



# Strictly Discrimination

## Supreme Court favors race-based policies

by JOSHUA DUNN

According to Oliver Wendell Holmes Jr., the law is nothing more than “the prophecies of what the courts will do in fact.” If that is so, then opponents of race-based classifications in K–12 education have cause for concern. Two recent U.S. Supreme Court opinions, both written by Justice Anthony Kennedy,

indicate that a majority of the justices approve of policies that the court’s equal-protection jurisprudence would seem to forbid as unconstitutional racial discrimination. For K–12 education, the consequences of these two new decisions could be significant. For example, challenges to racially driven school-assignment and discipline policies are not likely to meet with success in the Supreme Court.

In the 2015 case *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, Kennedy’s reasoning was characteristically opaque. The result was not. The opinion held that under the Fair Housing Act, plaintiffs can bring “disparate impact” claims of discrimination even when the alleged discrimination is unintentional (see “Disparate Impact Indeed,” *legal beat*, Fall 2015). Critics of disparate impact have long pointed out that the doctrine actually compels discrimination, since remedying any disparities caused by neutral policies requires racial quotas and classifications.

In June 2016, in *Fisher v. University of Texas at Austin*, a 4–3 majority led by Kennedy upheld the university’s affirmative action program (Justice Kagan recused herself, but certainly would have voted with the majority). Under the court’s equal-protection doctrine, cases that involve racial classifications on the part of government require the court’s “strict scrutiny,” the most exacting standard of judicial review. The default position is that whenever a government policy divides us by race and then divvies up benefits, it violates the equal protection clause. In order to pass strict scrutiny, the policy must further a “compelling government interest” and be “narrowly tailored” to promote only that interest. Kennedy said that the University of Texas met those requirements. However, in typical Kennedy style, he expressed deep concern, even anguish, about race-based classifications. “It remains,” he said, “an enduring challenge to our nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.” He also exhorted the university to continue to “scrutinize the fairness of its admissions program” and “to assess whether changing demographics have undermined the need for a race-conscious policy.”

Such admonitions might indicate that Kennedy could flip in future cases, but for a legal realist who thinks that the law is only what judges will do in the future, his words ring hollow.

Kennedy once questioned the notion that the benefits of diversity could make up for the racial discrimination that diversity-based programs require, but the past two years show that his doubts have receded. In fact, the trend line suggests that today Kennedy would likely approve a voluntary integration plan like the one he voted to strike down in 2007’s *Parents Involved in Community Schools v. Seattle School District No. 1*. In that case, four justices said that racial balancing alone can never be a compelling state interest. Kennedy joined the majority but took issue with that part of the opinion (see “Doubtful Jurisprudence,” *legal beat*, Winter 2008). His concurring opinion was a hash of contradictory sentiments. School districts, he said, could not engage in “systematic, individual typing by race,” but they could consider race when selecting school sites and drawing attendance zones.

Which of his contradictory sentiments will prevail in the future? Our best guide is recent history, and Kennedy appears to be a reliable vote, along with Breyer, Ginsburg, Sotomayor, and Kagan, for race-based policymaking. After all, the University of Texas engaged in the very “systematic, individual typing by race” that Kennedy condemned in 2007. Thus, even

if the late Justice Antonin Scalia is replaced with an opponent of racial classifications, *Parents Involved* is a vulnerable precedent.

Kennedy’s recent opinions are also good news for the Office for Civil Rights (OCR). In the name of equal percentages, OCR has all but explicitly declared that schools must treat individual students unequally. OCR’s 2014 school-discipline policies demand racial parity in school-discipline rates. Socioeconomic factors such as family income and childhood stress are some of the best predictors of student behavioral problems, and since variations in those influences are not evenly distributed by race, schools will have to engage in racial discrimination when meting out punishments. The victims will not be limited to unfairly punished students. All students who come to school to learn will have their education disrupted by troublemakers. In urban districts, those motivated learners will be primarily students of color. A clear statement by the court against racial classifications could have helped save these silent victims from OCR’s misguided obsession with percentages over individuals.

**A majority of the justices now approve of policies that the court’s equal-protection jurisprudence would seem to forbid.**

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