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Banning the Use of Racial Preferences in Higher Education: A Legal Analysis of *Schuette v. Coalition to Defend Affirmative Action*

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Summary

In the more than three decades since the Supreme Court's ruling in *Regents of the University of California v. Bakke* affirmed the constitutionality of affirmative action in public colleges and universities, many institutions of higher education have implemented race-conscious admissions programs in order to achieve a racially and ethnically diverse student body or faculty. Nevertheless, the pursuit of diversity in higher education remains controversial, and legal challenges to such admissions programs routinely continue to occur.

Currently, the Court is poised to consider a novel question involving affirmative action in higher education during its upcoming 2013-2014 term. Unlike earlier rulings, in which the Court considered whether it is constitutional for a state to use racial preferences in higher education, the new case, *Schuette v. Coalition to Defend Affirmative Action*, raises the question of whether it is constitutional for a state to ban such preferences in higher education.

Schuette arose in the wake of a pair of cases involving admissions to the University of Michigan's law school and undergraduate programs. Although the Court struck down the undergraduate admissions program, it upheld the law school's program in a decision that affirmed the constitutionality of the limited use of race-conscious admissions programs in public higher education. In the wake of the University of Michigan cases, opponents of affirmative action in Michigan successfully lobbied for the passage of Proposal 2, which amended the Michigan state constitution to prohibit preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting. Opponents of Proposal 2 sued, and a federal appeals court ruled that Proposal 2's ban on racial preferences in public education violates the equal protection clause of the United States Constitution. This decision was subsequently upheld in a divided ruling by the full court of appeals, sitting en banc, and the Supreme Court will review the case during the upcoming term.

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Introduction

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Background

The equal protection clause of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws."[5] Under the Supreme Court's equal protection jurisprudence, "the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[6] Laws based on suspect classifications such as race or gender, however, typically receive heightened scrutiny and require a stronger, if not compelling, state interest to justify the classification.[7]

[1] 133 S. Ct. 1633 (2013).

[2] Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 652 F.3d 607 (6th Cir. 2011).

[3] Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466 (6th Cir. 2012).

[4] Schuette v. Coalition to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

[5] U.S. Const. amend. XIV, §1.

[6] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

[7] *Id.*

Two different strands of the Court's equal protection jurisprudence appear to come together in the *Schuette* case. Under the first line of cases, the Court has grappled with questions about the constitutionality of promoting racial diversity in higher education, while the second line of cases deals with challenges to laws that involve political restructuring based on race. Both of these sets of cases are described briefly below.

Racial Diversity in Higher Education

The *Regents of the University of California v. Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action. Justice Powell, in the controlling opinion, stated that the attainment of a diverse student body is "a constitutionally permissible goal for an institution of higher education."[8] *Bakke* remained the leading case on affirmative action in higher education for a quarter of a century, until the Court issued its rulings in a pair of cases involving admissions to the University of Michigan's law school and undergraduate programs.

In *Grutter v. Bollinger*,[9] the Court held that the university's law school had a compelling interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a critical mass of underrepresented minority students. But in *Gratz v. Bollinger*,[10] the Court decided that the university's undergraduate policy of awarding "racial bonus points" to minority applicants was not narrowly tailored enough to pass constitutional muster. Taken together, the cases stand for the proposition that the government may assert a compelling interest in establishing programs to promote racial diversity in higher education, but such programs must be narrowly tailored in order to meet that interest. More recently, the Court reaffirmed its holding in *Grutter*, but nevertheless struck down on narrow tailoring grounds a race-conscious undergraduate admissions plan in *Fisher v. University of Texas at Austin*.[11]

Political Restructuring Based on Race

Meanwhile, under a separate and much less developed strand of the Court's equal protection jurisprudence, the Justices have held that an individual's ability to participate in the political process may not be disadvantaged on the basis of race. Only two such cases appear to be applicable to *Schuette*.

In *Hunter v. Erikson*,[12] local voters not only overturned an ordinance that prohibited housing discrimination, but also amended the city charter to require that any housing laws that prohibit racial discrimination could not take effect unless approved by a majority of voters. In other words, passage of regular housing laws required approval by the city council, while passage of housing laws designed to protect racial minorities required an extra legislative step and was therefore more difficult to achieve. In invalidating the measure, the Court held that this two-tiered system "place[d] special burden[s] on racial minorities within the governmental process" and

[8] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978).

[9] 539 U.S. 506 (2003).

[10] 539 U.S. 244 (2003).

[11] 133 S. Ct. 2411 (2013).

[12] Hunter v. Erickson, 393 U.S. 385 (1969).

ruled that the state may not "disadvantage any particular group by making it more difficult to enact legislation on its behalf."[13]

Likewise, in *Washington v. Seattle School District No. 1*,[14] the city enacted a student busing plan, but voters adopted a constitutional amendment to prohibit local school boards from establishing such plans. The Court struck down the amendment, noting that it imposed a disproportionate burden on the basis of race by requiring proponents of school busing laws to win support at a statewide level, unlike other school-related decisions that were approved by the local school board. According to the Court, the equal protection clause prohibits "a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[15]

Appellate Ruling

As noted above, a federal appeals court initially ruled that Proposal 2's ban on racial preferences in public education violates the equal protection clause of the United States Constitution.[16] This decision was subsequently upheld in a divided ruling by the full U.S. Court of Appeals for the Sixth Circuit, sitting en banc.[17]

In its ruling, the majority opinion of the en banc Sixth Circuit relied extensively on *Hunter* and *Seattle*. According to the court, *Hunter* and *Seattle* stand for the proposition that the equal protection clause is violated if a law (1) has a racial focus or targets a policy or program that primarily benefits minorities, and (2) reorders the political process in a manner that places special burdens on a minority group's ability to achieve its goals through that process. Applying this test, the court found that Michigan's Proposal 2 targets a program that primarily benefits racial minorities and reorders the political process in a way that burdens such minorities.[18]

Under the first part of the test, the court had little difficulty concluding that Proposal 2 targets a program that primarily benefits minorities, given that the measure eliminated race-conscious admissions policies at state universities. With respect to the second part of the test, however, the court reasoned that it must first consider whether the affected admissions procedure lies within the political process before it could determine whether Proposal 2 reordered that process in a way that burdened minorities. The Michigan state constitution expressly grants control over universities to a governing board. Although the board has delegated its authority over university admissions to universities and their faculty, the court held that the board has the ultimate authority over admissions decisions, which are therefore part of the political process.[19]

The court then concluded that Proposal 2 reordered the political process in a way that burdens minorities because it made the constitutional amendment process the only way in which race-

[13] *Id.* at 391, 393.

[14] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982).

[15] *Id.* at 467.

[16] Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 652 F.3d 607 (6th Cir. 2011).

[17] Coalition to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466 (6th Cir. 2012).

[18] Coalition to Defend Affirmative Action, 701 F.3d at 477.

[19] *Id.* at 482-83.

conscious admissions plans could be reinstated at state universities. In contrast, changes to other aspects of the admissions process could be made at several levels of government, including lobbying university officials or campaigning in university board elections. Moreover, voters not only eliminated the race-conscious policies established by university officials, but also stripped those officials of the authority to reinstate such policies, thus reordering the political process. According to the court:

> Because less onerous avenues to effect political change remain open to those advocating consideration of non-racial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to traverse a more arduous road without violating the Fourteenth Amendment. We thus conclude that Proposal 2 reorders the political process in Michigan to place special burdens on minority interests.[20]

Several judges on the en banc panel filed dissenting opinions. A common feature among the dissenting arguments in favor of Proposal 2's constitutionality was the assertion that the *Hunter*/*Seattle* precedents are not applicable. For example, some dissenters disagreed with the court's determination that Proposal 2 had reordered the political process in a way that impermissibly burdened racial minorities. In addition, some of the dissenting judges noted that the earlier cases involved laws that protect racial minorities from discrimination, while Proposal 2 involves racial preferences. Other dissenters argued that it was inherently contradictory to rule that a policy of non-discrimination could itself violate the equal protection clause, and contended that the court had erred by failing to consider the fact that the racial preferences at issue in Proposal 2 are presumptively invalid under the Court's more recent equal protection jurisprudence as it has evolved in the years since *Hunter* and *Seattle* were decided.[21] Citing another court of appeals that had reached the same result in a similar case,[22] the dissent concluded:

> ... [E]qual treatment is the baseline rule embodied in the Equal Protection Clause, from which racial-preference programs are a departure.... These programs—fundamentally different from the underlying policies in *Hunter* and *Seattle*—cannot receive special sanctuary from a decision of the majority of voters to return their law to the equal protection norm of equal treatment.[23]

Supreme Court Review

When it hears oral arguments in *Schuette* this coming October, the Court is likely to grapple with many of the same arguments debated by the en banc Sixth Circuit, as well as issues raised in the briefs filed by the parties in the case.

In the merits brief for the state of Michigan, the petitioner makes several arguments in support of the constitutionality of Proposal 2. First, the petitioner's brief notes that Proposal 2 does not violate traditional notions of equal protection because it does not single out any group for

[20] *Id.* at 485.

[21] *Id.* at 493-98.

[22] Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) (upholding California's ban on affirmative action).

[23] Coalition to Defend Affirmative Action, 701 F.3d at 498.

different treatment.[24] The petitioner further argues that Proposal 2 does not violate the political restructuring doctrine. For example, the petitioner's brief seeks to distinguish *Hunter* and *Seattle* by arguing that those cases overturned laws that sought to prevent equal protection for racial minorities and should not be applied to laws such as Proposal 2 that seek to prevent preferential treatment, especially in light of the fact that equal protection jurisprudence has evolved significantly since the era in which *Hunter* and *Seattle* were decided.[25]

The petitioner's brief also argues that Proposal 2 does not restructure the political process because admissions decisions are, in reality, made by faculty members who are not politically accountable.[26] However, even if Proposal 2 did work such a restructuring, argues the petitioner, the provision's bar on preferential treatment means that no racial classifications are involved, and thus the measure does not violate the equal protection clause unless there is some evidence of intentional discrimination. According to the brief, such evidence is lacking, given that Proposal 2 essentially requires that all racial groups be treated the same and that voters may have reasonably concluded there are better alternatives for promoting diversity in higher education than race-conscious admissions plans.[27] Finally, in the event that the Court rules that Proposal 2 violates the principles set forth in *Seattle*, the petitioner's brief urges the Court to overrule that case. According to the brief, "[t]he elimination of discrimination and preferences based on race, sex, or ethnicity—the requirement of equal treatment—should never contradict Equal Protection."[28]

In contrast, the reply brief filed by the respondents seeks to counter the petitioner's arguments. Specifically, the brief contends that the political restructuring doctrine is an essential component of the Court's equal protection jurisprudence that establishes the following rule: "when race is the predominant factor explaining a state's decision to establish a distinct political process, the governmental action creates a racial classification subject to strict scrutiny."[29] According to the respondents, because Michigan failed to offer a compelling governmental interest for Proposal 2, the measure therefore fails to pass strict scrutiny.

More specifically, the respondents argue that Proposal 2's explicit mention of the term "race" is strong evidence that race was a predominant factor in enacting the measure.[30] In addition, the respondents contend that Proposal 2 does alter the political structure because it removed from the governing board the authority over race-conscious admissions programs only. As a result, the board retains authority over all other non-race-conscious admissions decisions, while the ability to alter the policy regarding racial preferences was removed to a higher and more burdensome level of the political process—a process to which individuals who seek changes to other admissions criteria are not subject.[31] According to the respondents, this creation of a two-tiered political process for changes to a university's admissions policy is a racial classification subject to strict scrutiny, a test that Michigan fails to pass.[32] Ultimately, the respondents' brief urges the

[24] Brief for Petitioner at 14-16, Schuette v. Coalition to Defend Affirmative Action, No. 12-682 (June 24, 2013).

[25] *Id.* at 17-24.

[26] *Id.* at 24.

[27] *Id.* at 29-36.

[28] *Id.* at 38.

[29] Brief for Respondents at 6, Schuette v. Coalition to Defend Affirmative Action, No. 12-682 (August 23, 2013).

[30] *Id.* at 38.

[31] *Id.* at 51-55.

[32] *Id.* at 56-59.

Court to respect its earlier precedents by upholding *Hunter* and *Seattle* and by finding Proposal 2 to be unconstitutional.[33]

Conclusion

The *Schuette* case represents an interesting twist on the typical inquiry into the constitutionality of affirmative action programs. Unlike the challenges in *Bakke*, *Grutter*/*Gratz*, and *Fisher*, which all questioned whether it is constitutionally permissible to promote racial diversity in higher education, the *Schuette* case questions whether it is constitutionally permissible to ban all consideration of race in the higher education context. The Supreme Court will grapple with these constitutional arguments when it takes up *Schuette* during the upcoming 2013-2014 term.

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[33] *Id.* at 60-61.