involving in-school actions such as not saying the Pledge of Allegiance and wearing a black armband to protest war to the use of social media outside of the school grounds.

In *Mahanoy Area School District v. B.L.* (2021), the majority “set out factors that courts should assess in weighing the right of administrators to punish speech in nonschool settings, with one important component being whether parents are better suited to handle the situation.” And in *Tinker v. Des Moines Independent Community School District* (1969) the precedent was established that students do not lose their rights at the schoolhouse gate.

**YOUR ASSIGNMENT**

Cases pertaining to students and their rights are summarized and presented in chronological order of being heard and decided by the Supreme Court. Once you have decided on which two cases you wish to get to know better, you will need to do additional reading.

- Become familiar with a Supreme Court case that was decided before 1980.
- Become familiar with a Supreme Court case that was decided after 1980.

For both of your cases respond to the following questions.

1. What was the situation that brought the case to the Supreme Court?
2. What was the majority opinion?
3. What was the dissenting opinion?
4. Did the case that was decided before 1980 set a precedent for later cases involving students? Explain your response with an example.
5. In what ways did each case shape American life and establish the rights of students?

**1940  Minersville School District v. Gobitis**

Lillian Gobitas (age 12) and William Gobitas (age 10) were expelled from their Pennsylvania public school for not participating in the Pledge of Allegiance. Their father sued the school district because their family affiliation with the Jehovah’s Witnesses prevented oath taking to any flag. The Court ruled for the school district in 1940 but that decision only lasted about three years, when the Justices reversed themselves in *West Virginia State Board of Education v. Barnette* (1943). Jehovah’s Witnesses grade-school students Gathie (age 10) and Marie Barnett (age 8) were expelled from their public school for refusing to pledge. This time, Justice Robert Jackson, in a 6-3 decision, said the students’ First Amendment rights were violated.
1954  *Brown v. Board of Education of Topeka*
The Warren Court’s unanimous decision explained that the separate-but-equal doctrine from the 1896 *Plessey* decision violated the *Equal Protection Clause of the 14th Amendment*, and it ordered an end to legally mandated race-segregated schools. The ACLU describes this decision as “perhaps the most far-reaching decision of this century.”

1962  *Engel v. Vitale*
In the New York school system, each day began with a nondenominational prayer acknowledging dependence upon God. This action was challenged in Court as an unconstitutional state establishment of religion in violation of the First Amendment. The Supreme Court agreed, stating: “It is no part of the business of government to compose official prayers.”

1963  *Abington School District v. Schempp*
The Schempp family, including high school students Roger and Donna Schempp, sued the Abington (Pa.) school district over its policy of including bible verses and prayers at school activities. The Schempps who were Unitarians, sued the school even though it allowed for written exemptions for students objecting to the practice. Justice Fred Clark said the general practice violated the First Amendment: “While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.”

1968  *In re Gault*
Landmark 8-1 decision in the case that teens accused of crimes are entitled to the same due process rights as adults. In 1964, Jerry Gault, 15, was taken into custody for allegedly making an obscene phone call. Gault was held in custody since he was on probation for another incident and his parents weren’t initially notified. A judge then committed Gault to six years in custody for a crime that had an adult sentence of two months. Justice Abe Fortas said the juvenile detention and trial practices used by the state of Arizona widely violated due process clauses under the 14th Amendment and Fifth Amendment.

1969  *Tinker v. Des Moines Independent Community School District*
Mary Beth Tinker, a 13-year-old student at Warren Harding Junior High School in Des Moines, Iowa, wore a black armband to school to protest the Vietnam War and was suspended. Her brother and some high school students did the same. In the 7-2 majority opinion Justice Fortas said public school students don’t “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” While Fortas said these rights don’t extend to conduct that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others;” silent protest was permitted under the First Amendment.

1972  *Wisconsin v. Yoder*
Wisconsin mandated that all children attend public school until age 16, but members of the Old Order Amish religion and the Conservative Amish Mennonite Church refused to send their 14- and 15-year-old children to schools. They argued that the children didn’t need to be in school that long to lead a fulfilling life of farming and agricultural work, and such state-compelled laws violated their faith. The Supreme Court unanimously agreed, saying that the values of public school were in “sharp conflict with the fundamental mode of life mandated by the Amish religion.”
1972  *San Antonio Independent School District v. Rodriguez*

The District sued the state on behalf of the students in its district, arguing that since property taxes were relatively low in the area, students at the public schools were being underserved due to the lack of funding compared to wealthier districts. They argued that the Equal Protection Clause of the 14th Amendment mandates equal funding among school districts, but the Court ultimately rejected their claim. It held that there is no fundamental right to education guaranteed in the Constitution, and that the Equal Protection Clause doesn't require exact “equality or precisely equal advantages” among school districts.

1975  *Goss v. Lopez*

Nine students at an Ohio public school received 10-day suspensions for disruptive behavior, saying that once the state provides an education for all of its citizens, it cannot deprive them of it without ensuring due process protections.

1985  *New Jersey v. TLO*

Public school students have some rights when it comes to school officials who want to search their person or personal belongs for evidence of wrongdoing. But those rights are very limited. In Piscataway, New Jersey, a teacher accused a high school student (called “TLO” in court documents) of smoking in the bathroom. The school’s vice principal forced the student to hand over her purse and found drug paraphernalia. The student was eventually charged with multiple crimes and expelled from the school. Her family argued that the evidence should not have been admissible in court because it violated T.L.O.’s Fourth Amendment protection against unreasonable searches and seizures. The Supreme Court decided students have a legitimate expectation of privacy when in school, but school officials can conduct a “reasonable” search beyond a mere hunch, based on evidence, without a warrant.

1987  *Bethel School District No. 403 v. Fraser*

While *Tinker* showed how schools could not take actions on student speech that was not disruptive, the Fraser case showed that schools could take action on students whose speech was considered disruptive. When a high school student in a school assembly nominated a fellow student for a student-elective office, the student used an “elaborate, graphic, and explicit sexual metaphor” to refer to the other student. It resulted in a suspension. The Supreme Court decided students do not have a First Amendment right to make obscene speeches in school.

1988  *Hazelwood School v. Kuhlmeier*

This case presented another example of a school’s ability to mitigate student speech. The issue was a matter of censorship. Supreme Court Justices found that the First Amendment rights of students were not violated when school authorities prevented certain articles from being published in the school newspaper. The school’s principal considered certain article subjects inappropriate. One article was on stories of divorce and another was on teenage pregnancy. Concerns were expressed over journalistic fairness in the articles, protection of anonymity, and the topic of teen pregnancy not being suitable for younger audiences. The paper was also not considered a public forum where everyone could share their views; it was a determined to be a limited forum where students could fill the requirements of their journalism class.
1990  Board of Education of Westside Community Schools v. Mergens
Westside High School senior Bridget Mergens in Omaha, Nebraska, asked her principal for permission to start an after-school Christian bible, prayer and study student club. The principal denied Mergens’ request, telling her that a religious club would violate the First Amendment’s Establishment Clause. In (1990), Sandra Day O’Connor in an 8-1 decision said that since the club didn’t study school curriculum, it was permitted under the Equal Access Act, which allows student access to any similar club based on Free Speech principles. “The school has maintained a ‘limited open forum’ under the Act and is prohibited from discriminating, based on the content of the students’ speech, against students who wish to meet on school premises during noninstructional time,” O’Connor said.

2000  Santa Fe Independent School District v. Doe
Before football games, members of the student body of a Texas high school elected one of their classmates to address the players and spectators. These addresses were conducted over the school’s loudspeakers and usually involved a prayer. Attendance at these events was voluntary. Three students sued the school arguing that the prayers violated the Establishment Clause of the First Amendment. A majority of the Court rejected the school’s argument that since the prayer was student initiated and student led, as opposed to officially sponsored by the school, it did not violate the First Amendment. The Court held that this action did constitute school-sponsored prayer because the loudspeakers that the students used for their invocations were owned by the school.

2002  Board of Education of Independent School District #92 of Pottawatomie County v. Earls
The drug testing policy adopted by the Oklahoma school district required all middle and high school students consent to urinalysis testing for drugs in order to participate in any extracurricular activity. The Supreme Court held that random drug tests of students involved in extracurricular activities do not violate the Fourth Amendment.

2002  Zelma v. Simmons-Harris
The Ohio Pilot Scholarship Program allowed certain Ohio families to receive tuition aid from the state. This would help offset the cost of tuition at private, including parochial (religiously affiliated), schools. The Supreme Court rejected First Amendment challenges to the program and stated that such aid does not violate the Establishment Clause.

2005  Roper v. Simmons
Matthew Simmons was sentenced to death for the murder of a woman when he was 17 years of age. In the 1988 case Thompson v. Oklahoma, the Supreme Court ruled that executing persons for crimes committed at age 15 or younger constitutes cruel and unusual punishment in violation of the Eighth Amendment. Roper argued that “evolving standards of decency” prevented the execution of an individual for crimes committed before the age of 18. A majority of the Supreme Court agreed with Roper, and held that to execute him for his crime would violate the Eighth Amendment.

2007  Parents Involved in Community Schools v. Seattle
In 2003, the Supreme Court ruled in Gratz v. Bollinger and Grutter v. Bollinger that race-based classifications, as used in affirmative-action policies, must be “narrowly tailored” to a “compelling government interest,” like diversity. In light of this, the Seattle School District established a tiebreaker scheme for admission to competitive public schools in the district, in which racial diversity played a role in the ultimate decision. The policy was challenged, and the Supreme Court was tasked with deciding if the Equal Protection Clause had any bearing on the case. It determined that its earlier decisions for college affirmative action do not apply to public schools and that racial diversity is not a compelling government interest for public school admission. Furthermore, they held that the denial of admission to a public school because of a student’s race in the interest of achieving racial diversity is unconstitutional.
2021  *Mahanoy Area School District v. B.L.*
In 2017 a 14-year-old cheerleader learned that she had not made the varsity cheerleading squad. Upset, she used social media to send an expletive-filled, eight-word message when she was off school grounds. The Pennsylvania school suspended her from cheerleading for a year. The Supreme Court decision, on a vote of 8 to 1, did not establish a categorical ban on regulating student speech outside of school, citing the need of school systems to be able to deal with issues like bullying and threats. “Instead, it set out factors that courts should assess in weighing the right of administrators to punish speech in nonschool settings, with one important component being whether parents are better suited to handle the situation.”

This was the first time in more than 50 years that a high school student won a free-speech case in the Supreme Court, and the decision emphasized that courts should be skeptical of efforts to constrain off-campus speech. Justice Stephen G. Breyer, writing for the majority, said part of what schools must teach students is the value of free speech.

“America’s public schools are the nurseries of democracy,” he wrote. “Our representative democracy only works if we protect the ‘marketplace of ideas.’”

“Schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, ‘I disapprove of what you say, but I will defend to the death your right to say it,’” he wrote.

Justice Clarence Thomas dissented.

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**Resources for Your Supreme Court Cases**

These resources provide case details and both majority and dissent decisions.

American Civil Liberties Union
https://www.upcounsel.com/lectl-ACLUs-most-important-us-supreme-court-victories

FindLaw
https://caselaw.findlaw.com/court/us-supreme-court

Legal Information Institute | Cornell Law School
https://www.law.cornell.edu/supremecourt/text
https://www.law.cornell.edu

Oyez
https://www.oyez.org

Student Press Law Center
www.splc.org

United States Courts | Supreme Court Landmarks
https://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks

We the Students — Supreme Court Cases for and about Students
https://supremecourthistory.org/classroom-resources-teachers-students/
Justice Stephen Breyer to retire from Supreme Court

Justice Stephen G. Breyer, seen here in 2013, was selected for the court by President Bill Clinton in 1994.

Justice Stephen G. Breyer will retire at the end of the Supreme Court’s current term, giving President Biden a chance to reinforce its liberal minority and deliver on his campaign pledge to make history by nominating the first African American female justice.

Breyer, 83, is the court’s oldest justice and was nominated to the court in 1994 by President Bill Clinton. Breyer has been under unprecedented pressure to retire while Democrats have narrow control of the Senate, which must confirm Supreme Court nominees. The current term concludes at the end of June.

As he promoted a book at the end of the summer and in early fall, Breyer came up with a standard reply when asked about retirement: “I don’t think I’m going to die here — I hope,” Breyer told The Washington Post. “There are a lot of considerations, and I’ve mentioned health, I’ve mentioned the considerations of the court. I’m aware of what’s in the newspapers.”

It had been expected that Breyer would retire this term, but the timing of an announcement was unknown. The Supreme Court would not comment, but the justice is expected to meet with Biden at the White House on Thursday, according to a person familiar with the matter who spoke on the condition of anonymity, citing the situation’s sensitivity.

Biden was informed last week of Breyer’s plans, the person said, and the White House began to call senators about the news on Wednesday. NBC News was the first to report Breyer’s intentions.

A replacement chosen by Biden would not change the court’s conservative supermajority; Breyer is one of only three liberal justices. But it would give Biden the chance to have his nominee considered by a more favorable Senate and mean a younger colleague for the court’s other liberals, Sonia Sotomayor, 67, and Elena Kagan, 61.

Senate Majority Leader Charles E. Schumer (D-N.Y.) indicated that Biden’s eventual nominee would be considered and confirmed “with all deliberate speed.” His Republican counterpart, Minority Leader Mitch McConnell (Ky.), demurred when asked Wednesday whether the GOP intends to try to block Biden’s pick, as it did in 2016 with President Barack Obama’s final nominee to the court, Merrick Garland.

“We don’t know who the nominee is yet,” McConnell said at an event in Bowling Green, Ky.

The crucial difference now is that Republicans no longer control the Senate.

While senators and interest groups reacted to the news with bouquets and the occasional brickbat, Biden declined to get ahead of Breyer’s announcement.
“Every justice has the right and opportunity to decide what he or she is going to do and announce it on their own,” the president said. “There has been no announcement from Justice Breyer. Let him make whatever statement he’s going to make. And I’ll be happy to talk about it later.”

Biden’s pledge to nominate an African American woman is a first. There have been 108 White men on the court and only two Black men — Thurgood Marshall and Clarence Thomas. There have been five women — Sandra Day O’Connor, Ruth Bader Ginsburg and three current members: Sotomayor, Kagan and Justice Amy Coney Barrett.

There have never been four women serving at the same time on the nine-justice court, and the next version of the court headed by Chief Justice John G. Roberts Jr. seems likely to be the most diverse in the court’s history.

The two potential replacements for Breyer most often mentioned are Judge Ketanji Brown Jackson, a former Breyer Supreme Court clerk who in June was confirmed to join the U.S. Court of Appeals for the D.C. Circuit, and California Supreme Court Justice Leondra Kruger, a former Justice Department official who has represented the government at the Supreme Court as deputy solicitor general.

Others will surely be added to the list, and Biden probably will cast a wide net. There are few Black women on the federal appellate court bench, the traditional spot from which Supreme Court nominees are chosen.

On the current court, only Kagan did not serve previously on an appeals court.

It seems likely that Breyer will make his leaving the court contingent on the confirmation of a successor. Exactly how that will work is unclear — the court is at about the midpoint of its schedule for hearing cases, and aims to have its work completed by the end of June.

Senior Senate aides said there is precedent for completing the confirmation work on a judge before the seat is officially vacant.

Breyer was chosen for the court the year after Clinton picked Ruth Bader Ginsburg — Breyer interviewed for that opening, too, but he was in pain from a bicycle accident and reportedly the meeting did not go that well.

Breyer is a native Californian who served on the U.S. Court of Appeals for the 1st Circuit in Boston. He is an intellectual who reads and writes in French and has an abiding interest in architecture. But he also often seemed like a talkative law professor, his long and winding questions sometimes leaving counsel struggling to grasp his
Once when a lawyer confessed that he didn’t understand what Breyer was getting at, the justice acknowledged with a smile that he was afraid of that.

He is known as a pragmatic liberal, more moderate than others on the left and willing to search for compromise among the court’s ideologically divided justices. In that way, he and Kagan sometimes departed with Ginsburg and Sotomayor on the details of a case. One of his favorite colleagues was O’Connor, the court’s ultimate pragmatist.

He was part of the court’s compromise with Roberts that saved Obamacare in 2012. He was less willing than some liberals to side with criminal defendants.

“Justice Breyer hasn’t always ruled for us, but he has always earned our respect,” said David Cole, national legal director of the American Civil Liberties Union.

The term that ended last summer was one of the most productive and significant in Breyer’s career, and he received some of the top assignments from Roberts.

Breyer wrote the majority opinion when the court rejected the third challenge at the Supreme Court to the Affordable Care Act. Earlier, he wrote the court’s decision that Google did not violate copyright law in a multibillion-dollar showdown with Oracle, a closely watched case in the tech world.

And he wrote the court’s defense of the First Amendment rights of public school students in a case involving a high school’s punishment of a cheerleader for a profane rant on social media.

Though he might be closer to the center than his liberal colleagues, he is almost always a reliable vote on the left on issues such as affirmative action, gun rights and abortion, where he wrote some of the court’s most important opinions protecting abortion rights.

He is relentlessly optimistic and cheerful, and only occasionally did that persona slip. One occasion was the end of the first full term with Roberts as chief justice and Samuel A. Alito Jr. taking O’Connor’s seat. Liberals suffered through several defeats, including one that struck down voluntary school desegregation plans in Seattle and Louisville.

“It is not often in the law that so few have so quickly changed so much,” Breyer said in a lengthy dissent from the bench. He predicted it would be a decision “that the court and the nation will come to regret.”

In 2015, after years of hearing cases about how to fairly administer capital punishment, Breyer said in effect that he had decided it could not be done. He called for the court to reconsider the constitutionality of the death penalty. Only Ginsburg joined his call.

It is also likely that his former colleague played a part in his decision to leave now.

Ginsburg declined to retire while President Barack Obama was in office, thinking Donald Trump would not be elected, and Democrats paid the price. After her death in September 2020, Trump and Republicans in the Senate pushed through the nomination of Barrett just days before Election Day, and after voters already had started to cast the votes that led to Trump’s defeat.

The increasing partisan polarization surrounding the court has been one of Breyer’s concerns, one he shares with the conservative chief justice. He addressed it this spring during a speech at Harvard Law School.

“If the public sees judges as politicians in robes, its confidence in the courts — and in the rule of law itself — can only diminish, diminishing the court’s power, including its power to act as a check on other branches,” he said.

A decision to retire now, when a like-minded president has a chance to name a like-minded successor, could feed that view. But history shows retiring justices do just that.

Breyer’s plan is “the latest in the modern trend of politically timed retirements at the Supreme Court,” said Gabe Roth, executive director of the group Fix the Court. “While we know Breyer is a true believer that the court is an independent, apolitical institution, the nomination and confirmation scheme as it currently exists makes that an impossibility.”

The justice faced unprecedented pressure to leave, especially after
Ginsburg’s example of what could go wrong.

Hecklers interrupted a book interview at the Smithsonian with signs calling for him to retire. A Twitter account issued daily reminders that he had not signaled his intentions. A truck circled the Supreme Court with a sign telling him to pack up. “I wasn’t here,” Breyer said with a smile when it was brought up during an interview.

In an interview with the New York Times in August, Breyer acknowledged having a sympathetic president in office might factor into his decision. By the next day, he indicated in the interview with The Post that he regretted getting into it.

At the end of last term, Breyer already knew that the court was going to be taking on some of the issues about which he cared and that probably influenced his decision to stay.

The court is facing the most serious threat to Roe v. Wade in decades, an important case that could undermine some state and local gun-control laws, and challenges to the government response to the pandemic.

Breyer has seemed occasionally irritable on the bench, and unhappy about being outnumbered by the conservative majority — for instance, on the issue of a Texas law that, in Breyer’s view, unconstitutionally impairs the right to abortion before fetal viability.

He has written dissents three times as the case has come to the Supreme Court. He declared it “unbelievable” that the court was being asked to set aside the Biden administration’s plan for vaccine-or-mask mandate for the country’s largest employers. The majority did exactly that.

Breyer has at times been salty — for a justice on the bench. “You better be damn sure,” he warned his colleagues during the hearing on a restrictive Mississippi abortion law, when considering whether to overturn a landmark precedent such as Roe.

One Democrat active in liberal legal circles said the White House seemed to think it might hear something from Breyer in December, but that didn’t happen.

It is rare for a justice to make their intentions known so early. Among recent departures from the court, Justice Anthony M. Kennedy announced his retirement in June 2018. John Paul Stevens announced his departure in April, David Souter in May. O’Connor made her July retirement announcement contingent on a replacement being confirmed, and served another six months.

Mike DeBonis, Seung Kim, Ann E. Marimow and Tyler Pager contributed to this report.
For almost all of its history, the U.S. Supreme Court has been made up of White men. President Biden has promised to nominate a Black woman to the court for the first time, to replace retiring Justice Stephen G. Breyer. She would be only the eighth person in the court’s 233-year history who was not a White man.

A number of Senate Republicans have pushed back against Biden’s promise specifically to add a Black woman to the court, saying she would simply be a beneficiary of affirmative action rather than chosen because of her qualifications.

But only modern presidents have placed a premium on racial and gender diversity when nominating lifelong appointees to the Supreme Court — a stark reality visible in the court’s class photos.

The result is that the interpretations of Americans’ rights — for instance, the right to have a lawyer, the right to abortion, protection against gender-based discrimination — have been made almost exclusively by White men.

This lack of representation has led to some controversial decisions in modern times, such as the court’s allowing police to stop and frisk a person on the suspicion that the person might be involved in a crime, or not closing the door entirely to discriminating against women in the hiring process.
1954 — *Brown v. Board of Education*
In one of the most famous Supreme Court cases, the justices unanimously ruled that segregating children in public schools on the basis of race was unconstitutional.

1966 — *Miranda v. Arizona*
In a 5-to-4 decision, the Supreme Court decided that those detained by police should be informed of their constitutional rights before being interrogated.

1968 — *Terry v. Ohio*
The court held that the controversial police practice of stopping and frisking someone suspected of wrongdoing does not violate that person’s constitutional protections.

1971 — *Phillips v. Martin Marietta Corp.*
The all-male Supreme Court decided that it was unconstitutional to hire men with young children but not women with young children. But the ruling did not entirely close the door on gender discrimination.

1973 — *Roe v. Wade*
Another landmark women’s rights case decided entirely by men established a constitutional right to have an abortion, until the fetus would be viable outside of the womb.

1986 — *Bowers v. Hardwick*
The court, including Justice Lewis Powell, upheld sodomy bans. A well-told story is that Powell told one of his clerks that he had never met a homosexual, according to University of Texas law professor Stephen Vladeck. That clerk was gay. (*Bowers* was overturned in 2003.)
In 2013, the Supreme Court knocked down a portion of a federal law designed to protect Black voters from discrimination at the polls, and this year, it declined to stop an abortion ban in Texas from going into effect. And on Monday, it decided to let stand an Alabama congressional map that a lower court said should have included more majority-Black districts.

Diversity has trickled into the court in modern times, and there are indications that it has made a difference, such as when the court allowed a state to ban Confederate flag license plates and cross burning, rejecting free-speech arguments. Sometimes, the impact of diversity rippled out from a fiery dissent by a justice that animated minority groups and helped drive a political conversation.

“We wouldn’t have had many of the rights we have today, maybe most of them, if it wasn’t for White men,” said Lisa Soronen, an analyst of the court and executive director of the State and Local Legal Center, which supports states and local governments in cases before the Supreme Court.

“Every person of color and woman is relieved we’re no longer in a world where we have to rely on White men and their generosity.”

Here are some examples of how the few instances of racial and gender diversity on the Supreme Court have made tangible changes to American life.

**THE DEATH PENALTY**

**1972 — Furman v. George**

A couple years after Justice Thurgood Marshall became the first person of color on the court, justices debated whether the death penalty was constitutional. In 1972, they narrowly decided that certain applications of the death penalty resulted in cruel and unusual punishment. Marshall was one of only two justices who thought the death penalty was unconstitutional without exception. A few years later, the court upheld the death penalty more broadly, with some of the White justices arguing that taking convicted murderers’ lives is a benefit to society. Marshall dissented with passion: “First, the death penalty is excessive,” he said. “And second, the American people, fully informed to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable.”

**GENDER DISCRIMINATION**

**1996 — United States v. Virginia**

Shortly after the Supreme Court for the first time included two women — Justices Sandra Day O’Connor and Ruth Bader Ginsburg — it required the Virginia Military Institute to allow women to apply, ending male-only admissions at the last U.S. public university using the practice. Ginsburg, already well known for arguing gender-discrimination cases before the court as a lawyer, wrote the 1996 opinion, in which she tried to slam the door on all gender discrimination. She said it is “presumptively invalid [to have] ... a law or official policy that denies to women, simply because they are women, equal opportunity to aspire, achieve, participate in, and contribute to society, based upon what they can do.”

**CROSS BURNING**

**2003 — Virginia v. Black**

Should First Amendment rights protect cross burning? In 2002, Justice Clarence Thomas, the only person of color on the court and someone who rarely speaks in oral arguments, passionately argued that cross burning was reminiscent of the “reign of terror” of the Ku Klux Klan. “It was intended to cause fear and to terrorize a population,” he said. His arguments appeared to have a direct impact on his White colleagues, *The New York Times* reported. The court upheld the Virginia law banning cross burning.
PAY DISCRIMINATION

The court ruled that a woman had waited too long to sue for pay discrimination. Ginsburg, then the only woman on the court, wrote a fiery dissent and called on Congress to act. It eventually passed the Lilly Ledbetter Fair Pay Act. “Every woman of my age had a Lilly Ledbetter story,” she told The Washington Post in 2010. “And so we knew that the notion that a woman who is in a nontraditional job is going to complain the first time she thinks she is being discriminated against — the one thing she doesn’t want to do is rock the boat, to become known as a complainer.”

STRIP SEARCH
2009 — Safford Unified School District v. Redding

When a middle-schooler was strip-searched by school officials on a tip that she had ibuprofen on her in violation of school policy, the case made it all the way to the Supreme Court. Some of the male justices did not seem especially troubled by the search — which forced 13-year-old Savana Redding to be nude at times. At one point, Breyer suggested that it was no different from changing into her gym clothes. The court ended up siding in part with Redding; Ginsburg, still the only woman on the court, wanted to side entirely with the girl and allow her to sue school officials.

She later said she thought her male colleagues made light of the search because of their gender. “They have never been a 13-year-old girl,” she told USA Today. “It’s a very sensitive age for a girl. I don’t think that my colleagues, some of them, quite understood.”

AFFIRMATIVE ACTION
2013 — Fisher v. University of Texas

In 2009, for the first time, the court included two justices of color: Thomas and Sonia Sotomayor, who became the first Hispanic justice. And they took drastically different approaches to affirmative action, sparring on the issue in case after case.

When the court was deciding whether the University of Texas could use race to consider admitting students, the justices were leaning toward ruling against the affirmative action policy. According to Sotomayor’s biographer, Joan Biskupic, Sotomayor wrote a fiery draft dissent and shared it with her colleagues, drawing on how affirmative action benefited her as a Latina with lower test scores than many of her Whiter, wealthier peers. Biskupic writes that the other justices were “anxious about how Sotomayor’s personal defense of affirmative action and indictment of the majority would ultimately play to the public,” and rather than rule against affirmative action in this case, they drafted a compromise that sent the case back to the lower courts.

Thomas regularly and adamantly opposes affirmative action policies when they come before the court. “I believe blacks can achieve in every avenue of American life without the meddling of university administrators,” he wrote in 2003, echoing abolitionist Frederick Douglass. In the Fisher case, he wrote an opinion likening affirmative action to racial segregation and even slavery.

CONFEDERATE FLAGS
2015 — Walker v. Texas Division, Sons of Confederate Veterans

In 2015, the court was as diverse as it has ever been: a Black justice, a Hispanic justice and three women. That court considered whether Texas could ban Confederate flags on its license plates. Thomas sided with the court’s four liberals — a rare move for him, given that he usually sided with conservatives, including in rejecting most affirmative-action laws — to make the deciding vote that Texas did not have to allow the flags on license plates.
RIGHT TO SEARCH

2016 — Utah v. Strieff

In a 5-to-3 decision — Justice Antonin Scalia died before the case was decided — the court upheld a police officer’s right to search someone on the basis of a tip. Sotomayor vigorously opposed that decision, and she wrote essentially a manifesto about what it’s like to be brown in America. She talked about how African Americans and Latinos are stopped by police more often than Whites, and she argued that her White colleagues could not understand how degrading these stops are for people of color: “It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.”

Writing several years before mass American protests about police brutality, she tried to humanize the people who were stopped and searched, writing: “They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. … They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.”

Where the court goes from here

Representation doesn't always translate into expanded rights for the people being represented. Often, judicial philosophy takes precedent. See Amy Coney Barrett and Thomas, who often side with their White male conservative colleagues.

Sometime this year, the Supreme Court may get its first Black female justice. But there still are many Americans who have never been reflected on the court. For example:

There’s never been a justice of Asian or Native American descent.

No justice has ever publicly identified as being gay.

There has never been a Muslim justice.

No current justice has represented criminal defendants despite the fact the court regularly hears cases where convicted criminals’ lives are literally in their hands.

Seven of the nine justices spent most of their careers in the Northeast, and most went to either Harvard or Yale law schools. None went to a public law school or university.

Most of the current justices were well off financially growing up. (The exceptions are the two justices of color. Thomas grew up poor in Georgia, and Sotomayor grew up in public housing in the Bronx.)
The verdict on KBJ’s nomination hearings: Never again

• Originally Published March 30, 2022

Like many previous such proceedings before the Senate Judiciary Committee, Ketanji Brown Jackson's Supreme Court confirmation hearings produced more political grandstanding than new and useful information.

After long days of tendentious attacks from Republicans, several of whom treated Jackson less as a potential justice than as a foil for GOP talking points on crime, race and education, she emerged as pretty much the nominee everyone knew she was going in: basically decent, well-qualified, liberal and bound for a mostly party-line confirmation as the first Black female justice.

The only question left: How many more hearings, for how many more would-be justices, will the Senate hold before admitting that they’re worse than useless?

The Senate should abolish live testimony from Supreme Court nominees, in favor of alternatives that further its constitutional function of advice and consent, but have less potential for demeaning, cringeworthy political theater.

This is a radical notion, likely to meet with resistance not only from the Senate but also from a public accustomed to the idea that candidates for such a consequential lifetime position should have to go through a public “job interview.”

As a Senate Judiciary Committee member, Joe Biden once said a confirmation hearing is “one democratic moment … when the people of the United States are entitled to know as much as we can about the person we are about to entrust with safeguarding our future and the future of our kids.”

Still, it’s worth rethinking the conventional wisdom, beginning with a recognition of what’s special about the court and its members. The institution’s legitimacy uniquely hinges on its independence, perceived and actual; consequently, Supreme Court justice is a rare job whose qualifications include refusing to say exactly how you would do it.

As then-nominee Ruth Bader Ginsburg memorably explained in 1993: “A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case, it would display disdain for the entire judicial process.”

Hearings therefore put nominees in an “impossible position,” between what the senators might want to know and what judicial nominees may ethically tell them, as Benjamin Wittes, a legal analyst with the Brookings Institution, noted in “Confirmation Wars: Preserving Independent Courts in Angry Times,” a 2006 book that argued for doing away with the hearings.

Before World War II, the Senate bowed to that reality, generally declining to question Supreme Court nominees directly.

Only after the court overturned school segregation in Brown v. Board of Education in 1954 did Southern Democrats, intent on pinning nominees down over civil rights issues, begin insisting that they testify in public.

One of the uglier early nomination hearings, Wittes reminds us, was the browbeating meted out to Thurgood Marshall in 1967 by such Southern segregationists as Strom Thurmond and Sam J. Ervin Jr.

In other words, there is a historical link between the rise of a more active and influential court, which raised the stakes of court nominations — especially after Roe v. Wade in 1973 — and the institutionalization of testimony from nominees. Over time, Wittes argued, “the very purpose” of the hearings became “either to wring concessions from would-be justices or to tar them as unworthy.”

He wrote that in 2006. Whether you believe it was Jackson or Brett M. Kavanaugh who got the harshest treatment from the committee since then, you’d have to admit Wittes’s observation has aged pretty well.

Indeed, the one point of new and relevant information the Jackson hearing produced tends to confirm it. Responding to questions from Sen. Ted Cruz (R-Tex.), Jackson, who is a member of the Harvard University Board of Overseers, said her “plan” is to recuse herself from a case in which Asian Americans are challenging the school’s admissions policies as racially discriminatory.

Jackson’s decision was proper, on the merits, but would have been far better announced once she was actually on the court, not when she was still subject to confirmation.

When they do recuse, sitting justices usually reserve the right not to disclose their reasons, a prerogative, however minor, that Jackson has now conceded under hostile questioning. Whether this creates a precedent or affects future nominees remains to be seen.

The problem isn’t that confirmation hearings are too hard on the nominees, who are, after all, witting and willing participants. Good candidates for this lofty legal office are not being deterred by the gantlet they must run to get it.

The problem is that the Senate regularly conducts a spectacle that coarsens the political culture and clashes with judicial independence — without offsetting benefits, in terms of information it could not gain through other means.

The Senate can vet nominees adequately through witness testimony, by reviewing their (usually abundant) documentary records and, where necessary, by private, in-person questioning of nominees on sensitive issues that may come up in an FBI background check.

That’s more or less how things were done in a less frenzied past. And it’s how they could be done in a saner future.
An Integrated Curriculum of The Washington Post Newspaper In Education Program

Biden, who pledged to diversify the Supreme Court, has already made progress on lower courts

BY ADRIAN BLANCO

• Originally Published January 27, 2022

Justice Stephen G. Breyer’s pending retirement gives President Biden the opportunity to make his first appointment to the Supreme Court, rejuvenating the court’s liberal minority and diversifying the bench overall.

Biden has pledged to name the first Black woman to the Supreme Court, a key part of his commitment to diversify a federal judiciary overwhelmingly made up of White men for centuries. Justice Sonia Sotomayor is the first Hispanic person and first woman of color to serve on the high court thus far. The president already has muscled through the highest number of federal judges in the first year of a presidency in four decades, with picks from a diverse range of racial, gender and professional backgrounds.

Biden nominated as many minority women to be federal judges in four months as Trump had confirmed in four years, and he now has placed twice as many minority women on the federal bench as his predecessor.

As of Jan. 26, 42 of Biden’s appointees have been confirmed by the Senate. Of those, 33 are women, and 29 identified as Black, Asian, Native American, Hispanic or multiracial.

He has appointed only two White men as Article III judges, a category that includes Supreme Court justices and federal circuit and district judges. The U.S. Constitution stipulates those judges be appointed by the president and confirmed by the Senate.

Judge Ketanji Brown Jackson, right, whom Biden named to the U.S. Court of Appeals for the D.C. Circuit, speaks to students in 2017.

Biden secured more judges in Year One than recent presidents

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Source: Russell Wheeler, Brookings Institution
Diversity of confirmed federal judges, by president

Biden
42 judges confirmed so far

Obama
324 judges in two terms

Trump
229 judges in one term

Bush
324 judges in two terms

Clinton
372 judges in two terms

On the shortlist of potential nominees for the Supreme Court is Judge Ketanji Brown Jackson, who was confirmed last year to the influential U.S. Court of Appeals for the D.C. Circuit as one of Biden’s first judicial nominees.

Three Republicans joined all 50 Democrats to approve Jackson’s nomination, 53 to 44.

About this story
Federal judges data comes from the Federal Judicial Center. Article III Federal Judges have been considered for this analysis. Each judge has been counted only once for each president’s total.

Racial and ethnic identifiers for sitting judges were self-reported by the judges to the Office of Legal Policy in the Justice Department. For this analysis, judges that identified themselves as Black, Asian, Native American, Hispanic or multiracial were categorized as minority judges.
BOOK REVIEW

A lawyer who broke barriers, for herself and others

BY PATRICIA SULLIVAN

*Originally Published February 22, 2022*

From 1946 to the 1960s, Constance Baker Motley was the sole woman on the small team of lawyers waging an insurgent challenge to the South's racial caste system and laying the foundation for the civil rights revolution that transformed American life. The first Black woman appointed to a federal judgeship, in 1966, Motley's rulings advanced the rights of women, gays and lesbians, prisoners, and the homeless. In “Civil Rights Queen: Constance Baker Motley and the Struggle for Equality,” Tomiko Brown-Nagin recovers the story of this pioneering lawyer and jurist and invites a fresh consideration of the civil rights movement and the nature of its achievements.

Brown-Nagin, a legal historian and dean of Harvard University’s Radcliffe Institute, captures the arc of a life spanning the Depression era to the dawn of the 21st century. The interplay of forces that set young Constance Baker on her unlikely course are key to the story. Born to working-class immigrants from the Caribbean island of Nevis, Baker grew up in a close-knit community in New Haven, Conn., and excelled as a student. Her family’s economic struggles and the rampant poverty and suffering of the Depression years drew her to community activism and into a circle of young radicals and New Deal activists. College was beyond her family’s financial reach, but good fortune intervened. A local philanthropist, moved by a bold speech Baker delivered at a community center event, offered to pay for her college education and beyond.

Baker’s first encounter with the raw indignities of segregation was on a train ride to Nashville in the fall of 1941 to attend Fisk University, a historically Black college. She thrived at this oasis of Black achievement and cultural life, but the cloistered atmosphere and student apathy about pressing social issues did not suit her. After a year, she departed for New York University and then moved uptown to Harlem to attend law school at Columbia University.

Among the few Black women who had cracked the barriers to study at one of the nation’s elite law schools, Baker attempted to find legal work in New York but met impenetrable resistance. Upon arriving to interview for an internship at a Wall Street firm, “the partner looked at her as if he had seen an unidentified flying object,” Brown-Nagin writes. After other rejections followed, Baker found her way to the operation run by Thurgood Marshall in two cramped offices overlooking New York’s Bryant Park. As Brown-Nagin describes it, “Marshall wasted no time in offering the beautiful and brainy Baker the internship she sought.” After graduation, Baker continued in a full-time position with the NAACP Legal Defense Fund. Soon afterward, she married Joel Motley Jr., beginning their lifelong partnership.

After World War II, the NAACP resumed a concentrated legal campaign of targeting educational inequities, part of a broader strategy to topple the South’s system of segregation. Motley tried her first case in Jackson, Miss., in 1949, challenging discriminatory pay for Black teachers. She was the first woman to try a case in a Mississippi courtroom, and she and cocounsel Robert Carter were the first Black lawyers to appear in court since Reconstruction. Black people jammed into the federal courthouse to watch the two brilliant and confident Black attorneys commanding answers and grudging respect from White officials. While the judge ruled against them, the experience elevated the hopes of Black Mississippians that change was possible.

Motley wrote the complaint for Brown v. Board of Education. The historic 1954 Supreme Court decision declaring school segregation unconstitutional marked the beginning of an intense battle. Brown-Nagin vividly captures how the seasoned legal team pushed to enforce the ruling in the face of mobs, defiant White officials and a distant federal government. Mob rule ultimately foiled Motley’s efforts to sustain the court-ordered admission of Atherine Lucy to the University of Alabama in 1956. Lucy was accepted and registered for classes, but was expelled a few days later. In 1961, in a breakthrough case, Motley headed the team that desegregated the University of Georgia with the admission of Charlayne Hunter and Hamilton Holmes, a feat that “cemented her standing,” Brown-Nagin observes. The agonizing circumstances surrounding James Meredith’s admission to the University of Mississippi in 1962, and Motley’s deep personal investment in his success, are powerfully recounted here.

By the early 1960s, the strategy of direct action involving boycotts, sit-ins and marches; the founding of the Student
Nonviolent Coordinating Committee; and the launching of voting rights campaigns broadened the base and accelerated the pace of the civil rights movement. Brown-Nagin pays scant attention to this rapidly shifting landscape, sticking closely to Motley’s activities, notably her close relationship with Martin Luther King Jr. Motley played a largely overlooked role in the 1963 Birmingham campaign; most significant was her representation of the more than 1,000 students expelled from school for their participation in the protests. Motley secured an after-hours appeal before Judge Elbert Tuttle of the U.S. Court of Appeals for the 5th Circuit, who struck down a lower court’s ruling that upheld the expulsions — a ruling that would have had devastating consequences for the students, their families and the local movement. Motley remembered her advocacy for these children as her greatest “professional satisfaction.”

In the mid-1960s, as historic civil rights legislation codified legal victories, desperate urban conditions exposed the limited reach of legal remedies, igniting rebellions that escalated through the end of the decade. Motley’s professional career entered a new phase. In 1964, she ran successfully for a seat in the New York state Senate, becoming the first Black woman to serve in that body. A year later she was the New York City Council’s unanimous choice to serve as interim Manhattan borough president, the first woman to hold that position. In November 1965, she ran unopposed for a four-year term. As Brown-Nagin tellingly explains, Motley believed that the mid-1960s “had ushered in a time of rebirth and reward for elite Blacks.” In Motley’s words, “For educated Blacks, our time had come.”

In 1966, Lyndon Johnson appointed Motley to the U.S. District Court for the Southern District of New York — a historic appointment of the first Black woman to a federal judgeship. Motley was 45 years old and would serve until her death in 2005. Expectations for her were high, and, as Brown-Nagin reveals, assumptions about how her race, gender and past work as a civil rights lawyer would bias her rulings were rampant. Motley’s very presence on the bench inspired women and African Americans, and she became a generous mentor to a rising generation of female jurists.

Judge Motley interpreted and applied the changes in law that she had done much to secure. Brown-Nagin’s rich narrative highlights the major cases and rulings that marked these years and define her legacy, such as Blank v. Sullivan & Cromwell, a watershed case that opened opportunities to women in elite law firms. Among the most fascinating and controversial was Motley’s ruling in the case of Martin Sostre, which broke ground in the protection of prison inmates’ civil and religious rights. Brown-Nagin describes it as “the most audacious ruling of [her] entire judicial career.”

“Civil Rights Queen” considers Motley’s work and achievements within the world where she moved. There are brief references to more radical critiques of and approaches to the consequences of America’s tortured racial history, including a fascinating moment in 1961 when Motley engaged in a televised debate with Malcolm X on the question of “Where Is the Negro Headed?” Brown-Nagin underscores Motley’s singular focus on the law-based approach to racial change and civil rights advancement; it provided tangible results. By the late 1960s, however, Martin Luther King Jr. was among many who despaired over the poverty, deprivation and blighted hopes of Black urban communities, untouched by civil rights gains.

At a time when rights are being rolled back and history itself is under assault, this exemplary biography is timely and essential. As a Black woman, Motley was out front in dismantling gender and racial barriers; as a lawyer and jurist, she was a leader in the civil rights revolution that reached into many sectors of American life. The unfinished and perilous work to realize an inclusive and robust democracy reminds us there is no clear path. The story of Motley and the broader civil rights struggle, beyond a tally of victories and defeats, has much to teach us about the creativity, dedication, faith and boldness that keep the light burning.

Patricia Sullivan is the author of Justice Rising: Robert Kennedy’s America in Black and White.
KAREN TUMULTY

Clarence Thomas has some good advice for his wife

“I think we should be careful destroying our institutions because they don’t give us what we want when we want it.”

Those were wise words, spoken in September by Supreme Court Justice Clarence Thomas when he delivered a lecture at the University of Notre Dame Law School. It is too bad Thomas’s advice didn’t get through to his wife, Virginia.

Ginni Thomas is a longtime right-wing activist, whose push-the-envelope ventures have repeatedly raised questions about conflicts of interest for her husband.

That she is among those dangerous individuals who are willing to destroy even the most precious of institutions that do not produce the results they want when they want them was made abundantly clear in a series of at least 21 emotional, even unhinged texts she sent to then-White House Chief of Staff Mark Meadows in the aftermath of the 2020 election — an election that was not particularly close, that was fairly decided and that Donald Trump lost.

Those texts were revealed Thursday in a blockbuster article by The Post’s Bob Woodward and our former colleague Robert Costa, who now works for CBS News. “Help This Great President stand firm, Mark!!!” Ginni Thomas wrote. “You are the leader, with him, who is standing for America’s constitutional governance at the precipice. The majority knows Biden and the Left is attempting the greatest Heist of our History.”

Another text makes reference to a reassuring conversation she had with her unnamed “best friend.” A reasonable supposition, which it would be good to hear her address, would be that Ginni Thomas was referring to her husband.

Her overwrought texts were among a trove of material that Meadows has turned over to the House committee investigating the Jan. 6, 2021, riot by Trump supporters, who were seeking to block Congress’s certification of the electoral votes that made Joe Biden the president.

In other texts, she begged the White House chief of staff to take a look at bizarre conspiracy theories making the rounds with QAnon, including a preposterous one that Trump had secretly watermarked real ballots so he could identify frauds. “Watermarked ballots in over 12 states have been part of a huge Trump & military white hat sting operation in 12 key battleground states,” she wrote. She also urged Meadows to make lawyer Sidney Powell, who even some in Trump’s own circles considered bonkers, the “lead and the face” of the president’s legal team.

Clarence Thomas was hospitalized with an infection until Friday morning, and neither he nor his wife has commented on the texts. Ginni Thomas did not respond to a request for comment for this column. She acknowledged this month, in an interview with the conservative Washington Free Beacon, that she attended the “Stop the Steal” rally that preceded the Jan. 6 Capitol riot, though she denied reports that she helped organize it.

Power couples are far from rare in Washington, of course, and it seems only fair to allow a lot of leeway to accomplished and well-connected life partners who want to chart their own paths professionally. I also generally subscribe to the doctrine espoused by first lady Betty Ford back in 1975, when she told the International Women’s Year Conference in Cleveland: “Why should my husband’s job, or yours, prevent us from being ourselves? Being ladylike does not require silence.”

But in the Thomases’ case, there is an increasingly legitimate question about whether her political agenda influences his when it comes to the public trust. Clarence Thomas is himself a stalwart conservative, but was that the reason he was the lone dissenter to the court’s January decision to reject Trump’s effort to block the release of some of his presidential records to the House committee investigating the Capitol riot? Might he have had reason to know that the material could include communication between his wife and the White House? Ginni Thomas had also been among the signatories of a letter by conservative leaders blasting that committee’s work as “overtly partisan political persecution.”

Clarence Thomas further wrote a forceful dissent in February 2021, after the court majority declined to hear a case filed by Pennsylvania Republicans who were trying to disqualified some of their state’s mail-in ballots.

Federal ethics regulations, as applied to the court, leave it up to a justice to decide when to disqualify himself or herself from any proceeding where his impartiality might “reasonably be questioned.”

Ginni Thomas wrote to Meadows that she felt she was living through “the end of Liberty.” If that is the case, she should have been reassured, as it has become clearer that the election was a fair one. As recently as Wednesday, an independent review in Arizona found, yet again, that Maricopa County’s results were on the up and up.

That result was surely not what Ginni Thomas was hoping to see. But as her husband would tell her, the institutions did what they were supposed to do. Whether they continue to in the future, however, is far less certain.
Recusal and Spousal Interests

RECUSAL: Withdrawal of a judge, prosecutor or juror from a case on the grounds that he or she is unqualified to perform legal duties because of a possible conflict of interest or lack of impartiality.

The public expects the legal system to be fair and unbiased. When it is not, or is perceived to be partial to certain people or issues, trust is lost.

“There are rules in place governing the vast majority of federal judges (and states have their own codes based on ABA guidelines). The Code of Conduct for Federal Judges is created and updated by the Judicial Conference of the United States, the policy-making office of the federal court system,” according to FindLaw. “The code applies to ‘United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.’ But importantly, the code doesn’t apply to SCOTUS.” Congress has enacted the Judicial Misconduct Statute and the Judicial Disqualification Statute.

When it was revealed in March 2022 that Virginia “Ginni” Thomas, wife of Justice Clarence Thomas, had exchanged at least 29 text messages with then White House Chief of Staff Mark Meadows about the 2020 election results, the questions of spousal influence on justices’ decisions and when justices should recuse themselves from deliberation were in the spotlight.

Read the editorial cartoon and “Ethicists see Ginni Thomas’s texts as problem for court” by Robert Barnes and Ann E. Marimow.

1. Compile a list of the different points of view, include who was interviewed, each person’s expertise and where the reliable source works.
2. Do you think a Code of Judicial Conduct for SCOTUS should be established? If yes, why and who should write it? If no, explain your response.
3. Write a short essay on judicial integrity, recusal and/or spousal influence.

Until Conspiracy Theories Do Us Part

1. Editorial cartoonists use labels to be sure readers understand who is illustrated. What does the label tell you?
2. Michael de Adder comments on the influence of Virginia Thomas on the Supreme Court decisions of her husband. How does he communicate his point of view?
3. Summarize de Adder’s point of view.
Ethicists see Ginni Thomas’s texts as problem for court

BY ROBERT BARNES AND ANN E. MARMOW

Justice Clarence Thomas checked out of the hospital Friday after a week-long stay and walked into the latest ethics controversy about the intersection of his Supreme Court duties and his wife’s political activism.

Democratic lawmakers and many legal ethicists said they were shocked by revelations that Virginia Thomas, known as Ginni, repeatedly pressed White House Chief of Staff Mark Meadows to pursue efforts to overturn the 2020 presidential election, at a time when President Donald Trump was saying he would challenge the results at the Supreme Court.

The Washington Post and CBS News jointly reported Thursday [March 24] that in 29 text messages exchanged between Ginni Thomas and Meadows, she advocated for certain legal strategies, urged him to continue to dispute the election results and asserted that Joe Biden did not win the election.

“Help This Great President stand firm, Mark!!” Ginni Thomas texted Meadows in November, days after the election. “… You are the leader, with him, who is standing for America’s constitutional governance at the precipice. The majority knows Biden and the Left is attempting the greatest Heist of our History.”

Democrats on Capitol Hill said they were outraged by the messages and Justice Thomas’s participation in some of the election-related cases that reached the high court, none of which were decided in Trump's favor. One of the strongest reactions came from Sen. Ron Wyden (D-Ore.).

“Justice Thomas’ conduct on the Supreme Court looks increasingly corrupt,” Wyden said in a news release. “Judges are obligated to recuse themselves when their participation in a case would create even the appearance of a conflict of interest. A person with an ounce of common sense could see that bar is met here.”

Legal ethicists, even some who in the past have been sympathetic to the notion that justices’ spouses are entitled to their own political activities, said the revelations presented a serious problem for the Supreme Court.

“The public is going to be deeply concerned whether a justice can be fair when his wife has been such an active participant in questioning the outcome of the election,” said Steven Lubet, a professor and judicial ethics expert at Northwestern University law school.

Louis J. Virelli III, a Stetson University law professor who wrote “Disqualifying the High Court: Supreme Court Recusal and the Constitution,” said that “this situation is problematie” considering the Jan. 6, 2021, attack on the U.S. Capitol by hundreds of Trump’s supporters.

“It is so stark. You have the wife of a Supreme Court justice advocating for, effectively, an insurrection, on a matter which, at least in part, could end up before the court,” he said. “That’s pretty dramatic.”

Congressional Republicans came to Clarence Thomas’s defense.

“Justice Thomas is a great American and an outstanding Justice,” Senate Minority Leader Mitch McConnell (R-Ky.) said in a statement. “I have total confidence in his brilliance and impartiality in every aspect of the work of the Court.”

At the House Republicans’ retreat in Florida, House Minority Leader Kevin McCarthy (R-Calif.) said Thomas should
not automatically recuse himself from any Jan. 6 cases. “I think Justice Thomas could make his decisions like he’s made every other time — it’s his decision based upon law,” McCarthy said. “If you’ve spent any time studying the Supreme Court justice, he’s the one who studies correctly.”

Rep. Jim Jordan (R-Ohio) — who McCarthy said will become chair of the House Judiciary Committee if Republicans regain the majority in this year’s midterm elections — said he “totally” agreed with McCarthy’s assessment.

Both men have been at odds with the congressional committee investigating the Capitol riot — each spoke to Trump that day.


Adam White, a senior fellow at the American Enterprise Institute, where he focuses on the Supreme Court, said that, in general, previous criticisms of Ginni Thomas’s political work, as well as calls for the justice to recuse himself from participating in cases, were overstated and unfair. She should be allowed to have her own career, White and others have reasoned.

But, he said, the recent disclosures are “somewhat different because they pertain to a specific course of events that did give rise to Supreme Court litigation.”

“This does raise real questions about the need for Justice Thomas to recuse from future cases related to the Jan. 6 insurrection,” White said.

Ginni Thomas’s text messages, which do not directly reference her husband or the Supreme Court, illustrate her access to Trump’s inner circle to promote her efforts to guide the president’s strategy to overturn the election results. Meadows indicated in his responses that he was grateful to receive her advice.

Thomas has publicly denied any conflict of interest between her activism and her husband’s work on the Supreme Court. “Clarence doesn’t discuss his work with me, and I don’t involve him in my work,” she said in an interview with the Washington Free Beacon, a conservative news outlet, for an article published March 14.

In February 2021, when the Supreme Court rejected challenges filed by Trump allies to election procedures, Justice Thomas wrote in a dissent that it was “baffling” and “inexplicable” that the majority would not hear the case so as to provide guidance for future elections.

In January, he was the only justice to note his dissent when the court turned down Trump’s request to block the National Archives from sending White House documents requested by the House committee as part of its investigation. The text messages revealed Thursday did not come from those documents but were turned over to the committee by Meadows, before he ceased cooperating with it.

Thomas “did not explain his reasoning”
in the case in which he indicated he would have granted Trump’s request, Sen. Tim Kaine (D-Va.) tweeted Friday. “We need answers.”

Stephen Gillers, an ethics expert at New York University Law School, said Justice Thomas had an obligation under the recusal statute to know about his wife’s activities. He can’t claim ignorance about her work, Gillers said, or intentionally avoid becoming informed about her actions.

“It was his job to ensure the public would not question his impartiality” in cases involving the 2020 election and Congress’s investigation of the attack on the Capitol, Gillers said. “The public would suspect that the Thomases talked about the post-election challenge.”

Gabe Roth of the Supreme Court watchdog group Fix the Court said Justice Thomas’s continued participation in cases related to overturning the election would “further tarnish the court’s already fading public reputation.”

“Justice Thomas must recuse from any Supreme Court cases or petitions related to the Jan. 6 Committee or efforts to overturn the election,” he said.

Virelli said he would not go that far.

“If any future cases involve any communication from Ginni Thomas as evidence or involve her as a witness, all of those things should require immediate recusal from Justice Thomas, and I think it’s a fairly simple question,” he said. “It becomes more complicated when you step back a level.” For instance, he said he did not think a case involving prosecution of someone who broke into the Capitol on Jan. 6 would require recusal.

Amanda Frost, a professor and judicial ethics expert at American University law school, said the court should put in place a new system for the justices to review one another’s recusal decisions and require them to explain their decisions to the public.

If the court can’t police itself, she said, “Congress is going to have to step in to protect the integrity, legitimacy and reputation of the court.”

Last month, dozens of judicial ethics experts sent Chief Justice John G. Roberts Jr. a letter renewing a request for a code of conduct particular to the Supreme Court.

They noted that three years ago, Justice Elena Kagan told a congressional committee that the justices were “studying the question of whether to have a Code of Judicial Conduct that’s applicable only to the United States Supreme Court” and that it is “something that’s being thought very seriously about.”

But there has been nothing on the matter since. “We prefer that the Supreme Court draft a Code of Conduct and avoid the weighty questions that might arise if Congress imposed one,” the letter said.

Roberts in his year-end message about the state of the judiciary said such decisions should be made by that branch alone.

Justices are reticent to criticize one another and are equals on the court who make their own decisions. Roberts has no authority to force change. But Roth said that because the chief justice sees himself as the principal guardian of the court’s public image, he should take advantage of his position by speaking out.

Roberts did not respond to an inquiry about the Thomas situation or the status of the conduct code, nor have the Thomases commented.

Thomas was released from Sibley Memorial Hospital in Washington on Friday morning after a nearly week-long stay to treat an infection, the court’s press office said.

Thomas, 73, was admitted March 18, complaining of flu-like symptoms. The court said in a news release Sunday night that he had been diagnosed with an infection and was being treated with intravenous antibiotics.

A court spokeswoman said that Thomas had been vaccinated and boosted against the coronavirus and that his illness was not related to covid-19.

Thomas is the court’s longest-serving member, chosen in 1991 by President George H.W. Bush. He is also its second-oldest after Justice Stephen G. Breyer, 83, who plans to retire at the end of the term.

Justices decide for themselves how much health information they will release to the public, and there had been no additional guidance since Sunday until Friday’s brief notice from Supreme Court Public Information Officer Patricia McCabe. “Justice Thomas was discharged from the hospital earlier today,” she said in a release emailed to reporters.

There was no indication whether Thomas would rejoin his colleagues on the bench Monday, when they begin three days of oral arguments.