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 schools from using race as a factor in selecting students. With this sidestepping, the dissenting justices in the case to completely excluded race as a factor in selecting students. With this sidestepping, the dissenting justices in the case said the court’s holding was to be the principal case to completely excluded race as a factor in selecting students. The Kind of two-track admissions system that inspired the case 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 would be to return the kind of two-track admissions systems to their own ‘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 case of an odd procedural quirk. The one-paragraph opinion that was also signed by Justice David Souter, Justice Ruth Bader Ginsburg said that the court was denying re-review because the case did not act to present 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. In most other colleges and universities, the University of Texas Law School now uses a single applicant pool, in which race is one factor to be considered among others in choosing among the qualified.

Justice Ginsburg’s message, a welcome one, was that the Court’s refusal to hear the case should not be read as endorsement of the Fifth Circuit’s analysis. But, in fact, there was a remaining live controversy before the court in the Fifth Circuit’s decision on a state’s leading law school to completely excluded race as a factor in future admissions. The shame is that the Court declined to assess.

Instead, the court left behind a mess. Its refusal to hear the case has put educational institutions in the three states that make up the Fifth Circuit—Texas, Louisiana and Mississippi—in a terrible spot. They could face punitive damages if they fail to change their practices to conform to an ill-considered ruling that may ultimately be judged an incorrect statement of the law.

Nervous educators elsewhere in the nation can find some comfort at least in Justice Ginsburg’s benign explanation. Eventually, this equal rights battle will find its way back to the Supreme Court. Meanwhile, it is premature to give up on the kind of two-track admissions systems still needed to blot out historic racial bias and promote educational diversity.

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. COCHRAN. Mr. President, I ask unanimous consent that the Senate proceed to executive session to consider the following nomination on today’s Executive Calendar: Calendar No. 588, Edmund Sargus, J.r., of Ohio, to be United States District Judge for the Southern District of Ohio.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Without objection, it is so ordered.

The nomination considered and confirmed is as follows.

Edmund A. Sargus, J.r., of Ohio, to be United States District Judge for the Southern District of Ohio.

ORDERS FOR TUESDAY, JULY 23, 1996

Mr. COCHRAN. Mr. President, I ask unanimous consent that when the Senate completes its work today, it stand in adjournment until the hour of 9:30 a.m. on Tuesday, July 23; further, that immediately following the prayer, the Journal of proceedings be deemed approved to date, the morning hour to be deemed to have expired, and the time for the two leaders be reserved for their use later in the day, and the Senate immediately resume the reconciliation bill as under the previous order.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. COCHRAN. Mr. President, for the information of all Senators, tomorrow morning at 9:30 a.m., there will be a lengthy series of rollcall votes on, or in relation to, amendments to the reconciliation bill. Members should be alerted that there may be as many as 24 consecutive rollcall votes.

Mr. President, I now make unanimous consent that beginning at the first vote, all remaining votes in the voting sequence be limited to 10 minutes in length.