Supreme Court Upholds Michigan Affirmative Action Ban

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The Supreme Court has upheld Michigan's ban on affirmative action in public colleges in a 6-2 decision on *Schuette v. Coalition to Defend Affirmative Action*. The ban was implemented after the passage of Proposal 2, a 2006 ballot initiative banning public college's from giving preferential treatment to minority applicants. Justice Kagan was recused from the case, presumably because she worked on the case when she was U.S. solicitor general. Justices Sotomayor and Ginsburg dissented.

Last year the the United States Court of Appeals for the Sixth Circuit ruled in an 8-7 decision that Proposal 2 violated the U.S. Constitution's Equal Protections Clause.

New Hampshire, California, Florida, Washington, Arizona, Nebraska, and Oklahoma have similar bans on affirmative action in place.

Analysis

NPR notes that in the majority opinion Justice Kennedy said:

Here, the principle that the consideration of race in admissions is permissible when certain conditions are met is not being challenged.

NPR also says that in reading her dissent from the bench Justice Sotomayor said:

without checks, democratically approved legislation can oppress minority groups.

The ruling will not come as a surprise to the Cato Institute's Ilya Shapiro, who said the following in October:

In no conceivable world can the Equal Protection Clause – the constitutional provision that bans racial discrimination – prohibit a state law that bans racial discrimination. The Supreme Court should and almost certainly will reverse the lower court's ridiculous judgment to the contrary, and will likely do so with a great degree of unanimity.

Writing at about the case for *SCOTUS Blog* University of Chicago law professor Richard Epstein said that although he wouldn't have voted for Proposal 2, "Any public institution that employs either a colorblind or affirmative action policy within the institutions that it supports and operates should be responsive to the will of popular majorities in a democratic society." From *SCOTUS Blog*:

To repeat, I think that Proposal 2 is a mistake, and would vote against it. But I do not think that we have reached the point where colorblind legislation should be regarded as unconstitutional because of its supposed effect on the political process. Any public institution that employs either a colorblind or affirmative action policy within the institutions that it supports and operates should be responsive to the will of popular majorities in a democratic society. Where the state loses its power is in its ability to force private institutions to follow what the public dictates. I think the endless array of fair housing laws are indeed unconstitutional except in those situations, which almost never arise, where a credible claim can be made that a given party has monopoly power in some given market. That was the older rule that used a nondiscrimination rule to offset monopoly power, but never otherwise. It is a long argument, for another day. Subject to this qualification, the public/private distinction should have some real bite. I believe that this issue will come back to the Supreme Court in some form no matter how the Court comes out in Schuette.

In October, Reason Foundation's Shikha Dalmia wrote about how Michigan's Proposal 2 doesn't discriminate against racial minorities but rather discriminates "against racial discrimination." From *USA Today*:

Last November, however, the 6th Circuit Court ruled that this ban on discrimination was itself discriminatory. Why? Essentially, because it would require minorities who want preferential treatment to amend the Constitution. However, other groups — veterans, parents, firefighters — need only go through normal legislative channels to promote their interests. This "political restructuring" supposedly burdens the democratic rights of minorities and violates the 14th Amendment.

It's an interesting argument, but wrong. As University of San Diego law professor Gail Heriot notes, Prop. 2 doesn't discriminate against racial minorities but against racial discrimination. It doesn't just bar blacks from seeking special preferences in college admissions but whites, too. Each can, however, petition for, say, greater funding for sickle-cell anemia (which particularly afflicts blacks) or skin cancer (which disproportionately affects whites).

In other words, every racial group is equally encumbered when promoting racial privileges and equally unencumbered when promoting non-racial interests.

Dalmia has also noted that judges will never be able to eliminate affirmative action from higher education.

More from *Reason* on affirmative action here.