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Is the Supreme Court Behind the Times on Race?

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In 1968, as President Lyndon Johnson and the Senate were in a pitched battle over Chief Justice Earl Warren's replacement on the Supreme Court, I wrote an article for the *New York Times Magazine* entitled "Nine Men in Black Who Think White." My argument: One vote did not matter that much because the Court had already retreated from enforcing the civil rights of black Americans and was rubber stamping all but the most blatant forms of racism.

Today the rise of the Black Lives Matter movement illustrates how far from equality the nation remains, and how dangerous the racial divisions are to our nation's health. Because the Supreme Court has the last word on the meaning of the Constitution's Fourteenth Amendment's Equal Protection clause as well the nation's civil rights laws, and because the Court is deeply divided with one chair to fill due to the death of Antonin Scalia, I realize just how much one vote matters. Depending on that vote, we can either slide back toward the time when blacks were marginalized in this country or move forward to a time when blacks will be equal citizens and we can heal centuries old wounds.

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I was an attorney for the National Association for the Advancement of Colored People when I wrote my article. The country was mired in the Vietnam war. Martin Luther King Jr. and Robert F. Kennedy had been assassinated. Blood ran in the Chicago streets during the Democratic national convention, and most Americans thought the Warren Supreme Court was a liberal bastion. Along with the NAACP's general counsel, Robert Carter, I thought the Court had settled for the most superficial reading of our Constitution, and as result African Americans were locked into ghettoized neighborhoods with vastly underfunded and understaffed schools and facilities. The NAACP leadership, however, defended the Court and I was fired, leading to the resignation of the entire legal staff.

I was wrong, however, on one point: a single vote did make a difference. Six years later, in 1973, the Court ruled that Texas did not have to finance San Antonio's public schools to equalize what the poor schools received from local taxes compared to schools in more prosperous areas. One year later, a five Justice majority decided that the state of Michigan and the white suburbs surrounding heavily black Detroit had no responsibility for the segregation of the city's schools absent proof that they intentionally caused the schools to be segregated, and so it was not their obligation to fix.

In the years since then, the Court often by a five-Justice majority has continued to display its indifference to racial progress. For example, in 1991 five Justices effectively put an end to a process of desegregating Oklahoma City's schools. Then in 2007, the Court turned its attention to attempts by school officials who actually wanted to integrate their public schools. Chief Justice John Roberts Jr. and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito struck down integration plans approved by the Louisville and Seattle school boards.

In 2013, the Court, again by five to four, crippled enforcement of the 1965 Voting Rights Act by striking down as unconstitutional a critical section that required Justice Department approval before Southern states with proven track records of discrimination could change their voting rights law. The Court, just as the dissent predicted, opened the door to the passage of voter identification laws, reduced early voting days, and gerrymandering at will.

In December 2015, the Court heard arguments involving affirmative action in *Fisher v. University of Texas*. Because Justice Elena Kagan recused herself, as she had

worked on the case as the solicitor general, the affirmative action supporters were reduced to three. Court watchers saw Justice Kennedy, who had never supported affirmative action but at least had written that under extremely limited circumstances it might pass muster, appeared to have the deciding vote, and the ability to bring about a four to four tie, which would save the issue for another day. With Justice Scalia passing away before the Court rendered a decision, Justice Kennedy's vote became even more crucial. Now there appeared to be three votes committed to the opposing sides, for and against affirmative action. Whichever side Kennedy joined would prevail. Again, the deciding vote held either the possibility of progress or further retreat in the effort to integrate the nation's educational institutions. To the surprise of court observers, Kennedy, on June 23, joined the affirmative action minded justices, giving them the narrowest of victories. Once again, one vote made all the difference.

In crucial ways, Justice Scalia's death puts us back where we were in 1968, and filling that seat takes on an urgency that was not imaginable to me in 1968. A fifth conservative Justice joining what now is a four-person conservative bloc would be a disaster for racial equal opportunity. A liberal or even moderate appointment might stop the retreat, but on some fronts —like public school segregation and voting rights — the damage has already occurred.

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Whether faced with racial integration, voting rights, the death penalty, or cases involving other minorities like this term's immigration case—where the Court recently deadlocked four to four, effectively striking down an executive order issued by President Obama, and as a result stripped away the protection from deportation that order had given to millions of mainly undocumented Latino parents of American born children—the new Justice will step into many hotly contested areas where one vote matters.

America still needs a meaningful adjustment of political power and a redistribution of wealth to bring about substantial progress toward the kinds of equality of opportunity that I argued in 1968 was critical—but now more than ever every Supreme Court vote matters.

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