EDUCATION NEWS

Ignoring the Real Scandal at the University of Texas

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The Supreme Court upheld affirmative action at the University of Texas in a 4-3 decision Thursday by openly ignoring the facts of the case.

In his opinion for the majority, Justice Anthony Kennedy dismissed a bombshell report on admissions corruption at UT as mere "extrarecord materials" which "the Court properly declines to consider." The excuse would have been a lot more convincing coming from anybody else.

Justice Samuel Alito, writing the dissent for himself, Chief Justice John Roberts, and Justice Clarence Thomas, found those records not just worthy of consideration, but devastating both to UT's argument, and to Kennedy's rationale for accepting it. They prove that UT's official story about how race is considered in admissions is little more than a cover story. For more than a decade, the school has been running a backdoor affirmative action program for the wealthy and politically connected.

That's hypocritical, of course, for an institution that opposes privilege with such sanctimony, not to mention self-defeating, but it's also directly relevant to Kennedy's given standard. "Racial classifications," he has written, "are a last resort." If that's true, and if UT's backdoor program has been contributing to classes that are too rich and white, then shouldn't the first resort be to stop doing crooked favors for rich white parents? Wouldn't a level playing field produce more diversity?

The answer is obvious, which is why Kennedy averted his eyes.

We know that the University of Texas lied to lower courts about how it conducted admissions, because that lie was exposed, in stages – by a board member named Wallace Hall, by reports in Watchdog.org, by a whistleblower in the admissions office, in an investigation known as the Kroll report, in further reporting on the truly damning material left out of the Kroll report, and finally, perhaps one day, when the Texas courts force Chancellor Bill McRaven to turn over 25,000 pages of investigatory records he has hidden from his own board.

The legal principle the Supreme Court decided Thursday is whether UT's defense of its affirmative action would survive "strict scrutiny." But considering UT's own board is blocked from scrutinizing admissions, it's not clear what the court thinks it was scrutinizing. A bunch of decade-old legal fictions, I'd say, fictions exposed by the Kroll report.

At a panel at the Cato Institute in December, constitutional attorney Andrew Grossman, who filed a brief in the Fisher case, predicted that "there's no way this mess of a program passes muster with Justice Kennedy, unless he repudiates basically everything he's ever written on

affirmative action." That's just what Kennedy has done. Alito subtly called out the hypocrisy, by citing Kennedy 16 times in his dissent.

"[J]udicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect,'" was one Kennedy quotation. Another: "'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'"

Kennedy knew he didn't have that here, wondering at oral arguments whether the court ought not to send the case back down for more fact-finding. And he conceded as much in his opinion, writing that this case has "a record that is almost devoid of information about the students who secured admission to the University" under a law that awards three-quarters of the seats in each freshmen class based on high school class rank.

The court knew nothing about them, and of course nobody knew anything about the students admitted through the secret admissions program set up by disgraced former president Bill Powers. We know now that from 2009 to 2014, at least 764 applicants who were initially denied admission were ultimately admitted through Powers' secret back door, some with grade point averages below 2.0 and SAT scores in the 800s. The Cato Institute, citing my reporting for Watchdog.org, argued that it's likely the secret backdoor program "results in more admissions than… (the) ordinary 'holistic review' process" that the court was reviewing. In short, the actual admissions operation bore little resemblance to the decade-old record assembled in lower courts.

Kennedy's reason for ignoring the reports on admissions corruption was that they "are tangential to this case at best." He insisted that the university hadn't had "a full opportunity to respond to" them. The weasel word there is "full," as the university did respond to them in two briefs. Alito pointed out that six briefs in all referenced the admissions scandal, and even cited three passages in them that cite my own reporting.

Then Alito dropped the hammer: "the Court's purported concern about reliance on 'extrarecord materials' rings especially hollow in light of its willingness to affirm the decision below, which relied heavily on the Fifth Circuit's own extrarecord Internet research."

That's quite a principle the court is upholding: Only facts from the trial court may be considered, and Google, or something.

"The majority is also wrong in claiming that the Kroll Report is 'tangential to this case at best,'" Alito writes. "Given the majority's blind deference to the good faith of UT officials, evidence that those officials 'failed to speak with the candor and forthrightness expected of people in their respective positions of trust and leadership…' when discussing UT's admissions process is highly relevant."

This is not—as the Court claims—a "good-faith effor[t] to comply with the law." The majority's willingness to cite UT's "good faith" as the basis for excusing its failure to adduce evidence is particularly inappropriate in light of UT's well-documented absence of good faith. Since UT described its admissions policy to this Court in Fisher I, it has been revealed that this description was incomplete. As explained in an independent investigation into UT admissions, UT maintained a clandestine admissions system that evaded public scrutiny until a former admissions officer blew the whistle in 2014. Under this longstanding, secret process, university

officials regularly overrode normal holistic review to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT officials and faculty—to get family members and other friends admitted to UT, despite having grades and standardized test scores substantially below the median for admitted students.

The courts, Kennedy once wrote, must "force educational institutions to seriously explore race-neutral alternatives," by applying "strict scrutiny" to their actual operations. UT had a race-neutral alternative here. The 75-percent law (or Top 10 Percent law, as it's better known) has produced diversity throughout Texas universities. That's the major reason that universities across the country panicked when the Supreme Court took up this case a second time. It's the reason Grossman, like almost every expert, was sure UT's policy, at least, would be struck down. So it's wacky enough that the court upheld UT's racial preferences, but to pretend that it has engaged in "strict scrutiny" when UT's admissions office remains a black box is absurd. If the court is willing to toss aside its own standards as nothing more than legal jibber-jabber, why should it expect lower courts to pay them any more regard?

The absurdity is that scrutinizing a secret is simply an impossibility. Alito picked up on it, noting that "UT officials involved in this covert process intentionally kept few records and destroyed those that did exist…. And in the course of this litigation, UT has been less than forthright concerning its treatment of well-connected applicants."

He cited a UT attorney lying to the court at oral arguments in December, denying that the university gave special treatment to the children of alumni – which is illegal in Texas – when the Kroll report 10 months earlier found proof that it did.

"Despite UT's apparent readiness to mislead the public and the Court, the majority is 'willing to be satisfied by [UT's] profession of its own good faith,'" Alito wrote.

Kennedy once predicted that the "Court's refusal to apply meaningful strict scrutiny will lead to serious consequences," and he was right.

Universities will practice invidious racial discrimination, and they will lie to your face about it. But worse, they have taken this sin and made of it a religion, an anti-gospel of grievance and hatred. It has poisoned the soul of the academy. Alito, Roberts, and Thomas are all clear on this issue, uncomplicated. They know this is sin, but Kennedy is lost, off somewhere conducting an obscure Talmudic argument with himself.