9-28-2013

Section 3: Civil Rights

Institute of Bill of Rights Law, William & Mary Law School

III. Civil Rights

In This Section:

Schuette v. Coalition to Defend Affirmative Action

12-682

Ruling Below: *Coal. to Defend Affirmative Action v. Regents of the Univ. of Michigan*, 701 F.3d 466 (6th Cir. 2012), *cert. granted,* 133 S.Ct. 1633.

In support of affirmative action efforts, organizations and individuals with ties to Michigan state universities filed suits against state officials and universities to seek declaratory judgments stating the constitutional amendment prohibiting affirmative action in public education, employment, and contracting violates the First and Fourteenth Amendments. After consolidation, the United States District Court for the Eastern District of Michigan entered summary judgment in state's favor, denied law student's motion to intervene, and denied plaintiffs' motion to alter or amend judgment.

Questions Presented: Whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al., Plaintiffs–Appellants,
v.
REGENTS OF THE UNIVERSITY OF MICHIGAN, Board of Trustees of Michigan State University; Board of Governors of Wayne State University; Mary Sue Coleman; Irvin D. Reid; Lou Anna K. Simon, Defendants–Appellees

United States Court of Appeals for the Sixth Circuit

Decided: November 15, 2012.

[Excerpt; some footnotes and citations omitted]

COLE, Circuit Judge:

A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's constitution. The same cannot be said for a black student seeking the adoption of a constitutionally

permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution—a lengthy, expensive, and arduous process—to repeal the consequences of Proposal 2. The existence of such a comparative structural burden undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change. We therefore REVERSE the judgment of the district court on this issue and find Proposal 2 unconstitutional. We AFFIRM the denial of the University Defendants' motion to be dismissed as parties, and we AFFIRM the grant of the Cantrell Plaintiffs' motion for summary judgment as to Russell.

I.

A. Factual Background

[Affirmative action] challenges in the late 1990s culminated in the Supreme Court's decisions in *Gratz v. Bollinger*, and *Grutter v. Bollinger*, which held that "universities cannot establish quotas for members of certain racial groups" or treat their applications uniquely. But the Court allowed universities to continue "consider[ing] race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration," along with other relevant factors, a holding we do not today address or upset.

Following these decisions, Ward Connerly, a former University of California Regent who had championed a similar proposition in California, and Jennifer Gratz, the lead plaintiff in *Gratz*, mobilized to place on Michigan's November 2006 statewide ballot a proposal to amend the Michigan Constitution "to prohibit all sex- and race-based preferences in public education, public employment, and public contracting...." The initiative—officially designated Proposal 06–2 but commonly known as "Proposal 2"—sought "to amend the State Constitution to ban affirmative action programs." Though Proposal 2 "found its way on the ballot through methods that undermine[d] the integrity and fairness of our democratic processes," once there, it garnered enough support among Michigan voters to pass by a margin of 58% to 42%...

Proposal 2 took effect in December 2006 and wrought two significant changes to the admissions policies at Michigan's public colleges and universities. First, it eliminated the consideration of "race, sex, color, ethnicity, or national origin" in individualized admissions decisions, modifying policies in place for nearly a half-century. No other admissions criterion—for example, grades, athletic ability, geographic diversity, or family alumni connections—suffered the same fate. Second, Proposal 2 entrenched this prohibition at the state constitutional level, thus preventing public colleges and universities or their boards from revisiting this issue—and only this issue—without repeal or modification of article I, section 26 of the Michigan Constitution.

B. Procedural History

On November 8, 2006, the day after Proposal 2 passed, a collection of interest

groups and individuals, including the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary ("Coalition Plaintiffs"), filed suit in the United States District Court for the Eastern District of Michigan. They named as defendants then-Governor Jennifer Granholm, the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University ("University Defendants"), and alleged that the provisions of Proposal 2 affecting public colleges and universities violated the United States Constitution and federal statutory law. The Coalition Plaintiffs limited their request for relief to Proposal 2 as it applies to public education, and did not challenge its constitutionality as it applies to public employment or public contracting. About a month later, the Michigan Attorney General ("Attorney General") filed a motion to intervene as a defendant, which the district court granted. Shortly thereafter, Eric Russell, then an applicant to the University of Michigan Law School, and Toward A Fair Michigan ("TAFM"), a non-profit corporation formed to ensure implementation of Proposal 2, also filed a motion to intervene in the litigation.

On December 19, 2006, a group of faculty members and prospective and current students at the University of Michigan ("Cantrell Plaintiffs") filed a separate but similar suit …

That same day, the district court issued what was, in effect, a preliminary injunction, postponing the application of Proposal 2 to the universities' admissions and financial-aid policies until July 1, 2007, which was the conclusion of the 2006–2007 admissions and financial-aid cycle. The district court's order stemmed from a stipulation among the University Defendants, Coalition Plaintiffs, Granholm, and the Attorney General consenting to the injunction. While awaiting approval as intervenors, Russell and TAFM opposed the Attorney General's stipulation and sought a stay of the injunction from the district court. When two days passed without a ruling on their motions, Russell and TAFM filed with us an "Emergency Motion for a Stay Pending Appeal," which we granted. Meanwhile, we approved the district court's decision to allow only Russell to intervene in the Proposal 2 litigation.

On October 5, 2007, the Cantrell Plaintiffs filed a motion for summary judgment as to Russell, arguing that he should be dismissed from the litigation because he no longer represented an interest distinct from that of the Attorney General. On October 17, 2007, the University Defendants filed a motion to dismiss on the ground that they were not necessary parties to the litigation. On November 30, 2007, the Attorney General filed a motion to dismiss for lack of standing or, in the alternative, a motion for summary judgment on the merits as to all Plaintiffs. Russell and the Cantrell Plaintiffs likewise filed motions for summary judgment the same day.

On March 18, 2008, the district court issued two orders addressing these motions. First,

the court denied the University Defendants' request to be dismissed as parties and the Cantrell Plaintiffs' motion for summary judgment. The court also granted the Attorney General's motion for summary judgment, rejecting the Plaintiffs' arguments that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment. Second, the court granted the Cantrell Plaintiffs' motion for summary judgment, dismissing Russell as an intervenor. The Cantrell Plaintiffs subsequently moved the court to reconsider the first order, but the court denied the motion.

The Plaintiffs, the University Defendants, and Russell appealed these orders to this Court. A panel of this Court reversed the district court's grant of summary judgment in favor of the Attorney General, concluding that the portions of Proposal 2 that affect Michigan's public institutions of higher education impermissibly alter the political process in violation of the Equal Protection Clause. This Court also affirmed the district court's dismissal of Russell and the denial of the University Defendants' motion to be dismissed. The Attorney General then sought en banc review, which we granted, vacating the panel opinion.

II.

A. Constitutionality of Proposal 2

The Plaintiffs argue that Proposal 2 violates [the Equal Protection Clause] in two distinct ways. Both Plaintiff groups argue that Proposal 2 violates the Equal Protection Clause by impermissibly restructuring the political process along racial lines (the "political process" argument), and the Coalition Plaintiffs additionally argue that Proposal 2 violates the Equal Protection Clause by impermissibly classifying individuals on the basis of race (the "traditional" argument).

In addressing the Plaintiffs' arguments, we are neither required nor inclined to weigh in on the constitutional status or relative merits of race-conscious admissions policies as such…

We review de novo a district court's grant of summary judgment and denial of a motion for reconsideration of that decision. Whether a state's constitution violates the federal constitution is a question of law, which we also review de novo.

1. Equal Protection Within the Political Process

The Equal Protection Clause "guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute ... that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner." *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457, 467 (1982). But the Equal Protection Clause reaches even further, prohibiting "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." "[T]he State may no more disadvantage any particular group by

making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Hunter v. Erickson*, 393 U.S. 385, 393 (1969).

The Supreme Court's statements in *Hunter* and *Seattle* emphasize that equal protection of the laws is more than a guarantee of equal treatment under existing law…. Ensuring the fairness of the political process is particularly important because an electoral minority is disadvantaged by definition in its attempts to pass legislation; this is especially true of "discrete and insular minorities," who face unique additional hurdles.

Ensuring a fair political process is nowhere more important than in education. Education is the bedrock of equal opportunity and "the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Safeguarding the guarantee "that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." …Therefore, in the high-stakes context of education, we must apply the political-process doctrine with the utmost rigor.

Of course, the Constitution does not protect minorities from political defeat… We must therefore have some way to differentiate between the constitutional and the impermissible. And *Hunter* and *Seattle* provide just that. They set the benchmark for when the majority has not only won, but has rigged the game to reproduce its success indefinitely.

a. Hunter v. Erickson

In *Hunter,* the citizens of Akron, Ohio, overturned a fair housing ordinance enacted by the City Council. [T]he citizens amended the city charter through a referendum to require the approval of an electoral majority before any ordinance regulating real estate "on the basis of race, color, religion, national origin or ancestry"—past or future—could take effect. In other words, only ordinances based on those factors required a city-wide majority; ordinances based on any other factor required just a vote by the City Council…

The referendum halted operation of the existing fair housing ordinance, and more importantly for our purposes, erected a barrier to any similar ordinance in the future.

The Supreme Court found that the disparity between the process for enacting a future fair housing ordinance and the process for enacting any other housing ordinance "place[d] special burden[s] on racial minorities within the governmental process" by making it "substantially more difficult to secure enactment" of legislation that would be to their benefit.…

b. Washington v. Seattle School District No. 1

In *Seattle,* a case that mirrors the one before us, the Supreme Court applied *Hunter* to strike down a state statute, also enacted via a referendum, that prohibited racially integrative busing. *Seattle,* 458 U.S. at 463.

Prior to the referendum, Seattle School District No. 1 ("District") had implemented a school desegregation plan that made extensive use of mandatory reassignments… [T]he school board implemented the plan to accelerate its existing program of voluntary busing, which some constituencies saw as insufficiently alleviating racial imbalances.

In response, Seattle residents drafted a statewide measure—known as Initiative 350—providing in relevant part that "no school board ... shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence...." Though the initiative was framed as a general ban on mandatory busing, its myriad exceptions made its real effect the elimination of school reassignments for racial purposes only, except where a court ordered such reassignments to remedy unconstitutional segregation. Initiative 350 made it on the Washington ballot and passed by a substantial margin.

The Court found that Initiative 350, like the Akron city charter amendment, violated the Equal Protection Clause. The Court stated that its prior cases yielded a "simple but central principle": while "laws structuring political institutions or allocating political power according to neutral principles" do not violate the Fourteenth Amendment, "a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle*, 458 U.S. at 469–70. Echoing *Hunter*, the Court explained that this distinct analysis is necessary because non-neutral allocations of power "place [ ] *special* burdens on racial minorities within the governmental process, thereby making it *more* difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest…

In sum, *Hunter* and *Seattle* require us to examine an enactment that changes the governmental decisionmaking process for legislation with a racial focus to determine if it improperly manipulates the channels for change. To the extent that it does, we must strike down the enactment absent a compelling state interest.

2. Application of the* Hunter/Seattle *Test to Proposal 2

Hunter and *Seattle* thus expounded the rule that an enactment deprives minority groups of the equal protection of the laws when it: (1) has a racial focus, targeting a policy or program that "inures primarily to the benefit of the minority"; and (2) reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process. *See Seattle*, 458 U.S. at 467, 472, 102 S.Ct. 3187; *Hunter*, 393 U.S. at 391, 89 S.Ct. 557. Applying this rule here, we conclude that Proposal 2 targets a program that "inures primarily to the benefit of the minority" and reorders the political process in Michigan in a way that places special burdens on racial minorities.

a. Racial Focus

The first prong of the *Hunter/Seattle* test requires us to determine whether Proposal 2 has a "racial focus." This inquiry turns on whether the targeted policy or program, here holistic race-conscious admissions policies at public colleges and universities, "at bottom inures primarily to the benefit of the minority, and is designed for that purpose."…

Seattle conclusively answers whether a law targeting policies that seek to facilitate classroom diversity, as Proposal 2 does, has a racial focus. In *Seattle,* the Court observed that programs intended to promote school diversity and further the education of minority children enable these students to "achieve their full measure of success."… Accordingly, the Court noted that "desegregation of the public schools ... at bottom inures primarily to the benefit of the minority...." Because minorities could "consider busing for integration to be 'legislation that is in their interest,' " the Court concluded that Initiative 350's effective repeal of such programs had a racial focus sufficient to "trigger application of the *Hunter* doctrine."

The logic of the Court's decision in *Seattle* applies with equal force here. Proposal 2 targets race-conscious admissions policies that "promote [ ] 'cross-racial understanding,' help[ ] to break down racial stereotypes, and 'enable[ ] students to better understand persons of different races.' "… There is no material difference between the enactment in *Seattle* and Proposal 2, as both targeted policies that benefit minorities by enhancing their educational opportunities and promoting classroom diversity…

Seattle not only mandates our conclusion that Proposal 2 is racially focused, but it also dispels any notion that the benefit race-conscious admissions policies may confer on the majority undercuts its "racial focus." Although it is true that increased representation of racial minorities in higher education benefits all students, the Supreme Court has made clear that these policies still have a racial focus.

…

We find that the holistic race-conscious admissions policies now barred by Proposal 2 inure primarily to the benefit of racial minorities, and that such groups consider these policies to be in their interest. Indeed, we need not look further than the approved ballot language—characterizing Proposal 2 as an amendment "to ban affirmative action programs"—to confirm that this legislation targets race-conscious admissions policies and, insofar as it prohibits consideration of applicants' race in admissions decisions, that it has a racial focus.

b. A Reordering of the Political Process That Burdens Racial Minorities

The second prong of the *Hunter/Seattle* test asks us to determine whether Proposal 2 reallocates political power or reorders the political process in a way that places special burdens on racial minorities. We must first resolve (1) whether the affected admissions procedures lie within the "political process," and then (2) whether Proposal 2 works a "reordering" of this political process in a

way that imposes "special burdens" on racial minorities.

i. Proposal 2's Effect on a "Political Process"

The breadth of Proposal 2's influence on a "political process" turns on the role the popularly elected governing boards of the universities play in setting admissions procedures. The key question is whether the boards had the power to alter the universities' admissions policies prior to the enactment of Proposal 2. If the boards had that power and could influence the use (or non-use) of race-conscious admissions policies, then Proposal 2's stripping of that power works a reordering of the political process because minorities can no longer seek to enact a type of legislation that is in their interest at the board level. But if board members lacked such power, because policy decisions are actually under the control of politically unaccountable faculty members or admissions committees, then Proposal 2's effect on the political process is negligible…

The Michigan Constitution establishes three public universities—the University of Michigan, Michigan State University, and Wayne State University—and grants control of each to a governing board. These boards have the same role: to run, with plenary authority, their respective institutions. Michigan law has consistently confirmed this absolute authority…

Eight popularly elected individuals sit on these boards, and they hold office for eight years. The boards have the "power to enact ordinances, by-laws and regulations for the government of the university. Exercising this power, the boards have enacted bylaws—which they have complete authority to revise or revoke—detailing admissions procedures.

The University of Michigan's bylaws delegate the day-to-day management of undergraduate admissions to the associate vice provost and executive director of undergraduate admissions. Although the board delegates this responsibility, it continues to exercise ultimate decisionmaking authority because it directly appoints the associate vice provost and executive director of undergraduate admissions, and because it retains the power to revoke or alter the admissions framework. Nothing prevents the board from adopting an entirely new framework for admissions decisions if it is so inclined…

[T]he board fulfills its general supervisory role by conducting monthly public meetings to remain apprised of all university operations and by exercising its power to amend bylaws or revise delegations of responsibility. At these meetings, the board regularly discusses admissions practices, including the use of race-conscious admissions policies. Thus, the elected boards of Michigan's public universities can, and do, change their respective admissions policies, making the policies themselves part of the political process. But even if they did not, the Attorney General provides no authority to support his contention that an unused power is a power abandoned.

Nevertheless, the Attorney General argues, echoed by the dissenters, that admissions decisions lie outside the political process because the governing boards of the universities have "fully delegated" responsibility for establishing admissions standards to politically unaccountable admissions committees and faculty members. But the Michigan Constitution, state statutes, and the universities' bylaws and current practices directly contradict this argument…

Moreover, to the extent the Attorney General and the dissenters express concern over the degree to which the board has delegated admissions decisions, that delegation does not affect whether admissions decisions should be considered part of the political process…

Telling evidence that board members can influence admissions policies—bringing such policies within the political process—is that these policies can, and do, shape the campaigns of candidates seeking election to one of the boards. As the boards are popularly elected, citizens concerned with race-conscious admissions policies may lobby for candidates who will act in accordance with their views—whatever they are. Board candidates have, and certainly will continue, to include their views on race-conscious admissions policies in their platforms… Once elected, the new slate may revise the bylaws, and change their university's admissions policies—either by entirely revoking the delegation and handling all admissions policies at the board level or by enacting new bylaws giving more explicit direction to admissions committees. Thus, Proposal 2 affects a "political process."

ii. Reordering of a "Political Process"

The next issue is whether Proposal 2 reordered the political process in a way that places special burdens on racial minorities. The Supreme Court has found that both implicit and explicit reordering violates the Fourteenth Amendment…

The comparative structural burden we face here is every bit as troubling as those in *Hunter* and *Seattle* because Proposal 2 creates the highest possible hurdle. This comparative structural burden is most apparent in tracing the channels for change available to a citizen promoting any policy unmodified by Proposal 2 and those available to a citizen promoting constitutionally permissible race-conscious admissions policies.

An interested Michigan citizen may use any number of avenues to change the admissions policies on an issue outside the scope of Proposal 2…

Because Proposal 2 entrenched the ban on all race-conscious admissions policies at the highest level, this last resort—the campaign for a constitutional amendment—is the *sole recourse* available to a Michigan citizen who supports enacting such policies… Just to place a proposed constitutional amendment repealing Proposal 2 on the ballot would require either the support of two-thirds of both the Michigan House of Representatives and Senate, or the

signatures of a number of voters equivalent to at least ten percent of the number of votes cast for all candidates for governor in the preceding general election. Once on the ballot, the proposed amendment must then earn the support of a majority of the voting electorate to undo Proposal 2's categorical ban.

Only after traversing this difficult and costly road would [a] citizen reach the starting point of his neighbor who sought a legacy-related admissions policy change. After [a] successful constitutional amendment campaign, [a] citizen could finally approach the university—by petitioning the admissions committees or higher administrative authorities—to request the adoption of race-conscious admissions policies. By amending the Michigan Constitution to prohibit university admissions units from using even modest race-conscious admissions policies, Proposal 2 thus removed the authority to institute any such policy from Michigan's universities and lodged it at the most remote level of Michigan's government, the state constitution. As with the unconstitutional enactment in *Hunter*, proponents of race-conscious admissions policies now have to obtain the approval of the Michigan electorate *and*, if successful, admissions units or other university powers—whereas proponents of other non-universal admissions factors need only garner the support of the latter.

The "simple but central principle" of *Hunter* and *Seattle* is that the Equal Protection Clause prohibits requiring racial minorities to surmount more formidable obstacles than those faced by other groups to achieve their political objectives… As the Supreme Court has recognized, such special procedural barriers to minority interests discriminate against racial minorities just as surely as—and more insidiously than—substantive legal barriers challenged under the traditional equal protection rubric. Because less onerous avenues to effect political change remain open to those advocating consideration of nonracial 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.

3. Objections to the Applicability of the Hunter/Seattle *Doctrine to Proposal 2*

The Attorney General and the dissenters make a number of arguments as to why Proposal 2 survives constitutional scrutiny. At the outset, it should be noted that adopting these arguments as to Proposal 2's constitutionality would be particularly ironic, given that these arguments applied with equal force to Initiative 350 in *Seattle.* While distinctions obviously exist between the policy at issue here and that in *Seattle*, the factual differences are not so material as to justify departure from relevant Supreme Court precedent.

a. Hunter/Seattle *Doctrine and Preferential Treatment Programs*

The Attorney General and the dissenters

assert that *Hunter* and *Seattle* are inapplicable to Proposal 2 because those cases only govern enactments that burden racial minorities' ability to obtain *protection from discrimination* through the political process, whereas Proposal 2 burdens racial minorities' ability to obtain *preferential treatment.* At bottom, this is an argument that an enactment violates the Equal Protection Clause under *Hunter* and *Seattle* only if the political process is distorted to burden legislation providing constitutionally-mandated protections, such as anti-discrimination laws. Under this theory, a state may require racial minorities to endure a more burdensome process than all other citizens when seeking to enact policies that are in their favor if those policies are constitutionally *permissible* but not constitutionally *required.* This effort to drive a wedge between the political-process rights afforded when seeking antidiscrimination legislation and so-called preferential treatment is fundamentally at odds with *Seattle.*

The only way to find the *Hunter/Seattle* doctrine inapplicable to the enactment of preferential treatment is to adopt a strained reading that ignores the preferential nature of the legislation at issue in *Seattle,* and inaccurately recast it as anti-discrimination legislation…

The distinction urged by the Attorney General and the dissenters [] erroneously imposes an *outcome*-based limitation on a *process*-based right. What matters is whether racial minorities are forced to surmount procedural hurdles in reaching their objectives over which other groups do not have to leap. If they are, the disparate procedural treatment violates the Equal Protection Clause, regardless of the objective sought.

b. Proposal 2 as a Mere Repeal

Latching on to the Supreme Court's observation that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification," *Crawford v. Bd. of Educ.,* 458 U.S. 527, 539 (1982), the Attorney General implores us to classify Proposal 2 as a mere repeal of the universities' race-conscious admissions policies, rather than the kind of political restructuring that implicates the *Hunter/Seattle* doctrine. *Crawford,* a case decided the same day as *Seattle,* emphasizes the difference between mere repeals and political restructuring; state actors must retain the power to repeal policies without running afoul of the political-process doctrine—certainly not every policy elimination carries with it a political-process violation. *Crawford* brings this difference into focus, because the Court-approved political action in that case (amendment of the California Constitution) occurred at the same level of government as the original enactment (a prior amendment of the California Constitution), thus leaving the rules of the political game unchanged.

The Supreme Court has twice distinguished the "mere repeal" at issue in *Crawford* from the political reordering at issue in *Hunter* and *Seattle.* The *Crawford* Court

distinguished *Hunter* by clarifying that the charter amendment in *Hunter* was "something more than a mere repeal" because it not only repealed an ordinance adopted by the popularly elected City Council, it removed from the Council the power to reinstate it—more than just undoing an unpopular act, the electorate in *Hunter* had altered the framework of the political process. The *Seattle* Court drew the same distinction between the Washington State legislation and the California amendment…

Here, the rules are not the same after Proposal 2. Rather than undoing an act of popularly elected officials by simply repealing the policies they created, Michigan voters repealed the admissions policies that university officials created *and took the additional step* of permanently removing the officials' power to reinstate them. In short, Proposal 2 "works something more than the 'mere repeal' of a desegregation law by the political entity that created it."…

More generally, the dissenting opinions criticize our holding today in broad and strident terms. At their core, these opinions express disapproval of the political-process doctrine itself, dissatisfaction that *Grutter* allowed for even modest race-conscious admissions policies, and incredulity at the possibility that a state constitutional amendment forbidding consideration of race could violate the Equal Protection Clause. But *Hunter* and *Seattle* have not been overruled; *Grutter* continues to permit the same holistic race-conscious admissions policies Proposal 2 seeks to permanently eliminate; and courts must decide equal protection challenges by application of precedent, rather than resort to syllogism. Most importantly, our holding does not place race-conscious admissions policies beyond the political process. Opponents of affirmative action remain free to advocate for their preferred policies in the same manner and at the same level of government as its proponents.

4. Constitutionality of Proposal 2 Under the Political–Process Doctrine

Proposal 2 modifies Michigan's political process "to place special burdens on the ability of minority groups to achieve beneficial legislation." Because Proposal 2 fails the *Hunter/ Seattle* test, it must survive strict scrutiny. Under the strict scrutiny standard, the Attorney General must prove that Proposal 2 is "necessary to further a compelling state interest." In *Seattle,* the Court did not consider whether a compelling state interest might justify a state's enactment of a racially-focused law that restructures the political process, because the government made no such argument. Likewise, because the Attorney General does not assert that Proposal 2 satisfies a compelling state interest, we need not consider this argument. Therefore, those portions of Proposal 2 that affect Michigan's public institutions of higher education violate the Equal Protection Clause.

5. Traditional Equal Protection Analysis

Having found that Proposal 2 deprives the Plaintiffs of equal protection of the law under the political-process doctrine, we need not reach the question of whether it also

violates the Equal Protection Clause when assessed using the "traditional" analysis.

B. The University Defendants' Non–Dismissal

The University Defendants appeal the district court's denial of their motion to be dismissed as misjoined parties under Rule 21 of the Federal Rules of Civil Procedure. We review the district court's decision for an abuse of discretion and must affirm unless we are "left with a definite and firm conviction that the trial court committed a clear error of judgment."

…Because a motion to be dismissed under Rule 21 tracks Rule 20(a), we must ask whether the Coalition Plaintiffs have satisfied the rules for permissive joinder…

The district court concluded that the University Defendants were properly joined parties under Rule 20(a) because the Coalition Plaintiffs asserted a request for relief on a claim involving common issues of law and fact. The district court found that "the claims brought against the universities are intertwined with those challenging Proposal 2," and "[i]f [the court] were to find Proposal 2 unconstitutional, affirmative action would not automatically be reinstated into the admissions process. Rather, the universities would have to choose to do so on their own." Because the Coalition Plaintiffs' traditional equal protection claim could have required the University Defendants to grant relief by reinstating race-conscious admissions policies, the district court found Rule 20(a) satisfied and concluded that dismissal as a misjoined party was not appropriate.

The discretionary language of Rule 21, coupled with our deferential standard of review, presents a high hurdle for reversal of the district court's determinations. The Coalition Plaintiffs asserted a right to relief against the University Defendants, and so we are not "left with a definite and firm conviction that the trial court committed a clear error of judgment," and affirm the district court's denial of the University Defendants' motion.

C. Dismissal of Russell as an Intervenor

Intervening Defendant Russell appeals the district court's decision granting the Cantrell Plaintiffs' motion for summary judgment to dismiss him from the case because he no longer satisfied the requirements for intervention. We review de novo a district court's grant of summary judgment…

Under Federal Rule of Civil Procedure 24(a), an interested party must meet four requirements before being permitted to intervene as of right: (1) his motion to intervene must be timely; (2) he must have a substantial legal interest in the subject matter of the case; (3) he must demonstrate that his interest will be impaired in the absence of intervention; and (4) he must demonstrate that the parties already before the court do not adequately represent his interest. An intervenor also must continue to meet these requirements throughout the duration of the litigation, as courts must be able to ensure that parties have a live interest in the case.

Although Russell met all four requirements when he was permitted to intervene, it has become apparent during the course of litigation that Russell can no longer demonstrate that the parties already before the court do not adequately represent his interests… Russell's intervention in this litigation is no longer proper and we affirm the district court's grant of the Cantrell Plaintiffs' motion for summary judgment to dismiss him.

III.

Finding those provisions of Proposal 2 affecting Michigan's public colleges and universities unconstitutional, we REVERSE the district court's judgment granting the Defendants–Appellees' motion for summary judgment. We further AFFIRM the district court's denial of the University Defendants' motion to be dismissed as parties, and AFFIRM the district court's grant of the Cantrell Plaintiffs' motion for summary judgment as to Russell.

DANNY J. BOGGS, Circuit Judge, dissenting.

In 1848, the relevant local authority, the Boston School Board, decided that race should be used in making assignments in the Boston public schools. They excluded and segregated black students. However, in 1855 the ultimate political authority, the legislature of Massachusetts, established the general principle against racial discrimination in educational choices. The legislature was lauded for that choice.

Over 100 years later, various Michigan local and subordinate state authorities began to implement policies of racial discrimination in decisions on, *inter alia*, educational admissions. The Supreme Court of the United States held that such actions were permissible, but certainly not that they were compelled. Subsequently, the ultimate state political authority, the People of Michigan, voted to establish the same principle that Massachusetts did in 1855…

The majority of the en banc court now holds that this action of the People of Michigan was unconstitutional, relying on an extreme extension of two United States Supreme Court cases ruling on very different circumstances.

To begin with, those two cases each involved a single action that transferred, for the first time, decision making on a single matter, a transfer held to be wholly aimed at one disadvantaged race. In one instance, approval of new anti-discrimination ordinances was moved from the city council to the voters of the city of Akron, and in the other case, power over certain pupil assignment policies was moved from the citizens of one city in the state of Washington to the citizens of the entire state.

In our case, however, we have the citizens of the entire state establishing a principle that would in general have seemed laudable. Even plaintiffs here do not allege, in the context of their political-process argument, that if this constitutional provision had been enacted at some earlier time in Michigan, for example upon its entry into the union, or

upon the enactment of its new constitution in 1963, that it would have been unconstitutional. They instead contend that because of current circumstances, and intervening political decisions of racial discrimination, these Supreme Court cases make the principled action of the People of Michigan unconstitutional.

Indeed, the majority seems to concede that some set of decision makers in Michigan would be able to reverse the policies that they claim are immune from actions by the entire body politic. Rather, they demand that any changes in the educational (and perhaps employment) policies here can be enacted only by individual actions of each of the university governing authorities (three of which are chosen by statewide election over eight years), each regional state university (whose governing boards are appointed on a staggered basis by the governor over eight years), and each local educational authority for community and technical schools (whose governing authorities are chosen by a variety of methods by each individual county and locality)…

In addition, the situation in Michigan, in which the various local authorities are *permitted* (under *Grutter)* to engage in varieties of racial discrimination, both for and against variously defined groups, is wholly at odds with the single-instance restructuring of government involved in the Supreme Court precedents relied on by the majority.

Here, it was clear from the evidence in the *Grutter* case, and in the record in this case, discrimination may be practiced in favor of certain racially or ethnically defined minorities, primarily African–Americans (or perhaps those deemed to be "black," whether or not actually "American") or "Hispanics" (although there was some evidence that some groups generally defined as "Hispanic" (especially Cuban) might be discriminated against rather than in favor of. On the other hand, various groups, sometimes defined as racial minorities, may be discriminated against.

Under these circumstances, holding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is vastly far afield from the Supreme Court precedents…

I cannot agree that this decision is correct, either as a matter of general constitutional law or as an accurate interpretation of the Supreme Court precedents. I therefore respectfully DISSENT.

JULIA SMITH GIBBONS, Circuit Judge, dissenting.

Proposal 2 is not unconstitutional under either a political restructuring theory or under traditional equal protection analysis. I therefore respectfully dissent.

I.

Elementary principles of constitutional law tell us that plaintiffs' challenge to Proposal 2 should have little to no chance of success. Plaintiffs argue that Michigan must retain its racial and other preference policies in higher education and that the state's voters cannot

make the contrary policy choice that factors like race and gender may not be taken into account in admissions. They make this argument in the face of the core equal protection principle of nondiscrimination—a principle consistent with the choice of the people of Michigan. They make the argument despite the absence of any precedent suggesting that states must employ racial preferences in university admissions. Essentially, the argument is one of constitutional protection for racial and gender preference—a concept at odds with the basic meaning of the Equal Protection Clause, as understood and explained through decades of jurisprudence.

Although it has convinced a majority of this court, plaintiffs' argument must be understood for the marked departure it represents—for the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process. In reaching its conclusion, the majority strays from analysis bounded by familiar principles of constitutional law and loses sight of the parameters within which we should operate in deciding this case. To be accurate in characterizing the majority's approach, it relies on two Supreme Court cases, which it deems highly instructive. Yet, when examined carefully, these cases have no application here, and, in emphasizing them, the majority overlooks recent case law providing more relevant guidance.

II.

The political restructuring theory on which the majority relies does not invalidate Proposal 2…

In holding that student-body diversity is a compelling state interest that can justify the narrowly tailored use of race in university admissions policies, *Grutter* set forth three principles about race-based admissions policies that bear repeating here. First, *Grutter* reminded us that " '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race' " and that, as a consequence, "race-conscious admissions policies must be limited in time." This principle makes sense because all "racial classifications are presumptively invalid...." Second, *Grutter* indicated that the decision to end race-conscious admissions policies is primarily one to be made by states and their public universities, not courts. And third, while racially conscious admissions policies are permitted, they are not constitutionally required.

A.

With these core principles in mind we examine the applicability of *Hunter* and *Seattle* to the passage of Proposal 2 in Michigan…

Because *Hunter* considered only the political-process implications of repealing a law that required *equal* treatment, it cannot be read broadly to apply to the repeal of a law requiring *preferential* treatment. As we have observed, "[t]hese are fundamentally different concepts." Thus, *Hunter* does not guide us here.

Nor does *Washington v. Seattle Sch. Dist. No. 1*, suggest application of the political restructuring doctrine to Proposal 2… Accordingly, Proposal 2 is quite unlike the narrow anti-busing measure struck down in *Seattle;* it represents "a sea change in state policy, of a kind not present in *Seattle* or any other 'political structure' case."

The majority is quick to conclude that Proposal 2 and Initiative 350 each target policies—affirmative action and integrative busing, respectively—that "inure[ ] primarily to the benefit of the minority" and therefore each has a "racial focus." But in a political-restructuring challenge, it is not enough to observe that some of the policies affected by the challenged enactment primarily benefit minorities. Nor is it enough to observe that, as here, the challenged enactment was passed in response to a high-profile case permitting racially conscious admissions policies under some circumstances. Though relevant, these observations are alone insufficient: in a political restructuring case, it is imperative to consider the scope of the challenged enactment itself. The majority fails to account for the broad substantive reach of Proposal 2 when compared to the narrow focus of Initiative 350 and, in so doing, improperly stretches the political restructuring doctrine that *Seattle* articulates to the instant case…

B.

In concluding that a race-based classification that is presumptively invalid, but permissible under limited circumstances and for a finite period of time, receives the same structural protections against statewide popular repeal as other laws that inure to the interest of minorities, the majority walks alone. The two highest courts to have considered the question have concluded that the political restructuring doctrine of *Hunter* and *Seattle* does not prevent the statewide popular elimination of race-based classification policies. …

[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.

III.

There is another reason that *Hunter* and *Seattle* cannot forbid the amendment of the Michigan Constitution through the passage of Proposal 2. In both cases the relevant lawmaking authority was reallocated from a local legislative body to the "more complex government structure," of the city- or state-wide general electorate, thereby placing a "comparative structural burden ... on the political achievement of minority interests."… As the record here demonstrates, the people of Michigan have not restructured the state's lawmaking process in the manner prohibited by *Hunter* and *Seattle*. Instead, their vote removed admissions policy from the hands of decisionmakers who were unelected and unaccountable to either minority or majority interests and placed it squarely in an

electoral process in which all voters, both minority and majority, have a voice.

A.

Public higher education in Michigan is unique in that "[t]he Michigan Constitution confers a unique constitutional status on [Michigan's] public universities and their governing boards." These boards are "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is coordinate with and equal to that of the legislature." …

The governing boards have fully delegated the responsibility for establishing admissions standards to several program-specific administrative units within each institution, which set admissions criteria through informal processes that can include a faculty vote…

[T]he majority emphasizes that the boards—although they have fully delegated their decisionmaking power to admissions directors and faculty—can revoke this authority and can revise any bylaw in order to effect changes in university admission policies. …

B.

The decisionmaking structure at the universities is important because these program-specific faculty admissions committees are far afield from the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*. To appreciate this critical difference, we need look no further than *Seattle* itself.

In *Seattle*, the Court emphasized that the type of action it found objectionable was the creation of comparative burdens "on minority participation in the political process." The *Seattle* majority, however, did not view state university admissions committees as a part of the "political process" in the manner of an elected school board or city council. A dialogue between the majority and dissent in *Seattle* is particularly instructive on this point. In dissent, Justice Powell, critiquing the potential breadth of the majority's holding, argued:

> Thus, if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the dean of the law school, the faculty of the university system as a whole, the university president, the chancellor of the university, and the board of regents might be powerless to intervene despite their greater authority under state law.

The majority, however, flatly dismissed this concern as a misunderstanding of the court's decision: "It is evident, then, that the horribles paraded by the dissent, *which have nothing to do with the ability of minorities to participate in the process of self-government*—are entirely unrelated to this case."

For the *Seattle* majority, then, an

impermissible reordering of the political process meant a reordering of the processes through which the people exercise their right to govern themselves.

Thus, the academic processes at work in state university admissions in Michigan are not "political processes" in the manner contemplated in *Seattle*...

Of course, when an elected body delegates a power, it does not automatically follow that the delegatee's decisions fall outside the political process. But that is not the point. …

Although the majority appears to see no reason to distinguish between the unelected and unresponsive program-specific faculty admissions committees here and the legislative bodies from which lawmaking authority was removed in *Hunter* and *Seattle*, a consideration of political accountability in the political process is squarely grounded in the *Seattle* opinion. In *Seattle*, the Court undertook a close examination of Washington's system of "establish[ing] the local school board, rather than the State, as the entity charged with making decisions of the type at issue,":

> But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards.
>
> Thus "each common school district board of directors" is made "*accountable* for the proper operation of its district *to the local community and its electorate.*" To this end, each school board is "vested with the final responsibility for the setting of policies ensuring quality in the content and the extent of its educational program."

It was only upon its consideration of the state statutory structure's vesting of decisionmaking in local and politically accountable school boards that the Court could conclude that "placing power over desegregative busing at the state level ... restructured the Washington political process." Taking this into account, it is difficult to conclude that, in amending their state constitution to prohibit the use of racial preferences in university admissions, the people of Michigan modified "the community's *political mechanisms* ... to place effective decisionmaking authority over a racial issue at another level of *government.*"…

In short, Michigan has chosen to structure its university system such that politics plays no part in university admissions at all levels within its constitutionally created universities. The Michigan voters have therefore not restructured the political process in their state by amending their state constitution; they have merely employed it.

IV.

Finally, it is plain that Proposal 2 does not violate the Equal Protection Clause under a traditional approach to equal protection. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." We apply strict

scrutiny to laws that (1) include a facial racial classification or (2) have a discriminatory impact and a discriminatory purpose. Proposal 2, which prohibits racial classifications, *a fortiori* does not classify facially on the basis of race. As to discriminatory impact and purpose, the district court did find "sufficient evidence to establish a fact question on the disparate impact part of the test" but found no discriminatory purpose. Indeed, it stated that "the demonstration of a discriminatory purpose ... dooms [the] conventional equal protection argument" because it "cannot [be] sa[id] that the only purpose of Proposal 2 is to discriminate against minorities." The district court's conclusions are correct. "[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context." Thus, no heightened level of scrutiny need be applied to Proposal 2, and under rational basis review, Proposal 2 is easily justifiable. Proposal 2 does not violate the Equal Protection Clause under the conventional analysis. …

VI.

For these reasons, I would conclude that Proposal 2 does not violate the Equal Protection Clause of the United States Constitution under either a political restructuring theory or traditional theory of equal protection. Accordingly, I would affirm the judgment of the district court.

[ROGERS, Circuit Judge, dissent omitted]

SUTTON, Circuit Judge, dissenting.

I join Judge Gibbons' dissent and write separately to make a few additional points.

Today's lawsuit transforms a potential virtue of affirmative action into a vice. If there is one feature of affirmative-action programs that favors their constitutionality, it is that they grow out of the democratic process: the choice of a majority of a State's residents to create race-conscious admissions preferences at their public universities not to benefit a majority race but to facilitate the educational opportunities of disadvantaged racial minorities. Such democratically enacted programs, like all democratically enacted laws, deserve initial respect in the courts, whether the particulars of a program satisfy the Fourteenth Amendment.

Yet this lawsuit turns these assumptions on their head. Democracy, it turns out, has nothing to do with it. Plaintiffs insist that the Fourteenth Amendment's guarantee of "equal protection of the laws" imposes two new rules on the policy debates surrounding affirmative action in higher education. Rule one: States not only *may* establish race-conscious affirmative-action programs, but they *must* do so to comply with the Fourteenth Amendment. Rule two: even if the Fourteenth Amendment does not mandate that States establish affirmative-action programs at their public universities, it bars them from eliminating such programs through amendments to their constitutions.

A.

The first theory has little to recommend it, so little that the notion of mandatory affirmative action will come as a surprise to all Justices of the United States Supreme Court, past and present, who have labored to determine *whether* state universities may *ever* enact such race-conscious programs under the United States Constitution…

Plaintiffs nonetheless insist that, "to the extent that [Proposal 2] ... bar[s] race or gender conscious programs that would be permissible under the Fourteenth Amendment, it violates the Equal Protection Clause." Yet the words of the one amendment (prohibiting the State from "discriminat[ing] ... on the basis of race") cannot violate the words of the other ("nor shall any State deny to any person ... the equal protection of the laws").

That is especially true in the context of classifications based on race, which are presumptively unconstitutional and which must run the gauntlet of strict scrutiny to survive. If racial preferences are only occasionally and barely constitutional, it cannot be the case that they are always required. A State that wishes to treat citizens of all races and nationalities equally "is free as a matter of its own law" to do so. A first premise for resolving this case is, and must be, that a State does not deny equal treatment by mandating it.

B.

The claimants' other theory is of a piece. Having argued that the people of Michigan may not resort to the political process to eliminate racial preferences because the Fourteenth Amendment demands them, the claimants alternatively insist that the "political process doctrine" of the Fourteenth Amendment separately prohibits the State from eliminating such programs already in existence by way of a state constitutional amendment. That is not much of an alternative, as it comes to the same end. More fundamentally, the argument misapprehends what States may do as a matter of "politics" *and* "process."…

By any reasonable measure, Proposal 2 does not place "special burdens" on racial minorities. It bans "discriminat[ing] against, or grant[ing] 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." That is not a natural way to impose race-based burdens. The words of the amendment place no burden on anyone, and indeed are designed to prohibit the State from burdening one racial group relative to another. All of this furthers the objectives of the Fourteenth Amendment, the same seed from which the political-process doctrine sprouted.

That the people of Michigan made this change through their Constitution, as opposed to state legislation or a new policy embraced by the governing boards at the three state universities, does not impose a "special burden" on any racial minority. There is nothing unusual about placing an equal-protection guarantee in a constitution...

I do not doubt that Proposal 2 places a burden on proponents of affirmative action: They no longer have access to it, and they must amend the constitution to get it back. But the Fourteenth Amendment insists only that all participants in the debate have an equal shot… It would be paradoxical if something called the "political process doctrine" insulated one side of a vigorous policy debate from a timeless rule of politics: win some, lose some…

Another oddity of this theory is that it would apply even if the Michigan Constitution eliminated affirmative-action programs in another way. In 1963, the people of Michigan passed an earlier amendment to their Constitution, one that prohibited race discrimination by governmental entities. In view of this prohibition, a Michigan resident surely would have the right to bring a claim that the State Constitution's existing prohibition on race-based classifications bars a system of racial preferences in admissions, contracting and employment. If there is one thing that the closely divided decisions in *Regents of Univ. of Cal. v. Bakke*, *Gratz* and *Grutter* illustrate, it is that the Michigan Supreme Court could reasonably invalidate, or reasonably uphold, racial preferences under the State Constitution's existing equal-protection guarantee. A decision invalidating racial preferences, however, would have precisely the same effect as Proposal 2, establishing that the Constitution bars racial preferences and placing the onus on proponents of racial preferences to alter the Constitution. The claimants have no answer to this point. If Proposal 2 violates the political-process doctrine, so too would a decision by the Michigan Supreme Court that comes to the same end through a permissible interpretation of the 1963 equal-protection guarantee…

The Court's decision in *Romer v. Evans*, which did not concern racial classifications, holds nothing to the contrary. Colorado enacted a constitutional amendment prohibiting the State and its municipalities from enacting laws banning discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." In invalidating the amendment, the Court noted that the amendment "impos[es] a broad and undifferentiated disability" (the inability to seek protection from discrimination at the state or local level) "on a single named group" (gays and lesbians). The amendment "was inexplicable by anything but animus toward the class it affects" and therefore "lack[ed] a rational relationship to legitimate state interests." By contrast, Proposal 2 serves a rational interest, indeed a compelling one: eliminating racial classifications in admissions, public employment and public contracting.

The Court's decisions in *Hunter* and *Seattle*, which did concern racial classifications, also hold nothing to the contrary. The laws invalidated in both cases were designed to disadvantage one minority group—African-Americans—and no other…

The same cannot be said of Proposal 2. In the first place, Proposal 2 removes racial

preferences, not anti-discrimination measures. To the extent Proposal 2 has any effect on the political structures through which a group may acquire special treatment in university admissions, it is a leveling one… If ever there were a neutral, non-special burden, that is it. The Equal Protection Clause freely permits governments to ban racial discrimination, as here, but it does not freely permit them to ban all bans on racial discrimination, as in *Hunter* and *Seattle.*

In the second place, Proposal 2 prohibits discrimination not just on the basis of race but also on the basis of sex, ethnicity and national origin. To the extent it disadvantages anyone, it disadvantages groups that together account for a majority of Michigan's population, not this or that racial minority. It "make[s] little sense to apply 'political structure' equal protection principles where the group alleged to face special political burdens itself constitutes a majority of the electorate."

Nor is it even clear which groups—men or women, this racial group or that one—Proposal 2 helps and hurts, or when each group will be affected. Perhaps there was a time when a ban on gender-based preferences favored men…

It is no answer to say that Michigan may adopt a statewide policy regarding racial preferences if, and only if, they adopt statewide policies on other admissions policies—from how much weight to give Advanced Placement courses to how many zoology students to admit to how to treat children of alumni to how to treat football players, oboists or thespians. The Equal Protection Clause reflects our collective judgment that generalizations based on race are dubious in the near term and destructive in the long term, making it appropriate to treat racial proxies, which are presumptively unconstitutional, differently from other more-pedestrian distinctions, which are presumptively constitutional. It does not bar Michigan from recognizing the same.

Any doubt that *Hunter* and *Seattle* support rather than undermine the constitutionality of Proposal 2 is removed by *Seattle,* the last of the two decisions. In *Seattle,* Justice Powell, no stranger to affirmative-action debates, raised the concern that the majority's reasoning meant that, "if the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies." No worries, the majority responded: The problem with Washington's anti-busing initiative was "the burden it impose[d] on minority participation in the political process," a consideration that made Justice Powell's hypothetical "entirely unrelated to this case" because it had "nothing to do with the ability of minorities to participate in the process of self-government." If the Court thought that the removal of an affirmative-action policy was "entirely unrelated" to the concerns in *Seattle,* then I am hard-pressed to understand why the same is not true in this instance—and just as hard-pressed to understand how anyone can insist our hands

are tied in today's case. The companion political-process case to *Seattle*, handed down the same day, confirmed the point. The "Equal Protection Clause," it made clear, "is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place." That is all that happened here. The majority seeing it differently, I respectfully dissent.

GRIFFIN, Circuit Judge, dissenting.

Today's decision is the antithesis of the Equal Protection Clause of the Fourteenth Amendment. The post-Civil War amendment that guarantees equal protection to persons of all races has now been construed as barring a state from prohibiting discrimination on the basis of race… I join Judge Gibbons' dissent, except for Section III, and write separately to emphasize that the "political structure" doctrine is an anomaly incompatible with the Equal Protection Clause. I urge the Supreme Court to consign this misguided doctrine to the annals of judicial history.

The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." Under its application, a state law is subject to strict scrutiny when it explicitly distinguishes between individuals on the basis of race…

Facially neutral laws, on the other hand, warrant strict scrutiny only if they are "motivated by a racial purpose or object,"

The ill-advised "political structure" doctrine employed by the majority in this case was crafted by the Supreme Court more than one hundred years after the ratification of the Fourteenth Amendment. Before today, the cases fitting its mold numbered three: *Hunter v. Erickson,Washington v. Seattle Sch. Dist. No. 1,*and *Lee v. Nyquist*. The infrequent use of the doctrine is not surprising given its lack of a constitutional basis. It replaces actual evidence of racial motivation with a judicial presumption and, hence, is an aberration inconsistent with the Fourteenth Amendment.

The laws at issue in *Hunter* and *Seattle* were both facially neutral. Yet, in each case, the Supreme Court held that strict scrutiny applied without any need for the respective plaintiffs to show that the laws were enacted as a result of discriminatory intent or were inexplicable on grounds other than race. It simply declared that there was an " 'explicitly racial classification' " where the prior law inured to the benefit of racial minorities, and the newly enacted law moved the applicable decisionmaking process to a more remote level of government.

These decisions are justifiably characterized as "jurisprudential enigmas that seem to lack any coherent relationship to constitutional doctrine as a whole." "In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State ... violate[s] no federal constitutional principle."

Moreover, as first noted by Justice Powell,

the political structure doctrine unconstitutionally suspends our normal and necessary democratic process by prohibiting change when a lower level of state government has acted in a way that arguably benefits racial minorities. …

Finally, in an effort to avoid confusion and aid further review, I note the limits of the majority's holding. My colleagues do *not* declare MICH. CONST. art. I, § 26 unconstitutional in its entirety. Rather, their holding is limited to "racial minorities" and our court's declaration "[f]inding those provisions of Proposal 2 affecting Michigan's public colleges and universities unconstitutional...." Thus, the other provisions of MICH. CONST. art. I, § 26 that prohibit discrimination and preferential treatment on the basis of sex, ethnicity, or national origin in the operation of public employment, public education, and public contracting, survive this court's ruling. Further, the Michigan constitutional prohibitions against discrimination or preferential treatment based on race, except in the operation of public colleges and universities regarding "racial minorities," remain in effect. In this regard, art. I, § 26(7) contains a severability clause: "Any provision held invalid shall be severable from the remaining portions of this section."

I caution that because the term "racial minorities" is not defined by the majority opinion, the class of persons benefitting from it is unclear and will be a potent source of litigation were it allowed to stand. Under today's en banc decision, not all persons are entitled to the equal protection of the laws.

For these reasons, I would affirm the district court and therefore respectfully dissent.

"Supreme Court Takes New Case on Affirmative Action, From Michigan"

New York Times
March 25, 2013
Adam Liptak

The Supreme Court on Monday added a new affirmative action case to its docket. It is already considering a major challenge to the University of Texas' race-conscious admissions program.

The new case, *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, concerns a voter initiative in Michigan that banned racial preferences in admissions to the state's public universities. In November, the United States Court of Appeals for the Sixth Circuit, in Cincinnati, ruled that the initiative, which amended the State Constitution, violated the federal Constitution's equal protection clause.

The initiative, approved in 2006 by 58 percent of the state's voters, prohibited discrimination or preferential treatment in public education, government contracting and public employment. Groups favoring affirmative action sued to block the part of the law concerning higher education.

The appeals court majority said the problem with the law was that it restructured the state's political process by making it harder for disfavored minorities to press for change.

"A student seeking to have her family's alumni connections considered in her application to one of Michigan's esteemed public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school's governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state's Constitution," Judge R. Guy Cole Jr. wrote for the majority.

"The same cannot be said," Judge Cole added, "for a black student seeking the adoption of a constitutionally permissible race-conscious admissions policy. That student could do only one thing to effect change: she could attempt to amend the Michigan Constitution — a lengthy, expensive and arduous process — to repeal the consequences of Proposal 2."

A dissenting member of the court, Judge Jeffrey S. Sutton, wrote that the majority had it backward. "A state does not deny equal treatment by mandating it," he said.

The majority opinion, he added, "transforms a potential virtue of affirmative action into a vice."

"If there is one feature of affirmative action programs that favors their constitutionality," he said, "it is that they grow out of the democratic process."

In urging the Supreme Court to hear the case, Bill Schuette, Michigan's attorney general, said the Sixth Circuit decision was

"exceedingly odd" in saying, in essence, that the government must engage in affirmative action.

A brief filed by the American Civil Liberties Union defended the decision.

"The vice of Proposal 2," the brief said, "is that it selectively shuts off access to the ordinary political processes for advocates of otherwise permissible race-conscious policies."

The decision the Supreme Court will review was decided by an 8-to-7 vote. The eight judges in the majority were all nominated by Democratic presidents. The seven judges in dissent were all nominated by Republican presidents. (Judge Helene N. White, who was in the majority, was initially nominated by President Bill Clinton and was later renominated by President George W. Bush as part of a compromise involving several nominations.)

The United States Court of Appeals for the Ninth Circuit, in San Francisco, came to the opposite conclusion in 1997, upholding the state's ban on racial preferences in higher education and saying it "would be paradoxical" to rule otherwise. The court reaffirmed that ruling in 2010.

The case the Supreme Court agreed to hear on Monday will be considered in the term that starts in October. A decision in the Texas case is expected shortly.

"Affirmative Action in Texas and Michigan"

SCOTUSblog
May 1, 2013
Stephen Wermiel

When the Supreme Court agreed in February 2012 to hear the University of Texas undergraduate admissions case, there was no question that the appeal set up a major test of affirmative action. But why, with that case still lingering on the docket as the only undecided case from the Court's October sitting, would the Justices agree to hear a second affirmative action case, this one from Michigan, to be argued next fall?

The short answer is that the two cases are totally different.

Just how they differ and what the Court may consider in each of the cases is worth exploring. The answer may be of interest to students of the Supreme Court and to those interested in civil rights law and affirmative action.

The Texas case, ***Fisher v. University of Texas***, is at this point the better known of the two. The case is a challenge to an affirmative action plan in which race is taken into account as a factor for admission to the University of Texas. Most of the undergraduate places in the entering class are filled through a plan which guarantees a spot to any student who graduates in the top ten percent of a Texas high school. But the remaining slots – about nineteen percent of the total spaces – are filled by a second program that considers race among other factors to promote diversity in the make-up of smaller classes and academic departments.

Abigail Fisher, who is Caucasian, applied for admission to the university. But she was not in the top ten percent of her class, and she did not receive one of the remaining slots. She then challenged her denial of admission, arguing that she was a victim of discrimination based on her race in violation of the Fourteenth Amendment's Equal Protection Clause. Both the federal district court and U.S. Court of Appeals for the Fifth Circuit upheld the Texas plan.

In the Supreme Court, Fisher's lawyer disclaimed any interest in having the Justices reverse their 2003 decision, *Grutter v. Bollinger*, upholding the limited use of affirmative action at the University of Michigan Law School. Instead, he asked the Court to strike down the university's use of race to fill the remaining slots and to clarify that it goes beyond the very narrow circumstances in which race may be taken into account.

Ordinarily, if another affirmative action case came along while the Texas appeal was awaiting decision, the Justices would hold the second case until they decide the first. Then the Court would either grant the second case, vacate the ruling, and send it back to the lower court to apply the newly announced rule or, perhaps, grant the second

case if there are additional issues to be addressed.

But the Court did neither of those things with *Schuette v. Coalition to Defend Affirmative Action*, involving affirmative action in Michigan. Instead, it granted the petition for certiorari on March 25 without waiting to decide *Fisher* first.

The reason is that *Schuette* presents affirmative action issues in an entirely different context. The case involves a challenge to Proposal 2, an amendment to the Michigan Constitution, approved by voters in 2006, that banned affirmative action in the state. The statewide ban was challenged by a coalition of groups and individuals who support the continued use of affirmative action in Michigan. Other lawsuits were filed as well, but a federal district court largely upheld the ban enacted by the voters.

The appeal roiled the U.S. Court of Appeals for the Sixth Circuit, where a three-judge panel initially struck down the affirmative action ban by a two-to-one vote. Then the full Sixth Circuit agreed that Proposal 2 was unconstitutional, ruling eight to seven in an en banc decision that the voters had violated the Equal Protection Clause. The ruling by the full appeals court produced five separate dissenting opinions. The Supreme Court agreed to hear the appeal, and argument in the case will be held next fall.

The two cases are, in a sense, mirror images of one another. The Texas case asks whether the use of affirmative action violates the Equal Protection Clause. The Michigan case, by contrast, asks whether the *ban* on affirmative action violates the Equal Protection Clause.

The Sixth Circuit ruled in the Michigan case that because race-based affirmative action is still permitted by the Constitution, a decision by the voters of the state to prohibit this remedy distorts the political process and imposes a burden based on race that violates the Equal Protection Clause. The ruling turns not on the Court's long line of affirmative action cases but rather on a shorter set of precedents holding that individuals may not have their ability to participate in and influence the political process made more difficult because of their race. The Sixth Circuit found that amending the state constitution made it unconstitutionally difficult to advocate for the lawful remedy of affirmative action.

That the Texas and Michigan cases are different is underscored in the legal arguments. The Sixth Circuit opinion does not cite the *Fisher* case at all. And the only reference to *Fisher* in the Supreme Court appeal of the Michigan case is in a footnote in the petition by Michigan Attorney General Bill Schuette which says, "This case presents the different issue whether a state has the right to accept this Court's invitation in *Grutter* to bring an end to all race-based preferences." The invitation is a reference to the suggestion by former Justice Sandra Day O'Connor in *Grutter* that affirmative action should have an end point, perhaps twenty-five years after the 2003 *Grutter* decision.

Yet saying that the two cases are different and do not rely on one another is a strangely

unsatisfying answer. If the Supreme Court were to virtually abolish affirmative action in*Fisher*, for example, that might seem to obviate the need for a ruling in the Michigan case.

At the same time, it also seems odd to think that the Court may not say anything in the Texas case that will have an impact on the Michigan case. Of course, the fact that the Court granted the Michigan case does not preclude the Justices from saying something in the Texas decision that is relevant to the Michigan appeal.

What lies ahead in this volatile field is uncertain, then. When the Court granted the Michigan petition in March, there was speculation that the Texas ruling must be imminent or that the Court would dismiss the Texas case for procedural reasons – specifically, that Abigail Fisher has now graduated from another university, although she still seeks damages.

One thing the two cases share in common is that Justice Elena Kagan is not participating in either one, leaving an eight-Justice Court to wrestle with the important issues. With only eight participants and a Court closely divided over issues of race, there are myriad possibilities for how these cases might come out. Stay tuned this spring for the Texas ruling, and probably a year from now for Michigan.

“U.S. Court Takes Small Step to Bridge Ideological Divide”

Reuters
Joan Biskupic
June 25, 2013

It may never be clear what happened behind the scenes at the U.S. Supreme Court to yield Monday's compromise decision upholding university affirmative action. The case was heard in October, the first month of the term, and as the months went by and the justices deliberated in secret, the suspense grew.

Would this conservative-dominated court end university affirmative action? Closely watching were supporters who emphasized that education remains a gateway to opportunity for long-excluded blacks and Hispanics, as well as critics who said racial policies are unfair and no longer required in multicultural America.

In the end, Monday's ruling was a modest one that took the smallest of steps. Written by Justice Anthony Kennedy, the 7-1 ruling permits admissions officers to continue considering applicants' race to ensure campus diversity. That it took more than eight months - until the last week of the term - suggests protracted discussions and special care went in to garnering the support of justices across the ideological divide.

But even as the justices found common ground in the University of Texas case, they ensured that the last chapters of the national struggle with race have yet to be written. They already have a related racially charged case from Michigan on the calendar for next term and the legal standard voiced in Monday's decision could eventually bring the Texas race-based admissions policy back to the high court.

The role of the country's highest court in the decades-long affirmative action saga has never been easy and its series of tightly decided rulings reflect the country's ambivalence.

For now, the court has left intact the scaffolding of the historic 1978 opinion in Regents of the University of California v. Bakke, which first voiced the diversity rationale, and a 2003 decision, Grutter v. Bollinger, which vigorously affirmed the value of diversity. Both of those cases were decided on 5-4 votes.

The justices cast some doubt on the University of Texas' racial admissions, however, by saying that lower court judges had too generously deferred to university officials. Monday's ruling ordered the lower appeals court to reconsider its stance upholding the admissions.

CONSERVATIVES, LIBERALS JOIN TOGETHER

The opinion was joined by Chief Justice John Roberts and three other conservative justices who have criticized racial remedies, and by two liberals, including Justice Sonia Sotomayor, a Latina who attended Princeton and Yale law school on affirmative action and has touted the value of such programs.

But tensions plainly linger. Justice Ruth Bader Ginsburg, the only justice to dissent from the decision ordering a tougher lower-court review of the Texas program, read portions of her opinion from the bench on Monday. She said the majority should have simply upheld the Texas policy. Addressing broadly the value of racial policies, Ginsburg, the senior liberal on the bench, said, "State universities need not blind themselves to the still lingering, every day evident, effects of centuries of law-sanctioned

inequality."

Among the spectators in the white marble courtroom was Justice Sandra Day O'Connor, whose 2003 decision in *Grutter v. Bollinger* was at stake - and remained largely preserved for now. The retired 83-year-old justice sat with her hands clasped on her lap while Kennedy outlined the majority opinion.

When O'Connor penned her decision in the 2003 case from the University of Michigan, the majority expected the decision to hold for about 25 years, "when the use of racial preferences will no longer be necessary to further the interest approved today."

Advocates on both sides thought the end might come sooner than the O'Connor majority had supposed, given the interests of the Roberts court.

Abigail Fisher, a white suburban Houston student, began Monday's lawsuit, claiming she was wrongly rejected by the university when minorities with similar test scores and grades were admitted. The current majority took the Texas case though university officials said the case was procedurally flawed because Fisher decided to go to Louisiana State University, from which she graduated last year.

The challenged program that considers applicants' race supplements a Texas policy guaranteeing admission to the Austin flagship campus for high school graduates scoring in the top 10 percent of their individual schools. Administrators contended the 10 percent program did not make the university sufficiently diverse.

DIVERSITY VALUED

The ideological makeup of the court suggested it might be ready to roll back affirmative action. Justice Kennedy had dissented from the 2003 University of Michigan dispute, and O'Connor was succeeded by Justice Samuel Alito, far more conservative on racial policies and the U.S. Constitution's equality guarantee.

But, on this go-round, both accepted the 2003 decision.

"The attainment of a diverse student body," Kennedy wrote, "serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."

Liberal justices Sotomayor and Stephen Breyer were ready to sign on, possibly enticed by Kennedy's acceptance of the basic framework of the 2003 *Grutter* decision. The court's fourth liberal, Elena Kagan, did not participate because of her involvement in the dispute as U.S. solicitor general before she joined the bench in 2010.

In the term that begins next October, the justices will hear a case testing the constitutionality of a statewide ban on race-based affirmative action in public education, employment and contracting. Michigan voters adopted the prohibition in 2006. A Supreme Court decision that upholds it could embolden affirmative action opponents. But such a decision would affect only Michigan and the few other states that have such bans.

A broader decision that affects campuses nationwide would have to come in another case. For now, university policies aimed at racial diversity remain constitutional. Said University of Virginia law professor John Jeffries, biographer of Justice Lewis Powell who was the author of Bakke, said of Monday's decision, "It leaves the Powell position (for) diversity ... alive, with a chance to fight again another day."

"6th Circuit: Proposal 2 Unconstitutional"

The Michigan Daily
November 15, 2012
Rayza Goldsmith

The court issued an 8-7 decision to overturn a state ballot initiative — commonly known as Proposal 2, which was voted into law in 2006 — that banned the use of "preferential treatment" in state decisions regarding university admissions or employment on the basis of race, sex, color, ethnicity or national origin.

The ruling was made by all 15 judges on the 6th Circuit Court of Appeals, at the request of Michigan Attorney General Bill Schuette, a defendant in the case. A three-judge panel of the 6th Circuit Court of Appeals made an initial ruling against Proposal 2 in July 2011.

The majority ruled that the ban on the basis of race is a violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and therefore unconstitutional. The decision overturns a previous decision made by the U.S. District Court for the Eastern District of Michigan at Detroit, which ruled Proposal 2 to be constitutional.

The majority opinion was based on two primary arguments, rested on the argument that admissions decisions can be considered a part of the political process. Judge R. Guy Cole Jr. wrote for the majority, arguing that Proposal 2 is unconstitutional based on the fact that it primarily harms minorities by reordering the political process and placing undue burden on them.

"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," Cole wrote. "We thus conclude that Proposal 2 reorders the political process in Michigan to place special burdens on minority interests."

Law Prof. Mark Rosenbaum, who helped argue the case on behalf of the plaintiffs, said he was overwhelmed by the decision and excited about its implications.

"It's a landmark civil rights issue," Rosenbaum said. "It is not about the constitutionality of affirmative action; it is a bigger story than that. It's about access to the political process. It is about whether or not a popular initiative can cut minorities — people of color — out of the political process."

Rosenbaum said even if the defendants, including Schuette, appeal the decision, the ruling will take immediate effect, meaning the University could choose to use race as a factor in admissions decisions.

In a statement, Schuette said he intends to appeal the decision to the U.S. Supreme Court on the basis that the Michigan Civil Rights Initiative — the amended section of

the constitution that effectively banned affirmative action — is not only constitutional, but also approved by a majority of Michigan voters.

“MCRI embodies the fundamental premise of what America is all about: equal opportunity under the law,” Schuette said. “Entrance to our great universities must be based upon merit. We are prepared to take the fight for quality, fairness and the rule of law to the U.S. Supreme Court.”

In order to have the case heard at the Supreme Court level, Schuette must file a petition of certiorari within 90 days of Thursday’s decision.

In his dissenting opinion, Judge Danny Boggs drew on the fact that Proposal 2 was enacted by voters to make his case.

“We have the citizens of the entire state establishing a principle that would, in general, have seemed laudable,” Boggs wrote.

Boggs also wrote in the dissent that the majority’s case was a stretch and relied on tenuous precedent.

He responded to the majority’s assertion that admissions decisions fall within the jurisdiction of political processes, contending that such an argument does not have historical backing and that Proposal 2 is inherently not discriminatory.

“Under these circumstances, holding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is vastly far afield from the Supreme Court precedents,” Boggs wrote.

In a statement, University spokesman Rick Fitzgerald said the University is reviewing the decision, but because there are multiple lengthy opinions, it could take some time to fully understand the ruling's implications.

George Washington, an attorney for By Any Means Necessary — a pro-affirmative action group that helped argue the case before the court — said he would like to see a turnaround from the drop in minority enrollment as a result of the decision.

“It is a tremendous victory for black and Latino students and for the movement that fought for affirmative action for many years,” Washington said. “It means that thousands of black, Latino and Native American students who would not have the chance to go to our most selective colleges will now have that chance.”

Residential College Prof. Carl Cohen, a leading proponent of Michigan’s Proposal 2, said the majority opinion is incorrect in its assertion that Proposal 2 violates the Equal Protection Clause because it places an undue burden on those who seek preference, adding that the opinion is based on ludicrous, circuitous logic.

“The argument upon which the 6th Circuit Court of Appeals based its reversal is absolutely unbelievable,” Cohen said. “That's really acrobatic, that the constitutional amendment that says you may not give preferences violates the constitutional amendment that says you may not give preference.”

“Supreme Court is Urged to Reject Michigan Affirmative Action Ban”

Los Angeles Times
David Savage
August 30, 2013

California Atty. Gen. Kamala Harris urged the Supreme Court on Friday to strike down a Michigan voter initiative that bans "preferential treatment" based on race in its state colleges and universities, a ruling that would likely invalidate a similar ban approved by California's voters in 1996.

These bans on affirmative action "violate the Equal Protection Clause" of the Constitution, Harris said, by "erecting barriers to the adoption of race-conscious admissions policies."

For a second term in a row, the high court is set to consider a major test of affirmative action in state universities. In June, the court revived a white student's challenge to a race-based admissions policy at the University of Texas. In October, the court will consider a constitutional challenge that comes from the opposite direction. Lawyers representing black and other minority students are contesting Michigan's ban on affirmative action.

Separately, the University of California's president and 10 chancellors filed their own brief Friday highlighting the ban on affirmative action. "More than 15 years after Proposition 209 barred consideration of race in admissions decisions … the University of California still struggles to enroll a student body that encompasses the broad racial diversity of the state," they said.

In 2006, Michigan's voters approved Proposition 2, 58% to 42%. Using the words of the California measure, the ban said Michigan's public universities "shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, college, ethnicity or national origin."

Lawyers challenging the measure say that because it became part of the state constitution, they were deprived of the equal chance to lobby for affirmative-action policies in the state Legislature or before university officials. They say they want a Supreme Court ruling that would also wipe out the nearly identical voter-approved bans in California, Arizona, Washington, Nebraska and Oklahoma.

In November, they won an 8-7 ruling by the Cincinnati-based 6th Circuit Court of Appeals, which declared unconstitutional Michigan's Proposition 2. It "undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change," said Judge R. Guy Cole Jr. His opinion spoke for all eight Democratic appointees to the appeals court, while the seven Republican appointees dissented.

Michigan Atty. Gen. Bill Schuette appealed, and the court will hear arguments in the case of Schuette vs. Coalition to Defend Affirmative Action on Oct. 15.

Harris' brief for California was also signed by Lisa Madigan of Illinois and four other attorneys general, though none have similar voter measures that turn on the outcome. Usually, a state's top attorneys intervene in pending Supreme Court cases to defend their state's laws. In this instance, however, the California attorney general is asking the justices to hand down a ruling that would void a provision in California's Constitution.

Last year, Harris also refused to defend California's Proposition 8 and its prohibition on same-sex marriage after it had been struck down by a judge in San Francisco. The Supreme Court in June, citing the state's refusal, said the private sponsors of the ballot measure did not have legal standing to defend it in court.

Harris took office as attorney general in January 2011. Her website describes her as "the first woman, the first African American and the first South Asian to hold the office in the history of California."

Her friend-of-the-court brief read: "California has a particular interest in the outcome of this case because, as in Michigan, its voters amended its Constitution to add language virtually identical to the constitutional provision at issue in this case.... It is particularly important for states with large nonwhite populations to ensure that students of all races have meaningful access to their public colleges and universities."

She lauded the "well-reasoned decision" of the 6th Circuit and said the students and citizens should be free to press for "race-conscious admissions policies."

Harris' brief for California was also signed by the top attorneys from five other states and the District of Columbia: Madigan of Illinois, David Louie of Hawaii, Thomas Miller of Iowa, Gary King of New Mexico, Ellen Rosenbaum of Oregon and Irvin Nathan from Washington, D.C.

"What's Your Hurry?"

The New York Times
Linda Greenhouse
June 12, 2013

Every Supreme Court decision day that goes by without a ruling in the University of Texas affirmative action case provokes a generalized wringing of hands from those eager (or afraid) to learn the constitutional future of university admissions. "Where's the case? What's taking so long?"

To which I say: what's the rush?

True, *Fisher v. University of Texas* was argued way back on Oct. 10, making it the oldest argued case on the court's docket by more than six weeks. True, cases argued as recently as late April have already been decided, and it's rare for June to arrive with an October case still hanging.

So I'm as puzzled as the next person as to precisely why the eight justices participating in this case (Justice Elena Kagan is recused, due to her earlier work on the case as solicitor general) haven't been able to produce a decision. But that's not really my point.

Rather, I'm questioning why the justices set out to decide this case in the first place. Why were they eager to get their hands around the issue so soon after suggesting, in the 2003 decision that upheld race-conscious admission in the University of Michigan Law School, that the country and the court should let the matter rest for 25 years? Why would they pick a case destined to be decided by an eight-member court, a case afflicted with a major procedural obstacle — the disappointed white applicant has already received her college degree elsewhere, a fact that would seem to make the case moot, as an earlier, more restrained Supreme Court found 40 years ago when confronted with a similar situation in an affirmative action case it had undertaken to decide. This is a court in a hurry. The justices made that strikingly clear back in March, when they accepted a case on the validity of a voter referendum in Michigan that barred affirmative action in public university admissions. The United States Court of Appeals for the Sixth Circuit had declared the ban unconstitutional by a vote of 8 to 7. By the time the Supreme Court agreed on March 25 to hear the Michigan attorney general's appeal, its calendar for the current term was full, so the case won't be argued until after the new term begins in the fall.

The new case, *Schuette v. Coalition to Defend Affirmative Action*, differs from the Texas case in presenting an oblique rather than direct attack on affirmative action. The question is whether by adding the anti-affirmative action provision to the state constitution, the referendum altered the political process in a way that violates the federal constitutional guarantee of equal protection. This "political process" question, which the court has wrestled with for years, won't be answered by what the court does in

the Texas case. But it's hard to imagine that the Texas decision won't provide the lens through which to examine the issue in the Michigan case.

When the justices receive a new appeal that raises questions in the general vicinity of a case they have already agreed to decide, their routine response is to place the new case on hold to see how things shake out. It was therefore surprising that rather than deferring action on the Michigan case, the court grabbed it.

One reason might be that Justice Anthony M. Kennedy, who almost certainly received the opinion assignment in the Texas case, isn't going far enough in that case to satisfy the other conservative justices. Under this theory, those justices responded to what they saw as a frustratingly narrow Kennedy opinion by jumping aboard the Michigan case as the next potential vehicle for shutting down affirmative action. They might have waited — traditionally, they would have waited — but, as I said, it's a court in a hurry.

The question is why. The answer, I believe, can be found in the faint but resonant drumbeat of conservative concern about the stability of the Roberts Court's narrow conservative majority. Most uninformed commentary on the future of the Supreme Court — which is to say, most commentary — has focused on Justice Ruth Bader Ginsburg, who just passed her 80th birthday. Is she about to retire, everyone asks, to permit President Obama to name her replacement? (The answer is no, she's healthy and loves her job.)

This near-obsession with Justice Ginsburg's age, health and plans has obscured the fact that the conservative justices are growing old at exactly the same rate. Justice Antonin Scalia turned 77 in March. Justice Kennedy turns 77 next month. Even Justice Clarence Thomas, a mere 43 when he was named to the court 22 years ago, becomes eligible on June 23 for his Medicare card.

Curt Levey, a prominent conservative commentator, took the occasion of Justice Scalia's birthday to observe, in a Fox News op-ed, that it was entirely likely that at least one of the five conservative justices would leave the bench during the remainder of the Obama presidency. The result, he warned apocalyptically, was "a Warren Court redux," one that would erase "all the strides conservatives have made since the Reagan era in containing judicial activism."

Mr. Levey, a Harvard Law School graduate, heads an organization called the Committee for Justice, devoted to blocking Obama administration judicial nominations. His account of exactly what the court under Chief Justice Earl Warren can be blamed for left a bit to be desired. "The Warren Court brought us *Roe v. Wade*," he asserted. In fact, it was the Supreme Court under Chief Justice Warren E. Burger that issued the 1973 abortion decision, with a 7-to-2 majority opinion joined by three of President Richard M. Nixon's four appointees, including the chief justice.

Well, the details matter less, anyway, than the overall theme, which is: be afraid, be very afraid. Or to put it another way, in the words of the old Janis Joplin song: get it

while you can. This is as good as it's going to get.

That impulse may also explain the court's otherwise mysterious decision a few weeks ago to grant review in a new church-state case, *Town of Greece v. Galloway*. The western New York town is appealing a federal appeals court's decision that its practice of opening town board meetings with a prayer violates the Establishment Clause.

The problem that the United States Court of Appeals for the Second Circuit found was not the notion of prayer as such (the Supreme Court upheld the concept of legislative prayer 30 years ago but the fact that nearly all the prayers offered at the board meetings were Christian, with most containing explicit references to Jesus and/or Christian theology. That pattern, the appeals court said, meant that "the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint." Other federal courts confronted with similar facts have ruled the same way.

In recent years, the Supreme Court has been able to find near-unanimity in religion cases only by deciding the cases on the narrowest possible grounds. So what would motivate the justices to reach for this little case, with its facts that are surely inauspicious for those who want to elevate the role of religion in the public square? I suppose the answer is: there's nothing to lose, and if we don't go for it now, it may only get harder in the years ahead.

Get it while you can — or even if you can't. We'll see soon enough.

Madigan v. Levin

12-872

Ruling Below: *Levin v. Madigan*, 692 F.3d 607 (7th Cir. 2012), *cert granted*, 133 S.Ct. 1600 (2013).

Harvey N. Levin worked as an Illinois Assistant Attorney General from September 5, 2000, until his termination on May 12, 2006. Levin was over the age of sixty at the time of his termination and believes he was fired because of his age and gender. Levin filed suit against the State of Illinois, the Office of the Illinois Attorney General, Illinois Attorney General Lisa Madigan, in her individual and official capacities, and four additional Attorney General employees in their individual capacities. He asserts claims for relief under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983. The individual-capacity defendants argued at the district court that they were entitled to qualified immunity with respect to Levin's § 1983 age discrimination claim. Specifically, they argued that Levin's § 1983 claim is precluded by the ADEA because the ADEA is the exclusive remedy for age discrimination claims. The district court disagreed and denied qualified immunity. The Court of Appeals for the Seventh Circuit held that the court had jurisdiction to decide whether the ADEA precluded a § 1983 equal protection claim; resolving a matter of first impression in the Circuit, the ADEA does not preclude a § 1983 claim for enforcement of constitutional rights; and individual defendants were not entitled to qualified immunity.

Question Presented: Whether the Seventh Circuit erred in holding, in an acknowledged departure from the rule in at least four other circuits, that state and local government employees may avoid the federal Age Discrimination in Employment Act's comprehensive remedial regime by bringing age discrimination claims directly under the Equal Protection Clause and 42 U.S.C. § 1983.

Harvey N. LEVIN, Plaintiff–Appellee,
v.
Lisa MADIGAN, in her individual capacity, Ann Spillane, Alan Rosen, Roger Flahaven, and Deborah Hagan, Defendants–Appellants,
and
Lisa Madigan, in her official capacity as Attorney General of Illinois, Office of the Illinois Attorney General, and State of Illinois, Defendants.

United States Court of Appeals, Seventh Circuit

Decided on August 17, 2012

[Excerpt; some footnotes and citations omitted.]

KANNE, Circuit Judge

Harvey N. Levin worked as an Illinois Assistant Attorney General from September 5, 2000, until his termination on May 12, 2006. Levin was over the age of sixty at the time of his termination and believes he was fired because of his age and gender. Accordingly, Levin filed suit against the State of Illinois, the Office of the Illinois Attorney General, Illinois Attorney General Lisa Madigan, in her individual and official capacities, and four additional Attorney General employees in their individual capacities. He asserts claims for relief under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth Amendment via 42 U.S.C. § 1983. The individual-capacity defendants argued at the district court that they were entitled to qualified immunity with respect to Levin's § 1983 age discrimination claim. Specifically, they argued that Levin's § 1983 claim is precluded by the ADEA because the ADEA is the exclusive remedy for age discrimination claims. The district court disagreed and denied qualified immunity. The case is now before us on interlocutory appeal, and for the following reasons, we affirm the judgment of the district court.

I. BACKGROUND

Levin was fifty-five years old when he was hired as an Assistant Attorney General in the Office of the Illinois Attorney General's Consumer Fraud Bureau on September 5, 2000. On December 1, 2002, Levin was promoted to Senior Assistant Attorney General and retained this title until he was terminated on May 12, 2006. Levin was evaluated on an annual basis and his performance reviews indicate that he consistently met or exceeded his employer's expectations in twelve job categories. The Illinois Attorney General's Office asserts, however, that Levin's low productivity, excessive socializing, inferior litigation skills, and poor judgment led to his termination. Although not addressed in Levin's evaluations, these issues were discussed among Levin's supervisors and brought to Levin's attention.

Levin was one of twelve attorneys fired in May 2006. After he was terminated, Levin was replaced by a female attorney in her thirties. Two other male attorneys from the Consumer Fraud Bureau, both over the age of forty, were also terminated and replaced by younger attorneys, one male and one female. The Illinois Attorney General's Office disputes that these new hires "replaced" the terminated attorneys because the younger attorneys were not assigned the three former attorneys' cases.

Levin filed his complaint in the Northern District of Illinois on August 23, 2007, asserting claims of age and sex discrimination under the ADEA, Title VII, and the Equal Protection Clause via 42

U.S.C. § 1983. The defendants in this suit are divided into two groups for litigation purposes: (1) Lisa Madigan, in her official capacity as the Illinois Attorney General, the Office of the Illinois Attorney General, and the State of Illinois (the "Entity Defendants"), and (2) Lisa Madigan as an individual, Ann Spillane, Alan Rosen, Roger Flahavan, and Deborah Hagan (the "Individual Defendants"). Only the Individual Defendants have appealed to this court.

On November 26, 2007, the Entity Defendants and the Individual Defendants filed separate motions to dismiss Levin's complaint in its entirety. On December 12, 2007, the district court stayed discovery, requiring Levin to respond to the Entity Defendants's motion as to whether he was an "employee" for purposes of the ADEA and Title VII. On September 12, 2008, the district court held that Levin was an "employee" and lifted the stay on discovery. The Entity Defendants filed a second motion to dismiss shortly thereafter. Following discovery, the Entity Defendants and the Individual Defendants filed separate motions for summary judgment on November 13, 2009.

The district court ruled on the five pending motions in two separate opinions, both of which are pertinent to the issues before this court. In the first opinion, decided March 10, 2010, the Honorable David H. Coar addressed the three pending motions to dismiss. *Levin I.* Relevant to this appeal, Judge Coar granted the Individual Defendants' motion to dismiss Levin's § 1983 equal protection claim for age discrimination. In that motion, the Individual Defendants asserted that the § 1983 claim was either precluded by the ADEA or they were entitled to qualified immunity. After acknowledging that the Seventh Circuit has yet to address ADEA exclusivity, Judge Coar held that the ADEA does not foreclose Levin's § 1983 equal protection claim. But Judge Coar granted qualified immunity for the Individual Defendants because the availability of such a claim was not clearly established at the time Levin was terminated.

On January 7, 2011, Levin's case was reassigned to the Honorable Edmond E. Chang. Judge Chang issued an opinion on July 12, 2011, granting in part and denying in part the two pending motions for summary judgment. *Levin II.* Judge Chang did not disturb Judge Coar's ruling that the ADEA is not the exclusive remedy for age discrimination claims. He did, however, reverse two of Judge Coar's prior rulings, in light of additional briefing. First, Judge Chang determined that Levin is not an "employee" for purposes of Title VII and the ADEA, thus foreclosing any claim Levin could bring under those statutes. Second, Judge Chang held that the Individual Defendants were not entitled to qualified immunity on Levin's § 1983 claim for age discrimination. Rejecting Judge Coar's reasoning, Judge Chang noted that "[w]hen determining whether qualified immunity applies to protect a defendant, the question is whether a reasonable official would have known that the official was violating a clearly established constitutional right, which is a substantive question, not a question concerning whether a particular

procedural vehicle (*i.e.*, cause of action) is available." Because it is clearly established that the Fourteenth Amendment forbids arbitrary age discrimination, Judge Chang held that qualified immunity did not apply and Levin had established a genuine issue of material fact such that his § 1983 age discrimination claim could proceed to trial. The Individual Defendants filed this timely appeal, asking this court to find that they are entitled to qualified immunity because the ADEA is the exclusive remedy for Levin's age discrimination claims.

II. ANALYSIS

A. Appellate Jurisdiction

Levin does not dispute that we have jurisdiction over an order denying qualified immunity under the collateral order doctrine. But Levin believes this court lacks jurisdiction over the issue of whether the ADEA precludes a § 1983 equal protection claim. Levin asserts that this issue, resolved in Judge Coar's opinion, is not inextricably intertwined with Judge Chang's denial of qualified immunity.

We disagree with Levin's analysis. Instead, we believe this case is analogous to *Wilkie v. Robbins*. In *Wilkie,* on an interlocutory appeal of the denial of qualified immunity, the Supreme Court considered whether a new, freestanding damages remedy should exist under *Bivens.* The Supreme Court held that it had jurisdiction to consider whether such a remedy existed because the recognition of an entire cause of action is "directly implicated by the defense of qualified immunity." Similar to *Wilkie*, the very existence of a freestanding damages remedy under § 1983 is directly implicated by a qualified immunity defense such that we have jurisdiction over this appeal. Thus, we first consider whether the ADEA precludes a § 1983 equal protection claim before we turn to the issue of qualified immunity.

B. General Preclusion of § 1983 Claims

Section 1 of the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, "authorizes suits to enforce individual rights under federal statutes as well as the Constitution" against state and local government officials. Section 1983 does not create substantive rights, but operates as "a means for vindicating federal rights conferred elsewhere."

In evaluating the limits of relief available under § 1983 for statutory claims, the Supreme Court has held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." In *Sea Clammers*, the Supreme Court held that a suit for damages under the Federal Water Pollution Control Act ("FWPCA") or Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA") could not be brought pursuant to § 1983because both Acts "provide quite comprehensive enforcement mechanisms." These mechanisms include citizen-suit provisions, which allow private citizens to sue for prospective relief, and notice provisions requiring such plaintiffs to notify the EPA, the State, and the alleged violator before filing suit.

Over two decades after *Sea Clammers*, the Supreme Court again rejected a plaintiff's attempt to seek damages under § 1983 for violation of a statute which provided its own, more restrictive judicial remedy. In *Rancho Palos Verdes*, the plaintiff filed suit for injunctive relief under the Telecommunications Act of 1996 ("TCA") and sought damages and attorney's fees under § 1983 after a city planning committee denied his request for a conditional-use permit for an antenna tower on his property. The TCA "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless communications] facilities." When a permit is requested and denied, the TCA requires local governments to provide a written decision, supported by substantial evidence, within a reasonable period of time. An individual may seek judicial review within thirty days of this decision, and the court is required to hear and decide the case on an expedited basis. Further, a plaintiff may not be entitled to compensatory damages and cannot recover attorney's fees and costs.

In discerning congressional intent, the Court held that "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." Conversely, the Court noted that "in *all* of the cases in which we have held that § 1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue ... *did not* provide a private judicial remedy ... for the rights violated." Because the TCA's provisions limit the relief available to private individuals and provide for expedited judicial review, the Court held that the TCA precludes relief under § 1983.

While the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes* sought to assert federal *statutory* rights under § 1983, two other Supreme Court cases have examined whether a plaintiff is precluded from asserting *constitutional* rights under § 1983 when a remedial statutory scheme also exists. In *Smith v. Robinson*, the Supreme Court held that Congress intended the Education of the Handicapped Act ("EHA"), "to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." The EHA was designed to "aid the States in complying with their constitutional obligations to provide public education for handicapped children." The Act established "an enforceable substantive right to a free appropriate public education" and "an elaborate procedural mechanism to protect the rights of handicapped children." Under the EHA, plaintiffs were entitled to a fair and adequate state hearing, detailed procedural safeguards, and judicial review. Relying on the comprehensive statutory scheme and legislative history, the Supreme Court held that Congress did not intend to allow a handicapped child to bypass the EHA and go directly to court with a § 1983 equal protection claim as "such a result [would] render superfluous most of the detailed procedural protections in the statute."

In *Preiser v. Rodriguez*, the Supreme Court considered whether state prisoners deprived

of good-time credits could pursue their claims for equitable relief under § 1983 or if such a remedy was unavailable because of the habeas corpus statutes. The Supreme Court discussed the history of habeas corpus and recognized that "over the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law." Procedurally, the writ requires a prisoner to exhaust his adequate state remedies prior to seeking federal judicial relief. The Court held that Congress intended habeas corpus to be the sole remedy, as "[i]t would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings."

Although we have highlighted the four opinions in *Sea Clammers*, *Rancho Palos Verdes*, *Smith*, and *Preiser*, each of which found a § 1983 claim precluded, the Supreme Court does not "lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for the deprivation of a federal right. In fact, the Court has rejected § 1983preclusion arguments in several other cases.

Most recently, the Supreme Court considered whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), precludes a § 1983 equal protection claim. The Court first acknowledged the importance of discerning congressional intent and summarized its prior rulings, stating:

> In cases in which the § 1983 claim alleges a constitutional violation, lack of congressional intent may be inferred from a comparison of the rights and protections of the statute and those existing under the Constitution. Where the contours of such rights and protections diverge in significant ways, it is not likely that Congress intended to displace § 1983suits enforcing constitutional rights. Our conclusions regarding congressional intent can be confirmed by a statute's context.

The Court also recognized that, in its prior opinions finding preclusion, the statutes at issue required plaintiffs to exhaust their administrative remedies or comply with other procedural requirements before filing suit. "Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes."

Turning to the statute before it, the Supreme Court examined Title IX's remedial scheme and determined that Title IX does not preclude a § 1983 equal protection claim. Title IX prohibits discrimination on the basis of gender in educational programs that receive federal financial assistance. Two enforcement mechanisms exist: (1) "an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance" and (2) an implied private right of action, through which a plaintiff may seek injunctive relief and recover damages. A plaintiff suing under Title IX is not required to exhaust any administrative remedies or provide notice before filing suit; instead,

"plaintiffs can file directly in court and can obtain the full range of remedies." Further, Congress failed to include an express private right remedy, and the Court "has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation."

The Court also emphasized the differences between the protections guaranteed by Title IX and the Equal Protection Clause. First, Title IX permits a plaintiff to sue institutions and programs receiving federal funding, but does not authorize suit against school officials, teachers, or other individuals. In contrast, § 1983 equal protection claims reach state actors, including individuals, municipalities, and other state entities. Second, some policies that are exempted under Title IX could still be subject to claims under the Equal Protection Clause. Finally, the Court noted that "the standards for establishing liability may not be wholly congruent." For example, a Title IX plaintiff may only have to show that a school administrator acted with deliberate indifference while a § 1983 plaintiff must demonstrate the existence of a municipal custom, policy, or practice. Because of these differences and the absence of a comprehensive remedial scheme, the plaintiffs' § 1983 equal protection claim was not precluded.

We conclude from these cases that, in determining whether a § 1983 equal protection claim is precluded by a statutory scheme, the most important consideration is congressional intent. Congressional intent may be construed from the language of the statute and legislative history, the statute's context, the nature and extent of the remedial scheme, and a comparison of the rights and protections afforded by the statutory scheme versus a § 1983 claim. A statutory scheme may preclude a § 1983 constitutional claim, especially if a § 1983 claim circumvents the statute's carefully tailored scheme and provides access to benefits unavailable under that scheme. Keeping these concepts in mind, we now turn to the issue before us: whether the ADEA precludes a § 1983 equal protection claim.

C. ADEA Preclusion of § 1983 Claims

Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." The ADEA makes it unlawful for an employer to "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual ... because of such individual's age." In general, the ADEA provides coverage for private, state, and federal employees who are forty years of age and older, albeit with a few notable exceptions. The Act "incorporates some features of both Title VII and the Fair Labor Standards Act of 1938 [FLSA], which has led [the Supreme Court] to describe it as 'something of a hybrid.' " Specifically, the substantive provisions of the ADEA are modeled after Title VII, while its remedial provisions incorporate provisions of the FLSA.

The ADEA expressly grants individual employees a private right of action. An ADEA plaintiff must first file a charge with the Equal Employment Opportunity Commission (EEOC), generally within 180 days of the unlawful age discrimination. The EEOC then notifies all parties involved and, if the EEOC believes there has been a violation, the agency "promptly seek[s] to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." If the EEOC charge is dismissed or terminated, the EEOC is required to notify the plaintiff.

Sixty days after filing an EEOC charge, a plaintiff is entitled to file a civil lawsuit and, if he seeks damages, receive a trial by jury. This right terminates, however, if the EEOC files its own lawsuit to enforce the plaintiff's claim. "When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees." If a violation was willful, a plaintiff may recover liquidated damages. "The Act also gives federal courts the discretion to 'grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act].' "

Whether the ADEA precludes a § 1983 equal protection claim is a matter of first impression in the Seventh Circuit. All other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims, largely relying on the Fourth Circuit's reasoning in *Zombro v. Baltimore City Police Department*. District courts located in other circuits, however, are split on the issue. In the present case, two district court judges from the Northern District of Illinois held that the ADEA does not preclude a § 1983 equal protection claim.

In *Zombro,* the Fourth Circuit held that allowing a plaintiff to seek recovery for age discrimination through a § 1983 equal protection claim would undermine the comprehensive remedial scheme set forth in the ADEA. Citing the ADEA's provisions requiring notice to the EEOC, informal conciliation, and termination of a plaintiff's action upon the filing of a complaint by the EEOC, the court believed that if a plaintiff could pursue a § 1983 action instead, "[t]he plaintiff would have direct and immediate access to the federal courts, the comprehensive administrative process would be bypassed, and the goal of compliance through mediation would be discarded." Where Congress has enacted a comprehensive statutory scheme, such as the ADEA, the Fourth Circuit holds that preclusion of § 1983 suits is appropriate "unless the legislative history of the comprehensive statutory scheme in question manifests a congressional intent to allow an individual to pursue independently rights under both the comprehensive statutory scheme and other applicable state and federal statutes, such as 42 U.S.C. § 1983." The Fourth Circuit found no such intent in the language and history of the ADEA. That court also relied upon the ADEA's adoption of Section 216 of the FLSA, which has been held to be "the sole remedy available to the employee for enforcement of whatever rights he may have under the FLSA." To the court, this shared

provision, along with the ADEA's precisely drawn statutory scheme, evidenced congressional intent that the ADEA be the exclusive remedy for age discrimination suits.

Several circuit courts addressing ADEA preclusion have simply relied on *Zombro*'s holding. But not all district court judges are convinced. The leading district court case rejecting ADEA preclusion of § 1983 equal protection claims is *Mummelthie v. City of Mason City, Iowa*. In that case, Judge Bennett sharply criticized the Fourth Circuit's analysis in *Zombro,* noting that the court failed to consider the statutory language and legislative history of the ADEA, as well as its similarities to Title VII, a statutory scheme which does not preclude § 1983claims.

Given the conflicting case law, further review of this issue is required. Although the ADEA enacts a comprehensive statutory scheme for enforcement of its own statutory rights, akin to *Sea Clammers* and *Rancho Palos Verdes,* we find that it does not preclude a § 1983 claim for constitutional rights. While admittedly a close call, especially in light of the conflicting decisions from our sister circuits, we base our holding on the ADEA's lack of legislative history or statutory language precluding constitutional claims, and the divergent rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim.

1. Statutory Text and Legislative History

Nothing in the text of the ADEA expressly precludes a § 1983 claim or addresses constitutional rights. Nor does the legislative history provide clear guidance on this issue. Although the *Zombro* court interpreted this lack of explicit language or legislative history as congressional intent not to allow individuals to pursue constitutional rights outside of the ADEA's scheme, we reach the opposite conclusion. Congress's silence on the issue tells us nothing about preclusion—we do not know whether Congress even considered alternative constitutional remedies in enacting the ADEA.

We agree with the *Zombro* majority that the ADEA sets forth a rather comprehensive remedial scheme. The ADEA provides a private right of action, requires notice and exhaustion of remedies, and limits the damages available under the Act. Like *Sea Clammers* and *Rancho Palos Verdes,* this scheme speaks volumes as to how Congress intended allegations of *statutory* age discrimination to proceed.

But, as to constitutional claims, we do not believe Congress's intent is as apparent as other circuit courts have found. As noted in *Mummelthie,* "the ADEA does not purport to provide a remedy for violation of federal constitutional rights" and no express language indicates that Congress intended to foreclose relief under § 1983 for constitutional violations. Beyond that, we have a hard time concluding that Congress's mere creation of a statutory scheme for age discrimination claims was intended to foreclose preexisting constitutional claims. Congress frequently enacts new legal

remedies that are not intended to repeal their predecessors. Accordingly, the Supreme Court has emphasized on several occasions that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest."

What, then, do we make of the Supreme Court's holdings in *Smith* and *Preiser*, which held that constitutional claims were barred by the existence of comprehensive statutory schemes? In both of those cases, the statutes at issue were specifically designed to address constitutional issues. For instance, the habeas corpus statutes in *Preiser* provide a remedy for prisoners "in custody in violation of *the Constitution* or laws or treaties of the United States. Similarly, the *Smith* court acknowledged that "[t]he EHA is a comprehensive scheme set up by Congress to aid the States in complying with *their constitutional obligations* to provide public education for handicapped children." The statute itself provides that federal intervention is necessary to "ensure equal protection of the law." This goal is also referenced in the legislative history, as recognized in *Smith*. These references demonstrate that Congress considered alternative constitutional remedies in enacting the EHA.

The ADEA is readily distinguishable. "In contrast to the statutes at issue in *Preiser* and in *Smith*, the ADEA does not purport to provide a remedy for violation of constitutional rights. Instead, it provides a mechanism to enforce only the substantive rights created by the ADEA itself." For the preclusion of *constitutional* claims, we believe more is required than a comprehensive statutory scheme. This notion is supported by the Supreme Court's references in *Smith* to the legislative history of the EHA. Thus, in *Smith*, it was more than just the comprehensive remedial scheme that convinced the Court that the EHA is an exclusive remedy. In this way, *Smith* differs from *Sea Clammers* and *Rancho Palos Verdes*, cases tasked only with determining whether § 1983 statutory claims were precluded by that statute's own comprehensive scheme. In sum, even though the ADEA is a comprehensive remedial scheme, without some additional indication of congressional intent, we cannot say that the ADEA's scheme alone is enough to preclude § 1983 constitutional claims.

The Ninth Circuit's recent *Ahlmeyer* decision raises one additional point on this issue that necessitates discussion, as the court relied upon our prior precedent. As background, because age is not a suspect classification, an equal protection claim of age discrimination in employment is subject only to rational basis review, in which the age classification must be rationally related to a legitimate state interest. In contrast, the ADEA "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." Thus, the *Ahlmeyer* decision notes in its opinion that "[b]ecause the ADEA provides broader protection than the Constitution, a plaintiff has 'nothing substantive to gain' by also asserting a § 1983 claim."

In *Williams*, we briefly discussed the plaintiffs' failure to differentiate their Title VI and equal protection claims. Citing *Sea Clammers*, we noted that "[w]hen Congress enacts a comprehensive scheme for enforcing a statutory right that is identical to a right enforceable under 42 U.S.C. § 1983, ... the section 1983 lawsuit must be litigated in accordance with the scheme." We then recognized that, according to the Supreme Court, Title VI proscribes only those racial classifications that violate the Equal Protection Clause. Thus, there was nothing to gain by asserting an equal protection claim, and failure to comply with Title VI's procedural requirements would have left the plaintiffs without a remedy. But again, like *Smith*, Title VI's legislative history provides insight into Congress's intent. In light of this clear congressional intent, *Williams* (like *Smith*) is also distinguishable from the ADEA. And while we freely acknowledge that the ADEA's heightened scrutiny provides a stronger mechanism for plaintiffs to challenge age discrimination in employment, absent any additional indication from Congress, we simply cannot infer that Congress intended to do away with a § 1983 constitutional alternative.

Finally, the circuit courts rely upon Congress's incorporation of the FLSA's remedial scheme in finding that Congress intended to preclude a § 1983 constitutional remedy. This is a perplexing argument because the cases which have found the FLSA to be an exclusive remedy do not (and, in fact, cannot) address constitutional claims. Unlike Title VII and the ADEA, the rights created by the FLSA are not based on rights also guaranteed by the Constitution. Thus, cases addressing FLSA exclusivity speak little to the issue presently before this court. We have no quarrel with the notion that the FLSA is the sole remedy for the enforcement of FLSA rights and, similarly, the ADEA is the sole remedy for the enforcement of ADEA rights. Even the district courts that believe the ADEA does not preclude § 1983 constitutional claims agree on this point. Because the FLSA lacks a constitutional counterpart, it provides little additional guidance beyond the statutory text.

2. Comparison of Rights and Protections

Given the absence of any clear or manifest congressional intent in either the language of the statute or the legislative history, *Fitzgerald* directs us to compare the rights and protections afforded by the statute and the Constitution. We believe the rights and protections afforded by the ADEA and § 1983 equal protection claims diverge in a few significant ways.

First, an ADEA plaintiff may only sue his employer, an employment agency, or a labor organization. In contrast, a § 1983 plaintiff may file suit against an individual, so long as that individual caused or participated in the alleged deprivation of the plaintiff's constitutional rights. A § 1983 plaintiff may also sue a governmental organization, but only if he can demonstrate that the alleged constitutional violation was "caused by (1) an express municipal policy; (2) a widespread, though unwritten, custom or practice; or (3) a decision by a municipal agent with final policymaking authority." These divergent rights between

the ADEA and a § 1983 constitutional claim seriously affect a plaintiff's choice of defendants and his strategy for presenting a prima facie case.

Second, the ADEA expressly limits or exempts claims by certain individuals, including elected officials and certain members of their staff, appointees, law enforcement officers, and firefighters. The statutory scheme also prohibits claims by employees under the age of forty or those bringing so-called "reverse age discrimination" claims. There are no such limitations for § 1983 equal protection claims.

Finally, as a practical matter in light of the Supreme Court's decision in *Kimel*, state employees suing under the ADEA are left without a damages remedy, as such claims are barred by Eleventh Amendment sovereign immunity. In contrast, "[m]unicipalities do not enjoy any kind of immunity from suits for damages under § 1983." Without the availability of a § 1983 claim, a state employee (like Levin) who suffers age discrimination in the course of his employment is left without a federal damages remedy.

In light of our analysis of the ADEA and the relevant case law, and given these divergent rights and protections, we conclude that the ADEA is not the exclusive remedy for age discrimination in employment claims.

D. Qualified Immunity

Because the ADEA does not preclude Levin's § 1983 equal protection claim, we now turn to the issue of qualified immunity. We review a district court's denial of summary judgment based on qualified immunity *de novo*. To determine whether state actors are entitled to qualified immunity, we consider "(1) whether the facts, taken in the light most favorable to the plaintiffs, show that the defendants violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation." Beyond asserting that the ADEA precludes a § 1983 claim, the Individual Defendants do not challenge the first prong on appeal. Thus, for our purposes, we need only briefly discuss the second prong of the qualified immunity analysis.

"A right is clearly established when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Judge Coar's opinion granted qualified immunity as to Levin's § 1983 equal protection claim, finding that "whether the Seventh Circuit permits equal protection claims for age discrimination in light of the ADEA is unclear." Accordingly, Judge Coar believed that the constitutional right was not clearly established and qualified immunity was appropriate. On reconsideration, Judge Chang reversed Judge Coar's ruling, noting that "irrational age discrimination is clearly forbidden by the Equal Protection Clause" and the issue of qualified immunity is "not a question concerning whether a particular procedural vehicle (*i.e.*, cause of action) is available."

We agree with Judge Chang. At the time of the alleged wrongdoing, it was clearly

established that age discrimination in employment violates the Equal Protection Clause. Although age is not a suspect classification, states may not discriminate on that basis if such discrimination is not "rationally related to a legitimate state interest." Whether or not the ADEA is the exclusive remedy for plaintiffs suffering age discrimination in employment is irrelevant, and as Judge Chang noted, it is "odd to apply qualified immunity in the context where the procedural uncertainty arises from the fact that Congress created a statutory remedy for age discrimination that is substantively *broader* than the equal protection clause." Because Levin's constitutional right was clearly established, the Individual Defendants are not entitled to qualified immunity.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

"U.S. Supreme Court to Consider Application of ADEA to State and Local Workers"

Lexology
Jennifer Cerven
April 2, 2013

The U.S. Supreme Court has agreed to hear an appeal from Illinois Attorney General Lisa Madigan on the issue of whether state and local government employees can bypass the Age Discrimination in Employment Act and sue for age discrimination under an equal protection theory. The case is *Madigan v. Levin*, Docket Number 12-872.

Appellate courts are split on whether the ADEA is the exclusive route for state and local government employees to bring a claim for age discrimination, or whether an equal protection claim via Section 1983 is available. The Seventh Circuit Court of Appeals decided that the Plaintiff, a former Assistant Attorney General, could go forward with a Section 1983 age discrimination claim against certain defendants (including Madigan) in their individual capacity. The Seventh Circuit decided that the ADEA does not preclude a Section 1983 claim, but acknowledged that its decision was contrary to rulings in other circuits holding that the ADEA is the exclusive remedy for age discrimination claims.

The question presented to the Supreme Court is whether the Seventh Circuit erred in holding that state and local government employees may avoid the ADEA's remedial regime by bringing age discrimination claims under the Constitution's Equal Protection Clause and 42 U.S.C. 1`983.

In the petitioner's brief asking the Supreme Court to grant certiorari, Madigan noted the circuit split and argued that if the Seventh Circuit's ruling were to stand, there would be about one million state and local workers in Illinois, Indiana, and Wisconsin who would be able to bypass the ADEA's administrative dispute resolution process at the EEOC and go straight to court. Madigan argued that this would undercut the ADEA and would deprive state and local governments of prompt notice of claims.

The outcome of the case will be important not only for state and municipal employers, but also for individual employees. As a practical matter, the plaintiff could end up with no further opportunity for an age discrimination claim if the Supreme Court decides that the ADEA forecloses age claims under Section 1983. That is because the lower court decided that the employee fell under the ADEA exclusion of policy-making level employees, 29 U.S.C. §630(f). Moreover, sovereign immunity applies to protect states from individual suits for monetary damages under the ADEA, under Supreme Court precedent in *Kimel v. Florida Board of Regents,* 528 U.S. 62.

The case is likely to proceed to briefing during the current term and may be scheduled for argument in the fall term.

"Supreme Court to Take on Age Discrimination: Madigan v. Levin"

Constitutional Law Reporter
Donald Scarinci
March 28, 2013

Now that the same-sex marriage oral arguments are in the rear view, it is time to focus on the remainder of the 2013 term. While the remaining cases may not be as groundbreaking, there are a number of significant constitutional issues for the Supreme Court to tackle.

For instance, the justices recently agreed to take on age discrimination, one of the most common types of employment lawsuits. The specific issue before the Court is whether state and local government employees can avoid the federal Age Discrimination in Employment Act (ADEA) by bringing age discrimination claims directly under the Equal Protection Clause.

The Facts of the Case

Harvey N. Levin was terminated from his position as an Illinois Assistant Attorney General at the age of 61. After the office replaced him with a younger lawyer, Levin filed a lawsuit alleging that his termination not only violated the ADEA, but also the equal protection guarantee of the Fourteenth Amendment.

The defendants, who included the State of Illinois, the Office of the Illinois Attorney General, Illinois Attorney General Lisa Madigan (in both her individual and official capacity), and four other individual state employees, sought to dismiss the Constitutional claim. They argued that the ADEA displaced all other remedies for age discrimination claims.

The Seventh Circuit Court of Appeals disagreed, holding that the ADEA does not preclude equal protection claims. Accordingly, it denied the individual defendants qualified immunity.

The Issues Before the Court

The Supreme Court likely agreed to hear the case because the circuit courts have reached divergent results when asked to consider this issue. They are currently split 4-1, with the Seventh Circuit departing from the others.

Section 1 of the Civil Rights Act of 1871, codified as 42 U.S.C. § 1983, "authorizes suits to enforce individual rights under federal statutes as well as the Constitution" against state and local government officials. However, in evaluating the limits of relief available under § 1983 for statutory claims, the Supreme Court has held that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983."

Thus, the key question before the Court will be whether Congress intended to limit other remedies when including state and federal employees under the protection of the

ADEA, a determination the Supreme Court generally does not take lightly.

“Harvey Levin v. Lisa Madigan, Seventh Circuit Court of Appeals Decision”

JD Supra
Edward Theobald
August 17, 2012

The U.S. Court of Appeals for the Seventh Circuit has ruled that Illinois Attorney General Lisa Madigan and supervisors of the Attorney General’s Office are not entitled to qualified immunity from an Equal Protection § 1983 Age Discrimination claim brought by Harvey Levin, a former Senior Assistant Attorney General.

A three-judge panel acknowledged that its decision ran counter to rulings by six other circuits that the Age Discrimination in Employment Act (ADEA) precludes age discrimination claims under the Equal Protection Clause and 42 U.S.C. § 1983. The Seventh Circuit voted unanimously on August 17, 2012 to affirm Northern District of Illinois Judge Edmond Chang's July 2011 judgment in *Levin v. Madigan*. Judge Michael Kanne wrote the opinion, joined by Judges William Bauer and Richard Posner citing “the ADEA's lack of legislative history or statutory language precluding constitutional claims, and the divergent rights and protections afforded by the ADEA as compared to a § 1983 equal protection claim."

"In light of our analysis of the ADEA and the relevant case law, and given these divergent rights and protections, we conclude that the ADEA is not the exclusive remedy for age discrimination in employment claims," Judge Kanne concluded. As for qualified immunity, at the time of the alleged violation "it was clearly established that age discrimination in employment violates the Equal Protection Clause," he wrote. "Because Levin's constitutional right was clearly established, the Individual Defendants are not entitled to qualified immunity."

Harvey Levin was 55 years old in September 2000, when he became an assistant attorney general in the Illinois Attorney General’s consumer fraud bureau. Two years later, Illinois Attorney General James Ryan promoted Mr. Levin to a senior assistant attorney general. In May of 2006, the new Illinois Attorney General, Lisa Madigan, terminated Mr. Levin despite his consistent written performance evaluations that met or exceeded the Attorney General’s expectations in a dozen job categories. Mr. Levin was one of three consumer fraud bureau lawyers who were discharged and replaced with younger attorneys; Levin's replacement was a woman in her 30’s.

U.S. District Court Judge Edmond E. Chang has scheduled the jury trial on Harvey Levin’s age and sex discrimination in employment complaint for May 6, 2013 in the U.S. District Courthouse, 219 S. Dearborn Street, Room 1403, Chicago, Illinois 60604.

“High Court To Mull Circuit Split On Gov't Worker ADEA Claims”

Law 360
Bill Donahue
March 18, 2013

The U.S. Supreme Court on Monday agreed to weigh in on a circuit split over whether state and local government employees can directly sue for age discrimination under the equal protection clause rather than follow the out-of-court procedures of the Age Discrimination in Employment Act.

The high court will review a Seventh Circuit ruling that state workers were allowed to bring age discrimination claims under the 14th Amendment. Other circuits have said just the opposite — that the ADEA is the exclusive remedy for claims of age-based bias and that it forecloses constitutional allegations.

The case is significant for government employers because the ADEA mandates that workers file claims with the U.S. Equal Employment Opportunity Commission and take other administrative steps before filing a complaint. If employees can sue for constitutional violations, they can bypass all of that.

As is customary, the court didn't indicate why it chose to take the case, and Illinois Attorney General Lisa Madigan — who filed the petition for writ of certorari — didn't immediately return a request for comment Monday.

Madigan filed her petition in January, arguing that the Seventh Circuit's ruling in August had exacerbated an already-confusing divide among lower courts over whether the ADEA precludes constitutional age bias claims.

“This petition raises an important and frequently recurring question over which of the lower federal courts are hopelessly divided,” the petition said. “The Seventh Circuit acknowledged that its holding ... created a split with the rule in several other circuits [and] this court’s intervention is needed to reconcile this growing, nationwide split in authority.”

As Madigan explained in her petition, the Fourth, Fifth, Ninth and Tenth Circuits have all ruled that Congress made the ADEA the exclusive statutory vehicle for alleged age bias. Those courts have rejected efforts to sue under 42 USC § 1983 — the rule for deprivation of constitutional or other legal rights — as precluded by the ADEA.

And in other appeals court jurisdictions that haven't addressed the issue, like the Second, Third, Sixth, Eighth and Eleventh Circuits, district judges have ruled both ways, further muddling the situation, the petition argued.

Madigan pushed the high court to come down on the side of the courts that have upheld the exclusivity of the ADEA, saying that the Seventh's contrary view was detrimental to the “proper functioning of the

comprehensive scheme that Congress has carefully crafted for resolving employment disputes."

"Congress decided that these disputes, specifically, should be resolved wherever possible through prompt notice and informal conciliation rather than litigation," the petition said. "The more than one million state and local workers located in Illinois, Indiana and Wisconsin may [now] bypass the ADEA's dispute resolution process and go straight to court, undercutting the act as a means of securing voluntary compliance with federal age discrimination laws," Madigan argued.

Former assistant Illinois attorney general Harvey N. Levin sued Madigan and her office in 2007, claiming he had been fired due to his age — he was 55 when terminated — and replaced by a female attorney in her thirties. He brought claims under both the ADEA and the 14th Amendment, via 42 USC § 1983.

When Illinois and Madigan moved to dismiss the constitutional claims because they were foreclosed by the ADEA, the judge sided with Levin. In August, the Seventh Circuit affirmed that ruling, setting the stage for the Supreme Court to step in.

An attorney for Levin didn't return a request for comment Monday on the grant of certioari.

Madigan is represented by Illinois Solicitor General Michael A. Scodro.

Levin is represented by Edward R. Theobald.

The case is *Madigan v. Levin*, case number 12-872, in the U.S. Supreme Court.

"Supreme Court Stops Use of Key Part of Voting Rights Act"

The Washington Post
Robert Barnes
June 25, 2013

A divided Supreme Court on Tuesday invalidated a crucial component of the landmark Voting Rights Act of 1965, ruling that Congress has not taken into account the nation's racial progress when singling out certain states for federal oversight.

The vote was 5 to 4, with Chief Justice John G. Roberts Jr. and the other conservative members of the court in the majority.

The court did not strike down the law itself or the provision that calls for special scrutiny of states with a history of discrimination. But it said Congress must come up with a new formula based on current data to determine which states should be subject to the requirements.

Proponents of the law, which protects minority voting rights, called the ruling a death knell. It will be almost impossible for a Congress bitterly divided along partisan lines to come up with such an agreement, they said.

There could be immediate consequences from the court's ruling. Just hours after the ruling, Texas Attorney General Greg Abbott said his state will move forward with a voter-identification law that had been stopped by a panel of federal judges and will carry out redistricting changes that had been mired in court battles.

The act covers the Southern states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia, as well as Alaska, Arizona and parts of seven other states. It requires them to receive "pre-clearance" from the U.S. attorney general or federal judges before making any changes to election or voting laws.

Roberts said the court had warned Congress four years ago, in a separate case, that its decision to continue using a formula based on "40-year-old facts" would lead to serious constitutional questions.

"Congress could have updated the coverage formula at that time, but did not do so," Roberts wrote. "Its failure to act leaves us today with no choice but to declare [the formula] unconstitutional."

He added, "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."

He was joined by Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr.

One sign of racial progress has been the election of the nation's first African American president, who said Tuesday that he was "deeply disappointed" in the decision.

"For nearly 50 years, the Voting Rights Act . . . has helped secure the right to vote for millions of Americans," President Obama said in a statement. "Today's decision invalidating one of its core provisions upsets decades of well-established practices that help make sure voting is fair, especially in places where voting discrimination has been historically prevalent."

In Virginia, the state government presumably will no longer need approval from Washington for its new voter-ID law. The law could still be subject to a legal challenge, but the burden would be shifted to plaintiffs to show that the law would hurt minority voters.

Attorney General Eric H. Holder Jr., who called the decision a "serious setback for voting rights," said his department will "continue to carefully monitor jurisdictions around the country for voting changes that may hamper voting rights."

"Let me be very clear," Holder said. "We will not hesitate to take swift enforcement action, using every legal tool that remains available to us, against any jurisdiction that seeks to take advantage of the Supreme Court's ruling by hindering eligible citizens' full and free exercise of the franchise."

Justice Ruth Bader Ginsburg emphasized the liberals' disagreement with the decision by reading her dissent from the bench. She said the majority not only misread the lessons of the nation's racial progress but also inserted itself into a decision that the Constitution's Civil War amendments specifically leave for Congress.

"When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our democratic system, Congress' power to act is at its height," Ginsburg wrote in her dissent.

She noted that the 2006 extension of the Voting Rights Act, and the continued use of the formula in Section 4, was approved unanimously in the Senate and signed by President George W. Bush. "What has become of the court's usual restraint?" she asked from the bench.

She invoked the Rev. Martin Luther King Jr. and the march from Selma to Montgomery. "'The arc of the moral universe is long,' he said, 'but it bends toward justice' if there is a steadfast commitment to see the task through to completion," Ginsburg said. "That commitment has been disserved by today's decision."

She was joined in dissent by Justices Stephen G. Breyer, Sonia Sotomayor and Elena Kagan.

Roberts, too, was ready with history lessons. In his opinion, he noted that in 1965, white voter registration in Mississippi was nearly 70 percent and black registration stood at 6.7 percent. By 2004, a greater percentage of blacks than whites were registered to vote in the state, and that was true in five of the six states originally covered by Section 5.

"These are the numbers that were before Congress when it reauthorized the act in 2006," he said.

Roberts cited the deaths of men registering others to vote in Philadelphia, Miss., and

"Bloody Sunday" in Selma, Ala. "Today both of these towns are governed by African-American mayors," Roberts wrote. Yet the "extraordinary and unprecedented features" of Section 5, along with the coverage formula, were reauthorized "as if nothing had changed."

Ginsburg said that the longtime formula Congress decided to continue using still identified the areas most in need of federal oversight. Between 1982 and 2006, she said, the Justice Department blocked more than 700 voting changes on the grounds that they would be discriminatory.

She said the court's ruling does not accommodate the evidence Congress amassed to justify reauthorization. "One would expect more from an opinion striking at the heart of the nation's signal piece of civil rights legislation," Ginsburg wrote.

Roberts countered: "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."

Reaction to the ruling was impassioned.

Edward Blum, who coordinated the current challenge to Section 5 and a previous one in 2009, said the decision "restores an important constitutional order to our system of government which requires that all 50 states are entitled to equal dignity and sovereignty. Our nation's laws must apply uniformly to each state and jurisdiction."

Civil rights groups were outraged. "I think we should not soft-pedal what is an egregious betrayal of minority voters," said Sherrilyn Ifill, head of the NAACP Legal Defense Fund, whose lawyers participated in the case.

In his opinion, Roberts noted that the decision "in no way affects the permanent, nationwide ban on racial discrimination in voting" found in another part of the Voting Rights Act. And he said that "Congress may draft another formula based on current conditions."

But there appeared to be little bipartisan appetite for that on Capitol Hill, and some lawmakers said such an attempt would be unsuccessful.

"As long as Republicans have a majority in the House and Democrats don't have 60 votes in the Senate, there will be no pre-clearance," said Sen. Charles E. Schumer (D-N.Y.). "It is confounding that after decades of progress on voting rights, which have become part of the American fabric, the Supreme Court would tear it asunder," Schumer added.

The specific challenge before the court came from Shelby County, Ala., a fast-growing, mostly white suburb south of Birmingham.

A brief filed by the state of Alabama said bloody resistance to African Americans' voting rights was "particularly responsible" for making Section 5 necessary.

The state's attorney general, Luther Strange, said in the brief that Alabama had a well-earned place among the covered jurisdictions when the act was passed in

1965 and reauthorized in 1970, 1975 and 1982. But the 2006 reauthorization, which extended federal control for an additional 25 years, went too far, he said.

"It is time for Alabama and the other covered jurisdictions to resume their roles as equal and sovereign parts of these United States," the brief said.

The case is *Shelby County v. Holder*.

"U.S. Chief Justice Realizes Longstanding Vision in Voting-Rights Case"

Reuters
Joan Biskupic
June 25, 2013

For an often enigmatic figure at the U.S. Supreme Court, Chief Justice John Roberts spoke to the essence of his legal philosophy on Tuesday in eliminating a voting-rights provision enacted to protect blacks and other minorities.

His opinion for the court marks the culmination of an effort by conservatives, many of whom, like Roberts, cut their teeth in the Ronald Reagan administration, to ensure that federal voting requirements on the states be limited and race-based rules fade in contemporary America.

In a tenure-defining decision, the Roberts majority undercut a key section of the 1965 Voting Rights Act that requires states with a history of racial discrimination to obtain U.S. approval before changing election laws. The court struck down the formula used to determine which states were affected. Nine mostly Southern states had been covered.

The decision was the most significant racial ruling since Roberts, 58, became chief justice in 2005. Announced on the next-to-last day of term, *Shelby County v. Holder* was one of the most awaited of the current session and as Roberts spoke from the bench, the hushed courtroom felt quieter than usual.

CONSERVATIVE PRIORITIES

Last year at this time, Roberts defied many people's expectations when he provided the fifth vote to uphold the healthcare overhaul sponsored by President Barack Obama. But some legal analysts observed that such a case, testing federal commerce and taxing power, did not touch on his long-held conservative priorities.

When Roberts served as a lawyer in the Reagan administration, he sought to curtail government's use of racial remedies and specifically narrow the reach of the Voting Rights Act. In 1982, for example, Roberts advised the president to oppose pending legislation to enhance a section aimed at intentional voter discrimination.

Roger Clegg, who worked with Roberts at the Justice Department in the 1980s, said Roberts, like other young Republican lawyers, was inspired by a broad socially conservative agenda that included such subjects as abortion, religion and race.

"These were the big-ticket items back then," said Clegg, now president of the Center for Equal Opportunity, a conservative think tank. Clegg added that he did not think Roberts, who grew up in Indiana and was educated at Harvard, was motivated in his quest for race-neutral policies by especially Southern sympathies.

"This is not driven by the fact that his great, great grandfather was with (Confederate General Robert E.) Lee at Appomattox," said Clegg, referring to one of the final

battles of the Civil War. "It's from his belief in federalism," that is, a limit on what Congress may constitutionally impose on the states.

Once he joined the high court, as an appointee of Republican President George W. Bush, Roberts asserted his opposition to racial policies. In a 2006 case involving the drawing of "majority minority" voting districts to boost the political power of blacks and Latinos, Roberts referred to "this sordid business divvying us up by race." In a 2007 dispute over school integration plans, Roberts wrote, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

In a 2009 case, in which the court ultimately declined to review the constitutionality of the key Voting Rights Act section, Roberts warned that the screening provision may no longer be constitutional because "things have changed in the South."

He questioned why Congress would still target Southern states when widespread blatant racial discrimination had ended. Can members of Congress "impose this disparate treatment forever because of the history in the South?" he asked during oral arguments in the 2009 case. "When do they have to stop?"

On Tuesday, Roberts provided an answer: Now.

In his 24-page opinion for the court, Roberts criticized Congress for leaving in place the criteria for targeted states that traced to the 1960s and early 1970s, despite the gains in voting equality since then. Voicing irritation that lawmakers had not acted on the court's warning in 2009 to revise the formula used to determine which states were covered, Roberts said it had no choice but to strike it down.

As he wrote about the changes across the country in recent decades, the chief justice noted that voter registration rates for blacks and whites now approach parity and blatant discrimination is rare.

"Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions," Roberts wrote, joined by his four fellow conservatives.

Justice Ruth Bader Ginsburg, speaking for the four liberal dissenters, said the states targeted four decades ago still had the worst voting-rights violations. She invoked the words of slain civil rights leader Martin Luther King, Jr.: " 'The arc of the moral universe is long, he said, but ‘it bends toward justice,' if there is a steadfast commitment to see the task through to completion. That commitment has been disserved by today's decision."

In the cool marble courtroom on a scorching June morning, Roberts was expressionless. After decades of tension over the scope of voting rights, he had his majority.

“U.S. Sues To Block Texas Law On Voter ID”

The Wall Street Journal
Jess Bravin
August 27, 2013

The Justice Department on Thursday sued Texas over the state's voter-identification law and said it would join an existing case challenging congressional districts drawn by Austin's Republican-controlled legislature, alleging that both measures violate the 1965 Voting Rights Act and constitutional protections for minorities.

The lawsuits come after the U.S. Supreme Court in June ended nearly a half-century of direct federal supervision of election practices in states that historically discriminated against minority voters. The 5-to-4 decision found that historical data no longer justified requiring Texas and other such states to obtain federal permission before changing election procedures.

But the opinion left intact federal law authorizing voting-rights suits against state and local election laws after they are enacted. It also allowed courts to impose new "preclearance" requirements on jurisdictions found to discriminate against minority voters.

The Obama administration had pledged to use those powers vigorously, and on Thursday Attorney General Eric Holder said the Texas suits underscored that commitment.

"We will not allow the Supreme Court's recent decision to be interpreted as open season for states to pursue measures that suppress voting rights," Mr. Holder said in a statement. "This represents the department's latest action to protect voting rights, but it will not be our last."

Texas Gov. Rick Perry called the suit "an effort to obstruct the will of the people of Texas," adding, "We will continue to defend the integrity of our elections."

The Justice Department previously had rejected the voter-ID law, a decision upheld by a federal court in Washington. That ruling was nullified by the Shelby County ruling, which eliminated the formula that had placed Texas under the preclearance requirement.

The Texas law requires voters to present one of five forms of photo ID. A driver's license, passport or concealed-handgun license issued by the state Department of Public Safety are among the accepted forms of ID, while student cards aren't accepted. People who can prove their eligibility to vote with a birth certificate or other documents can obtain a special voter-identification card.

The Justice Department said the law, signed by Mr. Perry in 2011, would disadvantage minority voters. For instance, the department said Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack a driver's license.

The administration also said it would join the redistricting suit, which was filed in 2011 by civil-rights organizations and Texas voters, and is pending before a federal court in San Antonio.

"U.S. Asks Court to Limit Texas on Ballot Rules"

The New York Times
Adam Liptak & Charlie Savage
July 25, 2013

The Obama administration on Thursday moved to protect minority voters after last month's Supreme Court ruling striking down a central part of the Voting Rights Act of 1965, with the Justice Department asking a court to require Texas to get permission from the federal government before making changes.

In a speech before the National Urban League in Philadelphia, Attorney General Eric H. Holder Jr. said the request would be the first of several legal salvos from the administration in reaction to the Supreme Court's decision. "My colleagues and I are determined to use every tool at our disposal," he said, "to stand against such discrimination wherever it is found."

Last month's ruling, *Shelby County v. Holder*, did away with a requirement that Texas and eight other states, mostly in the South, get permission from the Justice Department or a federal court before changing election procedures. On Thursday, the administration asked a federal court in Texas to restore that "preclearance" requirement there, citing the state's recent history and relying on a different part of the voting rights law.

Republicans harshly criticized the announcement, in a sign that both parties view the battle over voting laws as important to future elections.

Gov. Rick Perry of Texas cast Mr. Holder's remarks as an attempt by the Obama administration to weaken the state's voter-integrity laws and said the comments demonstrated the administration's "utter contempt for our country's system of checks and balances."

"This end run around the Supreme Court undermines the will of the people of Texas, and casts unfair aspersions on our state's common-sense efforts to preserve the integrity of our elections process," Mr. Perry said in a statement.

For years, Republicans across the nation have pushed for tougher voter identification laws, shorter voting hours and other measures they say are intended to reduce voter fraud. The efforts have intensified across the South, from Texas to North Carolina, after the Supreme Court's ruling freed many states and localities from federal oversight.

Democrats have said the steps are intended to reduce voting by minorities, students and other heavily Democratic groups.

State Representative Trey Martinez Fischer, Democrat of San Antonio, who is the chairman of the Mexican-American Legislative Caucus, said racial discrimination in Texas was not a thing of the past.

"The fact that intervention in Texas is the Department of Justice's first action to protect voting rights following the Shelby County decision speaks volumes about the seriousness of Texas' actions," Mr. Fischer said.

"Texans should be proud that the resources of the federal government will be brought to bear to protect the voting rights of all," he added.

President Obama mentioned his concern about voting problems — especially long waits at the ballot box — in both his victory speech on the night of his re-election and in his second Inaugural Address. Several recent polls and studies found that voters in heavily Democratic areas face longer lines, although the reasons remain unclear.

The new move by the Justice Department relies on a part of the Voting Rights Act that the Supreme Court left untouched in the Shelby County case. The court struck down the coverage formula in Section 4 of the law, which had identified places subject to the preclearance requirement based on 40-year-old data. The court suggested that Congress remained free to enact a new coverage formula based on contemporary data, but most analysts say that is unlikely.

Striking down the law's coverage formula effectively guts Section 5 of the law, which requires permission from federal authorities before covered jurisdictions may change voting procedures.

The move by the Justice Department on Thursday relies on a different part of the law, Section 3, which allows the federal government to get to largely the same place by a different route, called "bail-in." If the department can show that given jurisdictions have committed constitutional violations, federal courts may impose federal oversight on those places in a piecemeal fashion.

Lawyers for minority groups have already asked a court in Texas to return the state to federal oversight. The Justice Department's action — filing a "statement of interest" in that case — will bring the weight of the federal government behind those efforts.

Richard H. Pildes, a New York University professor who specializes in election law issues, said the move was "a dramatically significant moment in the next phase of the Voting Rights Act's development" after the Supreme Court's ruling.

"If this strategy works, it will become a way of partially updating the Voting Rights Act through the courts," he said. "The Justice Department is trying to get the courts to step into the role the Justice Department played before the Shelby County decision. The Voting Rights Act has always permitted this, in some circumstances, but this strategy wasn't used much. If this approach works, it will help update the Voting Rights Act even without Congressional action."

In his speech, Mr. Holder said that evidence submitted to a court last year that the Texas Legislature had intentionally discriminated against Hispanics when redrawing district lines was sufficient to reimpose on that state the "preclearance" safeguard. The court blocked the map, saying the parties had "provided more evidence of discriminatory

intent than we have space, or need, to address here."

The department may also soon bring similar legal action against Texas over its voter identification law, which was also blocked by a federal court last year. Hours after the Supreme Court's ruling in the Shelby County case, the state said it would begin enforcing the law.

Richard L. Hasen, a professor at the University of California, Irvine, who specializes in election law, said Thursday's filing was a "huge deal showing that the department is going to be aggressive in seeking to resurrect what it can of the old preclearance regime" adding that "getting the state of Texas covered again would be important not just symbolically but practically, as it would put its tough new voter ID law back on hold."

But Professor Hasen added that trying to "bail in" jurisdictions under Section 3 was not a substitute for Section 5's comprehensive oversight requirements for all of the areas it covered.

"This is a clunky way to cover only a subset of jurisdictions found to be intentionally discriminating — a tough legal standard to prove," he said. "And courts have discretion to grant or not grant bail-in, and to fashion the remedy as they see fit."

Mr. Holder urged Congress to reimpose more general preclearance requirements.

The bail-in procedure, he said, is "no substitute for legislation that will fill the void left by the Supreme Court's decision."

"This issue transcends partisanship, and we must work together," Mr. Holder continued. "We cannot allow the slow unraveling of the progress that so many, throughout history, have sacrificed so much to achieve."