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Court To Decide If Voters Can Ban Affirmative Action

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What could possibly be wrong with a state constitutional amendment that forbids a state from discriminating against people based on their race or ethnicity, including giving them preferential treatment? Doesn't the amendment just instruct state officials to do precisely what the Constitution requires: to treat people the same regardless of their skin color or national origin?

That certainly sounds right. But in a case being argued before the Supreme Court tomorrow, the constitutionality of just such an amendment is in question.

To understand the case, you first need some background about affirmative action. That's because affirmative action is one of the few exceptions to the Supreme Court's general rule that discrimination based on race is forbidden. The Supreme Court has twice said (albeit by slim vote margins) that universities may consider race as a factor in admitting students for purposes of creating a racially diverse learning environment.

The Court last reaffirmed this principle in 2003 when it upheld the use of race as a plus factor in admissions at the University of Michigan Law School. Just three years later, however, Michigan voters passed the ballot initiative at issue in tomorrow's case. That initiative -- Proposal 2 -- amended the state Constitution to provide that Michigan universities not “discriminate against, or grant preferential treatment” based on race, color, ethnicity, national origin or sex.

Now you might think this amendment is unconstitutional because it conflicts with the Supreme Court's affirmative-action decisions. But those decisions didn't say universities have to use affirmative action. They just said universities could.

So what, then, is wrong with a state deciding not to engage in any type of racial or ethnic discrimination, including affirmative action? Isn't that just being true to the 14th Amendment's command to provide for the “equal protection of the laws”?

How a law requiring equal treatment could be unconstitutional is the conundrum underlying tomorrow's case. But let's consider the other side's argument.

Those opposing Proposal 2 make a “political-restructuring” argument. In essence, they say that the majority of Michigan voters have used the political process to put racial minorities at a unique disadvantage when they lobby for changes in the law to benefit their interests.

Think about it this way. If people who live in the Upper Peninsula of Michigan think that their kids are disadvantaged and should get a boost when applying to the University of Michigan, they have options at their disposal.

For starters, they could lobby the university's admissions committee. If that didn’t work, they could lobby the university's leadership. And if that didn’t work, they could go to the university's governing board. If all else fails, they could take the extreme measure of trying to pass a statewide referendum that commanded state universities to give Upper Peninsula kids an advantage.

Now think about African-American or Latino parents who would like the University of Michigan to give their kids a boost in admissions. Because of Proposal 2, it won't help for these parents to lobby the school's admissions committee, the school's leadership or the governing board. Instead, these parents can effectuate change only by passing a statewide referendum to remove the provisions of the state Constitution that were added by Proposal 2. That is one mammoth obstacle.

Seen in this light, the opponents of Proposal 2 say that the Michigan voters have amended the state Constitution to make it uniquely difficult for minority groups to lobby for changes in the law to benefit them.

The lower court agreed. The court emphasized that equal protection means more than just equal treatment under existing laws. It also means guaranteeing minorities a meaningful opportunity to “participate in the process of creating these laws,” which includes preventing the majority from manipulating the “channels of change” to make it difficult for minorities to pursue beneficial legislation.

As the lower court explained, this merely reflects the “unremarkable notion” that “when two competitors are running a race, one may not require the other to run twice as far or to scale obstacles not present in the first runner’s course.”

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