Court punts but affirmative action on the ropes

Decision an important step toward judging Americans on qualifications rather than color.

By: Ilya Shapiro- June 24, 2013

The Supreme Court, by a 7-1 vote, correctly slapped down the lower court for deferring to the University of Texas regarding the use of race in college admissions. It punted, however, on the larger question of whether that use of race is constitutional, instead instructing the U.S. Court of Appeals for the 5th Circuit to reconsider the issue under a less deferential standard of review.

That is, the lower court accepted the Supreme Court's 2003 ruling that using race as one factor, but not if race is tied to a set number of points or quotas, could be justified in the name of diversity. But it erred, the Supreme Court said, in not subjecting UT-Austin's admissions process to what lawyers call "strict scrutiny."

"The university must prove," Justice Kennedy wrote for the Court, "that the means chosen by the university to attain diversity are narrowly tailored." Regardless of administrators' experience in crafting admissions policies, it is up to judges to determine whether the use of race really is necessary (and therefore constitutional) to achieve the educational benefits of diversity.

Kennedy further explained that "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable, race-neutral alternatives do not suffice."

The ruling thus emphasizes that courts shouldn't assume good faith by state actors but instead evaluate the use of race in each particular case. A public university's mere assertion of a diversity interest, irrespective of its circumstances or motivations, doesn't trump an applicant's right to be treated as an individual rather than a racial specimen.

While it's gratifying that the Court recognized that the judiciary must exercise independent judgment on constitutional questions, it's unfortunate that it even gave UT-Austin another chance to argue its claim. As Justice Thomas wrote in a concurring opinion, the use of racial classifications in college admissions is abhorrent to the idea of equal protection of the laws.

The court thus provided a narrow victory for judicial engagement — subjecting government action to judicial review — but avoided an opportunity to advance liberty without regard to race.

And so the case of Abigail Fisher, a white applicant to UT-Austin who was denied admission even though her academic credentials exceeded those of many admitted minority students, continues. The 5th Circuit will now have an opportunity to reconsider the propriety of UT-Austin's process under a more stringent framework.

When it does so, it should find that the university's chosen method for applying racial preferences, far from being narrowly tailored, is arbitrary. For example, UT justifies preferences to Hispanics by pointing to the need for a "critical mass" of such students, even as it denies preferences to Asians, who comprise a smaller part of the student body.

Whether or not this case eventually returns to the Supreme Court, however, today's decision was an important step toward ensuring that young Americans are judged on their qualifications rather than their skin color.

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