Schuette v. Coalition to Defend Affirmative Action

A Supreme Court Legal Update from the Access & Diversity Collaborative

On October 15, 2013, the U.S. Supreme Court will hear oral arguments in *Schuette v. Coalition to Defend Affirmative Action,* which concerns the constitutionality of Proposal 2, Michigan's voter initiative that prohibits the consideration of race and gender in *public* education, employment, and contracting decisions.[1]

Michigan has been at the center of developments in diversity-related legal action for more than a decade. The University of Michigan's undergraduate and law school admissions processes were at issue in the Supreme Court's 2003 decisions, *Gratz v. Bollinger* and *Grutter v. Bollinger*, respectively. After the University of Michigan decisions were handed down – authorizing (but not requiring) an appropriately limited use of race/ethnicity in admissions when necessary to achieve compelling mission-driven interests – a new wave of state voter initiatives arose to adopt state constitutional amendments and laws that prohibit the consideration of race/ethnicity by *public* institutions in enrollment and other practices.[2] One such initiative was Proposal 2, which Michigan voters passed in November 2006. Proposal 2 was challenged in court by a number of entities, including the "Cantrell Plaintiffs" (a group of students and faculty) and Coalition to Defend Affirmative Action.

On November 15, 2012, the full U.S. Court of Appeals for the Sixth Circuit struck down (8-7) Proposal 2 as unconstitutional.[3] The central issue in the case is not the constitutionality of the use of race/ethnicity in admissions (as in *Grutter, Gratz,* and *Fisher v. the University of Texas at Austin* (2013)[4]), but whether the Michigan ballot initiative unduly burdens members of minority groups from achieving their goals in the political process. Relying on the Supreme Court's "political restructuring" / "political process" doctrine,[5] the Sixth Circuit majority concluded that Proposal 2 violated the Equal Protection Clause of

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[1] Justice Kagan has recused herself from the case, meaning that only eight Justices will participate in the decision.

[2] In all, five states – California, Michigan, Nebraska, Arizona, and Oklahoma – have implemented voter-initiated state constitutional bans. Florida has adopted a similar ban relating to admissions through administrative regulation, although other practices are also influenced by an executive order; New Hampshire through a state statute; and Washington through a state statute initiated by a voter ballot initiative. For a full summary and analysis of state voter initiatives, see Coleman, Lipper, & Keith, Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions (AAAS, 2012), available at: http://php.aaas.org/programs/centers/capacity/documents/BeyondFedLaw.pdf.

[3] Coal. to Defend Affirmative Action, et al. v. Regents of the Univ. of Mich., et al., 701 F.3d 466 (6th Cir. 2012), available at: http://www.ca6.uscourts.gov/opinions.pdf/12a0386p-06.pdf.

[4] For a full case analysis of *Fisher,* see the Access & Diversity Collaborative's guidance, Understanding Fisher: Policy Implications of What the U.S. Supreme Court Did (and Didn't) Say about Diversity and the Use of Race and Ethnicity in College Admissions (July 9, 2013), http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/diversity-collaborative-understanding-fisher.pdf.

[5] The political restructuring doctrine is based on two Supreme Court decisions: Hunter v. Erickson (1969) and Washington v. Seattle School District No. 1 (1982). Under this legal doctrine, state action is unconstitutional where it meets both elements of a two-prong test: (1) it has a racial focus, targeting a policy or program that primarily

the Fourteenth Amendment because it forced "racial minorities . . . to surmount procedural hurdles in reaching their objectives over which other groups do not have to leap." A core element of the prevailing argument was that a supporter of legally permissible race-conscious admissions could only effect change in Michigan through a constitutional amendment, while a supporter of other considerations in admissions policies (e.g., legacies) could pursue multiple, less difficult pathways (e.g., lobbying the admissions committee, petitioning university leadership, and influencing a school's governing board). The Sixth Circuit "stayed" its decision, meaning that Proposal 2 will continue to be in effect until the Supreme Court rules.

The Supreme Court's decision in *Schuette* has prospective implications beyond Michigan, particularly for other states with similar voter initiatives and their *public* colleges and universities.[6] Although the contours of specific state bans will substantially depend on *state* constitutional interpretations, the U.S. Supreme Court's determination of *federal* constitutionality of Proposal 2 will inform judgments regarding these laws.

Key points regarding *Schuette* include:

- **Though broadly related to *Fisher* because both cases affect the use of race/ethnicity in admissions, the core legal questions in *Schuette* fundamentally differ from those in *Fisher*.**[7] Indeed, the parties in *Schuette* presumed the constitutionality of the legal framework preserved in *Fisher,* questioning neither the educational benefits of diversity as a compelling interest nor the constitutionality of narrowly tailored race-conscious policies to attain those interests. The Petitioner and some of his amici, however, raised questions about the continued need for race-conscious admissions policies given what they asserted to be the availability of alternatives and the declining level of public support.

- **A federal circuit split now exists on the issue of the constitutionality of state bans that prohibit the consideration of race in the admissions procedures at public institutions of higher education.** Although the Sixth Circuit rejected Michigan's Proposal 2, a Ninth Circuit judicial panel upheld California's Proposition 209 in 1997 – applying the same legal principles but reaching a different result. (Notably, Proposition 209 served as the foundation for the similarly worded Michigan ban.) The Sixth Circuit found that Michigan's Proposal 2 caused a race-based disparity in the opportunity for minority *groups* to influence decision-making, which led to a violation of *individuals'* equal

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benefits the minority group's interest; and (2) it reallocates political power or reorders a decision-making process in a way that places special burdens on a minority group's ability to achieve its goals through the process.

[6] Voter bans do not directly affect private colleges and universities. See n.2.

[7] To reaffirm the higher education community's strong support for academic freedom, the preservation of institutional judgments in admissions, and the compelling educational benefits of diversity – and to reinforce the distinctions between the issues in *Fisher* and *Schuette* – the College Board joined a group of 48 amici from the higher education community on an amicus brief written by the American Council on Education (ACE), a sponsor of the Access & Diversity Collaborative. Organizational sponsors of the Access & Diversity Collaborative that signed on to ACE's brief included: the American Association of Collegiate Registrars and Admissions Officers (AACRAO); the American Dental Education Association (ADEA); the Association of American Colleges & Universities (AAC&U); the Association of American Medical Colleges (AAMC); and the National Association for College Admission Counseling (NACAC). The brief is available at: http://www.acenet.edu/news-room/Documents/AmicusBrief-BAMN-Michigan-083013.pdf. A separate but related amicus brief was filed by another ADC sponsor, the National School Boards Association.

protection rights under the Constitution. The Ninth Circuit, on the other hand, did not make this connection between equal protection for groups and individuals and instead found that, because California's Proposition 209 did not directly deny equal protection to *individuals* in the political process, it was constitutional.[8]

- **State legal context matters.** Though the language of Proposal 2 is similar to voter initiatives in other states, the role of the governing boards of Michigan universities was a significant consideration in the Sixth Circuit's ultimate holding that Proposal 2 impermissibly reallocated power in a political process in a way that placed special burdens on a minority groups' ability to achieve certain goals. Not only are Michigan's institutional board members popularly elected, but they also retain plenary power – granted directly by the state constitution – over all operations of their respective institutions, including over the admissions policies and procedures.

- **The political restructuring legal doctrine cited by the Sixth Circuit majority to strike down Michigan's Proposal 2 is based on seldom used Supreme Court precedent.** The last time the Court used it was in 1982 – before any of the current Supreme Court Justices sat on the bench. (For more information on this doctrine, see footnote 5.)

This guidance was prepared by EducationCounsel LLC on behalf of the College Board's Access & Diversity Collaborative. The Collaborative provides general policy, practice, legal and strategic guidance to colleges, universities, and state systems of higher education to support their independent development and implementation of access- and diversity-related enrollment policies.

This guidance is provided for informational and policy planning purposes only. It does not constitute specific legal advice. Legal counsel should be consulted to address institution-specific legal issues.

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[8] Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (2012);*see also* Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997). The Sixth Circuit majority summarily rejected the *Wilson* analysis in striking down Proposal 2.