Ducking on Affirmative Action

In a hurtful blow to affirmative action in higher education, the Supreme Court said on Monday that it would not hear an appeal by the state of Texas from a lower court ruling that barred preferences from using race as a factor in selecting students. With this sidestep, the University of Texas case left officials in at least three Southern states who are working to open educational opportunities for minorities in an untenable state of uncertainty. It also sowed confusion nationwide—hardly an uplifting way for the Court to finish its term and head into recess. The Court should instead have seized the opportunity to reject the lower court's flawed pronouncement and reaffirmed its historic commitment to carefully designed affirmative action.

The high court seemed insensitive to the long history of racism at the University of Texas Law School, whose affirmative action program was challenged by rejected white applicants, giving rise to the case. As late as 1971, the law school admitted no black students. The Court also ignored the Clinton Justice Department, which filed a brief warning that the "practical effect" of the lower court's holding "will be to return the most promising black and Hispanic students to the University of Texas’ systems to their former ‘white’ status." The refusal to hear the case left standing a ruling by the United States Court of Appeals for the Fifth Circuit that caused justifiable consternation in the academic world three months ago. An appellate panel invalidated a special admissions program at the Texas law school aimed at increasing the number of black and Mexican-American students. In doing so, the panel took the gratuitous, additional step of declaring the Supreme Court’s landmark 1978 affirmative action decision in the so-called Bakke case no longer good law.

That case involved a white applicant who sought entry to a California state medical school, resulted in a ruling that barred the use of quotas in affirmative action plans but permitted universities to use race as a factor in choosing among applicants to serve the "compelling interest" of creating a diverse student body.

If Bakke is no longer good law, it is for the Supreme Court to declare. But instead of grabbing the case to reassert Bakke’s sound principle, the justices found a way out in the odd posture of reviewing an one-paragraph opinion that was also signed by Justice David Souter, Justice Ruth Bader Ginsburg said that the Court was denying review because it did not accept the lower court’s ruling as "a live controversy." The kind of two-track admissions system that inspired the legal challenge is no longer used or defended by Texas, she explained. Like most other colleges and universities, the University of California state medical school, resulted in a ruling that barred the use of quotas in affirmative action plans but permitted universities to use race as a factor in choosing among applicants to serve the "compelling interest" of creating a diverse student body.

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