The End Of Affirmative Action?

Tina Wu explores the effects of Kavanaugh’s ascension to the Supreme Court on the future of Affirmative Action

Affirmative Action has long been a topic of controversy. The programme aims to create equality by lowering barriers to entry for racial minorities and women, focusing on sectors of education and employment[[1]](#endnote-1). Correspondingly, a contentious popular opinion has arisen, ensuring a tentative future for Affirmative Action. This article will explore the factors threatening the programme, contextualising Affirmative Action in the modern day setting of a conservative Supreme Court with the new admission of Justice Brett Kavanaugh. Indeed, it will be argued, the effects will remain harmful for Affirmative Action. Yet, it’s impact will be interpreted as more nuanced than commonly perceived, offsetting popular belief that Kavanaugh may prove the end for the programme.

That the legacy of racial discrimination within America deserved some form of redressing has, since the Kennedy administration, become a political truism for many. Accordingly, in 1961, Executive order 10925 was signed[[2]](#endnote-2), passing the enforcement of Affirmative Action and, as such, opening the lid to a greatly controversial topic which continues to shape the nature of American politics to this day. By 1954, the Supreme Court ended racial segregation in schools with the landmark ruling of Brown vs Board of Education in Topeka[[3]](#endnote-3), Kansas. Yet, in 1965, merely five percent of undergraduate students were of African American heritage[[4]](#endnote-4). Centuries of structural racism has ensured that African Americans have seen delayed economic progress which is, in turn, reflected in high concentrations of African American populations in less economically developed areas following the Great Migration - so commonly dubbed as “ghettos”[[5]](#endnote-5). Lowered economic opportunities have in turn provided a history of poor education for African American communities, leading to an ‘unrepresentative’ elite in modern day America. Politically, this has caused a cyclical nature, retarding progression, ensuring that the groups needed to represent black rights are missing. Clearly, a history of white supremacy and oppression have bequeathed an irrevocable way of thinking to the American society which critically required some form of atoning. The common belief which motivated the enforcement then, was derived from a prevailing privilege for white Americans. To supporters of the programme, the gulf in opportunities remained too stark and heavily required some form of government intervention to overcome those social and economic prejudices.

The well renowned 2001 metafiction, “Atonement” written by Ian McEwan underscores the need to attempt righting one’s wrongs. In the modern day context of America’s secular constitution, this remains far detached from it's parochial roots evident in the novel. Instead, for the liberal ‘left’, the conservation of affirmative A=action remains crucial in bridging those social and economic disadvantages which permeate American society. In Kennedy’s own words, an African American baby born in the same place, contemporaneously, as his white counterpart, was half as likely to finish their high school education and merely a third as likely to complete college[[6]](#endnote-6). Eventually succeeded by the Johnson Administration, who saw in the act a great force for equality, affirmative action was extended to any institution which received federal money[[7]](#endnote-7). By 1965, government contractors began to enforce affirmative action to increase the numbers of minority employees. Its effectiveness can be proved by adopting a schema of the events that took place in California, 1998. An abolition of affirmative action led to minority admissions in UC Berkeley fall by a drastic sixty one percent removing over half a century’s efforts to create a diverse student body[[8]](#endnote-8).

Indeed, the implementation of the order has not been without great contention. Modern day polls suggest that 9% of the American public believe race should play a major part in admissions, with 27% believing it should play a minor part[[9]](#endnote-9). In 2015, student Abigail Fisher sued the University of Texas, arguing that the consideration of race in university admissions went against the equal protection clause of the fourteenth amendment[[10]](#endnote-10). As it has on multiple occasions, the courts ruled in favour of the university, stating that sufficient evidence was given to determine that racial consideration was enacted to ensure a diverse student body. Despite the frequent cases against it, the Supreme Court has long created a precedent in support of Affirmative Action. However, many believe decisions such as these will now be reduced to a matter of history. On July 9th, 2018, the Trump administration nominated Brett Kavanaugh to the Supreme Court ending with his appointment, albeit with one of the smallest margins in US history[[11]](#endnote-11). Since, the Supreme Court has taken a decidedly rightward shift with Roberts now as the deciding member.

Yet, as always, the picture is not black and white and Kavanaugh’s attitudes to Affirmative Action remain tentative. On the one hand, Kavanaugh has provided plenty incentive to justify the NAACP lambasting him during his confirmation[[12]](#endnote-12). He has long supported a “race-neutral” agenda in obtaining racial diversity, being active in helping the Bush Administration appeal to the Supreme Court, insisting that the University of Michigan's policies of Affirmative Action remained unconstitutional[[13]](#endnote-13). Indeed, the Supreme Court maintained their long-standing support for a ‘well-tailored’ Affirmative Action programme. It should be noted that when asked about this , he eschewed from justifying his involvement against Affirmative Action in the case of Michigan, suggesting that it would be “improper” to comment[[14]](#endnote-14). Further, in 1999 as a lawyer for private law firm Kirkland and Ellis, Kavanaugh worked alongside Robert Bork to cowrite an amicus brief maintaining that it was unconstitutional to allow only Native Americans to vote for the trustees of the Office of Hawaiian Affairs[[15]](#endnote-15). Whilst this must be balanced with the idea that his past records as a private lawyer should not be overtly indicative of his role as Supreme Court Justice, it does indeed provide compelling evidence for a bleaker interpretation for affirmative action’s future.

On the other hand, Kavanaugh has outwardly spoken in favour of the programmes, claiming that diversity is vital to American society. During his confirmation, a letter emerged from the Black Law Students Association of Harvard, praising Kavanaugh following his long-standing work of encouragement with the BLSA[[16]](#endnote-16). Moreover, this was supplemented by his attempts to recruit clerks by addressing his alma mater: Yale Law school, specifically, the Yale BLSA. Since 2012, he has made annual trips and as such, thirteen of the forty-eight clerks he has since hired have come from BAME backgrounds[[17]](#endnote-17). This itself is emblematic of a larger, uncharacteristically liberal turn in Kavanaugh’s record since December 2018 when he joined more liberal justices in ensuring to block the hearing of cases proposed by Kansas and Louisiana, who both sought to prevent women from the ability to choose to receive medical care, backed by Medicaid from the Planned Parenthood programme[[18]](#endnote-18). Last month, he rejected Louisiana’s request to prolong a law which worked to restrict abortion[[19]](#endnote-19) and further, in Texas, ensured to block the execution of a man who had an intellectual disability[[20]](#endnote-20). It is plausible, then, to suggest that Kavanaugh’s performance on the Supreme Court has strayed from his past records as private attorney and circuit judge. Indeed, his nomination bore such a contentious political discourse amongst the public, it would only remain rational for Kavanaugh to temper his conservative tendencies.

It might be judged then, that, Kavanaugh may not prove the biggest threat to affirmative action yet. His awareness of public opinion might just be enough to moderate his views and direct him away from voting against the programme. That Kavanaugh remains the only threat, would, also, appear unsubstantiated. Most recently, an ongoing case against Harvard University has seen Asian Americans protest the racial quota which has arguably been stacked against them. An exposure of over 160,000 student files revealed a correlation of poor “personal ratings” albeit inadvertently difficult to quantify. Perhaps what caused this case to hold such a particularly high resonance with many Asian Americans is the concomitant memories of the Asian American stereotype – that they remain quiet, shy and merely ‘book smart’ as opposed to boasting any natural intelligence[[21]](#endnote-21). Received wisdom has often placed the role of enemy to Affirmative Action onto the traditional reactionary character, yet in America’s modern-day society, this remains monolithic, particularly in the case of Asian Americans.

An American society without affirmative action would, however, remain grave. The fundamental inability to foster equality of opportunities between minorities and white Americans creates symptoms which permeate all sectors of American society. Currently under the 116th congress, African Americans are underrepresented with 10.7% of the Representatives and similar 9.4% for Latinos[[22]](#endnote-22). In the Senate, which is often perceived as more prestigious, there remain merely 3% African Americans and figures for the Supreme Court remain worse, still[[23]](#endnote-23). This flies in the face of 12.3 percentage of the US who are African American[[24]](#endnote-24). Affirmative Action’s focus on education is the product of the fact that every member of the Senate hold higher degrees. Therefore, to bridge the gap at the top, the gaps between education rates must be compensated. The lack of equal opportunity for education leads to a disproportionate figure for representation at the top. Set in the context of a modern-day unrepresentative Congress, it is arguably unsurprising that symptoms such as racial gerrymandering or racial police brutality continue to exist.

Kavanaugh has played a game of strategy since joining the Supreme Court, conscientiously tempering those extreme-right tendencies which bought him Presidential support in the nomination process. In relation to Affirmative Action which has long been both controversial and complicated in nature, his long-standing support for race neutral alternatives will be expected to appear in ways more nuanced than clear cut ends to AA programmes. However, this does not lessen the severity of his role as Justice. His behavior thus far has been to appease the liberal left and, as such, it remains expected that Kavanaugh capitalises on the complicated nature of Affirmative Action. Instead, his disdain for racial preference may reveal itself, not by explicitly voting against Affirmative Action, but changing the nature of the rubric and ensuring harder conditions. Indeed, this works on existing threats which have long been problematic. Low ratings in polls is symptomatic of disillusionment which stems from the persistent institutionalised racism that continues to plague modern day America. Further, in the case of Harvard, the hope to cure the marginalisation of one ethnic group has merely led to an encroachment on another. Multiple strains of argument lead to the conclusion for many, that Affirmative Action remains ineffective. Yet, it is perhaps the sensitivity surrounding the legacy of slavery and the feeling of shame, US racial history evokes that ensures for many, Affirmative Action remains vital for modern day America.

1. F. Walter , ‘Affirmative Action’, *The Oxford Handbook of Practial Ethics,* 1, 2005, p1, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199284238.001.0001/oxfordhb-9780199284238-e-12>, (Accessed 27th February 2019) [↑](#endnote-ref-1)
2. Office of Equal Opportunity and Diversity, *A Brief History of Affirmative Action,* OEOD UCI, 2019, <http://www.oeod.uci.edu/policies/aa\_history.php> [accessed 28 February 2019]. (Accessed 26th February 2019) [↑](#endnote-ref-2)
3. Justia, *US Supreme Court, Brown vs Board of Education Topeka*, 2019, <https://supreme.justia.com/cases/federal/us/347/483/>, (Accessed 26th January 2019) [↑](#endnote-ref-3)
4. National Conference of State Legislatures, *Affirmative Action Overview,* 2014, <http://www.ncsl.org/research/education/affirmative-action-overview.aspx>, (Accessed 25th January 2019) [↑](#endnote-ref-4)
5. J. Ryerson, “Race In America After The Great Migration”,*The New York Times,* 18th November 2016, <https://www.nytimes.com/2016/11/20/books/review/race-in-america-after-the-great-migration.html>, (Accessed 1st March 2019) [↑](#endnote-ref-5)
6. John F Kennedy, ‘Radio and Television Report To The American People On Civil Rights, The White House, 1961

<https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/civil-rights-radio-and-television-report-19630611>, (Accessed 26th February 2019) [↑](#endnote-ref-6)
7. The New York Times, ’The History of Affirmative Action’, <https://www.youtube.com/watch?v=OWYNNFu1aQk>, (Accessed 1st March 2019) [↑](#endnote-ref-7)
8. K.Murphy, ”Affirmative Action Ban at UC, 15 years later”, *The Mercury News,* 12th August 2016, <https://www.mercurynews.com/2013/06/21/affirmative-action-ban-at-uc-15-years-later/>, (Accessed 25th February 2019) [↑](#endnote-ref-8)
9. S.Jaschik, ”Poll : Public Opposes Affirmative Action”, *Inside Higher Education,* July 8th 2016, <https://www.insidehighered.com/news/2016/07/08/poll-finds-public-opposition-considering-race-and-ethnicity-college-admissions>, (Accessed 25th February 2019) [↑](#endnote-ref-9)
10. Oyez, Fisher vs University of Texas, <https://www.oyez.org/cases/2015/14-981>, (accessed 25th February 2019) [↑](#endnote-ref-10)
11. B.Reis et al, ‘Senator’s Vote On Kavanaugh’s Nomination’, *CNN Politics,* <https://edition.cnn.com/politics/live-news/kavanaugh-fbi-investigation-oct-18/index.html>, (Accessed 26th February 2019) [↑](#endnote-ref-11)
12. NAACP, *Naacp Statement On Nomination Of Brett Kavanaugh To The Supreme Court ,* <https://www.naacp.org/latest/naacp-statement-nomination-brett-kavanaugh-supreme-court/>, (Accessed 26th February) [↑](#endnote-ref-12)
13. American Council On Education, *Amicus Brief To The U.S Supreme Court In University of Michigan’s Admissions Cases,* <https://www.acenet.edu/news-room/Pages/Amicus-Brief-Supreme-Court-Michigan-Admissions-Cases.aspx>, (Accessed 26th February 2019) [↑](#endnote-ref-13)
14. S.Jaschik, *Kavanaugh Evades Questions On Affirmative Action, ”*Inside Higher education”, <https://www.insidehighered.com/quicktakes/2018/09/14/kavanaugh-evades-questions-affirmative-action> (Accessed 26th February 2019) [↑](#endnote-ref-14)
15. L.Arvantis and S.Cho, ”Kavanaugh Poses A Potential Threat For Affirmative Action Experts Say”, *Yale News,* <https://yaledailynews.com/blog/2018/10/15/kavanaugh-poses-a-potential-threat-for-affirmative-action-experts-say/> (Accessed 26th February 2019) [↑](#endnote-ref-15)
16. A.Ryan, ”Harvard Black Law Students Association Clarifies It Is Neutral On Kavanaugh Nomination”, *The Harvard Crimson,*

<https://www.thecrimson.com/article/2018/9/7/blsa-kavanaugh-letter-neutrality/> (Accessed 26th February 2019) [↑](#endnote-ref-16)
17. M.Coyle and T. Mauro, ”The National Law Journal: ”Kavanaugh’s Clerk Hires: Inside The Diverse, Ivy-heavy Group of 48”, Law and Justice, <https://www.whitehouse.gov/briefings-statements/national-law-journal-kavanaughs-clerk-hires-inside-diverse-ivy-heavy-group-48/>, (Accessed 26th February 2019) [↑](#endnote-ref-17)
18. T. Higgins, ”Kavanaugh, Roberts side with liberal justices as Supreme Court hamstrings efforts by Kansas and Louisiana to defund Planned Parenthood”, *CNBC Markets, 10th December 2018,* <https://www.cnbc.com/2018/12/10/supreme-court-hamstrings-states-efforts-to-defund-planned-parenthood.html>, (Accessed 26th February 2019) [↑](#endnote-ref-18)
19. N.Totenberg et al., ”Supreme Court Stops Louisiana Abortion Law From Being Implemented”, *NPR,* 7th February 2019, <https://www.npr.org/2019/02/07/690319510/supreme-court-stops-louisiana-abortion-law-from-being-implemented>, (Accessed 26th February 2019) [↑](#endnote-ref-19)
20. R.Wolf,” ”Divided Supreme Court blocks Texas from executing intellectually disabled man, citing 'lay stereotypes'”, *USA Today,* 19th February 2019, <https://eu.usatoday.com/story/news/politics/2019/02/19/supreme-court-bobby-james-moore-death-penalty-case/2914569002/> (Accessed 26th February 2019) [↑](#endnote-ref-20)
21. M.Li ”I support affirmative action. But Harvard really is hurting Asian Americans.” *VOX 18th October 2018,* <https://www.vox.com/first-person/2018/10/18/17995270/asian-americans-affirmative-action-harvard-admissions-lawsuit>, Accessed 16th February 2019 [↑](#endnote-ref-21)
22. R.Zweigenhaft, ”The 116th Congress has more women and people of color than ever – but there’s still room to improve”, *The Conversation,* 6th November 2018, <https://theconversation.com/the-116th-congress-has-more-women-and-people-of-color-than-ever-but-theres-still-room-to-improve-105930>, (Accessed 26th February 2019) [↑](#endnote-ref-22)
23. Ibid. [↑](#endnote-ref-23)
24. ibid. [↑](#endnote-ref-24)