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National View: Are Americans ready for a post-racial society?

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GHS
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In its widely anticipated decision in Ricci v. DeStefano - the New Haven firefighters' case - a majority of the Supreme Court evaded a significant opportunity to seriously question the constitutionality of the long familiar affirmative-action claims by groups and classes that they had been discriminated against by race, gender, et al. I agree with the late Justice William O. Douglas - passionately opposed to discrimination in any form - that the 14th Amendment guarantees "equal protection of the laws" to individuals.

Although validating the promotion of the 18 firefighters (17 white and one Hispanic) - despite New Haven having discarded the test because no black aspirants made the cut - the court declined to deal with the winners' citation of the 14th Amendment that forbids any state to "deny to any person within its jurisdiction the equal protection of the laws."

Instead, the majority of the justices focused on a statute, Title VII of the 1964 Civil Rights Act, that bans intentional discrimination because of "race, color, religion, sex or national origin." The court's decision included another law, codified by Congress in 1991, that bars employment tests resulting in a "disparate (negative) impact" on hiring minorities unless the employer can prove that the tests were job-related and necessary to its business.

But Justice Antonin Scalia, though concurring, cited a 1995 Supreme Court case, Miller v. Johnson - ignored by the majority - stating "the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."

I began my controversial opposition to class-based affirmative action years ago in the course of an interview with Justice Douglas while I was covering early affirmative-action cases. On that morning, he was very angry with his brethren because the court's majority had punted on an affirmative-action case, DeFunis v. Odegaard - declaring it moot (no opinion issued).

Marco DeFunis, white, had been denied admission to the University of Washington Law School while 44 minority candidates were welcomed, 36 of whom had lower scores than DeFunis on the Law School Admission Test (LSAT). Charging reverse discrimination, DeFunis sued Dr. Charles E. Odegaard, then president of the University of Washington.

When Douglas' brethren declined to rule on the case, he vigorously dissented, telling me when we met: "This case is not moot! This is an issue that is inevitably going to come before us, and so we should address it now."

Instead of race-based admission policies, Douglas argued in his dissent, decisions should be made "on the basis of individual attributes, rather than according to a preference solely on the basis of race."

In subsequent public debates I had with ardent supporters of class-based affirmative action, I brought Justice Douglas into the stormy discussion, quoting from his dissent:

"Such a policy (based on individuals) would not be limited to blacks or Chicanos or Filipinos, or American ... groups such as these may in practice be the principal beneficiaries of it. But a poor Appalachian white or a second-generation Chinese in San Francisco or some other American whose lineage is so diverse as to defy ethnic labels may demonstrate similar potential and thus be accorded favorable by the (admissions) committee."

What did Douglas mean by "potential?"

He cited "a black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance and ability that shows an admissions committee more promise for law study than the son of a rich alumnus who achieved better grades at Harvard."

Before and after the High Court's decision on the New Haven firefighters, there have been many speculations on whether Judge Sonia Sotomayor's having voted in the lower courts to summarily dismiss the white firefighters' case would affect her nomination to the Supreme Court.

In view of her other more considered rulings that do not narrowly categorize her constitutional views, I think she will ascend to the court. But does she remember what she said to a group of students in 1994 about the Brown v. Board of Education Court decision? She told them: "Brown said to the country it's against our Constitution to treat each other differently. Everybody has to be given the same opportunity ... look around the room. There's a lot of colors in this room."

Each one of them an American.

The named plaintiff in Ricci v. DeStefano, Frank Ricci, got to the heart of the court's decision on National Public Radio (June 29): "I think this is just proof positive that people should be treated as individuals and not statistics. And that won out at the Supreme Court this day."

Not all the way to a post-racial society, Justice William O. Douglas' 14th Amendment views on individuals' equal protection of the laws have yet to be

considered by the Roberts court.

Nat Hentoff has written extensively on the First Amendment and the Bill of Rights. He is a member of the Reporters Committee for Freedom of the Press, and the Cato Institute, where he is a senior fellow.

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