

NATIONAL REVIEW

It's Up to Justice Kennedy, As Usual

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When he was nominated for the Supreme Court following the defeat of Robert Bork, Anthony Kennedy probably had no idea that he would in time become the decisive vote in many cases. That is the case, however, and it seems that once again he will settle things in *Fisher v. Texas*.

Cato Institute legal analyst Ilya Shapiro offers his thoughts on yesterday's oral arguments in the case [here](#).

The Court's liberal (which is to say, statist) bloc (minus Kagan, who recused herself from the case) will undoubtedly support the university's racial preferences simply because it's a statist article of faith that preferences for "underrepresented groups" is always a move toward social justice. And the Court's conservatives (including Chief Justice Roberts who, after all, has said that the way stop racial discrimination is to stop discriminating on the basis of race) will certainly vote against the Texas policy.

Since Kennedy has never been much in favor of racial preferences, it's up to him to decide how far the Court goes. Shapiro asks, "Will he merely vote to strike down the use of race in the admissions decisions complementing UT's Top 10 program, or will he cast doubt on the use of race in educational administration altogether? Will he tighten the judicial standard of review that the Court set in *Fisher I* — making it essentially impossible to meet — or will he throw bones to both sides in a way that again avoids changing the status quo?"

Shapiro is almost certainly correct. Let us hope that Justice Kennedy finds time to read some of the briefs arguing strongly that racial preferences don't produce any educational benefits but are actually harmful in several ways.

"At some point," Shapiro writes, "the Supreme Court has to realize that the hallowed 'diversity' interest is both pretext and ephemera, and that an admissions program that uses race in a constitutional manner is a self-contradicting proposition." Again, correct. It may be a long time, but eventually Americans will look back in amazement that the silly arguments for letting college administrators indulge in this kind of social engineering were once prevalent.