Supreme Court dodges affirmative action hot potato — or did it?

There will be much speculation about why the U.S. Supreme Court chose to dodge the hot-button issue of affirmative action in its recent Fisher v. University of Texas decision and instead kick it back to the lower courts.

The result, however, is consistent with Chief Justice John G. Roberts’ pragmatism, illustrated best by last term’s diabolically clever opinion upholding the Affordable Health Care Act (Obamacare), but in fact placing social legislation like it right in the court’s cross-hairs.

In both National Federation of Independent Business v. Sibelius last June and the Fisher decision, the court was able to present itself as the apolitical body it was generally perceived to be before Bush v. Gore appointed George W. Bush president by one vote (and we thought the Kennedy-Nixon election of 1960 was close!) and blew its ideological cover.

In Sibelius, Roberts defied predictions that President Obama’s signature accomplishment would be undone by the Republican majority. But he very cleverly inserted a poison pill. While the controversial individual mandate was upheld under Congress’s taxing power (a rationale very few would have predicted), it could not be justified by the far more significant Commerce Clause power, which has consistently underwritten progressive legislation since the New Deal.

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Similarly, in Fisher, the illusion of moderation is created by the seven-justice majority following precedent from a less polarized age (University of California v. Bakke and Grutter v. Bollinger).

But, again, the seed of destruction has been planted: the court’s insistence on the strictest of scrutiny for any race preference, no matter how modest. Time and again the opinion emphasizes how “searching” and “demanding” the examination must be by the lower courts. The task for university counsel to so justify every aspect of its holistic admissions process is, to say the least, unenviable.
Lost in the mix are several key points. First, it’s unclear that plaintiff Abigail Fisher, given her less-than-stellar academic record, would have been admitted in any event, a point pressed by Justices Ruth Bader Ginsburg and Sonia Sotomayor at the oral argument in the fall.

Such lack of “standing” is usually fatal to a plaintiff’s case, as when the court dismissed earlier this term the complaint of human rights and media organizations challenging the government’s top secret electronic surveillance program because, big surprise, they could not prove their communications were targeted.

Yet, like many “reverse discrimination” plaintiffs, Fisher felt she was entitled to admission. After all, her father and sister had attended the University of Texas, and she “took a ton of AP classes” and “studied hard.”

Second, the actual number of minority students who benefit from the University of Texas’ weighing of race as a “plus” was minimal. The evidence revealed that out of nearly 30,000 applications and close to 13,000 admissions, perhaps an additional 58 African-American and 158 Hispanic students were accepted as a result. Compare that to the far greater numbers of special admits typically by way of athletics, legacies, development, etc.

But perhaps most disturbing about the court’s pronouncement is that it allows the perpetuation of a big lie — that preferences in favor of minorities and women are as odious as the worst forms of racial segregation and oppression from our nation’s past and should be judged by the same legal standard.

Justice Clarence Thomas is the foremost proponent of that perverse view, but in past cases he has been joined by others who in Fisher submerged their views. In his concurring opinion, Thomas equates the arguments in favor of diversity at universities and the workplace with the “hollow justifications” advanced by slaveholders and, later, segregationists in the landmark case of Brown v. Board of Education (1954).

Such accusations are as bizarre as they are defamatory. Can it be seriously contended that turning away a white candidate in order to make room for someone from a historically underrepresented demographic carries the same baggage as separating black from white school children during the Jim Crow era, with its “colored” and “white” water fountains? Is a surgeon’s therapeutic amputation of a gangrenous finger the equivalent of a torturer’s similar act to inflict pain?

Only Ginsburg challenges Thomas on that point, in a passing footnote at the end of her dissent.

I suspect that Abigail Fisher’s reported expression of gratitude today to the justices “for moving the nation closer to the day when a student’s race isn’t used at all in college admissions” will prove the most perceptive comment on where the ruling ultimately will take us. The court didn’t dodge the issue of affirmative action; it foreclosed it.

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