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Legal Update

Coalition to Defend Affirmative Action et al. v. Regents of the University of Michigan et al. Case Summary

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Federal circuit holds that Michigan's ban on the consideration of race and gender in public university admissions is unconstitutional because the resulting political structure impermissibly burdens racial minorities.

On July 1, 2011, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit held 2-1 that Michigan's voter-initiated ban on the consideration of race and gender in public university admissions and government hiring violated the Equal Protection Clause because it "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities."

Under the political restructuring theory of the Fourteenth Amendment, the court considered whether Proposal 2 impermissibly restructured Michigan's political process along racial lines. The court examined two cases – *Hunter v. Erickson*[1] and *Washington v. Seattle School District No. 1*[2] – in which the Supreme Court overturned referendums that dealt with racial issues. In *Hunter*, the Court rejected an amendment to the city charter that required an additional step of a voter referendum to change local housing laws regarding race and religion discrimination, where other changes required only a city council vote. In *Seattle*, the Court overturned a referendum in Washington State that effectively abolished voluntary busing plans designed to promote racial integration, as adopted by school districts.

Applying these cases, the two-judge majority explained that the Equal Protection Clause not only guarantees equal protection under the law but "is also an assurance that the majority may not manipulate the channels of change in a manner that places unique burdens on issues of importance to racial minorities." Examining Proposal 2, the majority noted that no other admissions criteria (e.g., "grades, athletic ability, or family alumni connections") were affected by Proposal 2's prohibition. The majority further observed that Proposal 2, by entrenching the prohibition in the Michigan constitution, prevented the public or institutions of higher

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[1] 393 U.S. 385 (1969).

[2] 458 U.S. 457 (1982).

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education from revisiting the issue, short of a constitutional repeal, the type of procedural requirement that constituted "a considerably higher hurdle," as compared to the available avenue of petitioning university admissions bodies for all other admissions changes. The majority thus concluded that "Proposal 2 targets a program that 'inures primarily to the benefit of the minority' and reorders the political process in Michigan in such a way as to place 'special burdens' on racial minorities."

The majority rejected the Michigan Attorney General's argument that Proposal 2 did not have a "racial focus" because it also addressed gender preferences, finding that the political restructuring theory requires only that the law targets policies that minorities *may* consider in their interest. The majority further noted that its decision was "not impacted by the fact that increased representation of racial minorities in higher education also benefits students of other groups and our nation as a whole," expressly accepting the compelling interest asserted by advocates of race-conscious admissions policies.

The majority also rejected the Attorney General's distinction between enactments that burden racial minorities' ability to obtain protection from discrimination through the political process ("discrimination") and policies that burden racial minorities' ability to obtain preferential treatment ("preference"). The Attorney General largely relied on the Ninth Circuit's analysis of California's comparable Proposition 209 in *Coalition for Economic Equity v. Wilson*[3], which distinguished "preferential treatment" from "equal treatment." The Michigan district court decision, which the Sixth Circuit was reviewing, as well as an earlier Sixth Circuit decision – *Coalition to Defend Affirmative Action v. Granholm*[4], cited *Wilson* to find that although Proposal 2 had a racial focus and burdened minorities, the Equal Protection Clause was not violated because it created a burden to obtaining preferential treatment; the district court had found that *Hunter* and *Seattle* should be interpreted to apply only to burdens affecting "equal treatment," and not to "preferential treatment."

The Sixth Circuit majority rejected this interpretation, notably couching the relevant terminology as "discrimination" and "preference" (rather than "equal treatment" and "preferential treatment"). Specifically, the majority found that the Attorney General's position would make superfluous the governing political process theory, which was created to address state action that is constitutionally permissible (rather than constitutionally mandated under the traditional equal protection analysis). The majority observed that *Seattle* most clearly involved constitutionally-permissible state action, namely a voluntary, ameliorative effort to reduce the impact of *de facto* segregated housing patterns. The majority concluded, "[W]hat

[3] 122 F.3d 692 (9th Cir. 1997).

[4] 473 F.3d 237, 248-49 (6th Cir. 2006).

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matters is if racial minorities are forced to surmount procedural hurdles in reaching [a process-based right] over which other groups do not have to leap."

Judge Gibbons dissented from the court's conclusion that Proposal 2 impermissibly restructured the political process to burden the ability of minorities to enact beneficial legislation. She noted the limiting language in *Grutter* that cautioned that race-conscious measures are "a highly suspect tool" and that such measures be limited in time. Noting that the Supreme Court acknowledged state-law prohibitions on the use of racial preferences in admissions in California, Florida, and Washington, Judge Gibbons contended that the Equal Protection Clause was not violated where race-related policies, not required by the U.S. Constitution, are repealed.

Judge Gibbons further distinguished the Supreme Court opinions in *Hunter* and *Seattle* in which lawmaking authority was reallocated from a politically accountable legislative body to a more complex government structure: "these program-specific faculty admissions committees are far afield from the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*. The most crucial and overarching difference, of course, is that the faculty admissions committees and individual faculty members are not politically accountable to the people of Michigan." (The majority opinion characterized the dissent as arguing that "political process" requires an electoral component and disagreed with this position, noting "the abundance of language to the contrary in those [Supreme Court] cases." Further, even if the political restructuring theory requires an electoral connection, the majority opinion identified the connection between the admissions processes at the Michigan universities and Michigan's electorate political process.)

The majority did not reach the "traditional" argument under the Fourteenth Amendment that Proposal 2 violates the Equal Protection Clause by impermissibly classifying persons on the basis of race, but Judge Gibbons's opinion found that Proposal 2 was constitutional under this analysis.

Michigan's attorney general plans to appeal the decision and request a rehearing en banc before the full, 15-member Sixth Circuit. The University of Michigan does not plan to immediately alter its admissions policy.

The Sixth Circuit opinion can be accessed here: http://www.ca6.uscourts.gov/opinions.pdf/11a0174p-06.pdf.

Further analysis forthcoming.

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