Forbes

Texas Will Lose On Affirmative Action, But Will Supreme Court Outlaw Racial Preferences Entirely?

Daniel Fisher

December 5, 2015

Fisher v. University of Texas, to be argued at the U.S. Supreme Court Wednesday, is a pivotal test of affirmative action in education, but the outcome might be known already: Five justices will likely rule against UT.

The question is how far they go beyond that. A sweeping ruling outlawing racial and ethnic preferences entirely would follow Chief Justice John Roberts' famous prescription in a 2007 decision: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Justice Clarence Thomas also supports such a ban. But it is unlikely, since Justice Anthony Kennedy, the swing vote, has consistently upheld the concept of affirmative action in theory, even if he has voted to strike down specific examples in practice.

Attorney Bert Rein and his client Abigail Noel Fisher, whose case is at the Supreme Court for a second time. (Photo by Mark Wilson/Getty Images)

Look for the Justices to ask questions about why the specific program at UT is necessary. Texas already uses a clever technique for balancing admissions by accepting applicants who are in the top 10% of any accredited high school in the state. That guarantees applicants from schools with a high percentage of minority students have the same chance as students from wealthy white school districts.

Applicants who don't make it in under the top 10% program are evaluated through a second, "holistic review" that is at stake in this case. The Supreme Court was prepared to strike it down the first time Fisher v. University of Texas made it to the court, but instead sent it back to the Fifth Circuit Court of Appeals with instructions to apply stricter scrutiny to the details. The Fifth Circuit approved UT's program a second time, Fisher appealed, and the high court agreed to hear the case again.

The only reason there is a Fisher II is Kennedy agreed to give UT another chance in order to avoid acrimony on the court, according to an account by Reuters legal editor Joan Biskupic. In an interview with Pro Publica, Biskupic said while researching a book on Sotomayor she discovered the justice, the child of Puerto Rican immigrants who won a scholarship to Princeton, planned a strong dissent attacking her conservative colleagues' opposition to affirmative action. Since the conservatives were fractured on the topic anyway – Thomas, the court's sole black justice, wants to end all race-based classifications, while Kennedy supports them in theory – Kennedy brokered a deal to remand the case. (Sotomayor's dissent made a reappearance in Schuette v. BAMN, in which she wrote: "Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: `I do not belong here.'")

This time those same five justices are likely to strike down UT's plan entirely. In Fisher I, Kennedy wrote, "the reviewing court must ultimately be satisfied that no workable race neutral alternatives would produce the educational benefits of diversity." The fatal flaw with the UT program, opponents say, is it's opaque: University officials can't say what role race played in any specific admission, and therefore can't say whether the program actually advances the "educational benefits of diversity." Admissions officers grade students on their academic performance as well as "personal achievement," including race, and then average the two scores.

"They've designed this program quite deliberately to be unaccountable and non-transparent," said Andrew Grossman, an associate with Baker Hostetler in Washington who wrote a brief for the libertarian Cato Institute, where he's also a fellow. "The hallmark of strict scrutiny is the court has to satisfy itself the program is narrowly tailored and achieves the government's objectives."

The court could avoid banning racial preferences outright by ruling narrowly on UT's holistic review. And that would be just fine with officials at private colleges and universities, who have written a brief that not-so-subtly throws UT under the bus. Charles Sims of Proskauer Rose represents 36 selective colleges including Amherst and Williams who say their First Amendment rights are at stake if the court forces them to remove race entirely from admissions decisions.

"This decision can be written very narrowly, based on fact that Texas already has the 10% plan, and this additional little carbuncle doesn't make a difference," Sims said of UT's additional program of holistic review. His advice to the court: "Whatever you do to Texas, leave us for another day."

The Supreme Court first approved affirmative action in 1977 with Regents of the University of California v. Bakke, a fractured decision that allows college officials to consider race only if diversity advanced the educational mission of the school. The court upheld a similar plan at the University of Michigan Law School in 2003 with Grutter v. Bollinger, but struck down Michigan's undergraduate admissions policy for giving members of certain minority groups an extra 20 points on a 100-point scale.

Such blatant race-based favoritism was unconstitutional, the court held. But in Grutter, Justice Sandra Day O'Conner assembled a bare majority for the proposition that admissions officers could still strive for "diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts," citing Bakke.

Critics still say preferences can lead to insidious discrimination against groups college administrators don't like. In Grutter, former Michigan law School Dean Allan Stillwagon described how faculty debated whether to consider Cubans Hispanic, since at least one faculty member noted they were Republicans. Kennedy is particularly concerned about this at government institutions, and dissented in Grutter because he thought the court's scrutiny wasn't strict enough.

"Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution," he wrote, possibly signaling he will impose a higher duty on the University of Texas than private colleges generally.

The arguments for affirmative action are strikingly blunt: Unless admissions officials can consider the race or ethnic background of applicants, they will reject them. The Texas "holistic review" program, for example, is designed to solve the problem of too many poor black and Latino applicants by giving minority students who went to less segregated and presumably more academically difficult schools a second shot at attending the state's premier university. Those students tend to be more affluent and help diminish the stark socioeconomic divide between white students and students of color, the school argues.

The private colleges make a similar argument. In their brief Williams (full disclosure: My child is a sophomore there) says it studied admissions and concluded a program that considered only socioeconomic characteristics would "significantly limit" the number of black and Latino students in its applicant pool and their academic records "would be on average considerably weaker than it now can select from."

"Because so many of the poor applicants are white, attending to socio-economic factors without race consciousness would not maintain the present mix of diversity, but would shed the middle-class applicants of color who, research and experience show, are most likely to excel," Williams concluded.

The result would be a "drastic resegregating impact," the schools say, with African-American enrollment dropping 50-70%.

The private colleges, of course, maintain their programs would survive strict scrutiny under Supreme Court precedent anyway. They don't use color-coded folders or group applicants according to race or ethnic background and admissions officers aren't updated on the number of minority acceptances during admissions season, a practice that got the University of Michigan in

trouble. As a result, African-American admissions at Amherst have ranged from 125 to 179 since 2003, while at Pomona freshman African-American enrollment has ranged from 6.7% to 13.2%.

“It’s just not possible to say admissions people can’t think about somebody’s color,” said Sims, however. And Anthony Kennedy, the key man in this case (Justice Elena Kagan will recuse again), is unlikely to vote for a decision that removes color completely from the process.