The end of affirmative action

2003 was the last time the U.S. Supreme Court took up affirmative action, and a narrow majority in *Grutter v. Bollinger* held that public institutions could use race as a factor in deciding whether to admit students. Sandra Day O'Connor, writing for the Court, looked to a future, 25 years hence, where affirmative action would no longer be needed. The decision changed the compelling state rational for the practice, reasoning that affirmative action to remedy historical injustice was no longer acceptable, while the "tailored" use of affirmative action to achieve a many-hued student body was good in and of itself. In other words, diversity was a thing that the government had a right to use affirmative action to achieve because a diverse student body was an accepted institutional goal.

On Wednesday, Oct. 10, the court will hear a case that has the potential to end all types of racial preferences. It involves the admission system for the University of Texas at Austin.

Basically, most of the class is admitted from the top 10 percent of graduating high school students in each school. The university is allowed to use race to fill the remaining 15 percent of its student body. The plaintiff, Abigail Fisher, will argue that the 85 percent admitted under the "top ten" rule makes for a diverse-enough class and that the affirmative action preferences given to black students for the rest is therefore unwarranted and illegal.

One irony that the court's liberals are sure to note is that the 85 percent system achieves diversity precisely because Texas schools tend to be either all white, or all minority; the lack of racial diversity within high schools tends to produce a diverse class when the top 10 percent of all schools are allowed to enroll, regardless of the quality of the school.

Back in 2003, the court's conservatives strongly disagreed with O'Connor's sociological justification for affirmative action, and there is no reason to believe that they have changed their minds. Elena Kagan will recuse herself because the Obama Justice Department has intervened in the case. That leaves a chief justice who has said (as *The New York Times* noted) that "racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity'," and three associate justices (Scalia, Thomas, Alito) who plainly oppose affirmative action in all of its forms.

Justice Anthony Kennedy's views are not a cipher. He endorses the idea that affirmative action can be used to achieve a diverse student body, so long as race is considered as one part among many others, and so long as applicants are considered individually. It is hard to imagine him not finding fault with the racially conscious 15 percent admissions process. For Kennedy, race-conscious policies are permissible (barely) if (and only if) diversity cannot be achieved any other way. Plainly, the University of Texas has found a way to achieve some measure of diversity without affirmative action before it takes race into account.

Perhaps Kennedy will try to salvage affirmative action, but it is hard to see the court's conservatives allowing him to do so. They have their chance to end it, not mend it. Though John Roberts has said (and told Congress during his confirmation hearings) that he values precedent and wants the court's decisions to be incremental rather than sweeping, it will be hard to resist the temptation to sweep away racial preferences.