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Justice Kennedy's Racial Do-Over

Texas and the Fifth Circuit ignored his ruling in Fisher.

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Does a university have to follow Supreme Court rulings, or can its politically correct intentions justify disobedience? That's one of the questions the Justices will consider in oral arguments Wednesday in its second round of a case on college racial preferences.

The do-over comes in Fisher v. University of Texas, in which Abigail Fisher claims her rights were violated when she was denied admission by the University of Texas because she is white. The university used race in admissions despite the success of a race-neutral program that has made UT one of America's most diverse public universities.

The 7-1 ruling in 2013, written by Anthony Kennedy, said the Fifth Circuit Court of Appeals had used the wrong standard when it allowed the school's continued use of race and sent the case back to the lower court to reconsider the preferences under strict scrutiny. Justice Kennedy said this meant any use of race must be narrowly tailored and necessary to achieve the benefits of diversity because race-neutral means would fail.

Texas proceeded to change nothing, and two judges on the Fifth Circuit more or less gave the Supremes the brush off. In his dissent, Fifth Circuit Judge Emilio Garza wrote that his colleagues failed to make any meaningful inquiry into Texas's admissions process, which isn't scrutiny at all.

The reality is that UT has satisfied none of the commands laid down by Justice Kennedy. Its admissions process is opaque and the school won't say specifically how it uses race as a factor. University of Texas President Gregory Fenves graciously proves that point in a nearby op-ed. If you can figure out what "holistic" means, congratulations.

The state's race-neutral Top Ten Percent law provides a diverse student body without preferences. Texas public universities automatically guarantee admission to the top 10% or so graduates in every high school. In 2004 UT's freshmen were 21.4% African-American and Hispanic without the school using any racial classifications.

UT's use of racial preferences has also acted as a smokescreen for favoring politically connected applicants who qualify under the "holistic" approach. This includes admissions set-asides for friends and favorites of powerful politicians. In its amicus brief in Fisher, the Cato Institute notes that former UT President Bill Powers "placed 'holds' on about 150 to 300 in-state applicants each year from 2009 to 2014" for the politically favored.

Our view is that such arbitrary favoritism, racial and otherwise, is inevitable under any racial-preference scheme. The best solution is to ban the use of race in admissions under the Equal Protection Clause of the Fourteenth Amendment. But Justice Kennedy has never gone that far and has tried to offer schools and employers a middle way on race.

Yet the bias toward using race is so ingrained in academic culture that university officials simply won't obey that middle way. Universities like Texas are engaged in what can only be called massive resistance to the Supreme Court, and the Fifth Circuit has abetted them by failing to apply strict scrutiny. If Justice Kennedy lets them get away with it, others will treat his opinions with similar disdain.