CONSERVATIVES' SELECTIVE USE OF RACE IN THE LAW

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A central plank in conservative race relations law policy has been opposition to governmental use of racial criteria in policies aimed at helping historically disadvantaged racial minorities. Hence, leading conservatives, including Chief Justice Rehnquist and Associate Justices Scalia and Thomas, have been hawks in the war against affirmative action.[1]

Many conservatives, however, strike a different note when they confront the use of race by public authorities in the administration of criminal justice. In that arena, conservatives have been very willing to allow public authorities to discriminate racially to pursue law enforcement aims even in the absence of an articulated compelling justification. Two examples will illustrate my point.

Prior to 1986, the Supreme Court permitted prosecutors to peremptorily challenge jurors on a racially discriminatory basis.[2] Finally, after insistent prodding by Justice Thurgood Marshall,[3]

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1. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (O'Connor, J., majority opinion) (joined by Chief Justice Rehnquist) (holding that affirmative action programs are subject to strict scrutiny under the Equal Protection Clause); *id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment) (arguing that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination"); *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment) ("I believe that there is a 'moral [and] constitutional equivalence' . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.") (quoting *id.* at 2120 (Stevens, J., dissenting)); Richard v. J.A. Croson Co., 448 U.S. 469, 520 (1989) (Scalia, J., concurring) (arguing that "strict scrutiny must be applied to all governmental classification by race").

2. *See* Swain v. Alabama, 380 U.S. 202 (1965) (holding that a showing that blacks have not served on any petit jury during a specified period does not give rise to an inference of systematic discrimination through the use of peremptory challenges).

3. *See, e.g.*, McCray v. New York, 461 U.S. 961, 963-70 (1983) (denying certiorari in three cases) (Marshall, J., dissenting); *see also* Randall Kennedy, *Doing What You Can With What You Have: The Greatness of Justice Marshall*, 80 GEO. L.J. 2081 (1992) (describing Justice Marshall's campaign to reverse *Swain*).

the Supreme Court reversed itself. In *Batson v. Kentucky*,[4] the Supreme Court rightly prohibited prosecutors from using any racially discriminatory peremptory challenges. Chief Justice Burger and then-Justice Rehnquist dissented.[5] Subsequently, Justices Scalia and Thomas have also voiced unhappiness with the Court's effort to prohibit all racially discriminatory peremptory challenges, those initiated by defense counsel[6] as well as prosecutors.[7] These conservative jurists need to explain their tolerance of racial discrimination in the context of peremptory challenges but their intolerance of affirmative action.

A second example involves the use of race by police officials. Police around the country racially discriminate routinely in selecting whom to question, stop, or detain for purposes of investigating possible criminal wrongdoing. The Unites States Border Patrol, for instance, has stated candidly that it uses apparent Mexican ancestry as a basis for determining whom to question for purposes of investigating criminal trafficking in illegal workers. In *United States v. Martinez-Fuerte*,[8] the Supreme Court held that such racial discriminations are permissible as a reasonable law enforcement measure.[9] Justices Brennan and Marshall dissented in *Martinez-Fuerte*,[10] but none of the conservative Justices did so. The conservatives Justices were apparently satisfied with the notion that the Border Patrol's "reasonable" use of race posed no constitutional difficulty. Yet, in the affirmative action context, conservatives generally say that mere "reasonableness" is an insufficient justification when the government allocates benefits specifically targeted to aid racial minorities.[11]

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4. 476 U.S. 79 (1986).

5. *See id.* at 112-34 (Burger, C.J., dissenting) (joined by then-Justice Rehnquist); *id.* at 134-38 (Rehnquist, J., dissenting) (joined by Chief Justice Burger).

6. The Supreme Court ruled in 1992 that criminal defendants could not use race as a basis for a peremptory challenge. *See* Georgia v. McCollum, 505 U.S. 42 (1992). For a description of this case, see Patricia F. Kaufman, Recent Development, *The Beginning of the End of Peremptory Challenges:* Georgia v. McCollum, 16 HARV. J.L. & PUB. POL'Y 287 (1993).

7. *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1437 (1994) (Scalia, J., dissenting) (joined by the Chief Justice and Justice Thomas) (arguing that peremptory challenges cannot violate the Equal Protection Clause because all groups are equally subject to them).

8. 428 U.S. 543 (1976).

9. *See id.* (holding that routine vehicle stops at a permanent checkpoint, even if based upon ancestry, do not violate the Fourth Amendment).

10. *See id.* at 567-78 (Brennan, J., dissenting) (joined by Justice Marshall).

11. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (providing a discussion of strict scrutiny in the context of government contracts); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (holding that affirmative action in law school admissions is

If conservatives believe that, absent a compelling justification, race-based affirmative action is illegitimate, consistency would suggest that they ought similarly to argue that, absent a compelling justification, prosecutors should not be permitted to take race into account in making peremptory challenges and that police should not be permitted to use race as a proxy for heightened likelihood of criminal misconduct.

The inconsistency in conservatives' approach toward public officials' use of race is striking. It lends credence to the belief of many observers that conservatives tend to be fervent opponents of racial discrimination only when it is perceived to harm the interests of whites.

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