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## Panel 4: Criminal Procedure and Affirmative Action

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## PANEL 4: CRIMINAL PROCEDURE AND AFFIRMATIVE ACTION

MODERATOR: LAUREN SUDEALL

PANELISTS: DAN EPPS, GAIL HERIOT, AND CORINNA LAIN

**Professor Lauren Sudeall:** We're going to be transitioning a little bit in terms of topic now, and as you may have noticed, I'm not Eric Segall. I'm Lauren Sudeall. I'm on the faculty here at the Law School. I'm going to skip the longer introductions as has been done in the other panels just to save time. I'll just tell you who we have up here on the stage. We have Dan Epps from the Washington University School of Law, Corinna Lain from the University of Richmond School of Law, and Gail Heriot from the University of San Diego School of Law. We have the perhaps unique and challenging task of weaving together multiple topics, not even just what's listed on the agenda, but we're going to sort of squeeze the death penalty in there, as well, as sort of a sub-topic of criminal procedure.

Our format's going to be a little different by virtue of having the Herculean task of doing that. We're just going to sort of—I'll spend a minute or two giving a little introduction, and then we're going to go panelist by panelist, and I'll ask a few questions, give a brief opportunity for others to chime in, and then we'll try to reserve time at the end for Q and A.

So, as I mentioned, we're trying to knit together, or at least touch on, some pretty different areas here. But, perhaps we can draw some parallels and thinking about Justice Kennedy's approach to these topics. In the context of the death penalty, Justice Kennedy certainly didn't embrace abolition, but as in many of the other areas we've talked about today, he often provided the critical fifth vote in a number of important death penalty cases, including *Roper v. Simmons*, barring the death penalty for juveniles; *Kennedy v.*

*Louisiana*, barring the death penalty for non-homicide crimes; and joined Justice Stevens' opinion in *Atkins*; but, he also joined the majority in upholding a number of lethal injection protocols. So, I think in some sense we see someone who didn't want to strike the death penalty down altogether, certainly, but really was trying to be careful about demarcating the boundaries in which it could operate with a focus on sort of decency and a certain view of society. I know Corinna's going to talk about the importance of dignity in the context of the death penalty.

We have somebody who, for a long time, had never voted in favor of an affirmative action program but in *Fisher v. Texas* eventually changed his mind, upholding the university's plan. I know Gail will talk about that. He also wrote the concurring opinion in *Parents Involved*, again threading the needle. That case involved voluntary school-integration plans. So, in trying to think about all these different issues and these two different areas of the law, I'll at least put forth and certainly folks here can tell me if I've hit on anything of value, that I think we can think about Justice Kennedy as often trying to thread the needle and be very careful in trying to think about boundaries. But also, I think to some extent having this very aspirational view of society and maybe how society should be and maybe trying to reach that place of having that inform him in how he approached these different areas of the law, and I do think in some sense, maybe a certain idealism about society and at least where it should be, if not where it is today.

I'm going to start with Dan to talk about criminal procedure. If you could just start off by maybe summarizing, again, in ten minutes or so, or less than that, Justice Kennedy's approach to the field or maybe just hitting on a few highlights or cases that are of particular interest in that area.

**Professor Dan Epps:** Sure. So, I've been spending a lot of time thinking about Justice Kennedy's approach to criminal procedure and trying to come up with some themes. I think some of them are the

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relentless anti-formalism that we've been talking about for the whole day. I don't think he was particularly concerned with procedural rules for the sake of procedural rules. He was much more oriented toward substance in this field than straight up procedure. He cared about fairness but cared about fairness for particular ends. So, if you were someone coming in and saying, "Look, I'm a guilty person, but I didn't get this exact procedure to which I was entitled under the Constitution," he might not have been the best Justice for you. But if you're coming in saying, "Something really unjust just happened to me," you might have been in better shape.

One thing I've been thinking about a lot is, and trying to figure out, is that he's often called our most libertarian Supreme Court Justice in recent years, he has this big concern about liberty. I don't see a liberty focus in crim pro nearly as much as you might expect. At the very least, I don't see it in the sense of a traditional libertarian concern for the threat posed by the state. In his Fourth Amendment cases, which I'll talk about in a little bit, he is sort of more deferential to the government. He is—I found him generally more deferential to political actors and police in general in crim pro than you might expect, given his jurisprudence in some other areas.

In terms of his most important contributions, I think a lot of people are going to immediately go to the Eighth Amendment cases. I'm not going to talk about the capital cases, do not take the wind out of your sails, *Corinna*, but I'll talk about some of the related cases which are *Graham v. Florida*, right. This is a case where the Court says you can't impose life without parole for juvenile non-homicide offenders, and then it's built on in *Miller*, which requires individualized sentencing for juvenile homicide offenders before they can get life without parole. Those are going to get a lot of billing when people are talking about him and the sort of criminal sphere, but even in the Eighth Amendment context, he's not sort of a uniformly pro-defendant Justice. He writes a separate opinion in *Harmelin v. Michigan* sort of indicating some theoretical openness to Eighth Amendment challenges to terms-of-year sentences more generally,

not talking about the juvenile context, but there, ends up upholding a quite unjust sentence for a first-time drug offender.

Interestingly, he seems to get sort of intrigued by some problems with criminal justice late in his career. He gives this speech in 2012 to the ADA, where he talks about the dangers posed by corrections and how we need to care more for prisoners. But I don't know if he has enough of an opportunity to flesh that out in his jurisprudence before he ends up leaving the Court. He does so in the juvenile context. He writes the opinion in *Brown v. Plata*, which is about the remedy for a long series of conceded Eighth Amendment violations in the California prison system, but it seemed like maybe there was more he wanted to do or might have wanted to do if you can imagine him staying on the court for ten years. One thing I'm drawn to is he has this weird opinion in *Davis v. Ayala*, which is the case that has literally nothing to do with solitary confinement, but it turns out that the defendant in that case had been in solitary confinement. Justice Kennedy asked a random question about it in oral argument and then wrote this whole concurrence saying, "This is a thing I might be interested in getting into," and then that ends up being an unfinished legacy.

**Professor Sudeall:** So, you mentioned earlier the Fourth Amendment—and we talked a little bit earlier in the day about the relationship between Justice Scalia and Justice Kennedy. The Sixth Amendment and Fourth Amendment were areas where Justice Scalia was seen as being maybe unexpectedly defendant friendly, so would you say that he was more so than Justice Kennedy? We've also talked about areas in which the two of them really vehemently disagreed around certain issues. How did they play off each other in this context?

**Professor Epps:** Yeah, I would say certainly a little bit, and I don't want to overstate how much of a Fourth Amendment defender I think Justice Scalia was, because he talked a lot about the substance of the Fourth Amendment, but when it came down to remedies, I don't

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think he was really interested in doing a lot to meaningfully enforce the Fourth Amendment. But that said, when it came to the substance, I think Justice Scalia was more concerned with the Fourth Amendment than Justice Kennedy. Justice Scalia writes a very angry, and I thought quite effective, dissent in *Maryland v. King*, which is the case about whether you can DNA test arrestees. Justice Kennedy generally was okay with the drug testing. He wrote the *Skinner* and *von Raab* decisions. Justice Kennedy dissents in *Carpenter*, the recent case about whether it's a Fourth Amendment search to get cell site location information. Justice Kennedy writes *Hiibel v. Sixth Judicial District*, which is about when you can question or arrest someone who just refuses to give their name.

Justice Kennedy does write some pro-defendant Fourth Amendment cases, but not that many. This is where it gets to the point I was saying a second ago. You see in Justice Scalia, he does have this concern for the dangers of government. Whether it's real, whether it's just rhetorical, he really talks about that and seems to see that as a real threat and emphasizes that the Founders were worried about the dangers of government. I don't see that concern that much in Justice Kennedy's jurisprudence.

**Professor Sudeall:** So, if there is one or several ways in which you think his leaving the Court might change criminal procedure, what might that be, or might he not—might his departure not change that area of the law in a fundamental way?

**Professor Epps:** I think it would be hard to imagine it won't in some ways, and I think how it's going to change the law and which direction it's going to change the law in is going to depend on the issue. So, the sort of formalist issues, issues where the Constitution seems to dictate a certain kind of procedure but one that largely seems to serve to make it harder to get the bad guys, Justice Kennedy was usually with the government. In the Sixth Amendment context, Sixth Amendment sentencing, he was not a big fan of the *Apprendi* line. He wrote a lot of opinions trying to push back on that "*Apprendi*

Revolution.” Likewise, in the Confrontation Clause, I think he’s in the majority in *Crawford* but then later gets off the train and writes a bunch of dissents where he basically—the tenor of which is, “Why are we doing this? why are we insisting that people have the right to confront this particular accuser? This is just making it hard to get the bad guys.”

I think a new Justice—Justice Kavanaugh if it turns out to be Justice Kavanaugh, we’ll find out very, very soon—may be a little bit more formalist in those lines and may draw more on Justice Scalia’s decisions. Justice Scalia really emphasized that “Look, we don’t get to just sort of assess for liability. We have to look at the procedure mandate in the constitution. If you didn’t get that, that’s the end of the story.” Justice Kennedy, I think he was more interested in saying, “Look, what’s really going on here? Is this going to make it harder to get the bad guys, or are people really getting screwed over?” I think those cases, the defendants are going to be better off. In other cases, like ineffective assistance of counsel cases, defendants might be worse off under a more formalist, conservative, originalist approach that someone like Justice—Judge Kavanaugh if he’s confirmed—would offer. Justice Kennedy, he wrote the opinions in *Missouri v. Frye* and *Lafla v. Cooper*, which are about ineffective assistance of counsel in the plea context. Those are cases where I think you really see him saying, “Look, what’s really going on here? Maybe that there are these formal arguments that this doesn’t quite work in this context, but look, let’s be real.” He in fact quotes Bill Stunz’s work, basically says, “Our system of criminal justice is a police system, and that’s what’s important, and we need to give people a fair procedure there.” I would imagine that’s not going to be something that more conservative, originalist-type Justices are going to push forward.

**Professor Sudeall:** I want to give the two of you, if you want to chime in, or we could also transition. It’s a pretty seamless transition, as Dan highlighted. A big area for Justice Kennedy in criminal procedure was the Eighth Amendment, so maybe we could just move

to you to talk about—again if you could maybe summarize what his approach, if you can, to death penalty cases, had been.

**Professor Corinna Lain:** Sure, and I will say, by way of Dan’s comments, I agree 100%. I’m not surprised, Dan, that you mention some Eighth Amendment cases, because when I think about Kennedy on criminal procedure, it’s sort of unremarkable, whereas in the death penalty area, it’s “Oh yeah, there’s a real strong thread here.” I’m reminded of a survey—2006, 2008 or so—and it listed Justice Kennedy as one of the top 10 most conservative justices. That seems about right. Kennedy didn’t surprise us on criminal procedure. Scalia was much more interesting and much more surprising and had much more of a Libertarian thread on criminal procedure. Kennedy was more—there were some things that bothered him, and I think you nailed it, it was the basic fairness point—but otherwise, he wasn’t so distinctive.

But in the Eighth Amendment context, he really is distinctive. Today, what we’ve heard thus far and what we’ll continue to hear about, is this dignity jurisprudence, or language of dignity that he had. That plays out in the purist form in the Eighth Amendment, because the Eighth Amendment doctrine was all about dignity well before Kennedy ever showed up. So, for the guy who really cares about dignity, and by the way I went back and looked, and during his confirmation proceedings, Kennedy was asked, “What are the sort of liberties that the Constitution protects? What do you consider under the concept of liberty?” And he says, “An abbreviated list are the essentials of the right to human dignity.” Then he lists some things. He talks about harms to the person, injuries and anguish to the person, but the very first words out of his mouth are “the essentials of the right to human dignity.” So this is something that was important to Kennedy from the start.

And this is something that has been important in the Eighth Amendment from the start, or at least since 1958, when the Court decided *Trop v. Dulles*. There Chief Justice Warren is talking about



the Eighth Amendment and is breathing new life into the Eighth Amendment. He says, “The basic concept underlying the Eighth Amendment is nothing short of the dignity of man.” So you can see dignity being a theme in the Eighth Amendment from the earliest time. Justice Brennan and Justice Marshall are talking about dignity when they vote to abolish the death penalty as it is then administered in *Furman v. Georgia* in 1972. The Supreme Court, Justice Stewart for the plurality, is talking about dignity when the Court brings back the death penalty in 1976. In *Woodson* the Court says, “You can’t have an automatic death penalty. Why? Because that violates human dignity.” So you put the two together, and you’ve got the dignity doctrine for the dignity dude. So you can expect to see this really strong thread here.

It’s not to say, as Dan mentions, that Justice Kennedy wasn’t part of really some horrible decisions, especially at the beginning of his tenure on the Court. He was part of a pair of decisions in 1989 that said executing people who committed their crimes as juveniles was just fine, and executing offenders who had intellectual disabilities, then referred to as mentally retarded, was just fine. He was part of the majority in *Herrera* that said you need a constitutional violation to go with an actual innocence claim on habeas. He was part of the majority in *Walton*, where the Court said that even though the death penalty is supposed to be limited—it’s not supposed to be for just any murderer, it’s supposed to be for the worst of the worst—that it was okay if the aggravator was that the murder was cold-blooded. I remember the dissent in that case saying, yeah but that means that the death penalty is for all but the contrite murderer saying, ‘I’m really sorry but I’m going to have to kill you’ and Kennedy is saying, “Eh, that’s limited.”

So, he’s a part of some really quite dreadful death penalty decisions, especially in the early years. What’s interesting is that by the 2000s, Kennedy has really taken a turn. He does have some blind spots to this day, particularly end game stuff—so he’s a reliable vote for denying stays. He’s a reliable vote for narrowing habeas review in

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capital cases. He's a reliable vote to deny relief in the lethal injection cases.

But otherwise, he really takes a turn in the 2000s. He changes his mind on the execution of juvenile offenders and the intellectually disabled. He doesn't write the opinion in *Atkins* but he later writes the opinion in *Hall v. Florida* where the court is striking down Florida's very narrow conception of intellectual disability, and he talks about how the execution of the intellectually disabled is a violation of human dignity. He says this is just a blind rage. The death penalty is supposed to be for the worst of the worst and if the offender is intellectually disabled, then by definition they can't be the worst. He says this is against this notion of human dignity.

Then you have *Roper v. Simmons*. He writes the 5-4 decision to strike down the juvenile death penalty. Dan, I think you mentioned *Graham*, but there's also *Kennedy v. Louisiana*, where Kennedy writes the decision invalidating the death penalty for rape of children who did not die. And you mentioned *Brown v. Plata*. Each one of these decisions that he's writing, he talks about dignity. It's all over the place. What is the theme? It's dignity.

**Professor Sudeall:** Can I ask you, we didn't plan this, but I have a question for the two of you. Why is it that this doesn't translate over? Because death is at stake? Why does it not translate over into everyday interactions with the police, for example? Why does he not think about dignity in that?

**Professor Lain:** I think that human dignity has this special meaning and valiance when you're talking about the death penalty. I'm thinking of the Canadian Supreme Court decision that refused an extradition request in a capital case, and the Canadian Supreme Court says, "Even though we have this extradition agreement, we're not going to honor it here. Why? Because the United States has the death penalty, and that's the evisceration of human dignity." Then you've got Pope Francis in 2015 who says, "We should abolish the death penalty. Why? Because every human being has an unalienable right

to human dignity.” The death penalty says, “You don’t have a right to be a living human being anymore. We are kicking you out of the human community.” The point is that there’s this residual dignity and humanness to every person that the death penalty takes away. I think there’s something very unique about that. Death is different.

**Professor Epps:** Also, in these cases, though, it seems to be part of what’s important is the message society is sending more generally, because as you noted, even in the capital context, he doesn’t become a death penalty abolitionist late in his career. When he’s voting on all these stays and so forth, to win those cases they often break down along ideological lines. He’s almost always going to be with the conservative majority. He’s interested in making these big statements. Certain categories of defendants are just off limits, but it comes down to the way the law operates on its day-to-day operation, he’s less interested in really limiting things.

**Professor Lain:** It reminds me of Justice Scalia, who was speaking in 2015, I think it was, and he said, “I wouldn’t be surprised if the Supreme Court gets rid of the death penalty all together.” He was clearly referring to Kennedy, because there were already four votes, but you needed Kennedy. I have wondered if Kennedy’s jurisprudence over time, well we didn’t get to see it play out, but I have wondered whether he would have been willing at some point to go all the way.

I think Kennedy’s dignity doctrine had three meanings in the death penalty context. One was that the death penalty is uniquely degrading to human dignity, because you’re kicking a person out of the human community, and so you have to be very, very careful. Let’s be very, very careful about how we do that and who we do it to. And maybe there was room there, if one cared about dignity in its strongest formulation, to go all the way. We’ll just never know.

The second meaning is this notion of excessively severe, disproportionate penalties that carries over to the non-death penalty context, where he’s saying, “Look, if the person is not the worst of

the worst, then what you have is society playing out its rage over this murder. That is just a blind rage, a brutalization.” And the Court talks about this some in *Ford* where the Court says you can’t execute the insane. But I think that the proportionality doctrine comes from that.

Then the last thing that I think is he’s talking about is a sense of dignity of society and how we can’t treat offenders—we can’t treat brutal, vicious murderers like they treated their victims. Why can’t we do that? His view was you can’t just do unto others what they did to someone else, because you can’t stoop that low. It’s not because they don’t deserve it, it’s because civilized society shouldn’t set its standards by the people who are breaking the law and murdering people. I think that’s a piece of it too.

**Professor Sudeall:** You brought up the possibility of the Court ending the death penalty, and so along those lines I’ll ask—I think many writing in this area seem to believe that there’s this inevitable decline or that we’re seeing this decline. I don’t know if I personally agree with that. I think it’s a little more nuanced, maybe because I also live in a part of the country where that is perhaps less true than others. So, with Justice Kennedy leaving the Court, what of that possibility?

**Professor Lain:** It’s super interesting, and I’ve written about the death penalty collapsing under its own weight. With Kennedy off the Court, I think that really smart capital litigators are going to be even more careful about what they bring to the Court and whether they want to be bringing things to the Court, because you can make bad law. So, we might see less things going to the Court. Think about *Furman v. Georgia*—the death penalty was dying on its own. The Court stepped in and surely thought, “Oh we’re just shutting off the lights, everybody’s left the party,” and then you have this massive backlash.

In some weird way, I think Kennedy may have laid down the path to abolition even though his dignity doctrine didn’t go all the way. He was the power behind the evolving standards of decency doctrine.

That doctrine looks at how many states have the death penalty, what's happening with executions, what's happening with death sentences? And those things are declining. We've had seven states in the last ten years get rid of the death penalty. Executions last year—twenty-three in the country. *In the country*. I mean, ten years ago, fifteen years ago, Texas had forty-eight all by itself. And prosecutors are not asking for it as much. The prosecutors that were asking for it, they're retiring, or they're running for reelection, and they're not getting reelected. I do think the death penalty is dying its own slow death, and that if you are a death penalty abolitionist, the worst thing would be for the Supreme Court to step in again. In fact when Scalia said that about the Court striking down the death penalty, I thought "you're baiting them. You just want to rev this up again." So maybe this will all work out, but I hope not because of the Court.

**Professor Sudeall:** It's interesting. I think the death penalty is one of the areas where, you sort of alluded to this, there are sort of these renegade states that are repeat players that show up—Texas, of course being one of them. I teach capital punishment, and I think almost every case is a Texas or a Georgia case. But, the term that I was clerking, there were multiple cases where Texas got slapped down, and Justice Kennedy was often a big part of that. He wrote many of those. It's interesting that, even to the extent this is becoming a more localized issue, at least he was willing to play that role of not letting things go too far. I'll be curious to see, aside from this bigger question, whether the Court is at least playing that role and checking states that push back.

**Professor Lain:** Now it's Chief Justice Roberts who is in the position to play that role, and he has on occasion. So, in the *Buck v. Davis* case—that is the case where the defense has an expert, and the expert talks about future dangerousness and says, "Well, because he's black there's a higher chance that he's going to be dangerous in the future." And it's Chief Justice Roberts who writes the opinion in that case and says, "No, you can't do that." He has a line in that

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opinion where he says, “Some toxins are deadly in small doses.” That fits the death penalty so well on so many levels.

And then you have the *Madison* case. That’s the one where you’ve got this capital defendant who can’t see, can’t walk without assistance. He’s incontinent. He can only recite the alphabet to the letter G. He’s got all of these things wrong with him, and Alabama is rushing to execute him. It goes up to the Supreme Court to see whether he’s competent to be executed. Who knows how it’s going to turn out, but from the oral arguments it’s pretty clear that Roberts is going to side with the libs on this. Now, it’s a really limited case. I don’t think it’s going to churn any doctrinal water there, but in super egregious cases will we have somebody who cares? That’s going to have to be Roberts, because I think the other four conservatives are like eh, that’s what you get.

**Professor Epps:** I was just going to follow up on that and say that case, we don’t know for certain how it’s going to come out, but if that ends up being true, that might suggest that capital lawyers’ strategies of not bringing anything to the Court maybe is a bad one. Maybe you should try to get cases with really, really, really bad facts up there and say, “Hey, Chief Justice Roberts, do you really want to say this is okay?” The worst thing that happens is you lose, but they’re probably already going to be losing in the lower courts in light of all the recent nominees. I think that there’s some value in sort of forcing the Court’s hand and really saying, “Look, do you want to endorse this or not?”

**Professor Lain:** On really egregious cases, I think you’re exactly right, yeah. Good point.

**Professor Sudeall:** I want to transition. I don’t have a good segue to move from that to affirmative action—

**Professor Lain:** Death penalty to affirmative action, easy.

**Professor Sudeall:** Gail, maybe you can start us off, and let people adapt over the next twenty seconds, to summarizing Justice Kennedy's approach on affirmative action. You have five minutes.

**Professor Gail Heriot:** Well, okay. The usual story here about Kennedy is that he started out as a reliable conservative on issues of racial preferences. To be sure, he had a fondness for articulating more pliable, softer-sounding legal standards than what you would find in Justice Scalia's or Justice Thomas's opinions. But still, when push comes to shove, he was voting with his more conservative colleagues in favor of race-neutral results, even in those cases where he was only concurring the judgment. In more recent years, however, according to this usual story, he has made common cause with Justice Ginsberg, Justice Kagan, Justice Breyer, Justice Sotomayor, most notably in the second *Fisher v. University of Texas* case.

Now, it's true that this was hardly the first case where Justice Kennedy was seen as the swing Justice, but nevertheless, it was a race case. It was an affirmative action case, and that was considered to be much more unusual. People were asking why is that, what's going on in this case?

So, what did happen? According to some left-of-center commentators, he just got smart about the virtues of affirmative action. "We convinced him," they might say. Alternatively, conservative commentators, some of them like to say that he fell prey to Washington disease, that disease that afflicts so many small-government conservatives who find out they're really not in favor of small government once they are in charge of things. Power can corrupt anyone, but there is a special corrupting influence that has an effect on believers in small government. Or to give it an even less flattering spin, conservatives with Washington disease start longing to impress the liberal press.

I am actually not fond of any of those explanations. They're obviously over simplifications, and they don't have much of a law spin to them. Alas, I am not going to be able to give you a perfect

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legal explanation for all of Kennedy's opinions in the area of affirmative action, but for that matter I couldn't give you a *perfect* legal explanation in any other area or for any other Justice. Once you start looking really closely at a line of cases by a particular Justice, they will all baffle you a little bit, so let me try to give you a slightly more law-focused perspective.

First let me put my cards on the table here. I am a conservative, or a classical liberal if you will, with a bit of a libertarian streak, and that means that I'm generally sympathetic with Kennedy on affirmative action cases, the earlier opinions. I have *sometimes* found his softer, more pliable approach to be particularly appealing, and I would think the *Parents Involved* case that you mentioned a little earlier is one where I found the softer approach could be a better approach. On the other hand, the *Fisher II* decision I was disappointed in.

By way of legal substance, it's important to acknowledge that Kennedy has been completely consistent on the anti-formalism issue that has been brought up several times now, starting with his 1989 concurrence in *City of Richmond v. Croson*. That was a case involving racial preferences in public contracting, set-asides based on public contracting. Kennedy, as always, applied his—[looking at Professor Epps] I liked your term—"relentless anti-formalism." I think that's a good term. I'm going to use that.

He's been inclined to a case-by-case approach to race discrimination generally, and he's essentially saying that he trusts judges to conduct nuanced examinations of very complicated circumstances surrounding particular racial discriminatory policies, more or less free from rigid rules, and more or less free from any kind of doctrine beyond the very well-established doctrine of strict scrutiny, which he has continually referred back to. To be sure, like his conservative colleagues, his expressed view is that strict scrutiny must be applied no matter what race or what ethnicity is being affected. He's made it clear in *Croson* and most of the later cases that



he believes that is a very demanding standard. But, he doesn't want to declare that all race discrimination is unconstitutional, or even that all efforts to adjust for background societal discrimination in the past should be outlawed. Unlike Justice Scalia, unlike Justice Thomas, he wants to play it loose, case by case.

I suppose I could stop there and say that naturally if someone's going to play it loose, sooner or later they're going to hit on a case where they're going to take the other side of the issue, and that's basically what the standard interpretation of *Fisher II* has been. Sooner or later, this was going to happen.

I have to admit that these days I'm not a big fan of the anti-formalist approach to race discrimination issues. Back in 1989 during the *Croson* case, (some of you weren't born then), I would have been with Kennedy and said, hey, we want to play this loose, case by case. But after a few years of thinking about it, I tended to agree with Scalia's position that the presumption against race discrimination needs to be overwhelming. Otherwise, it eventually becomes just a political decision.

The trouble with attributing Kennedy's decision in *Fisher II* just to anti-formalism is that I have not been able to come up with a good explanation as to why *Fisher II* itself would be the exception for Kennedy. He really does seem to have drifted toward a position that is more accommodating to racial discrimination that favors under-represented minorities. So maybe the nonlegal explanations for Kennedy's change of heart in an outcome-determinative case were right. But you asked for sort of the standard explanation, so that's it.

**Professor Sudeall:** So, I was going to ask, what explains then—could it be the sort of threading-the-needle approach, this sort of holding others to this high standard, but if you meet that standard, not wanting to go so far as to say you can never—

**Professor Heriot:** Yeah, but you know I think even Scalia might say that he can think of a case where you wouldn't want to say, "This is

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unconstitutional.” The hypothetical everyone likes to use in this situation is the prison riot case, where you’ve got a race riot between prisoners and it’s a matter of seconds, you’ve got to move very quickly, you’re trying to save lives, and you decide to order the prison guards separate them by race. Of course, probably *somebody* isn’t fighting on the side of his skin color. The prisoners know each other, and they know who’s on what side; the guards don’t. It’s basically a race riot, but it’s not a “perfect” race riot. You separate them out that way and somebody’s going to get beaten up. But, nevertheless, even though prison guards have discriminated on the basis of race at that moment, I don’t think anybody’s going to argue that the prison guards should have conducted a nuanced examination. They had to act quickly, and they did. That’s the standard hypothetical that law professors tend to use.

The thing about Kennedy, though, that I thought was interesting is that in the *Crosby* case, he was not completely dedicated to his anti-formalism. He actually articulated his rule—he was pliable about his pliability in that case. What he said was that in discussing Scalia’s approach, he was not convinced of the need for it *at this time*. That’s kind of interesting. Then you have to wonder if he is an example then of what Scalia was talking about in connection with the need for strong rules in the area of race discrimination. If you could take Kennedy’s 1989 self and say, “Let’s look at how things have progressed toward identity politics by 2018. Would you have wanted to take a slightly more formal or at least a slightly stronger approach to prevent that from happening (including to prevent your own backsliding)?”

There are a number of problems with a loose approach to race discrimination cases. The notion of “I will know an unconstitutional race discrimination situation when I see it” is not a lot of guidance to give to the public actors who are governed by the Fourteenth Amendment or federal actors governed by the Fifth Amendment. Everyone naturally will believe, “What I think is a good idea, I bet the Supreme Court’s going to think it’s a good idea, too, because I’m

a smart person.” So, it’s basically no guidance at all. It’s telling these actors that they should do what they think is the right thing to do, and not surprisingly after the *Croson* case, which again is a case about public contracting and set-asides, a cottage industry got started up on how to get around the *Croson* case. Instead of getting less in the way of racial preference in contracting, we got more. I don’t think that was what either O’Connor, who wrote the majority opinion, or Kennedy thought they were getting. I don’t think they expected that to happen.

Another problem of course is that when you have an anti-formal approach, it’s not just you that gets to decide what is constitutional and what is not. Although, I’ll admit that in Kennedy’s case, he got to decide that an awful lot. He was often the swing Justice, but he’s not going to be on the Supreme Court very much longer. What happens is, there are other justices and their view of what is justified will be different and that’s what happened in the *Grutter* case, where Kennedy ends up in the minority.

In that case, much to his disappointment, O’Connor, joined by the left-of-center bloc, finds the University of Michigan Law School’s very large preferential treatment based on race was constitutional. Basically, the law school had been treating African-American and Hispanic applicants to the law school who’d gotten a 3.0 GPA the same as they would treat an Asian or white applicant who got a 4.0, which is really quite a difference, all other things being equal. That was very much not what Kennedy wanted. Justice O’Connor’s opinion was basically as long as you avoid setting aside a certain number of seats as they did in the *Bakke* case back in 1978, or as long as you avoid a certain number of points as was done in the *Gratz* case, which was the other University of Michigan case that was decided by the Supreme Court at the same time, they were willing to put up with that. O’Connor wrote an opinion that essentially said, “Look, we’re applying strict scrutiny, but we’re going to defer to the university,” which is kind of an odd notion, the notion of deference and strict scrutiny. Ordinarily, that would have been considered

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opposites. You can't defer and have strict scrutiny. Kennedy dissented.

That's the problem with anti-formalism. If you trust the other judges, if you think they're going to decide the way you're going to decide, then I guess it's fine. But, that's a problem. I think again O'Connor really thought she was applying the brakes lightly by deciding one case in favor of the university, *Grutter*, one case in favor of the plaintiffs, *Gratz*. She dropped the line in the opinion that in twenty-five years that there may be a different approach that she's going to want to take. I think that maybe, just maybe, by then Kennedy understood that the light approach was probably not going to lead to less consideration of race. It was probably going to lead to more, and there's plenty of empirical evidence right now, even with the University of Michigan itself, that yes, the level of preferences got larger immediately afterwards. That brings us, I guess, pretty much up to the more recent years and to *Fisher*, but—

**Professor Sudeall:** So I'm curious. I think you mentioned earlier that you maybe can't explain, or you don't know why the switch from *Fisher I* to *Fisher II*. I'm curious about your thoughts about *Fisher II*, but also how does that fit in to your description of Kennedy and pliability? How do you see that playing into how he ended up deciding in *Fisher II* to uphold the—

**Professor Heriot:** I think it's really hard to explain *Fisher II*. Let's start out with *Fisher I* here. Obviously, people who were in favor of race-preferential admissions were pretty pleased with the *Grutter* decision, and at the same time, those who wanted race-neutral admissions were pretty disappointed. It's very difficult to answer, "Where do we go from here?" Lawsuits like that are very expensive to maintain. It's very hard to get funding in order to bring another lawsuit if you're dealing with loosey-goosey law, and moreover not just loosey-goosey, but *Grutter's* pretty strong with deference point.

So along comes the *University of Texas* case, which was pretty odd on its facts and maybe one that wasn't going to be easily

reproducible. In the *University of Texas*, case, the University of Texas had actually been operating under very different rules prior to *Grutter*. There had been a decision by the Fifth Circuit Court of Appeals that essentially made it impossible for universities in the Fifth Circuit to have race-preferential admissions, because it had held, anticipating the Supreme Court would go the other way—in the *Hopwood* case it's called—that race-preferential admissions are simply unconstitutional. So, Texas had to stop using them.

At the time *Grutter* was decided, Texas could have just turned around and said, “Okay, now we’re going back to what we did in the past,” but in the meantime, the Texas legislature had passed a law that had instead required that in Texas, anyone who graduated in the top 10% of a Texas high school would automatically be admitted into the University of Texas, regardless of what their SAT score was (or regardless of whether they’d even taken the SAT, I believe). The University of Texas had been bragging that actually this solution was very effective, and it was getting the school as much racial diversity as it had under its previous methods of dealing with diversity issues. So, Texas was telling its students, telling everyone, “We’re doing great, we’re doing fine, we don’t need race-preferential admissions.” Then, within twenty-four hours after the *Grutter* decision was decided, it came out and said, “We’re bringing back race-preferential admissions.”

That actually was a very tiny decision in the sense that it only affected a tiny number of students, because the Texas 10% solution, that was a law, and the school was not in a position to change that. It actually was not very popular with the administration at the University of Texas, but it was a law, so Texas had very little maneuvering room there. Nevertheless, it brought back race-preferential admissions for the small number of discretionary admissions that it had. In general, the top 10%, that pretty much fills up the school, but it had a few discretionary positions. So that then led to the *Fisher I* case. Oral argument comes, and the case is pending before the court for a very, very long time, much longer than

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usual. It was argued in the early fall, and the decision didn't come out until the late spring. It was this little, puny thirteen-pager—by Kennedy, of course—basically adopting what he'd said in his earlier dissent in *Grutter*, saying, “Well, we said we would defer to the university, but we really only meant we would defer a little bit, and we really only meant on the compelling interest side of things, and we're certainly not going to defer on the question of whether or not a particular solution is narrowly tailored.”

So, a lot of the language was tougher than it had been before. Nevertheless, the Court didn't decide the issue of whether Texas's policy was narrowly tailored because it just remanded back to figure the issue out without any sort of deference. But the thought was they're going to get tough if the issue comes back up in *Fisher II*.

But that isn't what happened. Instead, when *Fisher II* came up for a decision on whether or not this really is narrowly tailored, Kennedy sided with the left-of-center bloc. The trouble is, this was not really a great case for that. If he's going to defect from the conservative group, really in some ways *Grutter* would have been a better case for that.

Texas was really unclear about what their motivation for this policy. It kept changing its mind. It had already said that it had plenty of diversity, and it was really only getting a tiny number of additional minority students in this way. I think the number was probably thirty-three out of a class of 10,000. Even so, Texas had, for example, about 20% Hispanic students, so it was very hard for them to argue lack of critical mass in this case. It was much easier for *Michigan* to argue that they didn't have a sufficient number for critical mass.

**Professor Sudeall:** I want to make sure that we do have enough time for Q and A. I'll just add—and I can't possibly try to wrap everything together—but two points that I think, at least when I think of some of the affirmative action cases, I think the dignity piece that we talked about so much, I think that part of Justice Kennedy's thought around—I think there's a dignity piece in some of his

writing, particularly in *Parents Involved*. I think it really offended him for people to be defined solely by their race. I think that offended some sense of personal dignity. I like to think that informed part of his thinking. Obviously a very different kind of dignity, but thinking about this inherent humanity or that we—I think that offended his sense of dignity.

The other thought that I have is, the other point I made about being careful or threading the needle. It struck me that *Fisher's* the case—if this doesn't work, nothing will work. It was very narrow. In some sense maybe why it didn't result in big results. Maybe, again, I'm not here to read his mind, maybe there was also some recognition that to foreclose even that plan would have been the end and he was not willing to go there. I was going to ask, maybe in the Q and A it'll come up, where do we go from here? But I want to make sure that I have a chance for somebody else to ask a question if anyone has a question on any of these topics in our remaining time.

**Professor Stephen Griffin:** Steve Griffin, Tulane Law School. I'm sorry I didn't hear the whole thing—

**Professor Sudeall:** Could you move a little closer to the mic?

**Professor Griffin:** Yeah. I'm sorry I didn't hear the whole—how about this—the presentation on affirmative action but I just wanted to point out, especially for the students, that just keep in mind that prior to *Grutter*, Texas couldn't use any form of racial preferences because the Fifth Circuit was existing in an anti-*Bakke* bubble because of the *Hopwood* case, in which the Fifth Circuit ruled that the *Bakke* case was not the law.

**Professor Heriot:** Yeah, we did talk about this.

**Professor Griffin:** Okay, sorry. But that might have been one of their reasons to explain why they decided to go back to the drawing board and look at affirmative action again.

**Professor Heriot:** But remember, they couldn't go back to the drawing board, because the statute wouldn't let them.

**Esmat Hanano:** Esmat Hanano from the Law Review. I'm in criminal procedure right now, so forgive me if this isn't going to make sense as a question, but some of the opinions that we're reading from Justice Scalia, there's the call back to interpreting the Fourth Amendment under traditional, originalist understandings. In the substantive due process analysis Justice Kennedy uses, he rejects Justice Scalia's call for that similar type of analysis. I think of *Michael H. v. Gerald D.* where Justice Kennedy writes separately saying, "Agree, but not with that method." But in the criminal procedure side, he doesn't do that. He kind of goes along with Justice Scalia. Am I thinking of that correctly? Is there a way to reconcile that or are they just two ships passing in the night that don't have anything to do with each other?

**Professor Epps:** My sense is that he's not always with Justice Scalia on the sort of original methods approach. Like in the Fourth Amendment context, Justice Scalia really wants to sort of bring in a new way of thinking that's premised on property rights, and that's something that Justice Kennedy was not totally onboard with that project. More generally, Justice Scalia made a lot of arguments that said, "Look, this is really what the Constitution required," and Justice Kennedy just sort of waves his hand at those kind of arguments. I think I see his approach as being more sort of, "Fourth Amendment, let's think a little bit about privacy. Eighth Amendment, let's think of evolving standards of decency rather than let's drill down to what the original meaning was."

**Esmat Hanano:** Okay, thank you.

**Professor Lain:** I'll just chime in a little bit, too. When I think of Justice Scalia on criminal procedure, there are some places where he has some great lines. And it can seem so principled, but my mind always goes back to the *Hudson* case. That's the exclusionary rule case where the court says exclusionary rule doesn't apply to knock



and announce violations. That in itself isn't particularly remarkable. But what he did in that particular case, is he talked about the exclusionary rule and, he said, "In dicta, we said the exclusionary rule was constitutionally required," and he cited *Mapp*.

The problem with that is that when *Mapp* said that—and it did—there were some pretty important words on the front. Those words were "We hold that." So here's this opinion where he lops off the words "we hold that" in a decision he hates and calls it dicta. I'm just—it's hard for me to get past moves like that.

**Professor Epps:** That goes to the sort of substance-remedy distinction. He really, Justice Scalia thought that the Fourth Amendment—he cared a lot about the substance but wasn't at all clear, to me, how he thought it should be enforced. Wasn't a big fan of the exclusionary rule and wasn't a big fan of civil damages actions.

**Professor Lain:** It's just really hard to take him seriously when he's all "Framers and original meaning" and then does something blatant like that that's not principled at all. I'm just—you lost me at hello.

**Professor Jonathan Adler:** Jonathan Adler, Case Western. I was wondering if any of the panelists wanted to explore something related to Justice Kennedy and the death penalty. As was discussed, he seemed to be very concerned about who is subject to the death penalty, but especially looking at his AEDPA jurisprudence, or the decisions he would join in the AEDPA context, he didn't seem to have much concern about why people might be subject to the death penalty. That is to say that he was generally a fairly consistent vote for fairly strict enforcement of AEDPA. That may have been correct as a matter of the meaning and proper application of AEDPA, but it does seem to be in tension with his opinions in the Eighth Amendment cases where he's concerned with who is being executed, particularly given that a decent number of these AEDPA cases involve ineffective assistance of counsel claims or actual innocence claims. It seems to be if you're mentally disabled or you committed

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the crime as a child, you can't be executed. But if you're innocent, well maybe you can.

**Professor Lain:** I agree. Why is it the case that executing an innocent person is not super bad for human dignity? But I do think his decisions on the "who" also went to the "why." They were deeply interconnected. So when he's talking about how society can fall into raw brutality, and so it's super important that we're not executing offenders who are sixteen years old and seventeen years old when they commit their offense or that have some sort of intellectual disability, there you can see how the why is deeply connected with the who. I have to say that I found that his blind spot, and I'm subject to pushback on this, but the blind spot that I see was in the endgame. That explains the habeas decisions. That explains the lethal injection decisions. That explains the denial of the stays, even when they were on issues that we otherwise would have thought he cared about. Maybe for him, it's a "well, if you get to the end it's just going to be ugly, I have nothing to say about this." Hard to say.

But even in the lethal injection context, it was really interesting in *Baze v. Rees* in 2008, where the Court upholds the use of a paralytic, and Kennedy is a part of that. The Court there says the paralytic is good for the dignity of the process, and I thought did they need to do that to get Kennedy's vote? Perhaps, but if you cared about dignity, maybe you would ask the offenders whether they think it furthers dignity in their dying process because clearly they don't think does—they're the ones challenging this. So here Kennedy was willing to say the dignity of how death looked was worth more than the risk that you were actually torturing someone and just couldn't see it, which I would think would be really problematic for someone who actually cares about human dignity. That's hard to make sense of other than as a blind spot to the endgame piece.

**Professor Epps:** I was thinking a lot about the EDPA stuff this morning, because I think it is one exception to my thesis that he was more concerned with bottom lines than procedures, because that is a

place where he really actually ratchets up the restrictions on federal habeas, and it's also sort of inconsistent with his larger vision of federal courts get to decide a lot of stuff. There's a debate about what the deferential standard of review should be under EDPA and he actually thinks it should be fairly deferential. The best answer I've been able to come up with is that, for him, those cases are really largely about federalism, and he really thinks federal habeas litigation is very intrusive, and very burdensome on state governments, and he thinks there's often not very much going on there.

**Professor Sudeall:** We're going to be talking about federalism later. I'll just add one quick comment, and then we have to break to make sure we don't go too far off schedule, but at the risk of trying too hard, I'll try to draw another connection with your description of dignity—

**Professor Lain:** You did a good job.

**Professor Sudeall:** —I think is interesting because it reminds me of thinking whose conception of dignity is it? Is it his version or, like you said, the individuals at issue? Because the point that I was making earlier about his discussion of the sort of offensiveness around defining people solely by their race—when I was writing about rights and identity, I talked about how you could use that language to tie it to the multiracial movement of people who think about race in a very different way. I think a lot of individuals would say that race does, in fact, define your experience. I think for a lot of people of color that is very true, because it affects every aspect of their life. Yet, he had this very different idea of I perceive that as being insulting to dignity. Maybe there's this larger question of dignity for whom.

**Professor Lain:** I have to give you props because I was thinking, okay affirmative action and death penalty, I'm just not quite sure what the connection is, but I think you found it.

**Professor Sudeall:** And on that note, we will end.