

AFFIRMATIVE ACTION, JUSTICE KENNEDY, AND THE VIRTUES OF THE MIDDLE GROUND

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When the Supreme Court hears arguments this fall about the constitutionality of affirmative action policies at the University of Texas,¹ attention will be focused once again on Justice Anthony Kennedy. With the rest of the Court split between a bloc of four reliably liberal jurists and an equally solid cadre of four conservatives, the spotlight regularly falls on Kennedy, the swing voter that each side in every closely divided and ideologically charged case desperately hopes to attract. Critics condemn Kennedy for having an unprincipled, capricious, and self-aggrandizing style of decision-making.² Though he is often decisive in the sense of casting the crucial vote that determines a case's outcome, his opinions can be maddeningly indecisive in the sense of failing to establish clear rules of law. Yet in *Fisher v. University of Texas*, Kennedy's irresolute nature may prove to be a blessing. By taking a middle-ground position that significantly sharpens judicial scrutiny of affirmative action programs but does not absolutely bar them, Kennedy can finesse the issue in a way that accommodates the American public's conflicted feelings about racial preferences, but simultaneously forces everyone to start thinking more seriously about how racial components of affirmative action can be phased out in a manner that will minimize disruption and bitterness.

I. A PATTERN OF SPLITTING THE DIFFERENCE

If Justice Kennedy winds up casting the deciding vote in *Fisher*, it will not be the first time that a middle-ground position taken by a single judge is decisive in a key Supreme Court case about affirmative action. When the Court first tackled the issue in *Regents of the University of California v. Bakke*,³ Lewis Powell was the Justice who held sway. In that case, Allan Bakke, a white male, claimed that the medical school at the University of

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¹ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-345) (link).

² See, e.g., Jeffrey Rosen, *Supreme Leader: The Arrogance of Anthony Kennedy*, NEW REPUBLIC, June 16, 2007, <http://www.tnr.com/article/politics/supreme-leader-the-arrogance-anthony-kennedy> (link).

³ 438 U.S. 265 (1978) (opinion of Powell, J.) (link).

California at Davis impermissibly discriminated against him by reserving sixteen out of one hundred seats in each entering class for applicants from disadvantaged minority groups.⁴ Four members of the Supreme Court thought the medical school's admissions policy violated federal law,⁵ while four others saw no legal flaw in the school's approach.⁶ That left Justice Powell to break the tie. While declaring that the medical school violated the Equal Protection Clause by fixing a rigid quota for minority students, Powell explained that he would approve a policy under which an applicant's contribution to the school's racial or ethnic diversity would be merely a "plus" factor in evaluating the applicant's admission file.⁷

A quarter of a century later, the Supreme Court returned to the question of affirmative action in a pair of cases involving the University of Michigan.⁸ At Michigan's undergraduate College of Arts and Sciences, the admissions formula specified that an applicant from an underrepresented minority group would receive a 20-point boost toward the 100 points needed to guarantee admission.⁹ Michigan Law School, on the other hand, used no fixed formula or point system, but took the race of applicants into account to ensure the enrollment of a "critical mass" of minority students.¹⁰ While most Supreme Court Justices saw no constitutionally significant difference between the college's point system and the law school's non-numeric method, Justices Sandra Day O'Connor and Stephen Breyer distinguished the two—casting the pivotal votes to strike down the undergraduate college's points-based policy but to uphold the law school's more flexible and vague approach. Justice O'Connor added an unusual twist to her opinion by noting that it had been twenty-five years since Justice Powell's landmark opinion in *Bakke*, and forecasting "that 25 years from now, the use of racial preferences will no longer be necessary" to ensure sufficient racial diversity in public universities.¹¹ The Michigan cases thus represented "the apogee of split-the-difference pragmatism" rather than a clear victory for either side of the affirmative action debate.¹²

More recently, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court looked at race-based policies at the elementary and high school levels.¹³ Four Justices scoffed at the notion

⁴ *Id.* at 272–79.

⁵ *Id.* at 324–79 (Brennan, concurring in the judgment in part and dissenting).

⁶ *Id.* at 412–21 (Stevens, concurring in the judgment in part and dissenting in part).

⁷ *Id.* at 315–20 (opinion of Powell, J.).

⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003) (link); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (link).

⁹ *Gratz*, 539 U.S. at 255.

¹⁰ *Grutter*, 539 U.S. at 315–16.

¹¹ *Id.* at 343.

¹² See J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1994 (2006) (link).

¹³ 551 U.S. 701 (2007) (plurality opinion) (link).

that race should ever be a factor in deciding which pupils attend which schools within a district, flatly declaring that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁴ On the other hand, four Justices applauded the notion that a school district would make race a factor in school assignments in order to fulfill the promise of racial integration and to achieve a more level racial distribution across all schools within the district.¹⁵ Justice Kennedy emerged as the lone occupant of a middle ground; he provided the fifth vote for striking down the particular school district policies but declined to rule out the possibility that a school district could craft a race-conscious assignment policy that would remain safely within constitutional boundaries.¹⁶

II. THE TEXAS SHOWDOWN

While Justice O’Connor predicted that the use of racial preferences in higher education would be obsolete twenty-five years after *Grutter* and *Gratz*, many now wonder if affirmative action will survive that long. When the Supreme Court granted certiorari in *Fisher*, widespread speculation ensued about whether the Court’s decision would mean the end of affirmative action.¹⁷

The University of Texas has two principal mechanisms to increase the racial and ethnic diversity of its student body. First, the state’s “Top Ten Percent Law” provides for automatic admission of Texas high school seniors with grade point averages in the top tenth of their graduating classes.¹⁸ Second, in evaluating all other applications, the University uses a “holistic” approach that considers race as one of the “special circumstances” that can boost an applicant’s “personal achievement score.”¹⁹ Although the “Top Ten Percent Law” is superficially race-neutral, it has the purpose and effect of substantially increasing minority enrollment. It provides a route to admission without regard for standardized test scores²⁰—which generally have been lower among minority students—and it takes advantage of persistent patterns of segregation where African-American and Hispanic students in Texas live and go to high school.²¹ In

¹⁴ *Id.* at 748 (plurality portion of the opinion of Roberts, C.J.).

¹⁵ *Id.* at 803 (Breyer, J., dissenting).

¹⁶ *Id.* at 782–98 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁷ See, e.g., Adam Cohen, *Is the Supreme Court Going to Kill Affirmative Action?*, TIME, Feb. 27, 2012, <http://ideas.time.com/2012/02/27/is-the-supreme-court-going-to-kill-affirmative-action/> (link); Abigail Thernstrom, *Will the Court Strike Down Affirmative Action?*, CNN, Feb. 22, 2012, http://articles.cnn.com/2012-02-22/opinion/opinion_thernstrom-race-court_1_racial-double-standards-affirmative-action-minority-students?s=PM:OPINION (link).

¹⁸ TEX. EDUC. CODE ANN. § 51.803 (West 2006) (link).

¹⁹ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 228 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-345).

²⁰ *Id.* at 224.

²¹ *Id.* at 241 & n.150.

the lawsuit now pending before the Supreme Court, the challengers have not questioned the constitutionality of the “Top Ten Percent Law.” Instead they have focused their attack solely on the holistic, multi-factor approach to diversity that the University of Texas uses to assess the applicant pool remaining after applying the “Top Ten Percent Law.”²² The petitioners assert that—like the points-based policy in *Gratz*—the University of Texas’s “personal achievement score” is impermissibly automatic in its application and decisive in its effect on admissions decisions.²³

Fears that *Fisher* will bring the end of affirmative action have been exacerbated by the fact that Justice Elena Kagan—a member of the Supreme Court’s four-vote liberal bloc—will not participate in deciding the case. Kagan recused herself because she was the U.S. Solicitor General when the Department of Justice filed an amicus brief in the case.²⁴ But while Kagan’s absence might seem like a blow to proponents of affirmative action, it is actually unlikely to matter. If Kagan chose to participate in the case, the University of Texas would need five votes to prevail. The University would count on the support of Kagan and the Court’s other three liberals (Stephen Breyer, Ruth Ginsburg, and Sonia Sotomayor) and it would hope that Justice Kennedy provided the crucial fifth vote for upholding the University’s affirmative action program. With Kagan not participating in the case, the University instead needs only four votes to win. That is because the Court will be reviewing a Fifth Circuit decision that upheld the University of Texas policies. In the event of a 4–4 tie, the Court would simply announce that the Fifth Circuit’s ruling was affirmed by an evenly divided court.²⁵ Constitutional law would not be altered, and precedents like *Grutter* would escape unscathed. But again, to achieve that 4–4 tie, the University needs to garner Justice Kennedy’s vote. In other words, Justice Kennedy’s vote would carry the day regardless of whether Kagan participates in the case.

Anthony Kennedy is thus the University’s only hope, and that hope is exceedingly dim. Kennedy did not like the Michigan law school’s policy in *Grutter*, and there is little reason to think he will feel differently about the Texas version of the same basic holistic-review-to-get-a-critical-mass approach. If anything, the challenged Texas policy may look even worse to Kennedy than what he denounced in *Grutter*, given that it has a numerical—or “points”—component that the *Grutter* policy lacked and this component kicks in after the state’s “Top Ten Percent Law” has already

²² *Id.* at 216–17.

²³ *Gratz v. Bollinger*, 539 U.S. 244, 270–76 (2003).

²⁴ See Hans A. von Spakovsky, *UT’s Missing Brief and Justice Kagan’s Recusal*, NAT’L REV. ONLINE, Oct. 27, 2011, <http://www.nationalreview.com/bench-memos/281465/uts-missing-brief-and-justice-kagan-s-recusal-hans-von-spakovsky> (link).

²⁵ See Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646 (2002) (link).

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provided a large dose of diversity enhancement for the University of Texas's incoming class.

While it thus seems likely that the University of Texas policy will be struck down, the larger question is whether Justice Kennedy will simply denounce the Texas approach or instead go further and join the Court's conservative quartet in putting a stop to affirmative action across the board. Based on Kennedy's opinions in previous cases, the answer would be no. Although repeatedly voting with the conservatives in affirmative action cases, Kennedy has always conspicuously avoided signing on to more sweeping denunciations of all government consideration of race. In *Grutter*, he scorned the Michigan law school's policy for pretending to consider all types of diversity while really being nothing more than a racial quota in a holistic disguise.²⁶ But at the same time, he noted that "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity."²⁷ Likewise, in *Parents Involved*, Kennedy voted to strike down the particular student/school assignment policies before the Court, but rejected his conservative colleagues' "all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."²⁸ Kennedy encouraged school districts to improve the racial balance of their schools in general ways, such as paying attention to race when choosing sites for new school buildings and when drawing up attendance zones, rather than by making race a factor in the individualized determinations about what school a particular student would attend.²⁹

Of course, Justice Kennedy might make a surprising turn to the left or right in *Fisher*. He might decide that even though he dissented in *Grutter*, that precedent now has the weight of *stare decisis* behind it, and it would be better for the Court to stand pat and let the remaining time run on Justice O'Connor's 25-year clock. On the other hand, he might decide to eradicate affirmative action entirely, figuring that it is better to firmly shut the door to it rather than leave even a small crack through which government officials will continually try to squeeze too much. But the most likely outcome is that Kennedy will once again arrive at a middle ground, refusing to put a complete stop to affirmative action, but insisting that government officials must finally realize that rigorous strict scrutiny really and truly will apply.

²⁶ *Grutter v. Bollinger*, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting) ("[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.").

²⁷ *Id.* at 392-93.

²⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

²⁹ *Id.* at 788-89.

III. SOMEWHERE BETWEEN ALL AND NOTHING

The disadvantages of that sort of middle-ground outcome are obvious. No matter how hard Justice Kennedy might try to explain his views, he would be taking a position significantly more nuanced than simply saying “anything short of a full-blown quota is permissible” or “the Constitution requires complete color-blindness.” The waters inevitably will be muddied, leaving government officials and lower court judges to puzzle over exactly what Kennedy thinks the Constitution permits. Kennedy will be condemned again for failing to spell out a sufficiently clear and comprehensive set of requirements and restrictions. As Dahlia Lithwick whimsically imagined after the oral argument in *Parents United*, protestors might swarm the Supreme Court plaza to chant, “Two-four-six-eight, Justice Kennedy, make up some constitutional rules—you’re driving us freakin’ crazy.”³⁰

Yet that sort of frustration and uncertainty might be a price worth paying. Affirmative action is an issue about which many Americans have ambivalent, inconsistent feelings. Public opinion polls show that a strong majority of Americans favor affirmative action programs, but at the same time oppose racial preferences by an equally wide margin.³¹ This seeming contradiction results in part from ambiguity about the meaning of “affirmative action.”³² For example, that term could include efforts to encourage more minority students to apply to a university, without giving them any advantage when evaluating their applications. But the poll numbers also reflect a real struggle going on in many hearts and minds, as people try to reconcile their desire for racial equality with their commitment to judging individuals by merit.³³ In one poll, only 36 percent of Americans said that affirmative action programs giving preferences to blacks and other minorities should be continued,³⁴ but a few weeks later another poll found that 63 percent of Americans think such programs should be continued as long as they do not involve rigid quotas.³⁵ Slight differences in the wording

³⁰ Dahlia Lithwick, *Affirmative Inaction*, SLATE, Dec. 4, 2006, http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2006/12/affirmative_inaction.single.html (link).

³¹ See, e.g., *Public Backs Affirmative Action, but Not Minority Preferences*, PEW RESEARCH CTR., June 2, 2009, <http://pewresearch.org/pubs/1240/sotomayor-supreme-court-affirmative-action-minority-preferences> (link); *Conflicted Views of Affirmative Action*, PEW RESEARCH CTR., May 14, 2003, <http://www.people-press.org/2003/05/14/conflicted-views-of-affirmative-action/> (link).

³² Loan Le & Jack Citrin, *Affirmative Action*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 162, 162–63 (2008) (link).

³³ *Id.* at 163.

³⁴ *U.S. Voters Disagree 3–1 with Sotomayor on Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action*, QUINNIPIAC UNIV. POLLING INST., June 3, 2009, [http://www.quinnipiac.edu/institutes-and-centers/polling-institute/search-releases/search-results/release-detail?ReleaseID=1307&What=affirmative action&strArea=&strTime=28](http://www.quinnipiac.edu/institutes-and-centers/polling-institute/search-releases/search-results/release-detail?ReleaseID=1307&What=affirmative%20action&strArea=&strTime=28) (link).

³⁵ See NBC NEWS/WALL STREET JOURNAL SURVEY 22 (June 12–15, 2009), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/090617_NBC-WSJ_poll_Full.pdf (link).

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of poll questions produce wild swings in the results because many Americans remain deeply conflicted about the issue, troubled by affirmative action but also wary of the consequences of wiping it away entirely.

Thanks to swing voters like Lewis Powell, Sandra Day O'Connor, and Anthony Kennedy, the Supreme Court so far has avoided giving a simple "yes" or "no" answer to the affirmative action question. Instead, the constitutional rule has been, "it depends." While that is not the most definitive or clear way to resolve the issue, it has created the opportunity to wait and see how much progress would be made in overcoming racial hostilities and disparities and to look for approaches that might best reconcile the competing interests at stake. In essence, even when the vote at the Supreme Court was nominally 5 to 4, the swing voters' cautious, tempered approach ensured that the decision was really more of a 4½ to 4½ balancing act.

Of course, the Supreme Court's task is to interpret the Constitution rather than to follow public opinion polls. And on some issues, it will not be possible to give each side half a loaf. But where the Court and the nation are closely divided and a reasonable middle ground does exist, there is surely some value in the Court reaching a result that roughly corresponds to the median of the American public's sentiments. Such a result at least lends legitimacy to the Court's decisions in the eyes of the public. Moreover, the need for legitimacy may be particularly great in *Fisher*, given that it will be decided a year after the Supreme Court's highly controversial ruling about the fate of the federal health care reform legislation.³⁶

When asked about the future of affirmative action, Barack Obama has acknowledged that it makes little sense to dwell on race alone. His daughters, for example, have enjoyed a privileged upbringing and would not deserve an advantage when they apply to college.³⁷ The challenge, Obama recognized, is to move toward more sophisticated forms of affirmative action that take account of the persistent effects of racial discrimination but that do so by broadly considering all the circumstances that a person of any race has faced and the difficulties overcome.³⁸

When the Supreme Court decides *Fisher*, Justice Kennedy will have the chance to tell the nation that it is time to get serious about putting Obama's prescription into practice. By making clear that judicial scrutiny of affirmative action policies will be genuinely strict, Kennedy can force governments to be more careful and selective about their reliance on race and to begin phasing out the use of racial distinctions where they are not

³⁶ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (link).

³⁷ *This Week with George Stephanopolous* (ABC television broadcast May 13, 2007) (transcript of interview with Senator Barack Obama on file with ABC News), available at http://blogs.suntimes.com/sweet/2007/05/obama_on_abcs_this_week_with_g.html (link).

³⁸ *Transcript of the Democratic Debate in Philadelphia*, N.Y. TIMES, Apr. 16, 2008, http://www.nytimes.com/2008/04/16/us/politics/16text-debate.html?_r=1&pagewanted=print (link).

truly necessary. At the same time, by refusing to condemn categorically every form of race-based affirmative action, Kennedy can underscore that constitutional law will remain sensitive to the difficulties created by the profound role that race has played, and continues to play, in American society. The middle ground is not pure, neat, or simple, but sometimes it is the best place to stand.