Supreme Court Crisis

Why the next appointed Supreme Court Justice matters in Fisher v. University of Texas at Austin, et. al

Elva Pérez Treviño

Author's Note: This article (Part I of II) was meant to originally just discuss the Fisher v. University of Texas at Austin, et. al case and its possible implications and impact on affirmative action and education. But two things have changed since the Supreme Court heard this case at its December 2015 session. Justice Anthony Scalia, a seating Justice at the time who heard the case, has died. The Senate now refuses to proceed forward with voting, and ultimately selecting, a new Supreme Court Justice to replace him, from the candidates to be sent to them by President Obama. The facts of the Fisher case, and the Senate's refusal to obey the constitution puts us, as a country, smack in the middle of a constitutional crisis right before a major national election for president. Given the circumstances, the author would like to take an opportunity to explain who the Supreme Court is, what it does, how it does it, and why it does things the ways it does, all within the context, and juxtaposed to the Fisher case. It will help illustrate this apparent constitutional crisis, our dire straits as a country and why, likely, the best scenario for us as a nation should be a presidential contest between the likes of Bernie Sanders and Donald Trump that will lead us to decide, finally: Are we a country of reactionary racists, or are we a country willing to join the rest of the world in peace and cooperation?

With Supreme Court Justice Scalia's recent death and Justice Kagan (in grey) recused from the Fisher v University of Texas @ Austin, et. al case—the final decision may rest on the shoulders of only 7 justices if Justice Scalia is not replaced.

This article is not meant to be a comprehensive overview, nor a deep analysis, more appropriate for another type of journal article, about affirmative action programs and their intersection with access to education by racial minority students. I attempt to present enough information concerning this intersection of forces to at the least raise the reader's curiosity, and certainly to raise the reader's concern, about the future of affirmative action and education especially now when an appearance of a constitutional crisis has arisen. Here is the situation: Affirmative action is now dependent on seven (7) justices to survive or fail as a social national experiment meant to remedy past discrimination against minority race citizens excluded from equal protection under the law, equal opportunity at economic freedom from poverty and freedom of movement, and access to information and knowledge.

Racial Equality, then, for us, rests on our trust that government will continue to honor our history and legacy of theft, death and pain that has led, brokered, financed and maintained this country from its birth through its wars to the present wherein education is not free and it costs a fortune to get schooling.

Racial equality, then. rests, too, in the hands of Congress and the Senate as created and given their powers under Article I of the Constitution of the United States; on an Executive Branch, the President, authorized under Article II; and on a Supreme Court, whose creation, powers, and authority are all outlined in Article III. Racial equality, then, is a reality that can only manifest itself as long as these three branches of government continue to provide for us the consistency and continuity of a progressive national political character of law and order based on the higher good for all.

Here is why the next Justice matters: The Supreme Court's main function is as arbitrator of what the constitution, law and legislation mean, and their validity and legality in application, result and effect. In combination these three Branches of Government are to balance each other out, help keep order, structure and function in government. No one Branch can try to be superior to the other. Under this scheme the President gets to nominate who sits on the Supreme Court and the Senate gets to decide by vote which of the nominees sent to them by the president is selected. By announcing that the Senate will not consider any candidate pushed forward by President Obama the present Senate is trying to name the next Justice to seat on the Supreme Court by illegal means but hiding behind procedure and protocol.

Early on in the development of these United States the Supreme Court usurped the authority to review the government actions of the legislative and the executive branches of govern-

> ***In other words, who gets to select the next justice gets to select the next person who will bring legal meaning into our lives. That person will be acting through more than a cultural institution, that person will be a reflection or a reproduction of a particular culture.***

ment, it took on the task of being the ultimate decision maker of deciding what is the "law of the land". Whoever seats on the Court then has a lifetime to influence and have a direct effect on our lives, the conditions of our lives, and whether lawful means are ultimately left to us the citizens with which to grieve and confront a wayward legislature intent on paralyzing this country into antiquated times and a supreme court leading us into dangerous thinking on race, intelligence and equality.

Sometimes the Supreme Court is accused of making up rights out of whole cloth that don't exist, at others, it struggles to correct untenable situations for us as citizens coming before it with our grievances in hand asking it to try cases that are really the provenance of politics and legislatures.

At other times the Court works very hard at cutting away and limiting the rights we do have. No one decision, no one case, no one set of facts can possibly always deliver justice or equal protection or due process, that is a given—but when the Court who claims to be anti-social engineering, like the current Roberts Court does, starts doing exactly that type of social engineering of which it complains, then we have a Supreme Court that has been compromised by the politics of Congress as we see currently happening with the death of Justice Scalia and President Obama appearing to be unable to move forward with replacing this Justice.

National Action Network members demonstrate outside the Supreme Court on Dec. 9 as the court heard oral arguments in the Fisher case. (Cliff Owen/AP)

Who ultimately gets to nominate the next Justice of the Supreme Court matters more because there is a connection between Law and Culture. Culture is a precondition for the possibility of human meaning engaged in the work of reproducing social order. Within the context of culture, this person will select ideas and perspectives, will interpret and rely on these for his or her ongoing own political experience, values and moral bearings—in a word, their personal politics to form the dynamic relationship and the job of doing justice.

So then who is this Supreme Court? It goes about its business by selecting text, interpreting text, and reaching collective decision where language is traded like a commodity, words are bargained for meaning, and weight, and nuance, and effect; all just like money.

A Supreme Court opinion is not written by any one person, it is instead made up of the collective mind of the Court. It is a language of consensus politics, at times intentionally broad or vague and at other times, too specific. Thus we come to consider "what the law is", as well as, "what is the law". The task becomes more difficult because it becomes a task of interpretation. What eventually becomes a "law" that is, what rule will regulate certain perspectives or certain applications, becomes a political weapon to be wielded by perpetrator against victim until the next time the issue comes before the court in a question form it likes.

And so at times it becomes impossible to apply "this law" to all situations and still be able to reach a reasonable understanding of why we get the results we get. Added to this is that, anytime anyone tries to write about the "law", meaning the rule in question, or any other legal topic, then our social, political lives must grapple with the concepts of 'justice", "equal protection" and "due process" in our daily lives. That, again, another matter of perspective and what we want the "result" to be, how we want to process that result, and how we get there by a certain way.

Who gets selected as the next Justice matters because the language the justices finally select and use in their collected opinion as one unified voice of the Court, at the end, is a language that decides the "whom" [i.e. for *whom* it will be decided] behind the "who" shall win the case.

The next Justice matters because, as it reaches decisions momentous to our lives, the Supreme Court is engaged in a type if collective bargaining, bartering over "words", their implications, their inferences, their twirls and turns of double meaning, at times intentionally vague or over broad, at others, intentionally limited to fact or case specifics. It is a certain language whereby certain "points of view' or "perspective" or certain "historical lenses" are adjusted; others are fought over; and some are just sacrificed for the greater good or the lesser evil. All this is the Supreme Court's effort to present a perspective that appears as the most unified voiced legal opinion it can present to the country that is "equitable, fair and just". They render decisions

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that seem on the surface, to be well reasoned, amorally applied, aesthetically argued and decided and that, in practice, are neutral in application and impact to our individual rights as citizens of these United States, as Human Beings, and as members of specific, identifiable protected classes under color of law.

So who is this Supreme Court? It is the most conservative court that has ever sat in modern times. The fight for the Supreme Court and the fight to sit as many conservative justices as possible has been an on-going very public battle since George Bush I. But the Supreme Court can never seem conservative enough because the country of the conservative right has shifted into reactionary fanaticism and the Court remains too liberal for this political element.

The Fisher v. U.T. el al case, reargued on December 9, 2015, will be decided at the end of the 2015–2016 term. People will queue up once again to hear it.

The Supreme Court that currently sits does not adequately reflect this county's diversity of population, thought, philosophy nor cultural influences and backgrounds. This is the reason there is a constitutional crisis on-going with regard who gets to vet, nominate and deliver to the senate the next potential justice to sit on the Supreme Court.

With all this in mind, I submit that the Supreme Court headed by chief Justice Roberts selected the Fisher v. University of Texas @ Austin, et. al because it wanted to review affirmative action without the facts getting in the way, and without having to consider any minority perspective on the matter. As a whole the majority of the justices on the Supreme Court are skeptical or are downright hostile to affirmative action.

Lets look at the Court's action in the selection of text, that is the case it chose to hear. As mentioned earlier, it is important to note text and context because this determines the question the Supreme Court takes on for review for its decision making and laying down the law, a very paternalistic endeavor, indeed. The Court selected the Fisher case even though there are major problems with it.

The question presented to the Court in the Fisher case is more a political question than a legal question. The U.S. Constitution prohibits the Supreme Court from hearing political questions and also from issuing political opinions. The political question no one dare ask, is the one that asks whether or not we are going to acknowledge that historically, skin color has been a badge of shame and glory, and that life can be grand in America if you are white in America. Dare we as a nation discuss racism for the political weapon that truly separates us into warring camps that cut deep into the fabric of our national unity. Do we finally stop ranking oppression and just unify and fight oppression.

Bio: Elva Pérez Treviño, an Attorney at Law, is a native of San Antonio, Texas. Part II of this article continues in the May Voz.

Guns in The Classroom

Misinterpreting the Constitution

Jen Knox, Adjunct Professor at San Antonio College

The Second Amendment was passed in 1791 in an America that did not have the legal infrastructure that it has today, and it was designed for the purpose of self-defense and resistance to cruelty. The Second Amendment was not designed to lead to oppression or to deny the rights of educators and students who are holding class in a public venue.

A law that allows students to carry concealed firearms is, in fact, denying my right to feel safe and free to speak about tough issues. College is place where ideas should be open and shared, not censored. Free speech allows students and educators to explore the ideas of the world and challenge notions that have been long held. Guns in the classroom, however, invite violence in such a well-documented way that I no longer want to teach in face-to-face settings.

Those who believe vehemently that they have a right to bear arms in 2016 have fought to have access to guns on college campuses and, therefore, have fought to deny me a right to feel safe in my classroom. They have fought despite myriad documented and horrifying reasons that begin with the endless news stories about school shootings, such as Virginia Tech and Sandy Hook, and end with innumerable news stories about accidental gunfire, even by our country's own Vice President in February of 2006. Those who tout the Second Amendment as a reason to bring guns—which were intended for self-defense and to oppose tyranny—to places of learning are misunderstanding the constitution and, in fact, violating my First Amendment rights.

A *Quiet* Change with a BIG Impact

By Rodney Klein & Eduardo Juárez

With all the publicity surrounding the U.S. Supreme Court's ruling on gay marriage, the passage of the City of San Antonio's non-discrimination ordinance, and the unfortunate repealing of the City of Houston's non-discrimination ordinance, the steps taken by the U.S. Equal Employment Opportunity Commission (EEOC) to protect LGBTQI workers from employment discrimination has gone largely unnoticed by the mainstream press and quite possibly by many workers in San Antonio. But, just because those steps have not gotten the same notice as other recent events, does not mean they will not have a significant impact.

Photo: Community Alliance for a United San Antonio (CAUSA) and other civil rights groups eventually pushed SA's Non-Discrimination Ordinance through at City Hall.

So, what did the EEOC do? I will give you the short explanation, then I'll give you a slightly longer version.

The short version: Transgender employees and applicants for employment are protected from discrimination.

The slightly longer version: Wait, transgender applicants and employees can't be protected, right? We all know the federal civil rights statutes protect employees and applicants for employment from discrimination based on race, color, religion, sex, national origin, age (40 and over), disability and genetic information. Gender identity is not explicitly on that statutory list, so how is it protected?

Sex is protected. It is protected under Title VII of the Civil Rights Act of 1964. And, it has two definitions under Title VII, thanks to a precedent setting decision by the U.S. Supreme Court. The first definition, as you would expect, is biological sex. The second definition, though, involves the idea of "gender." The Court said that our society creates norms and stereotypes around the concepts of masculinity and femininity. It concluded that when people are harmed in their employment because they don't meet these stereotypes – or in other words, are judged by others as not meeting a "masculine" or "feminine" ideal, given their particular biological sex – then they are being discriminated against because of sex, which is a violation of federal law.

Since that decision, this legal concept, known as gender stereotyping, has been increasingly applied to cases of employment discrimination against individuals who are transgender. So, in 2012 the EEOC adopted a public position saying that employers who discriminate against employees or applicants because they are transgender are discriminating against them because of their sex. This includes individuals who express gender in a non-stereotypical fashion, individuals who have transitioned or are in the process of transitioning from one gender to another, and individuals who identify as transgender.

So what about sexual orientation? I'm sure you noticed that sexual orientation also is not explicitly on the statutory list of protected classes. Is it protected, too, under federal employment law?

Short answer: Yes, lesbian, gay, bisexual, and straight persons are protected from employment discrimination.

Slightly longer version: Again, it involves sex. In July 2015, after carefully analyzing years of federal court decisions, the EEOC concluded that sexual orientation is covered under Title VII as sex. The EEOC's reasoning is very direct. In explaining its position, the agency says that workplace discrimination based on sexual orientation is, "inherently" and "necessarily" sex-based. In other words, the connection is obvious. Sexual orientation discrimination is sex discrimination.

Let me give you three examples of how this works. Example one, let's say I am being discriminated against on the job because I (a man) am attracted to men. This is sex-based because if I were a woman attracted to men, it wouldn't be a problem.

Example two involves something known as associational discrimination. This is a theory of discrimination that has been recognized by the EEOC and federal courts for years, but mostly in regards to race. It works like this. Let's say I'm discriminated against on the job because my wife is Black (and I'm not Black). This amounts to race discrimination because I have a close association with a person who is Black. Well, if this works for race, it should also work for sex. In other words, if I (a man) am being discriminated against on the job because I have a close association with, or married to, another man, then that is sex discrimination.

Example three goes back to the gender stereotyping concept we discussed earlier. If we can say that being attracted to people of the same sex does not conform to certain socially constructed gender stereotypes, then being discriminated against because of that attraction must be sex-based and actionable under Title VII.

These protections are important and far reaching, even if they don't get as many headlines as some other high profile issues that are, for obvious reasons, very important to our community. This is particularly true in Texas, where, as we know, State law does not protect people from employment discrimination based on gender identity or sexual orientation. So, know your rights, be your own best advocate, and call us at the EEOC if you need us.

If you would like to speak with an EEOC staff member about a workplace issue, or about possibly filing a charge, call 1-800-669-4000, for a video call with an American Sign Language interpreter call 1-844-234-5122. Or, if you would like some additional education on this topic or any other law enforced by the EEOC, call me, Rodney Klein, Outreach and Education Manager, at 210-281-7666 or my cell 210-693-9618 or through e-mail at rodney.klein@eeoc.gov.