

## Behind the affirmative action decision

By: Josh Gerstein- June 24, 2013

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The Supreme Court took a long time to issue a relatively short and nearly unanimous opinion Monday on affirmative action — a result that analysts say demonstrates the internal debates and politicking among the nine justices.

The seven-judge majority didn't upend racial preferences in higher education but instead told lower courts to take a closer look at the University of Texas program in dispute. To Court watchers, the pre-Independence Day fizzle was about conservative and liberal justices spending months convincing themselves that they'd rather not have the court confront the issue head-on. At least not now.

"After eight and a half months, the court issues a 13-page opinion? Clearly there was something going on in the background," Ilya Shapiro of the libertarian Cato Institute said, noting that the case was argued back on October 10. "It's curious."

"It's an interesting vote and it took a long time, which made people wonder what was happening, but it seems like a majority of the court and Justice [Anthony] Kennedy—in particular—sees value in diversity," said Kerry Scanlon, a former top civil rights division official in the Clinton Justice Department who now works for Kaye Scholer.

Chuck Sims, a former ACLU lawyer now at Proskauer Rose, said he believed that the facts of the decision suggest that the final version issued "looks very different than the first draft."

"Clearly, there was a lot of horse trading and it became the dominant judgment up there that they were better off doing less with more support than having a very fractured decision," Sims said. "My guess is Breyer and Sotomayor came along pretty late in the day, probably after some angrier draft dissents or concurrences got put away. This decision was probably much, much lengthier a month or two or three ago."

Shapiro said he suspects either Chief Justice John Roberts or Kennedy urged the court to avoid a splintered result. "I think there were several attempts at different kinds of majority opinions or plurality opinions, [but] Roberts or Kennedy suggested the narrowest possible ruling.....It could go along with Roberts having the court speak with more of one voice," Shapiro said. "There were certainly sections in there that could have been part of a Kennedy opinion striking down a U.T. program."

Given indications that both Roberts and Justice Samuel Alito have a dislike for race-based preferences, some analysts were surprised to see them join an opinion which arguably

reinforced the basic thrust of the court's 2003 opinion upholding affirmative action in Grutter—a challenge to the University of Michigan's undergraduate admissions program.

Many liberals thought Roberts and Alito might join with Justices Antonin Scalia and Clarence Thomas to try to bring an end to the use of race in public higher education, and get Kennedy's vote to join them. All but Thomas backed away from the approach in Monday's opinions.

Scalia noted that lawyers for Abigail Fisher, the white UT applicant who sued after being denied admission to the school, never actually asked the court to upend the 2003 ruling.

"The petitioner in this case did not ask us to overrule Grutter's holding that a 'compelling interest' in the educational benefits of diversity can justify racial preferences in university admissions.... I therefore join the Court's opinion in full," Scalia wrote in a one-page concurring opinion.

That raises the question of whether Fisher's legal team should have attacked the earlier precedent head-on in the Supreme Court.

"I'm confident that the way we argued the case based on the facts on the ground, that we argued this from the correct posture," said Fisher attorney Edward Blum. "I suspect there one day may be litigation that asks the court to revisit the underlying principles of Grutter and the constitutionality of used race in admission at all. It looks like from the opinion here...that the time may not be ripe to ask the court to do something like that."

Sotomayor and Breyer may have also concluded that they didn't want to wind up on the losing side of a case that either overturned affirmative action or set an impossible bar for such programs to meet. They may have decided that the result announced Monday would get them past the halfway mark on the famous 25-year clock Justice Sandra Day O'Connor started ticking in the Grutter opinion as the point by which there would no longer be a need for educational affirmative action.

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