

# Affirmative Action in Education: Swing Justices and the Meaning of “Diversity”

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## I Background and Introduction

ON 17 NOVEMBER 2014, THE STUDENTS FOR FAIR ADMISSIONS, INC. (SFFA) filed a complaint against Harvard College in federal district court, alleging that the Harvard undergraduate admissions process discriminated against Asian-American applicants in violation of Title VI of the Civil Rights Act.<sup>1</sup> More specifically, SFFA argued that Harvard used racial balancing, failed to use race merely as a “plus factor” in admissions decisions and to fill the last “few places” of the incoming class, used race where there were workable race-neutral alternatives, and used race as a factor in admissions.<sup>2</sup> On 1 October 2019, Federal District Court Judge Allison D. Burroughs issued a decision in favor of the defendant, arguing that the Harvard admissions process passes the strict scrutiny required of race-based preferential treatment — also known as affirmative action:

“It serves a compelling, permissible and substantial interest, and it is necessary and narrowly tailored to achieve diversity and the academic benefits that flow from diversity. Consistent with the hallmarks of a narrowly tailored program, applicants are afforded a holistic, individualized review, diversity is understood to embrace a broad range of qualities and experiences, and race is used as a plus factor, in a flexible, non-mechanical way.”<sup>3</sup>

The decision will certainly be appealed. After Judge Burrough’s decision was issued, SFFA President Edward Blum released a statement saying that “SFFA will appeal this decision to the 1st Court of Appeals and, if necessary, to the U.S Supreme Court.”<sup>4</sup> What would happen if *SFFA v. Harvard* reached the Supreme Court? Would the sitting justices agree with Judge Burroughs’ idea of “diversity,” or her judgement that the program is “flexible and non-mechanical”? To answer these questions, we must first ask: How has the Court approached race-based preferential treatment thus far?

In this paper, I analyze the development of the Court’s jurisprudence as it relates to race-based preferential treatment, paying special attention to the views of Justices Powell, O’Connor, and Kennedy — all of whom served as pivotal swing votes in the decisions in which they took part. I focus on the diversity standard as laid out in *Regents of University of California v. Bakke* (1978),<sup>5</sup> expanded upon in *Grutter v. Bollinger* (2003),<sup>6</sup> and applied in recent cases like *Fisher v.*

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<sup>1</sup>*Students For Fair Admissions Inc. v. President and Fellows of Harvard College (Harvard College)*, No. 14-cv-14176-ADB (D. Mass. Sept. 30, 2019) at 4.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* at 127.

<sup>4</sup>Lombardo, Clare and Elissa Nadworny. “Federal Judge Upholds Harvard’s Race-Conscious Admissions Process.” NPR. <https://www.npr.org/2019/10/01/730386096/federal-judge-rules-in-favor-of-harvard-in-admissions-case> (accessed October 3, 2019).

<sup>5</sup>*Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>6</sup>*Grutter v. Bollinger*, 539 U.S. 306 (2003).

*University of Texas I* (2014)<sup>7</sup> and *II* (2016).<sup>8</sup> In doing so, I offer a starting point from which one can hypothesize about the future of the *SFFA v. Harvard* case, and indeed the future of affirmative action in the United States.

Ultimately, I argue that the Court's stance on race-based preferential treatment has largely been shaped by the pivotal actions of the aforementioned swing justices, who were themselves highly influenced by interactions between "political" (external) and "legal" (internal) forces.<sup>9</sup> Common to Powell, O'Connor, and Kennedy's decisions is the attempt to balance various constitutional values, ideological dispositions against the interests of outside groups, and most importantly, ideological dispositions against concerns about "social divisiveness."<sup>10</sup> I end the paper by hypothesizing about the outcome of *SFFA v. Harvard*, were it to reach the Supreme Court. In short, I posit that with Chief Justice Roberts as the new "swing justice," the Court will likely strike down Harvard's affirmative action policy — though the possibility remains that Roberts will be swayed by legal and political forces.

## II *Bakke*: Justice Powell and the "Diversity" Standard

"The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."<sup>11</sup> In a scathing dissent against the plurality's decision in *Schuette v. Coalition to Defend Affirmative Action* (2014), Justice Sotomayor offered a substantial defense of the use of race-based preferential treatment in public university admission decisions — also known as affirmative action. While the decision itself focused on the constitutionality not of race-based preferential treatment per se, but of an amendment to a state's constitution *prohibiting* such treatment in public university admission decisions, Sotomayor's remarks highlight the deep-seated ideological differences that exist in the Supreme Court with regards to race-based classifications. Justices supportive of affirmative action view some racial classifications as "benign" and thus constitutional, believing them to be the only way to confront social inequality and America's history of racial discrimination. Justices critical of affirmative action, on the other hand, view all classifications based on race as "suspect" and presumably unconstitutional. These justices believe that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>12</sup> Other justices still have adopted positions that do not seem to fall under either of these two polar opposite positions, confusing jurists and Court analysts in the process.

One such justice was Justice Powell, whose vote was pivotal to the Court's first affirmative action case in the realm of education: *Regents of University of California v. Bakke* (1978). In *Bakke*, the Court first laid out the principles and methods by which public and private universities may use race preferences in admissions. The Court asked whether the University of California, Davis School of Medicine violated the Fourteenth Amendment's Equal Protection Clause and the Civil Rights Act of 1964 (CRA) by practicing an affirmative action policy, under which the medical school reserved 16 out of 100 places in its entering class for members of minority groups. This procedure was challenged by Allan P. Bakke, a white applicant who was rejected by the medical

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<sup>7</sup> *Fisher v. University of Texas*, 570 U.S. (2013).

<sup>8</sup> *Fisher v. University of Texas*, 579 U.S. (2016).

<sup>9</sup> Keck, Thomas M. "From Bakke to Grutter: The Rise of Rights-Based Conservatism." In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch, 414. Lawrence, KS: University Press of Kansas USA, 2006.

<sup>10</sup> Siegel, Reva B. "From Colorblindness to Anti-Balkanization: An Emerging Ground of Decision in Race Equality Cases." 120 *Yale L. J.*, 1278 (2010).

<sup>11</sup> *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014) at 46.

<sup>12</sup> *Id.* at 44.

school even though applicants were admitted under the special program with GPAs, MCAT scores, and benchmark scores significantly lower than Bakke's.

The splintered Court issued six different opinions in total — none of which, in full, had the support of a majority. Ultimately, it was Justice Powell who delivered the judgement of the Court, finding the university's specific race-based admissions program (i.e. the quota system) to be unconstitutional, yet holding the consideration of race in admissions processes to be permissible *under certain circumstances*.<sup>13</sup> In his plurality opinion, he created two separate majorities: four justices joined him in striking down the university's specific race-based admissions program (i.e. the quota system); the other four justices dissented from this part of the opinion, but joined him in holding that the consideration of race in admissions processes is permissible under certain circumstances.<sup>14</sup>

In his opinion for the Court, Powell starts by establishing that Bakke had a right of action under Title VI of the CRA, since "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."<sup>15</sup> In doing so, he first rejects the argument that "benign" racial classifications can be defended on the ground that the 14<sup>th</sup> Amendment's original purpose was directed at hostile legislation subordinating a disadvantaged minority. Instead, he posits that "the Amendment itself was framed in universal terms," that "the clock of our liberties cannot be turned back to 1868," and implies that the context in which race preferences are employed does not matter to the constitutional analysis.<sup>16</sup> Second, he argues that varying the level of judicial review according to a perceived "preferred" status would be very difficult, since the white majority itself is "composed of various minority group, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals."<sup>17</sup> Finally, he elaborates on "serious problems of justice connected with the idea of preference itself," warning that "it may not always be clear that a so-called preference is in fact benign"; that preferential programs may reinforce common stereotypes; and that there is "a measure of inequity" in forcing non-minority individuals, like Bakke, to bear the burdens of "redressing grievances not of their making."<sup>18</sup>

Powell then moves on to apply strict scrutiny to the UC Davis admissions policy, analyzing the university's asserted interests, as well as the means used to promote these interests. Of the four interests asserted by the university, Powell accepts only one: the interest of "obtaining the educational benefits that flow from an ethnically diverse student body."<sup>19</sup> In doing so, he refuses to view "countering the effects of societal discrimination," "increasing the number of physicians who will practice in communities currently underserved," and "reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession" as countervailing constitutional interests. In other words, racial classifications can neither be used to specially aid minorities, nor to remedy or compensate for the effects of past discrimination and societal injustices. The exception to this, according to Powell, is when past discrimination can be *identified* and *feasibly* rectified — an exception that will be problematized in future cases like *Schuetz*.

Yet Powell's acceptance of "robust exchange of ideas" as a countervailing constitutional interest is also quite significant on its own, signifying Powell's readiness to defer to institutions of higher education, contrary to his earlier assertion that all race-based classifications are subject to strict scrutiny ("The fact the Court engages in... deference is a tell-tale sign that it is not applying a scrutiny as strict as it claims"<sup>20</sup>). He justifies this deference by arguing that "academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern

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<sup>13</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>14</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>15</sup> *Id.* at 291.

<sup>16</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) at 295.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 298.

<sup>19</sup> *Id.*

<sup>20</sup> Balkin, Jack M. "Plessy, Brown, and Grutter: A Play in Three Acts." 26 *Cardozo L. Rev.* 1689, 136 (2005).

of the First Amendment,”<sup>21</sup> and that this academic freedom allows universities to make their own judgements with regards to the selection of their student bodies. In short, he claims that all racial classifications are suspect, and yet he applies a level of scrutiny lower than “strict,” most likely due to the fact that the racial objective is “benign.”

Nevertheless, Powell decides in favor of Bakke, ruling that Bakke shall be admitted into UC Davis School of Medicine,<sup>22</sup> and, more importantly, that the Equal Protection Clause prohibits the university’s “specific” race-based admissions program. Powell’s main problem is with Davis’ quota system. He argues that “diversity” — while indeed a compelling state interest — “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single (albeit important) element.”<sup>23</sup> Focusing solely on ethnic identity, which the quota essentially does by reserving a certain number of slots for minority students, would “hinder, rather than further, attainment of genuine diversity.”<sup>24</sup> The admissions policy, then, is *not* narrowly tailored to further a compelling or legitimate state interest, and thus must be struck down. He emphasizes, however, that ruling in favor of Bakke does not mean that the state has no substantial interest in maintaining an affirmative action program; it just means that the program has to be “properly devised.” Whether a program is “properly devised,” then, becomes the focal point in the cases following *Bakke*.

It is clear that the Court’s judgment in *Regents of University of California v. Bakke* was largely shaped by the views and ideology of Justice Powell. After the *Bakke* decision, public and private universities followed Powell’s guidelines in fashioning their admissions programs. This entailed focusing on the diversity standard that Powell laid out as compelling, and designing a *non-quota*, race-based admissions procedure.

### III *Grutter & Gratz: Continuing the Legacy?*

A decade after the *Bakke* decision, the Court started reviewing race preferences in contracting and employment with increased scrutiny, leading to cases like *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995).<sup>25</sup> Many raised questions about whether race preferences in education would meet the same fate, and whether Powell’s opinion in *Bakke* would be overturned. In 2003, two cases brought to the Court made it once again ask whether race preferences in education violated the Equal Protection Clause. *Grutter v. Bollinger* (2003) involved the University of Michigan Law School’s race-based admissions policy, which aspired to “achieve that diversity which has the potential to enrich everyone’s education,” recognized “many possible bases for diversity admissions,” sought to “enroll a ‘critical mass’ of minority students,” and reaffirmed the Law School’s commitment to a particular type of diversity<sup>26</sup> — “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against.”<sup>27</sup> *Gratz v. Bollinger* (2003)<sup>28</sup> revolved around the University of Michigan undergraduate college’s race-based admissions policy, which considered a number of factors in making admissions decisions, but ultimately used a point system to select their students. Under this point system, every applicant from an underrepresented group was automatically awarded 20 points (of the 100

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<sup>21</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) at 312.

<sup>22</sup> The question of whether plaintiffs in reverse discrimination cases such as *Bakke* are justified in seeking admission to the university as relief — even without demonstrating that he would have been admitted in the absence of an unconstitutional racial preference program — is not addressed here, but is worth thinking about.

<sup>23</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) at 315.

<sup>24</sup> *Id.*

<sup>25</sup> Unfortunately, preferential treatment in employment and contracting is outside the scope of this paper.

<sup>26</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 316.

<sup>27</sup> *Id.*

<sup>28</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

needed to guarantee admission).

Applying the *Bakke* standard, the Court issued split — and seemingly contradictory — judgments as to whether the race-based admissions policies were constitutionally sound: the admissions policy of the Law School in *Grutter* was upheld, while that of the undergraduate college in *Gratz* was invalidated. As was the case in *Bakke*, a swing justice — this time Justice O'Connor — played a pivotal role in shaping the final outcome, providing the key vote in upholding the admissions policy in *Grutter*, and in striking down the admissions policy in *Gratz*. O'Connor, writing for the majority in *Grutter* and concurring in judgement in *Gratz*, argued that “the Law School engages in a highly individualized holistic review of each applicant’s file,”<sup>29</sup> while the undergraduate college’s “selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed.”<sup>30</sup> Moreover, as was the case in *Bakke*, O'Connor held diversity to be a compelling state interest — reaffirming and even expanding on the diversity standard as laid out by Powell.

Several more comparisons between the two swing justices are worth noting. First, both Powell and O'Connor agreed that strict scrutiny should be applied in cases of race-based classifications — meaning that the policy or law in question must be “narrowly tailored to further compelling governmental interests”<sup>31</sup> — and yet both exercised judicial restraint and deferred to the schools’ educational judgements, justifying this by claiming academic freedom to be part of constitutional tradition. Second, both Powell and O'Connor believed that race must be used in a “flexible, non-technical way,”<sup>32</sup> and that it must not “unduly burden individuals who are not members of the favored racial and ethnic groups.”<sup>33</sup> At the core of this belief is an interpretation of the Equal Protection Clause as protecting individuals, not groups. These two principles — one of judicial restraint and the other of a color-blind equal protection clause — were treated with balance by both O'Connor and Powell. Powell engaged in what Thomas M. Keck, the Chair of Constitutional Law and Politics at Syracuse University, calls an example of “pragmatic judicial compromise.”<sup>34</sup> Similarly, O'Connor frequently exercised judicial restraint, recognizing no “political thickets” that the Court should not wade into, but believing that the Court should “temper the reach of some guarantees at the margins.”<sup>35</sup> Third, both Powell and O'Connor were heavily influenced by amicus briefs submitted by civil, military, and business leaders across the United States. In *Bakke*, Powell relied heavily on Harvard University’s amicus brief explaining its use of non-quota “plus factors” in its race-based admissions program.<sup>36</sup> In *Grutter/Gratz*, O'Connor cited the arguments of a group of retired military officers and of various major corporations, a large majority of which found a compelling interest in diversity through maintaining racial preferences. The influence that these amicus briefs had on their respective cases demonstrates how much attention the Court, and particularly O'Connor and Powell, paid to public opinion and national sentiment when it came to affirmative action.

An examination of the actual content of these amicus briefs further reveals differences between Powell’s and O'Connor’s understandings of “diversity.” Their conceptions of this vague yet symbolic value were at least partially shaped by the briefs that they read. Powell followed Harvard’s

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<sup>29</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 309.

<sup>30</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003) at 279.

<sup>31</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 326.

<sup>32</sup> *Id.* at 334.

<sup>33</sup> *Id.* at 341.

<sup>34</sup> Keck, Thomas M. “From Bakke to Grutter: The Rise of Rights-Based Conservatism.” In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch, 417. Lawrence, KS: University Press of Kansas USA, 2006.

<sup>35</sup> *Id.* at 433.

<sup>36</sup> Sullivan, Kathleen M., and Noah Feldman. *Constitutional Law*. 19th St. Paul, MN: Foundation Press, 2016. 700.

lead and saw diversity (ethnic, socioeconomic, etc.) as integral and beneficial to the classroom experience (fostering a “robust exchange of ideas”). Going beyond this, O’Connor took in the retired military officers’ and business leaders’ arguments and declared that diversity ensures that “the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>37</sup> Moreover, O’Connor seemed to imply another rationale for diversity, one that focused on compensating groups with a history of prior discrimination: she notes in *Grutter* that “[the Court] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” So in short, while Powell provides an epistemic rationale, O’Connor goes further and hints at both distributive and compensatory motives. Indeed, Thomas H. Lee, Associate Professor at Fordham University School of Law, describes two main ways of thinking about the educational benefits of diversity — as “discourse benefits,” or as “leadership benefits”<sup>38</sup> — and argues that while many view O’Connor as simply “endorsing” Powell’s view of diversity, in actuality she “adopted an altogether different reason to find diversity a compelling interest in the higher educational context,”<sup>39</sup> one that the Powell himself explicitly denounced in *Bakke*.

Thus far, we have seen how swing justices were integral to the outcomes of the affirmative action cases *Bakke* and *Grutter/Gratz*. But we have also seen — from the subtle differences between Powell’s and O’Connor’s conceptions of diversity — that these outcomes cannot be solely attributed to the ideological dispositions of these key swing justices. We must not view their ideological dispositions as operating in a vacuum, but as in interaction with external forces. Indeed, Keck contributes to this argument by holding that the Court’s stance on affirmative action, particularly between *Bakke* and *Grutter*, has largely been shaped by the interactions between “political” and “legal” forces,<sup>40</sup> or in other words, by what was happening both outside and inside the Court. He explains that Powell’s opinion in *Bakke* contributed to the development of organized interest groups formed around rights-based conservatism — which succeeded in creating “new constituencies,” mobilizing self-proclaimed white victims, and influencing “constitutional doctrine to the extent that the conservative justices [like Scalia, Thomas, and Rehnquist] have been willing to abandon, or at least cabin, their commitment to judicial restraint.”<sup>41</sup> These external pressures, however, clearly failed to convince O’Connor, who had developed her own “distinctive version of such restraint”<sup>42</sup> and — as noted previously — was persuaded more by the amicus briefs of high-profile leaders across the United States.

Some scholars disagree with this narrative of the *Grutter* opinion — and to a lesser extent, the *Bakke* opinion — as an “act of supreme statesmanship, in which O’Connor [and Powell] balances what appeared to be irreconcilable conceptions of equality and produces a political compromise that most of the public can live with.”<sup>43</sup> For example, Jack M. Balkin, Professor of Constitutional Law and the First Amendment at Yale Law School, argues that while indeed a political compromise, O’Connor’s opinion in *Grutter* — conflating different forms of diversity<sup>44</sup> and prescribing a less stringent standard of review for “benign” racial classifications — more likely symbolizes the

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<sup>37</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 308.

<sup>38</sup> Lee, Thomas H. “University Dons and Warrior Chieftains: Two Concepts of Diversity,” *Fordham Law Review*, Vol. 72, 2302 (2004).

<sup>39</sup> *Id.* at 2303.

<sup>40</sup> Keck, Thomas M. “From *Bakke* to *Grutter*: The Rise of Rights-Based Conservatism.” In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch, 414. Lawrence, KS: University Press of Kansas USA, 2006.

<sup>41</sup> Keck, Thomas M. “From *Bakke* to *Grutter*: The Rise of Rights-Based Conservatism.” In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch, 436. Lawrence, KS: University Press of Kansas USA, 2006.

<sup>42</sup> *Id.*

<sup>43</sup> Balkin, Jack M. “Plessy, Brown, and *Grutter*: A Play in Three Acts.” 26 *Cardozo L. Rev.* 1689, 138 (2005).

<sup>44</sup> Balkin argues that there are four different types of diversity: ideological, experiential, talent, and demographic. See Balkin, Jack M. “Plessy, Brown, and *Grutter*: A Play in Three Acts.” 26 *Cardozo L. Rev.* 1689, 134 (2005).

untenability of what he terms “the model of scrutiny rules.” Balkin theorizes that just before *Brown v. Board of Education* (1954) and throughout the New Deal and Second World War, the way constitutional citizenship was conceptualized changed, creating new forms of inclusion and exclusion.<sup>45</sup> The Supreme Court began to shift from a so-called “Tripartite model” — which divided the rights of citizens into three parts: political, civil, and social<sup>46</sup> — to a “model of scrutiny rules,” which recognizes social rights to a certain extent by viewing the rights of citizenship as a “series of protections from state power,” and separating them into fundamental rights and suspect classifications. Indeed, we see this model in both the *Bakke* case and the *Grutter/Gratz* cases; every justice spoke the language of fundamental rights and suspect classifications. Even dissenters, arguing for race-based classifications, did not deny the existence of suspect classifications, but rather believed that classifications that aid racial minorities do not fall under suspect classifications.

Yet, while Balkin’s analysis regarding constitutional citizenship conceptions and political compromises seems fairly intuitive and unopposed to Keck’s arguments, his ultimate claim that *Grutter* symbolizes the erosion of the “model of scrutiny rules” — simply because O’Connor chose to “obfuscate and fudge existing doctrinal categories”<sup>47</sup> — does not. This argument that the “model of scrutiny rules” is failing seems fallacious in light of more recent Court decisions (see below), and the judicial appointments of Justices Kavanaugh and Gorsuch. The simpler, yet more convincing, explanation is that O’Connor — influenced by the (interaction of) “political” and “legal” factors listed above — decided that the affirmative action policy in *Gratz* was unacceptably “mechanical,” while the one in *Grutter* was appropriately designed and served a compelling state interest.

#### IV *Parents Involved* and *Fisher I&II*: Justice Kennedy in the Roberts Court

By 2007, when the Court took on *Parents Involved in Community Schools v. Seattle School District No.1*, O’Connor had been replaced by Justice Alito, and Chief Justice Rehnquist by Chief Justice Roberts. Justice Kennedy, who ruled against the affirmative action policies in both the *Gratz* and *Grutter* cases only four years prior, had replaced O’Connor as the “swing justice” on the Court.

*Parents* is actually a pair of consolidated cases regarding school districts in Seattle and Louisville, which voluntarily adopted student assignment plans relying upon race to determine which public schools certain children may attend. Roberts spoke for a divided court, with Kennedy casting the decisive vote against the school district plans. It would be fitting then, to focus on the part of Robert’s opinion which he joined, as well as his concurrence. A few points are important here: first, Kennedy was mainly concerned with how the plans “[assign] to each student a personal designation according to a crude system of individual racial classifications.”<sup>48</sup> He saw the system of “personal designation” and racial balancing as similar to a quota system, ignoring the fact that the racial tiebreakers used by both school districts operated at the margins. As Breyer notes in his dissent, the “school boards’ plans simply set race-conscious limits at the outer boundaries of a broad range,”

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<sup>45</sup>He emphasizes that these conceptualizations of constitutional citizenship are the product of political compromise; more often than not, this has meant that the end results were the ones most palatable to the most powerful groups in society, and more often than not, this has meant white Americans. See Balkin, Jack M. “Plessy, Brown, and Grutter: A Play in Three Acts.” 26 *Cardozo L. Rev.* 1689, 104 (2005).

<sup>46</sup>He describes political rights as rights such as the right to vote, serve on juries, and hold office; civil rights as rights to make contracts, own lease, convey property, and sue/be sued; social rights as concerning whether persons were considered social equals in civil society. See Balkin, Jack M. “Plessy, Brown, and Grutter: A Play in Three Acts.” 26 *Cardozo L. Rev.* 1689, 106 (2005).

<sup>47</sup>Balkin, Jack M. “Plessy, Brown, and Grutter: A Play in Three Acts.” 26 *Cardozo L. Rev.* 1689, 138 (2005).

<sup>48</sup>*Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) at 9.

being only one part of larger plans that depend primarily upon other, nonracial elements.<sup>49</sup>

Second, Kennedy joins Roberts in speculating that the minimal effect these classifications have on student assignment suggests that other means would be effective.<sup>50</sup> In other words, because the racial tiebreaker employed by Seattle apparently has little impact on fixing racial inequalities, it “casts doubt on the necessity of using racial classifications,”<sup>51</sup> and fails the narrow tailoring component of strict scrutiny. Third, Kennedy joins Roberts in pointing out that the school districts have failed to show that “they considered methods other than explicit racial classifications to achieve their stated goals,”<sup>52</sup> adding that narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives”<sup>53</sup> (citing O’Connor in *Grutter*). Finally, and most curiously, in Kennedy’s own concurrence, he criticized the plurality for being “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”<sup>54</sup> He joins O’Connor in suggesting a distributive and epistemic rationale for affirmative action, accepting the interests asserted by the school districts: diversity and equal opportunity to students.

Notably, by refusing to join the rest of Roberts’ opinion holding *all* racial classifications to be unconstitutional, Kennedy showed himself to be ideologically distinct from the other conservatives on the bench with regards to the heritage of *Brown*. According to Goodwin Liu, former Associate Dean and Professor of Law at UC Berkeley,<sup>55</sup> Kennedy’s reasons for striking down the Seattle and Louisville plans do “not misappropriate notions of group stigma, inferiority, or inequality at the heart of *Brown*.”<sup>56</sup> Rather, he was motivated by values of personal liberty, or more specifically, “the freedom of self-definition without undue government coercion.”<sup>57</sup> Heather Gerken, Professor of Law at Yale Law School, points to another reason, arguing that the “bits and pieces [of his opinion in *Parents*] that do not follow easily from his prior jurisprudence” can be explained by thinking of them “as a narrative about the domain of public education, a story about teaching civic morality rather than guaranteeing equality.”<sup>58</sup> His concurrence is strongly anchored in the domain of education, “trumpeting the role that public schools play in teaching civic morality,”<sup>59</sup> and linking this role to integration. And noting the similarities between Powell and Kennedy’s methodologies and purposes, J. Harvie Wilkinson III, Circuit Judge of the United States Court of Appeals for the 4<sup>th</sup> Circuit (and frequent critic of affirmative action), argues that “they both allow a little use of race, but not too much. They both bear the earmarks of caution and circumspection. The ultimate purpose of each effort is to soften the edges of a harsh controversy and allow a fractured nation the chance to muddle through.”<sup>60</sup> In other words, Kennedy took notice of his role as the swing justice and approached his opinion with moderation. Since the Court’s decisions are always a mix of “legal” and “political” factors, it is likely that Kennedy had all of these values and motives in mind when he cast his vote in *Parents*.

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<sup>49</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) (Breyer, J., dissenting) at 34.

<sup>50</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) (Kennedy, J., concurring) at 9-10.

<sup>51</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) (Kennedy, J., concurring) at 9-10.

<sup>52</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) at 4.

<sup>53</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) at 27.

<sup>54</sup> *Parents Involved in Community Schools v. Seattle School District No.1*, 551 U.S. 701 (2007) at 6.

<sup>55</sup> Now Associate Justice of the Supreme Court of California.

<sup>56</sup> Liu, Goodwin. “‘History Will Be Heard’: An Appraisal of the Seattle/Louisville Decision.” 2 *Harv. L. Pol’y Rev.* 53, 70-71 (2008).

<sup>57</sup> *Id.*

<sup>58</sup> Gerken, Heather K. “Justice Kennedy and the Domains of Equal Protection.” 121 *Harv. L. Rev.* 104, 114 (2007).

<sup>59</sup> *Id.*

<sup>60</sup> Wilkinson III, J. Harvie. “The Seattle and Louisville School Cases: There is No Other Way,” 121 *Harv. L. Rev.* 158, 171 (2007).



Kennedy's importance to the Court's decisions regarding affirmative action is highlighted by the last three cases discussed here: *Fisher I* and *II*, and *Schuette*. In all three cases, Kennedy delivers the Court's opinion. In *Fisher I*, Kennedy writes for a 7-1 majority remanding the case to lower courts "so that the admissions process can be considered and judged under a correct analysis."<sup>61</sup> In *Schuette*, Kennedy writes for a plurality upholding a constitutional amendment to Michigan's State Constitution that prohibits the state from using race-conscious affirmative action. And in *Fisher II*, Kennedy writes for a 4-3 majority upholding the University of Texas' admissions policy, adopted after *Grutter* was decided, which states that the 25% of the freshman class *not* filled through the "Top Ten Percent Plan"<sup>62</sup> shall be admitted through an approach similar to the one in *Grutter*, in which race is given some weight in the application. The process in UT's case, however, is slightly more transparent, as race is given weight as a sub-factor within the Personal Achievement Index, which itself is weighted against the Academic Index.

In all three cases, Kennedy seemingly treaded a middle ground, consistently emphasizing that race-based classifications are permissible under *some* circumstances but balancing this against some other countervailing constitutional interest. In arguing his position in *Fisher I*, for example, he refused to strike down race-based classifications, but insisted that they were still subject to strict scrutiny. In *Schuette*, he argued that the question the Court must answer "is not whether injury will be inflicted but whether government can be instructed not to follow a course...adopted, we must assume, because the voters deemed a preference system to be unwise."<sup>63</sup> His focus, in other words, was apparently on the value of democracy, or more precisely, majoritarianism. He refused to see the prohibition of affirmative action as changing "the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities."<sup>64</sup> Unlike the precedents<sup>65</sup> cited by the respondents, he argued, there was no "immediate design and intent"<sup>66</sup> of the amendment to discriminate, and there was no "demonstrated injury on the basis of race."<sup>67</sup> Here, he adopted Powell's opinion in *Bakke* in declaring that racial classifications cannot be used to remedy the effects of past discrimination, or to compensate for past societal injustices, unless past discrimination can be *identified* and *feasibly* rectified. Finally, in *Fisher II*, Kennedy upheld UT's race-based admissions program, arguing that UT "has provided ... a 'reasoned, principled, explanation' for its decision to pursue these goals,"<sup>68</sup> and has met its burden in "showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan."<sup>69</sup> Throughout his decision, however, he emphasized the limitations of race-based classifications, and held that the university must constantly tailor its approach in light of changing circumstances, "ensuring that race plays no greater role than is necessary to meet its compelling interest."<sup>70</sup>

Kennedy's decisions in affirmative action cases harken back to the compromises seen in O'Connor's and Powell's decisions in *Grutter/Gratz* and *Bakke*, respectively. Common to all three justices is the attempt to balance various constitutional values. Despite differences in how they each conceptualized "diversity" or "injury," they upheld affirmative action policies in the educational context. Why is this? And what should we make of the exceptions of *Gratz* and *Schuette*? Reva B. Siegel, Professor of Law at Yale Law School, argues that the swing justices voted to simultaneously uphold

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<sup>61</sup> *Fisher v. University of Texas at Austin*, 570 U.S. (2013) at 13.

<sup>62</sup> The Top Ten Percent Plan admits the top 10% of students from every school district in Texas; this plan fills up 75% of the freshman class. This was implemented with the assumption of residential segregation.

<sup>63</sup> *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014) at 18.

<sup>64</sup> *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014) (Sotomayor, J., dissenting) at 2.

<sup>65</sup> *Reitman v. Mulkey* (1967) and *Hunter v. Erickson* (1969) were mentioned as relevant precedents in this case.

<sup>66</sup> *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014) at 6.

<sup>67</sup> *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014) at 8.

<sup>68</sup> *Fisher v. University of Texas*, 579 U.S. (2016) at 13.

<sup>69</sup> *Id.* at 13-14.

<sup>70</sup> *Id.* at 11.

and to restrict race conscious remedies “because of concerns about social divisiveness,” which they believe “both extreme racial stratification and unconstrained racial remedies can engender.”<sup>71</sup> She labels this the “anti-balkanization perspective.” Siegel argues that in *Parents*, for example, Roberts and Thomas convey an anti-classification understanding of *Brown*, Breyer and Stevens convey an anti-subordination understanding, while Kennedy stakes out “a position in the tradition of Justices Powell and O’Connor... responsive to the tug of each vision, while refusing to cleanly adopt either.”

This anti-balkanization framework explains the apparent inconsistencies in Kennedy’s decisions, and also solves an issue posited earlier: why did O’Connor uphold *Grutter* but not *Gratz*? Was there really a significant difference between the law school’s and undergraduate college’s preference systems? O’Connor deemed the latter too “mechanical” a process, since the “selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed.” Yet, unlike a quota system, *Gratz*’s admissions procedure did not insulate minority candidates from the general admissions pool. It only formalized what is apparent in all affirmative action policies: race matters when assessing a candidate. It seems that the only difference is that one makes race salient, and the other does not. And ultimately, this runs true for most of the cases discussed here: the Court has approached affirmative action with an eye on social divisiveness, and has made decisions rooted in compromise.

## V Conclusion: Swing Justices, *SFFA v. Harvard*, and Affirmative Action

In this paper, I have analyzed the evolution of the Supreme Court’s jurisprudence as it relates to race-based preferential treatment, focusing on the diversity standard — as articulated in *Regents of University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003), and *Fisher v. University of Texas I* (2014) and *II* (2016) — as well as the key role played by swing justices in those respective cases. In light of this analysis, I now ask: what should we make of the future of affirmative action in education, and of a potential *SFFA v. Harvard* Supreme Court case?

It is clear that Supreme Court decisions concerning affirmative action in education have largely been shaped by the ideologies and actions of certain swing justices, particularly Justices Powell, O’Connor, and Kennedy. As of 2019, the role of swing justice has fallen upon Chief Justice Roberts,<sup>72</sup> who has thus far displayed little sympathy towards affirmative action policies and diversity in education. Examining the case of *Parents Involved*, we see that Roberts, unlike Kennedy, holds an “anti-classification” understanding of equal protection, defining “paradigmatic harm not as group subordination but rather the *classification of any individual* by race.”<sup>73</sup> As Siegel argues, Roberts — unlike the swing justices that came before him — cares less about social cohesion (i.e. anti-balkanization) and unequal group status (anti-subordination), and more about eliminating racial classifications.<sup>74</sup> Liu takes this further, arguing that Roberts, in his opinion for *Parents Involved*, “[refuses] to confront the social meaning of segregation and its harm to black Americans.”<sup>75</sup>

Thus, looking only at the ideological makeup of the Court, and particularly the ideology of the

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<sup>71</sup>Siegel, Reva B. “From Colorblindness to Anti-Balkanization: An Emerging Ground of Decision in Race Equality Cases.” 120 Yale L. J. (2010): 1278

<sup>72</sup>Hurley, Lawrence. “U.S. chief justice’s ‘swing’ role shown in census, gerrymandering rulings.” Reuters. <https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-chief-justices-swing-role-shown-in-census-gerrymandering-rulings-idUSKCN1TS3A4> (accessed October 3rd, 2019).

<sup>73</sup>Siegel, Reva B. “From Colorblindness to Anti-Balkanization: An Emerging Ground of Decision in Race Equality Cases.” 120 Yale L. J., 1287 (2010).

<sup>74</sup>*Id.* at 1346.

<sup>75</sup>Liu, Goodwin. “‘History Will Be Heard’: An Appraisal of the Seattle/Louisville Decision.” 2 Harv. L. Pol’y Rev. 53, 63 (2008).

current swing justice, it seems probable that if *SFFA v. Harvard* were to reach the Supreme Court, Harvard's admission plan would be struck down. Yet, as I have discussed throughout this paper, the outcomes of Supreme Court affirmative action cases cannot be solely attributed to the ideological dispositions of swing justices; we must examine how these legal factors interact with political forces *external* to the Court to produce different, even unexpected, results. Effective amicus briefs, for example, shaped how Justices Powell and O'Connor conceptualized "diversity" and how they voted in their respective cases. Moreover, considering the evolution of Justice Kennedy — from his votes as a "race conservative" in the *Grutter/Gratz* cases to his decisive role as a swing justice in upholding *Fisher II* — one might wonder if a similar transformation could happen to the current Chief Justice.

Determining which political forces will decisively affect *SFFA v. Harvard*, and how these forces will interact with legal forces specific to the 2019 Roberts Court, is unfortunately outside the scope of this paper — as is making a fully-informed prediction about the outcome of the case. Still, by discussing how the Supreme Court's affirmative action jurisprudence has evolved over the past four decades, I have hopefully illuminated how one should study future affirmative action cases, clarifying whom — and what — one should pay attention to when examining them.

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