

# Indian Country and the Supreme Court: A Look Back and a Look Ahead

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Presentation to the Native American  
Bar Association of AZ

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# The Justices of the Supreme Court

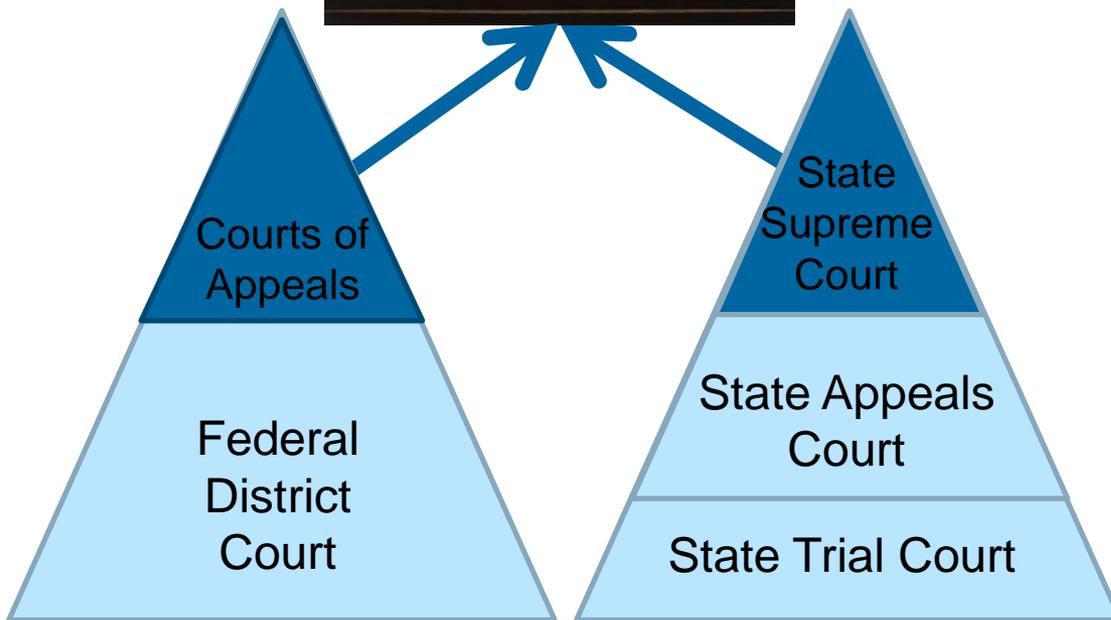


# Path to the Supreme Court



## Original Jurisdiction:

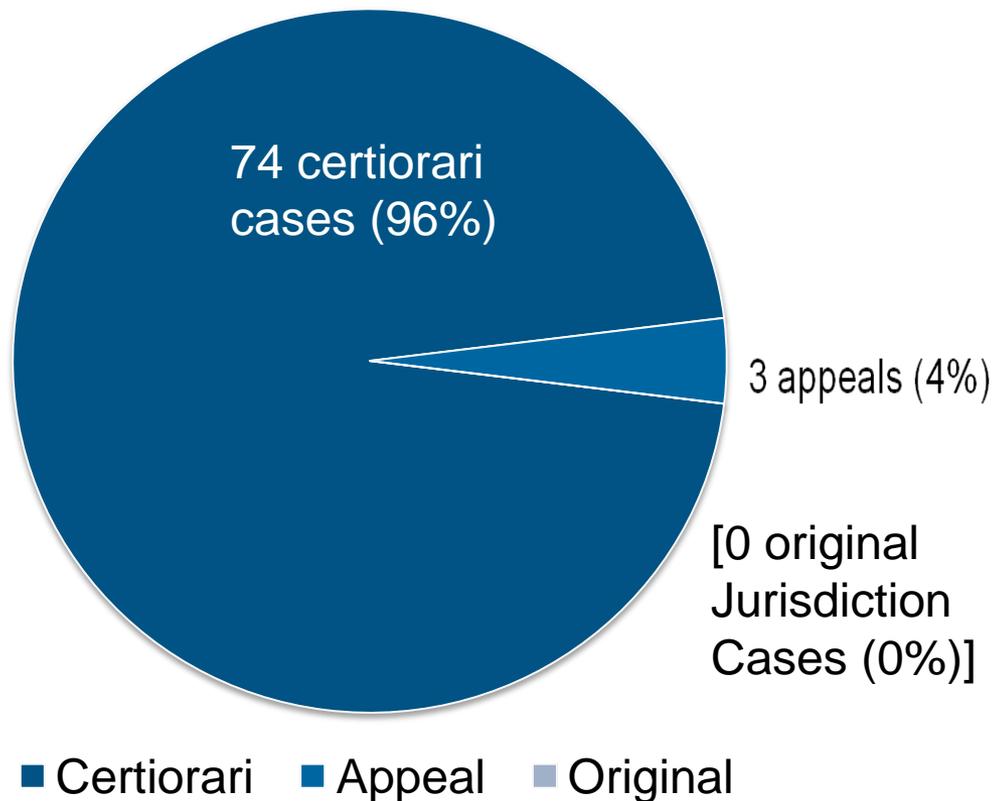
*State v. State*  
*State v. United States*



## Origin of OT 2011 Cases

Federal Court	68 (88%)
State Court	9 (12%)
Original Juris.	0 (0%)

## How do these cases get there?

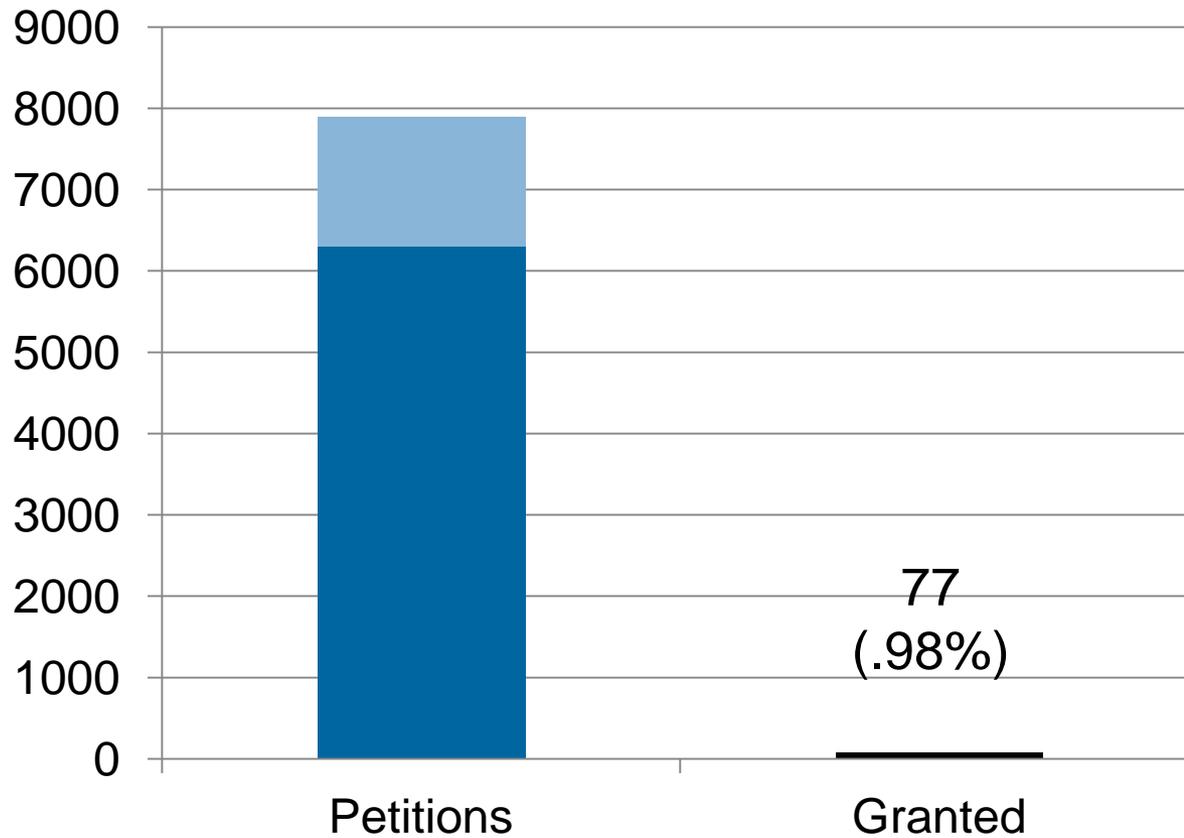


- ❑ Certiorari: Takes four votes to grant
- ❑ Federal Laws Declared Unconstitutional
- ❑ Top Prospects
- ❑ Circuit Conflicts
- ❑ Five votes required for a stay

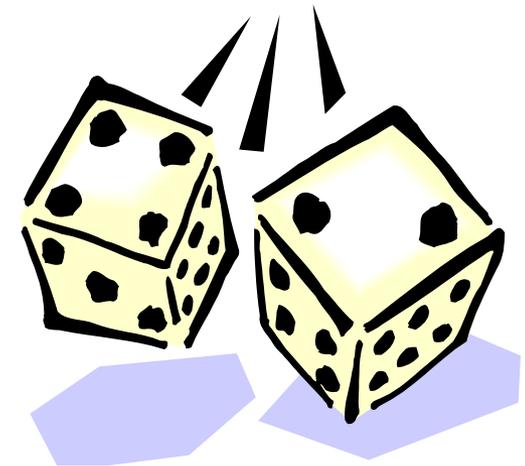
- *Hamilton v. Texas* (1990): Four votes for certiorari in death penalty case, but no fifth vote for stay
- Custom now is a “courtesy” fifth vote

# What Are the Odds?

## Petition and Grants for OT 2011



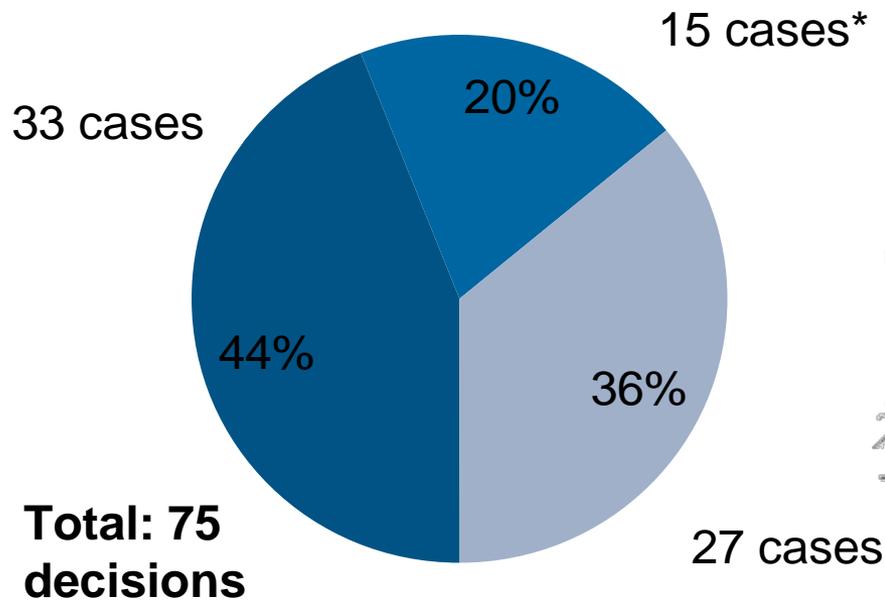
■ Paid  
■ IFP



# The Court's Divided Voting

## Decisions (2011 Term)

■ Unanimous ■ 5-4 ■ Other



\*Two-thirds of 5/4 decisions this Term  
“ideological”  
Broke 50/50 liberal/conservative.

# Overview

- The Court granted 3 of 27 Indian Law petitions for the 2011 Term
  - *Salazar v. Ramah Navajo Chapter* (5-4 in favor of Ramah Navajo)
  - *Arctic Slope Native Ass'n v. Sebelius* (Granted, Vacated, Remanded in favor of ASNA)
  - *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak* (8-1 in favor of Patchak)
- There are no Indian law cases currently pending before the Court for review in the 2012 Term and only six pending petitions for cert.:
  - *Young v. Fitzpatrick* (No. 11-1485)
  - *United States v. Samish Indian Nation* (No 11-1448)
  - *Craven v. Cobell* (No. 12-234)
  - *Good Bear v. Cobell* (No. 12-355)
  - *Contour Spa v. Seminole Tribe of FL* (No. 12-372)
  - *Furry v. Miccosukee Tribe of Indians of FL* (No. 12-376)



## What is the Roberts Court's Record on Indian Law Cases?

**2011:** *Salazar v. Ramah* (**W**); *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak* (**L**); *Arctic Slope v. Sebelius* (**GVR for Arctic Slope**)

**2010:** *United States v. Jicarilla Apache Nation* (**L**); *United States v. Tohono O'odham* (**L**); *Madison County v. Oneida Indian Nation* (**GVR to consider Tribe's waiver of immunity**); *United States v. Eastern Shawnee Tribe of Oklahoma*: (**GVR against tribe**)

**2009:** No Cert Grants

**2008:** *United States v. Navajo Nation* (**L**); *Hawaii v. Office of Hawaiian Affairs* (**L**); *Carcieri v. Salazar* (**L**)

**2007:** *Plains Commerce Bank v. Long Family* (**L**)

**2006:** No Cert Grants

**2005:** *Wagnon v. Prairie Band of Pottawatomi Indians* (Fuel Tax) (**L**); *Wagnon v. Prairie Band of Pottawatomi Indians* (License plates) (**GVR-against tribe**); *Lingle v. Arakaki* (**GVR in favor of native Hawaiians**)

# Indian Law Opinions Handed Down by the Court in the 2011 Term

- *Salazar v. Ramah Navajo Chapter*
- *Arctic Slope Native Ass'n. v. Sebelius*
- *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*



## Government contracting: *Salazar v. Ramah Navajo Chapter, et al.*

### Facts:

- ❑ Ramah Navajo Chapter contracts to administer federal programs pursuant to the Indian Self-Determination and Education Assistance Act
- ❑ Congress placed a spending cap on funds for such self-governance contracts
- ❑ Department of the Interior refused to cover the gap in funding

### Issue:

- ❑ Is the government required to pay contract support costs incurred by a tribal contractor, where Congress imposed a statutory cap on appropriations available to pay such costs and the Secretary of the Interior cannot pay the costs without exceeding the statutory cap?



"Can we, just for a moment, Your Honor, ignore the facts?"

## Salazar v. Ramah Navajo Chapter, et al. contd.

How they voted: 5-4 vote in favor of Ramah Navajo Chapter.

- ❑ Justice Sotomayer delivered the opinion, in which Justices Scalia, Kennedy, Thomas, and Kagan joined. Justice Roberts filed a dissenting opinion that was joined by Justices Ginsburg, Breyer, and Alito.

Holding: THE US MUST PAY WHAT IT OWES FOR WORK DONE UNDER A CONTRACT!!!!

- ❑ The government will have to perform its duty when a contractor fulfills their side of the bargain in the same contract
- ❑ In the case of a funding shortfall, the government must pay a contractor where Congress initially appropriated enough funds to cover the contract in question.
- ❑ Aggrieved contractors can sue the United States and seek payment from the Judgment Fund



# Government contracting: *Arctic Slope Native Ass'n v. Sebelius*

## Facts:

- ❑ Arctic Slope enters into a contract with the Secretary of Health and Human Services to administer healthcare facilities and operations
- ❑ Congress places a spending cap on the funds to be appropriated for such contracts and HHS refused to cover the shortfall.
- ❑ 9<sup>th</sup> Circuit held Secretary not obligated to pay costs above statutory cap

## Issue:

- ❑ Whether the government is required to pay contract support costs incurred by a tribal contractor, where Congress imposed a statutory cap on appropriations available to pay such costs and the Secretary of the Interior cannot pay the costs without exceeding the statutory cap.

## Outcome:

- ❑ The Court granted cert, vacated the lower court's ruling, and remanded the case for further consideration in light of its holding in *Ramah Navajo Chapter* (GVR)
- ❑ Arctic Slope will be awarded damages to cover the shortfall in federal government funding



# Land into trust, Prudential Standing, Sovereign Immunity: *Match-E-Be-Nash-She-Wish Band of Potawatomi v. Patchak*

## Facts:

- ❑ United States accepts land into trust for Tribe to conduct gaming
- ❑ Gun Lake Defeats Suit by Michigan Gambling Opposition
- ❑ Patchak re-starts the litigation *after 30 day deadline* arguing that, pursuant to *Carcieri*, the US cannot take land into trust for the Tribe

## Issues:

- ❑ Whether the US has sovereign immunity from suit under the Quiet Title Act for an action seeking to divest the US of title
- ❑ Whether Patchak has prudential standing under the Indian Reorganization Act (IRA) to challenge the acquisition of the land into trust by the federal government



## Match-E-Be-Nash-She-Wish Band of Potawatomi v. Patchak contd.

### How they voted: 8-1 in favor of Patchak

- ❑ Justice Kagan delivered the opinion; Justice Sotomayer dissented.

### Holding: Patchak's suit may go forward

- ❑ The APA waives the government's immunity from suit and the Quiet Title Act only prohibits suits against the US where the plaintiff asserts its own title

- ❑ Here, Patchak did not seek to quiet title in his name but only to divest the United States of its title

- ❑ The zone of interests, for which a person has prudential standing under the IRA, includes all people living near the land who may be affected by activities upon it.

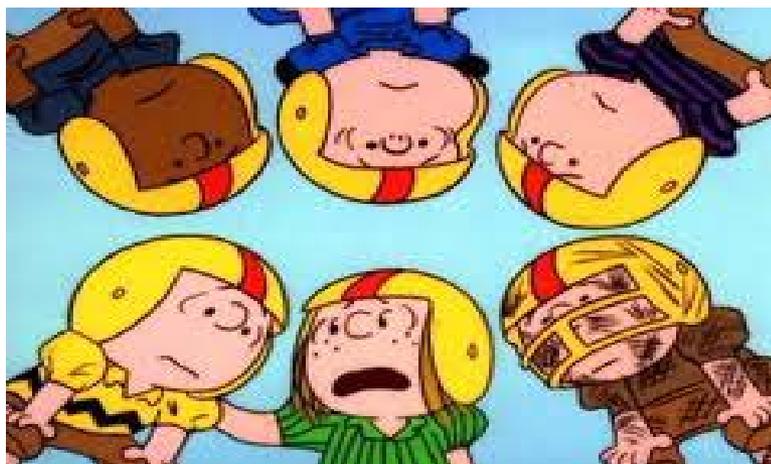
- ❑ The statute for limitations for challenges to trust acquisitions can extend to 6 years



*'I tell you, Henry, what this country needs is a Supreme Supreme Court!'*

## Pending petitions for cert. in Indian law cases

- ❑ *Young v. Fitzpatrick* (No. 11-1485)
- ❑ *United States v. Samish Indian Nation* (No 11-1448)
- ❑ *Craven v. Cobell* (No. 12-234)
- ❑ *Good Bear v. Cobell* (No. 12-355)
- ❑ *Contour Spa v. Seminole Tribe of FL* (12-372)
- ❑ *Furry v. Miccosukee Tribe of Indians of FL*



# Sovereign Immunity: *Young v. Fitzpatrick* (No. 11-1485)

## Facts:

- ❑ Man acting erratically resists arrest; and is crushed to death by police officers employed by the Puyallip Indian Tribe but cross commissioned as WA police officers
- ❑ Estate of Dr. Young files wrongful death suit; Washington State Court of Appeals holds that sovereign immunity precludes suit against tribal police officers acting in their official capacities

## Issues:

- ❑ Are police officers that are employed by a tribe but cross commissioned by a state subject to suit under federal and state law for actions taken while acting in their official capacity?
- ❑ Do treaty provisions or any sources of federal or state law preempt the qualified immunity of tribal police officers for violations of state and federal law?

\*\*\*On October 1<sup>st</sup>, the Court called for the views of the US Solicitor General on certiorari



# Sovereign Immunity: *Contour Spa v. Seminole Tribe of FL* (No. 12-372)

## Facts:

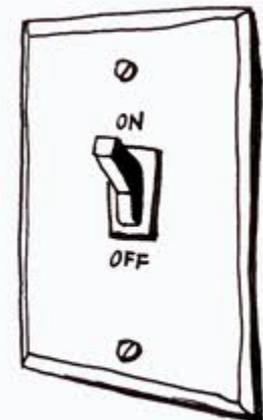
- Contour enters into lease with Seminole Tribe;
- Tribe waives sovereign immunity for actions arising from breach of the lease;
- BIA rejects the lease and Tribe retakes premises, closing Contour
- Tribe removes Contour's state action seeking injunctive relief to federal court, where Contour amends complaint to add ICRA cause of action for taking of private property without compensation

## Issues:

- Can tribal sovereign immunity be asserted with claim specificity & preserved for federal cause of action
- Does ICRA create a cause of action for unlawful taking of property by a Tribe from a non-tribal member?

\*\*\* No action likely until December.

SOVEREIGN IMMUNITY



## Sovereign Immunity: *Furry v. Miccosukee Tribe* (12-376)

### Facts:

- ❑ Furry got drunk at the Miccosukee gaming facility and died in car accident.
- ❑ Furry's estate brought suit in US district court alleging violation of FL dram shop laws and federal law providing that FL laws relating to alcohol are in effect on Indian lands.
- ❑ Eleventh Circuit upheld dismissal of the suit on tribal sovereign immunity grounds

### Issue:

- ❑ Should the concept of tribal sovereign immunity be “revised and discarded” in the context of regulating tribal alcoholic beverage commercial activities?
- ❑ Does tribal sovereign immunity apply where a tribe operates under a state liquor license and has violated state law regarding that license?



# Subject Matter Jurisdiction: *United States v. Samish Indian Nation* (No 11-1448)

## Facts:

- 1972- Samish Indian Nation petitions for and is denied federal recognition
- Court reverses Secretary; Recognition in 1996
- Nation files suit under Tucker and Indian Tucker Acts for damages for federal benefits wrongfully denied
- Federal Circuit permits suit to go forward
- After US cert petition, Nation dismisses suit.

## Issues:

- Does the Tucker Act or Indian Tucker Act grant the CFC subject matter jurisdiction over a claim for damages from a violation of the Revenue Sharing Act (for failure to appropriate money to a tribal government)?
- What is effect of voluntarily dismissal in the CFC?  
-- Moot or GVR?

\*\*\*Decision Due October 15th



## Class Action Settlements: *Craven v. Cobell* (No. 12-234)

### Facts:

- ❑ Class action suit for mismanagement of trust resources;
- ❑ Settlement provides flat rate payout, per capita payout, incentive payouts to class representatives, and \$99 million in attorneys fees
- ❑ Craven sues arguing that class reps and attorneys had undue incentive to settle
- ❑ Settlement approved in Federal Circuit

### Issues:

- ❑ Nature of burden on the objector to a settlement to show evidence of a class conflict where no such evidence exists?
- ❑ Does the payment of incentives to named plaintiffs compromise their ability to represent the class at settlement?

\*\*\*Decision Due Oct. 29



## Class Action Settlements: *Good Bear v. Cobell* (No. 12-355)

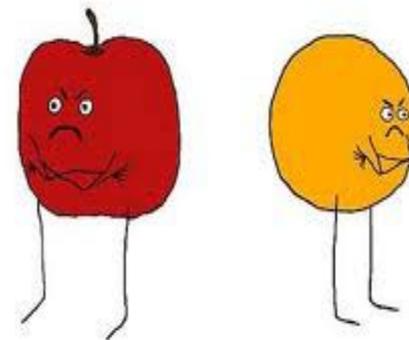
### Facts:

- ❑ Same facts as *Craven v. Cobell*
- ❑ Settlement resolves two claims: a Historical Accounting Class (individuals w/ Individual Indian Money Accounts) and a Trust Administration Class (includes Historical Accounting Class plus individuals w/ an interest in Indian land but no individual account)
- ❑ Petitioners argue not enough commonality among class members because the Trust Accounting Class resolves claims of individual account holders in the same way as class members who did not have such accounts.

### Issues:

- ❑ Can a settlement be approved over class member objections based upon a lack of commonality among class members where the Court of Appeals approved the settlement?
- ❑ Can a mandatory settlement be approved over the objection of a class member who seeks to opt out of a settlement that only provides a monetary settlement and waiver of future claims?

\*\*\* Action due end of year.



## Other important issues coming before the Court:

### ☐ Affirmative Action

- *Fisher v. University of Texas at Austin* (cert. granted)

### ☐ Voting Rights Act

- *Shelby County, Nix*: two petitions pending
- *Texas v. Holder*



# Affirmative Action -- *Fisher v. University of Texas at Austin* (cert. granted)



- “Texas Top 10% Rule”: Any student in top 10 percent of high school class in Texas automatically admitted; for rest, race is weighed as one “factor of a factor of a factor.”
- Last major Supreme Court case:
  - *Grutter v. Bollinger* (2003): Upheld admissions policy at University of Michigan law school that considers race as “plus” factor
- What Has Changed?
  - Justice O’Connor gone
  - Justice Kagan recused
  - Solicitor General & Business Support UT
- Argument Oct. 10th

## Voting Rights Act – Is Preclearance Constitutional

- *Shelby County, Nix*: two petitions pending  
Cert Decision due end of October
- Section 5 of the VRA requires some States and localities to obtain “preclearance” from the Attorney General or a D.C. Court of election changes.
  - Applicability of Section 5 determined by 1972 formula.
- Congress reauthorized Section 5 in 2006.
- In 2009, the Supreme Court decided a Section 5 case on narrow grounds but *unanimously* warned Congress:
  - “The Act’s preclearance requirements and its coverage formula raise serious constitutional questions...”
- Voter ID Impact?



# Voting Rights Act – *Texas v. Holder*

## Possible Appeal of Texas Voter ID Law?

- Proposed law would require Texas voters to present, in addition to voter registration documents, a valid, government-issued photo ID.
- D.C. District Court held that law would have a “retrogressive effect on racial minorities” in violation of Section 5 of the VRA, because the cost of obtaining valid ID will most affect the poor, and a disproportionate percentage of Blacks and Hispanics in Texas live in poverty.
- Texas Attorney General has vowed to appeal to the Supreme Court, but has not yet done so.



## Questions or Comments?



*"It's from my attorney."*