

Michigan Case Puts Chink in Higher Education Admission Standards

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Abstract: This paper examines the recent April 2014 decision by the U.S. Supreme Court supporting the state of Michigan's constitutional amendment banning the use of race as an affirmative action tool in selecting admissions to the state's public universities. The 6-2 ruling in the case of *Schuette v. Coalition to Defend Affirmative Action* has been hailed by some as a major step in the unraveling of the policy of Affirmative Action on a permanent basis.

Introduction

This case was brought by Bill Schuette, Attorney General for the State of Michigan in *Schuette v. Coalition to Defend Affirmative Action*; The Coalition filed a constitutional challenge to Proposition 2 which was spearheaded by the Michigan Civil Rights Institute.¹ Proposition 2 amended the Michigan Constitution to ban affirmative action preferences by state entities It was passed by Michigan voters 58 to 42 percent in 2006 stating that educational entities within the state must "not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."² Justice Kennedy announced the judgment of the U.S. Supreme Court and delivered the opinion.³ He was joined by the Chief Justice Roberts, Justice Breyer and Justice Scalia who wrote concurring opinions.⁴ The 6-2 ruling (Justice Kagan recused herself) upheld the state of Michigan's Prop 2 Amendment which firmly stated that race could no longer be used by the University of Michigan in its admission policies. The case had its genesis some 20 years ago when the University of Michigan rejected honor student Jennifer Gratz's application while at the same time admitting minority students who she felt were less qualified.⁵ The central issue of this case is whether the voters and state of Michigan could tell the University of Michigan how to manage its admission policies. That amendment supported by the likes of Ward Connerly would effectively put an end to the use of race as an affirmative action tool and restrain the university in its ultimate goal of achieving diversity in its class rooms. Michigan joins seven states including Florida and California which have either adopted or plan to adopt similar amendments operating under the belief that the only way to ensure fairness is take race out of the process.⁶ Justice Sotomayer raised the greatest amount of dissent to the majority judgment in her opinion, stating that alternate means of achieving college diversity have failed in the past. She noted how legacy admissions,

¹ *Coal. to Defend Affirmative Action v. Regents of Univ. of Michigan*, 701 F.3d 466, 471 (6th Cir. 2012) (en banc).

² *Id.*

³ *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. __ (2014)

⁴ *Id.* (Roberts, J., Breyer, S., and Alito, S., concurring in the judgment).

⁵ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

athletes, and admissions of children of rich donors are not weighted the same and quite often circumvent the admission process all together.⁷ Recent statistics have shown that since the passage of the amendment, diversity in the University of Michigan and several other highly ranked schools have fallen by about one third⁸.

Affirmative Action

Although often hotly debated and deeply contentious, Affirmative action has become a remedy and solution for many in this country who have suffered through a history of slavery, racism, discrimination, segregation, and Jim Crow. Many of the vestiges and ill effects of this dark time in our country's history still remain today. It has also become a very divisive social issue. Its purpose is to help create a level playing field in both education and the work place, but it has been a difficult and tumultuous road to travel in both the work place and in trying to achieve diversity higher education.

In *Grutter v. Bollinger*⁹, the U.S. Supreme Court upheld an earlier decision in *Regents of the University of California v. Bakke*,¹⁰ which held that race (although not quotas) could be used as a "plus" factor to further a compelling state interest in obtaining the educational benefits that flow from a diverse student body¹¹. Such a practice is not prohibited by the Equal Protection Clause, Title VI, or Sec. 1981.Pp.9-32.

Earlier in June of last year, the Supreme Court ruled in *Fisher v. University of Texas at Austin*,¹² that although race could be used as a tool to achieve diversity, it must be done under strict scrutiny and in "good faith". The admission program must be narrowly tailored to obtain the educational benefits of diversity.¹³

Affirmative Action v Michigan's New State Amendment Proposal 2

Michigan's Proposal 2 was the initiative approved by 58 percent of the Michigan electorate in response to the *Grutter v Bollinger* decision. It prohibited the use of discrimination, preferential treatment in public education, government contracting, and public employment. More specifically what it did was to successfully amend Michigan's state constitution and bring the issue of race as it relates to higher education back to the judicial forefront. This is what happens when public policy i.e. the will of the people challenging the finality of a Supreme Court decision.

⁷ *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. __ (2014) (Sotomayor dissenting in judgment).

⁸ Ford Fessenden and Josh Keller, How Minorities Have Fared in States with Affirmative Action Bans, *The New York Times*, April 22, 2014, <http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html>

⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003)

¹⁰ 438 U.S. 265 (1978).

¹¹ *Id.* at 315-20 (opinion of Powell, J.)

¹² 631 F.3d213(5thCir. 2011), cert. granted, 132 S.Ct. 1536 (Feb. 21, 2012) (No. 11-345).

¹³ *Id.* at 8-13

The U.S. Court of Appeals for the Sixth Circuit in Cincinnati eventually responded by saying the Michigan state amendment was unconstitutional and that it was a violation of the U.S. Constitution's equal protection clause. The current Supreme Court ruling in reversing that decision left many of the supporters of Affirmative Action and Diversity scratching their heads and asking the question; what just happened here? How could the courts go so quickly from basically supporting Affirmative Action to now opening the door to its ultimate unraveling?

The seemingly contradiction may have had something to do with the University of Michigan's admission process in the past. It now uses a holistic approach.. The University of Michigan used many different variables before accepting an applicant. Not all qualified applicants would get in or would go on to experience a University of Michigan education. Each year there are only a limited number of slots available. Some critics felt that although quotas were clearly outlawed under the law, the use of race as a variable or plus factor in admission was still discriminatory despite being upheld by the law in *Grutter v. Bollinger*. They argue that the practice of adding up to 20 points to an applicant's application in tandem with the entire application process indirectly because they were black; Latino, Native American or some other minority was still patently unfair. The opposing argument might be that using only straight grades and standardized test are naturally biased against those same minorities and cannot be considered race neutral for the purpose of achieving diversity.

The Dodge

Either through ingenious legal maneuvering or a stroke of genius, the state of Michigan, has once again managed to move the goal post in terms of the rights of minorities and Affirmative Action according to Justice Sotomayer. The case decision represents a totally different approach to attacking Affirmative Action and Diversity. Instead of simply once again questioning the legality of Affirmative Action the, case went from being about the constitutionality of race-conscious admissions policies in higher education to whether and when voters in the States may chose to prohibit the consideration of such preferences, as stated by Justice Kennedy. The Justices then went on to write some 100 pages of briefs explaining the difference.¹⁴ It is quite obvious that when judging the rights of individuals under the equal protection clause of the constitution and the role of the judiciary under the separation of powers clause, very different conclusions can be reached.¹⁵ In substantiating its decision, the court spent much of its time arguing the relevance of another case, *Parents Involved in Community Schools v. Seattle School District No. 1*, which involved the propriety of race-conscious student assignments for the purpose of achieving integration in the city of Seattle Washington¹⁶. The 6th circuit had used the argument in the Seattle case to rule against Michigan's Prop 2. The 6th circuit said the race-conscious school assignments in Seattle were necessary to prevent discrimination not aid discrimination. The

¹⁴ Schuette v. Coalition to Defend Affirmative Action, 572 U.S. __ (2014)

¹⁵ The Equal Protection Clause applies "For any law expressly requiring state actors to afford all a protection of the laws".¹⁵ U.S Const. Admt. 14 Sec 1. Pp 15-17. Separation of Powers can be found U.S. Const. art. I § 1, art. 2 § 1, art. III § 1 & art. III § 7

¹⁶ 551 U.S. 701 (2007) .

Michigan Supreme Court's ruling now holds that the arguments and formulation in Seattle are wrong in determining whether state voters in Michigan have a right to determine if a race conscience policy should continue. The argument might be that the race based admissions policy at the University of Michigan actually increases discrimination rather than help in its elimination if not for the new amendment.

In summary, the majority held that the respondents could not prove that the state action reflects a racially discriminatory purpose. The language in the amendment saying that you cannot use race as a variable or tool in University admissions does not in itself prove that the state is discriminating on the basis of race. By taking out race, the court has positioned itself to eliminate the argument that not using race inherently discriminates against minorities. In Seattle, race was used to stop discrimination, a claim that proponents of affirmative action tried to apply to counter Proposition 2 in Michigan. The Supreme Court didn't find this argument applicable and found that the purpose of this amendment is not inherently discriminatory. As far as the court is concerned to argue otherwise would be like arguing a negative. The court went on to explain that as a part of our constitutional system, citizens have a right to speak, debate, learn and then act through a lawful electoral process. Opponents argued that such an approach drowned out the voice of minorities and imposed too much of a burden on them to change the political process.

Is Affirmative Action Dead?

The simple answer is No...at least not yet. Even the most ardent supporters of Affirmative Action have always known that it was not meant to last forever. We know that it still lives on at the Federal Government level whereby through executive order; President Obama attempts to preserve the rights of minority contractors through diversity inclusion initiatives.¹⁷ Supporters have never doubted its legality in the past or whether it could be justified. After all, it was just a means to an end seeking to justify a long overdue moral wrong that had been imposed on the poor under privileged of this country for centuries past. Although not perfect, it was the best solution at the time to fix an America that for the most part didn't want to be fixed. The only real question was not if it should end, but when should it end and when would true equality came about Even Chief Justice Roberts famous common sense quote in 2007 in the University of Texas case " The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," may not inspire its end ,if the very society which preaches equality and fairness, consistently keeps a large segment of its population on the short end of life's score card.¹⁸

¹⁷ The Office of the Press Secretary. "Executive Order 13583-- Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce." The White House. <http://www.whitehouse.gov/the-press-office/2011/08/18/executive-order-establishing-coordinated-government-wide-initiative-prom> (accessed May 28, 2014).

¹⁸ Liptak, Adam. "Court Backs Michigan on Affirmative Action." The New York Times. http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=0 (accessed May 20, 2014).

Now that the Supreme Court has spoken, it is more likely than not that the majority electorates across the country will join in and ride the current conservative tide. Quite honestly, Affirmative Action as we know it might be on life-support.

One good source to look for as a possible new solution might be in the book *Place, Not Race: A New Vision of Opportunity* by Sheryll Cashin.¹⁹ In her book she writes about “opportunity hoarding” and a long held observation that in its present form, Affirmative Action least helps that segment of the population that it was originally meant to lift up when it was first envisioned. She prefers to replace the word “race” with “place” in defining any working or new definition of Affirmative Action. She believes that the key to upward mobility is indeed higher education but that access to it must be fair and equal to all. She does not begrudge Minority groups or even the middle class, who have used race as a guise when trying to gain advantages and entry under various Affirmative Action programs, even though sometimes those advantages were gained to the detriment and unfair advantage of others. A day may come in the near future where under the name “diversity practice”, all persons may benefit on the sole basis of their own merit or academic achievement and not the circumstance of their birth. Someone would probably still complain if slightly more of a benefit or financial incentive was given to someone truly in need, or who has had to overcome overwhelming obstacles to reach the same level or opportunity, but there is where a new type of Affirmative Action might come into play. No one would be rewarded simply because of race.

Ward Connerly, Justice Clarence Thomas, and the now deceased Clarence Pendleton once considered the leading minority voices opposing Affirmative Action would all probably rejoice upon its eventual demise. They have always believed wrongly or rightly that it has done more harm than good for minorities. The old thought process that minorities would never be considered equal by the majority as long as they are given something appears about to be coming full circle. However, they just needed to understand that in order to get to this point in our history, the last twenty years of Affirmative Action was not only justified but necessary. It was a necessary part of a societal transition period in this country’s history. It is truly what America is all about.

¹⁹ Cashin, Sheryll. *Place Not Race : Creating Opportunity for All after Affirmative Action*. Boston: Beacon Press, 2014.

