How to Save Affirmative Action

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The Clinton Administration's reversal of position on a case that could be one of the most important of the Supreme Court's coming term has disappointed supporters of affirmative action. But given the tenor of the Court's recent decisions on racial preferences, the Administration has made a smart strategic move to preserve what can and should be saved of affirmative action.

The case concerns the decision of the Piscataway, N.J., school board to promote racial diversity by laying off a white teacher so that it could preserve the job of an equally qualified black teacher. Though the Administration had previously supported the school board, the brief it filed with the Supreme Court on Aug. 23 concedes that the board violated the civil rights of the white teacher.

In previous rulings, the Court has maintained that government use of racial preferences is constitutional only when such action is necessary to remedy a history of overt discrimination, or when the public goal being pursued is "compelling." Moreover, the Court has said, the use of racial preferences must be "narrowly tailored" to meet the particular goal.

The appellate court that heard the Piscataway case declared, in effect, that racial diversity could never be a compelling state interest. Should the Supreme Court completely uphold the appellate court's ruling, the use of race in decisions about hiring and firing public employees could, for all practical purposes, be prohibited.

In the Piscataway case, the avowed goal -- racial diversity within a single, small department of an otherwise diverse faculty -- does not seem "compelling." And the way the school board chose to pursue its goal of diversity -- dismissing a white teacher solely because of her race -- was not "narrowly tailored."

By acknowledging this, yet at the same time making a broader argument for affirmative action, the Administration hopes to preserve some constitutional latitude for race-based public hiring. The approach it has suggested in its brief is essentially a compromise. Even if the Piscataway school board was wrong in this specific instance in its use of racial preference, the Administration argues, there is still a place for affirmative action, and not only to remedy past discrimination. Indeed, as it points out in its brief, there are times when taking race into account is the only way to further compelling public goals.

A police department, for example, may need to recruit a diverse officer corps to carry on effective undercover work or to retain public confidence in neighborhoods where there are racial tensions. At schools and colleges, a diverse faculty may, through the example of its own collegiality, teach students important lessons about working across racial lines.

Nevertheless, the absolutist opponents of affirmative action have the upper hand, in the courts as well as in the broader public debate. California now outlaws the use of race in public hiring, contracting and education. And in a case challenging affirmative action at the University of Texas Law School, a Federal appeals court ruled last year that racial diversity in a student body could never constitute a compelling state interest.

The Supreme Court declined to review that decision, but in taking on the Piscataway case, the Court has the opportunity to clarify the question of when, if ever, it is legitimate to use affirmative action to achieve racial diversity.

It would be a grave error for the Court to adopt an absolutist color-blind view on the question of whether race should ever be a factor in decisions about public employment. Moreover, it is impossible to maintain such absolutism and still uphold a commitment to prevent racial discrimination.

Consider efforts to recruit job applicants that are directed toward minority candidates -- as when companies send recruiters to heavily black schools when blacks are underrepresented in their work force. Such efforts would clearly violate the color-blind principle. Even when the final hiring decision is made solely on the basis of an applicant's qualifications, without regard to race, these recruitment programs involve discrimination because they bestow the benefits of better job information and a greater number of alternative job offers on some individuals solely because of their race. Yet these programs are widespread in both the public and the private sectors, and they are needed to prevent discrimination.

When it comes to public employment, the Administration makes a strong case for considering race. Indeed, its argument could also be applied to the lifetime appointments to the Federal courts that interpret the constitutionality of race-based state action. The legitimacy of court rulings in this area would surely be undermined by the absence from the bench of nonwhite members.

That doesn't mean that racial quotas should be used for judicial appointments. But as far as the Federal judiciary is concerned, there is a compelling public interest in racial diversity for its own sake. Perhaps the Justices who decide the Piscataway case will have the wisdom to see this point.