"It's like the last tool of ordinary people."

By Michael Corey

So said Catherine Turner of the government watchdog group "Ohio Citizens Action" in a 2010 interview with the Cleveland Plain Dealer. She was describing a tool – voter initiatives, whereby the people circumvent a state's respective general assembly, respectfully or not – that gives voters the opportunity to legislate on their own behalf.

In Ohio, we have seen such voter initiatives on issues as innocuous as establishing a Livestock Care Standards Board, and as controversial as prohibiting same-sex marriage. Indeed, whether it's a referendum to establish casinos in Ohio's four major cities, or it's a referendum to undo a law that would have limited collective bargaining, voter initiatives tend to be driven by a powerful interest – supported by a mass of people and the mass of money that follows – that wants to see it passed.

In that state up north, one such powerful interest sought to use a voter initiative to prohibit the consideration of race in college admissions. The push to block affirmative action was known as Proposal 2, and it was launched in the wake of a pair of 2003 Supreme Court decisions – Gratz v. Bollinger and Grutter v. Bollinger – that had pitted the University of Michigan's race-conscious admissions policies against the charge that affirmative action is unconstitutional. The Supreme Court, thanks to the unsheathed pen of now-retired Justice Sandra Day O'Connor, narrowed but upheld the constitutionality of considering race in college admissions. However, she included a qualifier: the Court did not believe such considerations would be necessary in 25 years.

At least two people did not want to wait that long. The first was Jennifer Gratz, the named petitioner in the 2003 Supreme Court ruling. The second was Ward Connerly, a businessman and political advocate who first made national headlines in 1996 when he spearheaded a successful voter initiative in California called Proposition 209, which prohibited the state from considering race in public education. Gratz had met Connerly at some point during the Supreme Court's 2003 review of the challenges to affirmative action, and in the wake of that ruling, Gratz saw an opportunity to duplicate Connerly's California proposition in Michigan.

So Gratz, who coincidentally had been living in California when Gratz and Grutter came down, picked up and moved to Michigan in 2004. She soon became the executive director of the "Michigan Civil Rights Initiative," the appellation chosen to represent Proposal 2, which aimed to parallel Proposition 209's success in Michigan. And that initiative's most prominent financial backer was none other than Connerly, who gave $500,000 in support of the initiative. "When my toes turn up," Connerly told the New York Times in 2006, "that's when I'll stop fighting this."

And the fight did not end there, even after the initiative passed in 2006 with 58% of the vote. Legal sparring inevitably arose, and Gratz now finds herself in a familiar position: awaiting word from the judicial branch as to the constitutionality of Proposal 2.

The case, Schuette v. Coalition to Defend Affirmative Action, first wound through the 6th Circuit Court of Appeals, where the proposal was handed a pair of defeats from a three-judge panel, and en banc panel as well.

Unlike the Gratz and Grutter cases, the issue before the 6th Circuit was not specific to the consideration of race in higher education. Indeed, the 6th Circuit took pains to expressly sidestep the issues presented in those cases. (As an aside, the Supreme Court will have the opportunity to revisit Gratz and Grutter soon nevertheless, in a case called Fisher v. University of Texas. The Court has already punted that case back to the lower courts, but it is sure to return, and with it the possibility that affirmative action will soon come to an end.)

The issue before the 6th Circuit was "whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even consider using race as a factor in admissions decisions – something they are specifically allowed to do under Grutter."

After a consideration of the arguments, the 6th Circuit held that Proposal 2 unconstitutionally skewed the political process by unfairly burdening racial minorities and their ability to effect change: a single avenue would remain open to them for countering Proposal 2, namely a similar alteration of the state constitution.

In grander terms, the issue strikes me as being of fundamental importance, an argument as old as the nation itself. Did direct democracy fail to meet that most terrific of challenges identified by James Madison in Federalist No. 10, that a republic must beware the danger that the majority may not respect the rights of the minority?

The 6th Circuit thought so, ruling that this unique change to the political process was unconstitutional.

The question was argued before the Supreme Court on October 15th. The key vote, as ever, will be that of Justice Anthony Kennedy, who has consistently been a theoretical supporter of race-conscious policies, but also an equally consistent critic of the means by which the state has sought to promote diversity. The focus for Kennedy, as indicated through the many questions he posed to the advocates before him, was in trying to identify the limits – or perhaps, limitations – of the political process theory articulated by the 6th Circuit. He asked, for example, whether it would be permissible if a law required a three-fourths vote in a legislature to pass any bill authorizing affirmative action.

The difficulty in answering this question underscores the ongoing challenges that states face in addressing race: Jennifer Gratz (with a nod to Chief Justice Roberts) would likely suggest that the best way to avoid issues on the basis of race is to stop legislating on the basis of race. Indeed, supporters of Proposal 2 argued that the referendum was not an attempt to skew anything, but to equalize the playing field in Michigan. Of course, the University of Michigan would surely suggest otherwise. They would likely frame the issue as one that impermissibly changed the political process to render the "last tool of ordinary people" the only tool for a minority of the population.

The Supreme Court's ruling, due in the spring or summer of 2014, could have interesting implications for the future of voter referenda and direct democracy more broadly. Until then and well thereafter, the marketplace of ideas will churn on.

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