For Opinion See 2011 WL 2600665

United States Court of Appeals,
Sixth Circuit.
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, et al., Defendants-Appellees.
andMICHAEL COX, Michigan Attorney General, Intervenor-Appellee.,
Nos. 08-1387, 08-1534.
June 2, 2009.

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit
Oral Argument Requested

Appellants-Cross-Appellees' First Brief

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for the plaintiff-appellants certifies that no party to this appeal is a subsidiary or affiliate of a publicly-owned corporation and no publicly-owned corporation that is not a party to this appeal has a financial interest in the outcome. The plaintiff-appellants are either individual students or prospective students, voluntary unincorporated associations, or non-profit corporations.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Coalition plaintiff-appellants request oral argument in this case because Michigan Proposal 2's ban on affirmative action programs in Michigan raises an issue of profound importance to Michigan and to the nation. It has now prevented public bodies from adopting or minority residents and their supporters from fighting for the exact programs approved by this Circuit in an en banc decision and by the United States Supreme Court in Grutter v Bollinger, 539 U.S 306 (2003).

A Ninth Circuit panel approved California's Proposition 209, from which Proposal 2 was copied, before Grutter had reestablished the legality of affirmative action in higher education and before the disastrous effects of Proposition 209 on minority enrollment in California's most selective public universities had become clear. Coal for Econ Equity v. Wilson, 122 F. 3d 692, 708 (9t1 cert. den. 521 U.S. 963, 1141 (1997). In a situation where clarification of the basic law was clearly needed from the Supreme Court, five judges on the Ninth Circuit nevertheless dissented from the decision denying en banc hearing and expressed the view that Proposition 209 violated the Equal Protection Clause. Id., at 711718.

The issues presented are of fundamental importance and this Court should grant oral argument on the case.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case under 28 U.S.C. ss. 1331 and 1343(3). The plaintiff-appellants assert that Michigan Proposal 06-02, now Const. 1963, art. 1, sec. 26, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States. On March 18, 2009, the district court issued a final order granting summary judgment to the defendant appellee Michael Cox and dismissing all claims. On March 19, 2009, the plaintiff-appellants filed a timely notice of appeal with the district court.

STATEMENT OF THE ISSUES FOR REVIEW

1. Does Michigan Proposal 06-02, which is now Article 1, Section 26 of the Michigan Constitution, violate the Equal Protection Clause of the Fourteenth Amendment by denying minority residents and their supporters of access to a political procedure for securing change on admission standards related to race that is equal to the political procedure provided for residents seeking change on all other issues by selectively stripping the governing boards of Michigan's public universities of the power to adopt lawful affirmative action plans that have been approved by the Supreme Court and that have been shown to be the only means of assuring that racial minorities have access in any numbers to the most selective schools in public universities?

2. Does Michigan Proposal 06-02, which is now Article 1, Section 26 of the Michigan Constitution, violate the Equal Protection Clause of the Fourteenth Amendment by mandating that (a) the universities follow more onerous subs-

tantive policies for the admission of minority students than are followed for the admission of other students and by (b) allowing them to seek every other form of diversity or integration except racial diversity and integration, which is the form of diversity and integration that is most important and most difficult to achieve

3. Does Michigan Proposal 06-02, which is now Article 1, Section 26 of the Michigan Constitution, violate the Equal Protection Clause of the Fourteenth Amendment as to gender in ways similar to the violations that it imposes due to race

STATEMENT OF THE CASE

In theircomplaint and on this appeal, the plaintiff-appellants assert that Michigan Proposal 2, the anti-affirmative action amendment to the Michigan constitution backed by Ward Connerly, is essentially an attempt to relitigate the claims that Mr. Connerly and his supporters lost six years ago in the United States Supreme Court decision in Grutter v Bollinger, 539 U.S 306 (2003).

Leaving aside claims that have not been appealed, the plaintiffs' complaint asserted that Proposal 2 violates the Equal Protection Clause in three separate but interrelated ways.

First, it selectively strips the governing boards of the defendant universities of the power to adopt any affirmative action program based on race or national origin, including the very plan approved in Grutter. By so doing, it violates repeated decisions of the Supreme Court of the United States by creating a more onerous, and, in reality, impossible political procedure for minority students seeking changes in admission standards that are in their interest.

Second, when its substantive commands are judged in the light of reality, Proposal 2 violates the Equal Protection Clause by mandating different substantive standards for the admission of minority students and by allowing the governing boards to continue seeking diversity or integration on every axis except the one most protected by the Equal Protection Clause: racial diversity and integration.

Third, by banning all gender-based affirmative action programs under any circumstances whatever, Proposal 2 violates the Equal Protection Clause in ways similar to the violations as to race.

The plaintiffs in this action include black, Latino and women students who assert that they have or will be excluded from the most selective public universities in Michigan as a result of this Proposal. They are led in this action by the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN). BAMN has fought California's Proposition 209, intervened as a defendant in Grutter, challenged the racially-targeted fraud that was used in getting Proposal 2 on Michigan's ballot, and played a crucial role in defeating anti-affirmative ballot initiatives identical to Proposal 2 in Oklahoma, Missouri, Arizona and Colorado.

Leaving aside the defendants who were dismissed by stipulation or order of the district court, the defendant-appellees in this action include the governing boards and presidents of the University of Michigan, Michigan State University, and Wayne State University. The university defendants, who said affirmative action was essential in Grutter, have fallen silent after the November 2006 elections. They take no position on the constitutionality of Proposal 2.

The Attorney General of Michigan, who was the only statewide officer or candidate in Michigan who supported Proposal 2, has intervened without objection as a defendant. He asserts that the Proposal complies with the Equal Protection Clause.

A motion panel of this Court considered, although explicitly did not decide, some of the issues raised on this appeal. Coal. To Defend Affirmative Action v. Granholm, 473 F. 3d 237 (6th Cir. 2006). In an opinion dissolving a stay, the panel suggested, but did not hold, that Proposal 2 furthered, rather than violated, the Equal Protection Clause because

it banned what the panel proclaimed were "preferences." *Id.,* at 250-251.

Shortly before that motion panel issued its opinion, another group of plaintiffs (the "Cantrell plaintiffs") filed suit in district court asserting that as applied to race Proposal 2 violated the Equal Protection Clause in ways similar to those that the Coalition plaintiffs alleged in the first argument described above. The district court consolidated the two cases and they have been consolidated in this Court for briefin and arument.

At the close of discovery below, every party except the Coalition plaintiffs moved for summary judgment. The Coalition plaintiffs asserted that there were crucial factual disputes, primarily over whether affirmative action was a "preference" and over whether the Proposal was in substantive terms a means for imposing a more onerous educational policy targeted at blacks, Latinos and Native Americans.

In its opinion, the district court found there were no disputes over material facts, rejected the arguments of the Coalition plaintiffs, denied the Cantrell plaintiffs' motion for summary judgment, and granted the motion for summary judgment filed by the Attorney General. The district court held that Hunter v. Erickson, 393 U.S.385 (1969) did not provide any right to an equal political procedure for black, Latino and Native American residents and women, because they were fighting for what the court believed were "preferences" or "advantages." Similarly, the district court held that Proposal 2 did not substantively discriminate against black, Latino and women students because there were other, purportedly benign, reasons for mandating a different treatment of race, national origin and gender in the admission standards.

The Coalition plaintiffs appealed immediately. The Cantrell plaintiffs filed a motion to alter or amend the judgment, which called some of the district court's errors to its attention. After considering that motion for eight months, the district court denied it and the Cantrell plaintiffs then appealed.

The issues at stake are obviously of profound importance to the nation, not only because of its past, but because of its future, in which racial minorities, who are now the majority in several major states, will within a few decades be the majority in the entire country. The fundamental questions at issue in this case are whether the current white majority in Michigan's electorate may effectively exclude the issues of minority admissions from consideration under the political procedures that have governed the universities for a century-and-a-half and whether that white majority may mandate the universities to follow different substantive policies targeted at minority students alone.

The constitutional theory offered in support of Proposal 2 is a radical and dangerous revision of the Equal Protection Clause. The plaintiff-appellants urge this Court to reverse the district court and strike down Proposal 2 as a violation of the Fourteenth Amendment.

STATEMENT OF FACTS

A. *The "preferences/non-discrimination" distinction used by the district court is false to the core.*

The legal advocates for Proposal 2 dwell in the realm of soothing abstractions. They say they are against both "discrimination" and "preferences." But as the Supreme has held since Brown, in dealing with matters of race, the Court cannot deal in abstractions. It must look at the facts-that is, at reality.

In Grutter, the Supreme Court set forth much of the reality that the proponents of Proposal 2 hope to ignore. But even though the Supreme Court has already decided many of the defining issues, it is necessary to set them forth again because the proponents of Proposal 2 have reasserted their old arguments in new forms.

From the Constitution of 1850 forward, the elected governing boards of the University of Michigan and, later, of Michigan State and Wayne State, had full power over all of the academic affairs of those institutions, including the

policies for admission. Const 1850, art.13, sec. 8. When it was still controversial to do so, the Regents of the University of Michigan dropped the race and gender bar (R. 222-15, Anderson Report, at 7-14).

But as justly proud as the University is of that history, it was essentially a segregated institution before affirmative action. In 1960, there were only a few hundred black students out of a total student body of over 18,000.[FN1] Open segregation was rampant in the rental housing where most students lived. In the fraternities and sororities, racial and religious exclusion was blatant-and President Harlan Hatcher refused to do anything about it. Even in the dormitories, the University gave backhanded support to segregation by allowing incoming students to opt out of rooming with Negroes (R. 222-15, Anderson Report at 6-14).

> FN1. In this brief, the plaintiffs will, for reasons of space, concentrate on the University of Michigan. The other state schools tended to follow what Michigan did on affirmative action.

The Michigan Law School was, perhaps, the clearest example of the past which the supporters of Proposal 2 would like to forget. During the entire decade of the 1960's, its "color blind" admissions policies resulted in 3,032 white graduates-and nine black graduates. There are no records as to whether there were any Latinos at all (R 222-19, UM Law School Graduates).

If it had not been for the action of black students and their supporters, the de facto segregation at the University of Michigan may well have increased. In the early 1960s, the University had begun requiring standardized tests in admissions. With the enormous post-war expansion of the groups applying to college, leading educators had proposed adopting those tests as a way to select students and to identify poorer students who were "diamonds in the rough." As was known then and is better known today, the standardized tests predicted only first year grades and that rather weally. But they had, and continue to have, an enormously disparate impact upon black, Latino and Native American applicants (R 222-14, Dec. of Schaeffer, paras 8-9 and passim.).

In 1970, before the new tests could have their full segregating effect, a student group calling itself the Black Action Movement (BAM), launched a series of protests, including a student strike, demanding that the University of Michigan increase minority admissions. The Governor of Michigan and many other state and national political leaders openly supported the BAM demands. By May 1970, the Regents adopted a modified version of the BAM demands, including the "goal" of achieving ten percent minority admissions by fall 1973 (R 222-21, Minutes of Regents, 1970; R. 222-22, Memo of A. Ross).[FN2]

> FN2. Since 1970, affirmative action plans have generally applied to "underrepresented minorities," which is almost always defined to include black, Latino and Native American students, with occasional breakdowns within those groups. The conditions and inequalities faced by the three groups share many features, but there are also distinctive features for each. Above all, Latinos face discrimination by language and citizenship as well as by "race." Native Americans, who are generally isolated on reservations or residents of inner city neighborhoods, also face particular circumstances different than either blacks or Latinos. For reasons of space-and because Proposal 2 adversely impacts all three groups-the differences are not set forth in this Brief.

The protestors-and the University-recognized that this meant that the University would be accepting minority students with lower grade point averages and lower average test scores than white students (R. 222-20, Letter of R. Fleming, March 5, 1970). As reflected in countless decisions of this and other courts, segregation and inequality were rampant in the primary and secondary schools of Michigan during the 1960s. As will be seen, the huge gap in test scores both reflected and exaggerated the inequality in primary and secondary education.

In theory, the Regents could have adopted in 1970, or at any time since, an entirely new admissions system in response to the BAM demands. But no one knew then, or knows now, how to set a single admission standard that judges "merit," "promise," or "ability" for students who come from widely differing backgrounds.

The Regents and virtually every selective university in the country thus amended their existing policies to provide special consideration for minority students. Under these amendments-which came to be known as affirmative action-admissions officials explicitly considered race and admitted black, Latino and Native American students with lower average test scores and grade point averages.

By the standard of reality, Michigan's programs aimed at ending the virtual exclusion of minority students from the university. But Vice President Spiro Agnew attacked the Michigan settlement as a preference, asserting that "unqualified students [were] being swept into college on the wave of the new socialism" (R. 222-15, Anderson Report, at 24). But in two key decisions, the United States Supreme Court held that affirmative action was lawful because it furthered a compelling state interest of assuring that the universities educated a racially diverse and integrated student body. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter, supra.

The Regents and the other governing boards changed the plans on repeated occasions after 1970. Bakke and Grutter required changes in some of the programs. The faculty and the administration changed selection procedures for educational reasons. At times when the number of minority students dropped significantly, minority students and their supporters waged new campaigns (Anderson R. 222-15, at 16-27). In every case, the changes were hammered out in the democratic forums of the Regents' or faculty meetings (R. 222-15, Anderson Report, at 23,25)

The programs led to a vast increase in the number of black, Latino and Native American students (See, e.g., R. 221-19, UM Law School graduates). It inspired women of all races to enter fields and schools that had previously been all-male. Soon, the hundreds and eventually thousands of successful minority graduates broke down age-old myths of racial and gender inferiority. Among its many other achievements, affirmative action paved the way for the white majority to accept exceptionally talented political leaders like Colin Powell, Condolezza Rice, and, eventually, Barack Obama.[FN3]

> FN3. The proponents of Proposal 2 frequently cite the prominence of Powell, Rice, Obama and others as evidence that affirmative action is no longer needed. But at the same time that they praise the skill of these leaders, they ignore the fact that each one was the product of affirmative action-and even more than that, they ignore that each one of these leaders, often at some risk, has proclaimed that affirmative action must continue if there are to be more leaders like them. The proponents of Proposal 2 cite these leaders as icons, but they refuse to listen to what they have to say on the crucial points at issue.

B. As Grutter recognized, affirmative action is, in some circumstances, essential today in order to ensure a racially-integrated student body.

The most astute proponents of Proposal 2 assert that affirmative action may once have been necessary but that it is no longer needed in the supposedly color-blind world in which we now live.

The Supreme Court rejected that argument in Grutter and there is no indication that the Court has, or will, reconsider that decision. So, the proponents of Proposal 2 have reformulated the exact argument rejected in Grutter by claiming that affirmative action has only a semi-legal status. According to their latest argument, because affirmative action is "preference," the states may deny universities of any power to adopt such plans and thus deny minorities of any forum in which to fight for it, except through the impossible forum of a statewide referendum.

The facts establishing that we do not live in a color-blind society are obvious-but are ignored all too often. Three out of every four black students in Michigan attend primary or secondary schools that are over 50 percent minority. Almost sixty percent attend schools that are over 90 percent minorities (R. 206, Rep of Jeannie Oakes, at 10-11). Although not separately broken down in the statistics below, on a national basis, Latino students are even more segregated.

Gary Orfield, one of the nation's leading authorities on educational equality, described the dramatic educational inequality caused by this segregation. Unlike poor white children, who are often distributed in middle-class or even upper middle class schools, students in racially segregated schools almost invariably attend schools that have large concentrations of poverty. The differing social milieus exert an upward pressure on academically-inclined poor white students and a downward pressure on academically-inclined black and Latino students (R 222-17, Test of Orfield, at 101-104).

As Orfield testified, segregated schools are unequal in a thousand ways: they have more rundown, inefficient, and overcrowded buildings; fewer teachers per student; a lower ratio of certified teachers; a narrower curriculum; fewer academic traditions and connections; higher turnover of students and teachers; fewer educational resources in families and communities; and more social problems, to name but a few of the differences. Above everything, there is the pervasive stigma of inferiority. As Orfield opined, segregated schools are a "different world in every sense ofthe word" from predominantly white schools (R 222-17, Test of Orfield, at 93).

Of course, there have been changes since 1970, some good and some bad. The proponents of Proposal 2 focus usually focus only on one change for the better-the growth of a black middle class which has been able to gain somewhat better education for its children. Of course, that middle class has arisen in large part because of affirmative action-which the proponents of Proposal 2 want to eliminate. But even in its own terms, the change for the better is not as large as the proponents of Proposal 2 sometimes claim.

The black middle class is a much lower percentage of the black population than the white middle class is of the white population. Many, although by no means all, of its children who are admitted to Michigan attend Detroit's exam schools or are part of the relatively small, but still significant, number of black students attending integrated suburban schools. Together, these two groups account for a vastly disproportionate share of the in-state minority students admitted as undergraduates at Michigan in 2005 (R. 222-4, Dec. of Miller, at 137, 141-143).

There is, as yet, no comparable development among Latinos in Michigan. Moreover, even for the black students from middle-class backgrounds, inequality has not ended. As Orfield testified, the black middle-class parent is far less stable economically than a white middle-class parent with the same income. The black middle-class student has a far greater chance of coming from or returning to segregated and unequal schools than his or her white counterpart (R 222-17, Test. of Orfield, at 102-103).

Moreover, the educational opportunities for the small black middle class and the even smaller Latino middle class are still not equal to those of a disproportionately larger white middle class. Detroit's exam schools are still segregated; the educational opportunities they offer barely match those of an average suburban district. Even the small number of black and Latino students who have gained access to a few predominantly white suburban districts have not achieved equality. Some of those districts shunt minority students into second-class schools and programs. Even where they do not, black and Latino students face isolation and sometimes harassment (R. 222-17, Test. of Orfield, at 102-105).

Finally, even if the education were equal, which it is not, the record below reveals the continued gross disparity in scores on standardized tests. In 2007, white students had an average combined score of 1579 on the SAT verbal and math tests-a score that was, respectively, 125, 208, and 292 points higher than students from of Native American, Chicano and African-American backgrounds. Apart from the continuing myth that these tests reflect "intelligence" or "aptitude" claims that the testing companies have long since been forced to abandon-there are two myths about these tests that are dispelled by the facts in the record below (R. 222-14, Dec of Schaeffer, at 3; Ex 1).

First, the disparity is not simply the result of the economic differences between white students on the one hand and black and Latino students on the other hand. As Ward Connerly testified, studies conducted on the massive population of the University of California consistently demonstrated that black students from the highest one-fifth of income scored lower than whites in the lowest one-fifth of income (R. 222-1, Dep. of Connerly, at 101). As white students of

any given economic class outscore minorities in the same class by significant margins, no criteria of class can ever substitute for the consideration of race (R. 222-14, Dec of Schaeffer, paras 16-18).

Second, the disparity is also not simply the result of different educational achievements. In a study of thousands of applicants to Berkeley's famous Boalt Hall Law School, researchers found that black students who had the same grade point average in the same major at the same undergraduate college scored 9 points less on the LSAT than white students-a gap wide enough to ensure that the black students could not be admitted to any selective law school if the scores had been applied rigidly (R. 222-14, Dec of Schaeffer, para 18).

The statistics on the undergraduate class admitted to the University of Michigan's School of Literature, Science and the Arts in fall 2005 provide some measure of the vast inequality that persists even with affirmative action. Nineteen Detroit high schools had no graduates who were admitted-while 131 students from Grosse Pointe's two high schools received offers of admissions and 169 from the three small private schools, Country Day, Cranbrook and Roeper received offers of admissions (R. 222-4, Dec. of Miller, para 16).

The overwhelmingly white supporters of Proposal 2 may believe we live in a color-blind society-but the facts make clear that is absolutely untrue.

C. Proposal 2's attack on affirmative action requires an attack on the democratic rights of racial minorities.

Proposal 2 began in California. In that state, a Republican governor appointed Ward Connerly as a member of the Board of Regents of the University of California in 1993. Less than two years later, Connerly sponsored a successful resolution by the Regents to end affirmative action in admissions at all nine campuses of the University (R. 222-2, Dec of Laird, para 11).

In his own words, Connerly then led the drive to adopt the constitutional amendment known as Proposition 209 specifically because he wanted to prevent minorities from reversing the ban through the normal democratic procedures: “If [the Regents] revisited and overturned the vote, the principles we fought for [i.e., the end of affirmative action] would be defeated...” (R. 222-11, selections from Ward Connerly's Creating Equality, at 165-166).

Two days after the Grutter decision, Connerly decided to bring the same undemocratic agenda to Michigan. Neither he nor his supporters ever made any attempt to secure a vote by the Regents to end any affirmative action program. Instead, Connerly publicly announced that he would end all such votes by amending the Constitution of Michigan to add a carbon-copy of Proposition 209. In its operative terms, his proposal, which came to be known as Proposal 2, provided as follows:

(1)The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, color, sex, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Const 1963, art 1, sec 26(1)(emphasis added).

As the Michigan Constitution and statutes already banned “discrimination” on all of these grounds, the sole operative content of Proposal 2 was the three emphasized words banning “preferential treatment.” The Proposal did not define those terms, but it did incorporate the remedies provided by the state civil rights act, including an individual right of action for damages, injunctive relief, and attorneys' fees. Const 1963, art 1, sec 26 (6); MCL 37.2801.

Soon after Proposal 2 passed, the defendant Universities amended their admission policies to eliminate any consideration of race (R. 222-4, Spencer, at 62-63). At the undergraduate level, Michigan adopted a whole series of new

admission criteria that simulated some of the effects of considering race, including, most importantly, special consideration to students from "underrepresented schools" and "underrepresented areas" (R. 222-4, Dep of Spencer, at 94-96).[FN4]

> FN4. In the conditions of segregation, selecting students by area can assist in maintaining the numbers of minority students, although it often impairs selecting those minority students who have the best chance of succeeding in college. In his Declaration, Bob Laird, the director of undergraduate admissions at UC Berkeley when Proposition 209 went into effect, stated that the minority students most harmed by Proposition 209 were those who attended integrated middle-class schools. They had the best chance of success at Berkeley-but they came from schools where white and Asian students scored higher on the standardized tests and they were therefore the students who were shut out the most by Proposition 209 (R. 222-12, Dec of Laird, paras 58-60).

The twelve years that Proposition 209 has been in effect in California demonstrate the catastrophic consequences that the forced abandoning of affirmative action has had. In the first year Proposition 209 went into effect, minority admissions at Berkeley and UCLA, which are the schools most comparable to Michigan, dropped by over 50 percent. In some state medical schools and in the most selective state law schools, the drop was far greater (R. 220-12, Dec of Laird, at 16-17).

The absolute numbers subsequently recovered somewhat, but in California-a state where Latinos, blacks and Native Americans are already a clear majority of high-school graduates-the gap between the percentage of minorities in the population and the percentage in the leading universities has increased dramatically. The largest public university in the world is being resegregated, with black and Latino students forced to attend the least selective campuses, while the most selective universities are increasingly white and Asian (R. 222-12, Laird, at 13-14; R. 206, Report of Oakes, at 6).

The record in this case was closed before the first full class admitted under Proposal 2 enrolled in September 2008. However, at Michigan's Law School, from which many of the state's leaders have come, the Director of Admissions testified that without affirmative action there would be an irremediable drop in minority admissions because of the gross disparities in test scores and educational backgrounds (R. 222-3, Dep. of Zearfoss, at 10). The Dean of Wayne State Law School made a similar prediction (R. 222-7, Dep. of Wu, at 79-82).

According to published reports, which are not available on official web sites, the classes that entered in fall 2008 showed a significant drop in minority students at Michigan's Law School and Wayne State's Medical School. There was no comparable drop in undergraduate admissions at Michigan-and the Wayne State Law School data is difficult to interpret because the school, for reasons unrelated to affirmative action, cut its class size by one third.

Whatever the results were in 2008 or will be in September 2009, however, Proposal 2 has established a regime in which every political procedure puts a constant downward pressure on minority admissions. For the first time since 1850, minority students and their supporters have no political means to present demands to increase minority admissions. Indeed, they have no forum other than a statewide referendum to win adoption of the programs that desegregated the University in 1970 or that were approved by the Supreme Court in 2006.

On the other side, the University is subject to expensive and politically embarrassing suits for any program that is explicitly or implicitly designed to increase the enrollment of racial minorities. The threats are real: conservative political groups financed the politically and economically expensive suit in Grutter and Mr. Connerly himself threatens UCLA and the other schools of the University of California with a suit each time minority admissions creep upwards.[FN5]

> FN5. www.acri.org (chairman.html).

Under Proposal 2, the University may, without any fear of suit, adopt programs that are-or that have the appearance of beingpreferences" for poor students, veterans, residents of rural areas, or for any other social group. Only for the social group facing the greatest disparity in opportunity-and for whom special programs are therefore most essential-is it impossible to enact programs that are, or have the appearance of being, "preferences."

D. The oppression of the minority by the majority.

The proponents of Proposal 2 claim the mantle of the 58 percent vote in favor of that Proposal.

means the white people of Michigan. According to the Mitofsky exit polls used by every major news network, including Fox News, nine out of every ten black voters cast No ballots on Proposal 2. Michigan's minorities were simply outvoted by the two to one majority in favor of Proposal 2 among white citizens, who constituted 85 percent of those who voted in 2006 (R. 222 2, Dep of Linski, Ex 3).

The proponents of Proposal 2 quibble about the polling methods of the Mitofsky poll, but its results are consistent with every known fact. White voters passed Proposition 209 over the determined opposition of the minorities in California's electorate.[FN6] Even more significantly, Michigan's official election returns, of which this Court may clearly take judicial notice, show that in the City of Detroit, which is now over 90 percent minorities, the voters rejected Proposal 2 by a vote of 206,529 to 14,863.[FN7]

> FN6. Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, 1495 n. 12 (N.D. Cal. 1996), *rev'd on other grounds,* 122 F. 3d 692, 708 (9th Cir.1997), cert. den. 521 U.S. 963, 1141(1997)
>
> FN7. http://miboecfr.nictusa.com/cgi-bin/cfr/precinct srch res.cgi.

Even though it is absurd to do so, the proponents of Proposal 2 choose to quibble over the racial character of the vote because they want to cover up and ignore the simple fact that a white majority imposed Proposal 2 on the state over the opposition of the overwhelming majority of Michigan's black, Latino and Native American citizens.

SUMMARY OF ARGUMENT

The Fourteenth Amendment had as its fundamental purpose protecting the newly-freed slaves from discriminatory legislation that denied them their basic rights as citizens. In 1954, the Supreme Court restored the original purpose of the Fourteenth Amendment by holding that the white majority could not exclude racial minorities from equal and integrated access to the public schools. Brown v Board of Education, 347 U.S. 483 (1954).

Following Brown, the Court soon held that a white majority could not exclude power over racial issues from public bodies because that excluded minorities from the normal legislative procedures used by other groups to advance their interests. Hunter v Erickson, 393 U.S. 385 (1969).

Much later, the Court held that public universities could, in appropriate circumstances, adopt racially-conscious affirmative action plans designed to assure that the student bodies included significant numbers of black, Latino and Native American students. Grutter, supra.

Proposal 2 violates the fundamental principles established in all three decisions.

Turning first to the rights guaranteed by Hunter, on three occasions, a white majority, opposed to integration, sponsored a referendum that deprived government officials of the power to implement the changes that minorities had just

won. On each occasion, the Supreme Court struck down the constitutional amendment adopted in those referendums because it deprived racial minorities of the fundamental right to fight for change on equal terms in the legislative bodies that determined the fate of every other group's demands. Hunter, supra; Washington v Seattle School District No. 1,458 U.S. 457 (1977); Romer v Evans, 517 U.S. 620 (1996)(Kennedy, J).

Proposal 2 follows the exact method struck down in Hunter, Seattle and Romer. The district court, however, summarily disregarded those decisions because it asserted that affirmative action was a "preference" and not a demand to end discrimination. In so ruling, the district court ignored Hunter's requirement of an "extraordinary justification" for depriving minorities of their rights to the same procedures used for deciding all other issues and its command that the state's or the court's view of the substantive merits of the minority's demands could not serve as such a justification.

Furthermore, the district court's distinction between "preferences" and demands to end discrimination is factually and legally wrong. Affirmative action was and is the means by which the de facto segregation of universities was ended, and it is the means today that makes it possible for significant numbers of minority students to attend the most selective schools.

Finally, the district court's departure from Hunter has led it to reach results that directly conflict with Grutter. The district court held that Michigan's minority residents have no right to fight on an equal basis for affirmative action programs because they did not further the goal of ending discrimination-even though Grutter just held that affirmative action programs were constitutional precisely because they provided a means to allow students from all races to attend the universities.

In order to justify the results that it reached, the district court and the authorities on which it relies have been forced to adopt a radical state's-rights revision of the Fourteenth Amendment in which minorities have equal procedural rights on all issues except those where the most compelling state interests are involved. On those issues-the most vital of all-the states may do whatever they want b whatever rocedure the deem most aroriate.

The district court's conclusions on the substantive standards enacted by Proposal 2 are no less radical a departure from the existing law. In its opinion, the district court identified two substantive purposes offered by the supporters of Proposal 2: decreasing the number of supposedly "underqualified" minority students and, by decreasing the number of those students, imposing a policy of "tough love" which would supposedly encourage minority students to work harder so that they can gain entry on their own "merits." By its terms and by the statements of purpose offered by its two primary supporters, Proposal 2 specifically targets students on the basis of their race-a targeting that has been outlawed since Brown.

Finally, Proposal 2's ban on gender-based affirmative action violates the Equal Protection Clause in ways similar to its ban on race or national origin based affirmative action.

STANDARD OF REVIEW

The Court reviews de novo the district court's grant of a motion for summary judgment and reviews de novo any challenge to a state law's constitutionality. Cherry Hill Vineyards LLC v. Lilly, 553 F. 3d 423, 431 (6th Cir. 2008); *Committee for Equity v. Michigan High Sch. Athletic Ass n.*, 459 F. 3d 676, 680 (6th Cir. 2006).

ARGUMENT I

PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY DEPRIVING BLACK, LATINO, AND NATIVE AMERICAN RESIDENTS OF AN EQUAL POLITICAL PROCEDURE FOR SECURING ADMISSION AND OTHER ACADEMIC STANDARDS THAT FURTHER THEIR ADMISSION TO PUBLIC UNIVERSITIES.

a. the supreme court has repeatedly held that a referendum may not be used to deprive racial minorities of an equal political procedure to secure action on measures designed to combat prejudice.

The Supreme Court precedent on which the plaintiffs rely has been established in three cases spanning the years from 1967 through 1996. Hunter, supra; Seattle School District No. 1, supra; Romer, supra.

In Hunter, where the principles at issue were first established, minority citizens and their supporters won a fair housing ordinance by vote of the Akron, Ohio, City Council. The white majority then passed an amendment to the City Charter repealing the ordinance and preventing the passage of any fair housing ordinance without a vote of the electorate. The Court struck down the charter amendment because it imposed the more onerous burden of a referendum on minorities who sought measures designed to overcome racial prejudice and segregation:
Moreover, although the law on its face [Section 137] treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates race on the ballot [citation omitted], s 137 places special burden on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.

Hunter, supra, 393 U.S. at 390-391.

In his concurring opinion, Justice Harlan recognized that a city or a state normally had the right to allocate power as it saw fit, but said that if it did so on racial issues alone, that decision should be struck down unless the state overcame a "heavy burden of justification:"
In the case before us, however, the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest. Since the charter amendment is discriminatory on its face, Akron must bear a far heavier burden of justification than is required in the normal case. [citation omitted] And Akron has failed to sustain this burden.

Hunter, supra, 395 U.S. at 395 (Harlan, J. concurring).

Thirteen years later, the Court reaffirmed Hunter. Emphasizing that no showing of discriminatory intent was necessary, the Court struck down a referendum adopted in the State of Washington stripping local school boards of the power to use busing to assure integration in primary and secondary schools. Seattle School District No. 1, supra. The Court ruled on the following broad basis:
...[W]hen the political process or the decision-making mechanism used to address racially conscious legislation--and only such legislation--is singled out for peculiar and disadvantageous treatment, the governmental action clearly rests on distinctions based on race [citation omitted]. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." [citation omitted]. In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of powerlessness as to command extraordinary protection from the majoritarian political process."

Id., at 485-486.

Fourteen years later, the upreme Court expanded Hunter and Seattle to cover groups that were not a suspect class. Romer, supra. In that case, the Court struck down a Colorado constitutional amendment, adopted in a referendum, that prohibited local and state bodies from adopting ordinances or policies that protected lesbians and gay men against discrimination. As Justice Kennedy declared for a six-Justice majority: "A law declaring that in general it shall be

more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Id., at 633.

Proposal 2 is an exact copy of the laws that the Supreme Court struck down for violating the Fourteenth Amendment. The elected Regents and the other elected governing boards had adopted affirmative action programs in order to be able to admit significant numbers of minority students. As Connerly declared in his book (see supra, at 17-18), he wanted to repeal those programs in a way that could not be undone by future governing boards. Thus, he and others sponsored a referendum whose sole purpose was to end affirmative action and to assure that it could never be adopted again.

The district court made the findings that should have led it to strike down Proposal 2. It held that Proposal 2 had a clear "racial focus;" that its "impact [fell] entirely on racial minorities and women;" and that it undeniably made it "...more difficult for minorities to obtain official action that is in their interest" (R. 246, Dist. Ct. Op., at 49). But having recognized how Hunter, Seattle and Romer should apply, the district court suddenly, and almost without explanation, held that they did not apply.

Summarily, it declared that Hunter, Seattle and Romer did not apply because Proposal 2 was supposedly not "...an impediment to protection from unequal treatment but [was] an impediment to receiving preferential treatment" (R. 246, Dist. Ct. Op., at 49-50). As support for this proposition, the district court cited only two authorities: (1) the divided decision by the Ninth Circuit-which was issued long before Grutter and long before the disastrous effects of Proposition 209 had become clear-and (2) the suggestions of the motion panel in this case, which were preliminary and issued on the basis of a two-day briefing schedule. (R. 246, Dist. Ct. Op., at 49-50 citing Coal for Econ Equity v. Wilson, 122 F. 3d 692, 708 (9th Cir.1997), cert. den. 521 U.S. 963, 1141(1997); Coalition to Defend Affirmative Action v Granholm, supra.

The "preferences are not an attempt to end discrimination" rationale is the entire reasoning of the district court and of the divided Ninth Circuit decision on which it is based.[FN8] As will be seen, this rationale violates Brown, Hunter and Grutter-and, if adopted, would amount to a fundamental state's rights revision of the Fourteenth Amendment itself.

> FN8. The division in the Ninth Circuit was exceptionally sharp. A conservative panel approved Proposition 209. There was no majority for a rehearing en banc but five judges dissented on the grounds that the panel decision violated Hunter. Of the Ninth Circuit judges who expressed a view on the substantive merits, there were therefore more judges who thought Proposition 209 violated the Hunter precedents than opined that it was consistent with those principles.

B. The district court erred as a matter of law by sustaining an unequal political procedure based on its belief that the substantive demands of the minority were purportedly seeking a "preference" or "advantage."

Hunter and Seattle make clear that the state had to offer an "extraordinary justification" in order to sustain a charter or constitutional amendment that allocated political power over racial issues alone to a more onerous political procedure. Seattle, supra, 458 U.S. at 485; Hunter, supra, 393 U.S. at 391-392. Moreover, the Court made clear that the substantive nature of the racial minority's demands could not serve as that "extraordinary justification:"

It is undeniable that busing for integration...now engenders considerably more controversy than does the sort of fair housing ordinance debated in Hunter. [citation omitted]. But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest." Hunter, supra, 393 U.S. at 395.

Seattle, supra, 458 U.S. at 473-474.

The first sign that the district court and the authorities on which it relies have erred badly is their cavalier treatment of these commands by the Supreme Court. The same judges who have demanded exacting factual review as part of the "extraordinary justification" necessary to support an affirmative action plan have required no factual justification at all to satisfy the "extraordinary justification" demanded by Hunter and Seattle. A literary formulapreferences are not attempts to end discrimination-is all that they required.

Similarly, the same judges who demand exacting adherence to precedent have simply ignored specific and binding language by the Supreme Court making clear that neither the state nor the courts could limit the right to procedural equality based on the substantive merits of the minority's demands.[FN9] In the view of the district court and the Ninth Circuit, there is today, for the first time, a substantive litmus test for procedural rights under Hunter: if the minority's demands are, as here, a demand for what the court deemed "preferences," the demands, no matter how lawful, are not entitled to protection under Hunter. Only if the district court determines that the demands are, in its view, genuine demands to end discrimination, are minorities entitled to their rights under Hunter.

> FN9. The Supreme Court held that the minority had the right to procedural equality when it sought "to enact legislation in its behalf," Hunter, Supra, 393 U.S. at 395, sought action to "ameliorate race relations or protect racial minorities," Seattle, Supra, 458 U.S. at 485-486, or "[sought] aid from the government." Romer, Supra, 517 U.S. at 633-634

By their decisions, the district court and the Ninth Circuit panel have thus assumed a power for the federal judiciary that it does not have and should not want. These decisions will require the federal courts to examine the class of lawful demands that a minority might make. In that class of lawful demands, the courts must then identify the sub-class that should be relegated to a semi-legal status in which public bodies may be denied power even to consider them because they are supposedly a demand for a "preference" or "advantage."

As is absolutely obvious, this parsing of lawful demands by the federal courts almost certainly would be out-come-determinative. If the court found that a demand was a preference, it would almost certainly never be adopted. On the other hand, if it found that the demand was actually directed against discrimination, it might well be adopted in a political body where the minority had equal rights.

By what standards the lower courts should make the fateful decisions as to what is and is not a "preference," neither the district court nor the circuit court panels say. Apparently, however, they need look no further than the standards that are in existence. If a minority asks for a departure from those standards-which in this case are the grades/test score standards-it is asking for a "preference." On the other hand, if it can devise a new standard that is purportedly non-discriminatory, that, perhaps, may be a legitimate anti-discrimination demand.

The Supreme Court, which is familiar with our history, recognized the danger of having referenda or courts determine procedural rights by a review of the substantive demands at issue. By its very nature, from Reconstruction forward, the Civil Rights Movement has repeatedly demanded the elimination of, or relief from, existing standards that it saw as discriminatory. Those who benefitted from the existing standards often said that minorities were seeking a preference. Thus, in their day, opponents of fair housing, busing, and lesbian and gay rights labeled the minority's demands as ones for "preferences." Similarly, Andrew Johnson vetoed the Freedman's Act,[FN10] the Supreme Court struck down the Civil Rights Act of 1866,[FN11] and the Southern segregationists opposed the Civil Rights Act of 1964 because they supposedly created "preferences."[FN12]

> FN10. Johnson opposed the economic relief and schools provided to the newly-freed slaves because "we" (sic.) have never provided such aid for "our" (sic.) people. Eric Foner, *Reconstruction: America's Un-finished Revolution,* (1988), at 247.

> FN11. The Supreme Court struck down the first Civil Rights Act because "there must be some stage in the

> progress of his [the Negro's] elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws...” Civil Rights Cases, 109 U.S. 3, 25(1883).
>
> FN12. During the debate on the Civil Rights Act of 1964, Senator Richard Russell (D-La), among others, asserted that as administered the new law would compel employers “to give priority definitely and almost completely, in most instances, to the members of the minority group.” 110 Cong. Rec. 13150 (1964).

If the “preference/non-discrimination” standard had been in effect, federal courts could easily have found that virtually every major step forward in civil rights was not entitled to equal procedures under the Fourteenth Amendment because the demand was supposedly for a preference.

The disastrous effects of judicial review of the substance of lawful demands to advance minority interests are apparent in this case. From 1970 forward, minorities have seen affirmative action not just as a demand against discrimination, but as the central and only means by which the discrimination inherent in the grades/test score standards could be overcome. Minorities demanded fair housing ordinances to get access to better housing; busing to gain access to better primary and secondary schools; and affirmative action to gain access to the best public universities.

By any objective standard, affirmative action has been and is designed to “overcome the special conditions of prejudice.” It ended the virtual segregation of the University of Michigan. It made it possible for a few students from the non-exam schools in Detroit to be admitted at the same time as 70 or more were admitted from a single suburban school. To say, as the district court and the circuit court panels did, that affirmative action is not a demand to end discrimination is to ignore the facts and to insult the deeply-held beliefs and hopes of the minority communities and their supporters.

Of course, from the standpoint of the far right, The Truth is that affirmative action is a preference. But the federal courts, which are charged with enforcing the Fourteenth Amendment-which was adopted to protect racial minorities-should not adopt the standard of the far right as the test of what may be debated in legislative bodies.

In the narrowest sense, affirmative action departs from the existing admissions systems, and is thus a “preference” within the context of the existing system.[FN13] But again, the federal courts, which are charged with assuring a fair legislative process for challenging the existing standards, should not decide that matters are subject to a fair and equal debate based on whether they ask for relief from the existing system. Neither the universities, nor the testing companies, nor any reputable scientist has said that the existing grades/test scores system is racially neutral-and the Court cannot possibly say that a demand for departure from such a system forfeits rights as important as those protected by the Equal Protection Clause.

> FN13. Both Bakke and Grutter routinely use the word “preferences” to describe the affirmative action programs at issue in those cases. But in each case, the term signifies a departure from the existing system. Neither case makes any decision, or purports to make any decision, on whether the existing admission systems are racially neutral.

The Hunter, Seattle and Romer Courts rightly avoided this quagmire by declaring in no uncertain terms that the right to procedural equality did not depend upon anyone's view as to the merits of the demands that the minority made. As the district court simply ignored this command, its decision should be reversed.

C. The district court's decision defies the Supreme Court's decision in Grutter.

The Supreme Court has recognized that a state body may, in appropriate circumstances, use “preferences” in order to overcome past “discrimination.” Adarand Constructors, Inc. v Pena, 515 U.S. 200 (1995): Grutter, supra. In those cases, the district court's “preferences/non-discrimination” standard for determining what subjects are entitled to

Hunter rights falls apart completely because the Court has clearly determined "preferences" may be used to overcome discrimination.

But even though the district court strives mightily to uphold its proposed distinction in higher education, it falls apart there as well. By definition, an affirmative action plan designed to assure a racially diverse student body is designed to assure access to a university for racial minorities. Thus, the Supreme Court upheld the Michigan Law School affirmative action plan because it found that at that law school and in many selective schools affirmative action was the only practical way of assuring racial equality in access to higher education:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." See Sweatt v Painter, 339 U.S. 629, 634 (1950). Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogenous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Grutter, 539 U.S. at 332.

It is no answer to say that Grutter declared that affirmative action should end in 25 years (R 258, Dist Ct Op Deny Mot Alter Judge, at 6) because the issue is plaintiffs rights now and during the next quarter century.

Nor is it an answer to say that Grutter declared that the states could consider alternatives to affirmative action-because the issue is whether those alternatives must be considered under political procedures in which minorities have the rights set forth in the Hunter precedents.

At the request of the California Supreme Court, the Attorney General of California has recently advised that court that to the extent that Proposition 209 is interpreted "...to bar race or gender conscious programs that would be permissible under the Fourteenth Amendment, it violates the Equal Protection Clause of the federal constitution, pursuant to Washington v Seattle School Dist. No. 1, [supra.] and Hunter v Erickson, [supra.] [FN14] In extensive and strong dissents, five judges from the Ninth Circuit and one from the California Court of Appeals have also reached the conclusion that Proposition 209 (and thus Proposal 2) violates the Equal Protection Clause under Hunter. Coal. For Economic Equity, supra, 122 F 3d at 711-717 (Schroeder, Pregerson, Norris and Tashima, JJ, dissenting) and at 717-718 (Hawkins, J, dissenting); Coral Const. Inc v City and County of San Francisco, 57 Cal. Reptr. 3d 781, 804-823 (2007)(Rivera, J, dissenting), review granted and opinion superceded 65 Cal. Reptr. 3d 761 (2007).

> FN14. The full text of the letter brief that the Attorney General provided to the Supreme Court of California in the Coral Construction case is available on the Attorney General's web site. See www.ag.ca.gov/newsalerts /release (4/23/2009). As of this date, the California Supreme Court has not ruled on the challenge to Proposition 209 in that case. That Court has, however, been an ardent and strong supporter of Proposition 209.

The reasoning in these dissents is thorough and sound. As those judges did, this Court should hold that Proposal 2 violates the Equal Protection Clause because it imposes a more onerous burden on minorities fighting for affirmative action programs, including for the very programs that have been found lawful by the Supreme Court of the United States.

D. The district court's decision and, even more, the Ninth Circuit panel opinion on which it is based, have approved a radical and dangerous state's rights revision of the Equal Protection Clause.

The district court and the Ninth Circuit opinions are based on nothing other than a repetition of quotations from past Supreme Court decisions about the suspect nature of any racial classification. The quotations are genuine, the policy is real-and yet it ignores the entire other half of the law under the Equal Protection Clause.

Since the 1960s, the Court has repeatedly recognized the reality of inequality that our history has left us. It has recognized that racial classifications may serve a compelling state purpose and may be the only means for achieving that purpose. Indeed, many, if not most, of the most important civil rights programs have involved the assertion that a compelling need overcame a normally suspect classification.

By any reasonable standard, the rights protected by Hunter are particularly essential in the cases where a minority asserts that a compelling need requires a racially conscious policy. It is precisely on those issues that a public body must have all the facts, consider all the interests, and strike the most appropriate and careful balance. And it is on precisely those issues that a federal court, which may be charged with assessing the balance that has been struck, should welcome and protect the right to full and equal debate that is demanded by the Hunter precedents.

Yet it is precisely on those issues-the most important, the most difficult and the most controversial-where the district court and the Ninth Circuit say there is no need for debate at all. According to them, minorities have no right to be heard on the single most important issue of equality in higher education affirmative action. They have no right to fight for the future of their children and grandchildren.

Connerly and the other proponents of Proposal 2 do not trust any public body to make a decision as to whether affirmative action is necessary. Nor do they trust any court to review any such decision. The only solution, the permanent solution, they say, is a one-shot, winner-take-all referendum in which the white majority can declare there can never be racial inequality in "our" state that is so great that a public official could, for any purpose, vote for an affirmative action program.

The whole approach obviously violates the Hunter precedents. So, too, does the proclamation of a "color-blind Constitution." The Supreme Court has repeatedly held that this theory is "inconsistent in both its approach and its implications with the history, meaning and reach of the Equal Protection Clause." Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 127 S. Ct. 2738, 2788 (2007)(Kennedy, J.). It must remain an "aspiration," but "In the real world, it is regrettable to say, it cannot be a universal constitutional principle." Id., 127 S. Ct. at 2792 (Kennedy, J).

And yet, the Ninth Circuit panel and, less so, the district court say that this constitutional theory, which has been rejected by the Supreme Court, can override the federal rights protected by Hunter. Only the late and not-lamented John C. Calhoun could endorse such an argument.

Above all else, the Fourteenth Amendment was intended to provide national protection against any state's attempts to deny those rights. The substantive outcomes may be different, but minorities must have the same right to equal procedures to fight for affirmative action in Michigan as they now have in Ohio, Kentucky and Tennessee.

Once before, the Court approved a state's rights theory of the Fourteenth Amendment, declaring that the ruling white majority in Louisiana could enact laws that reflected the "usages, customs and traditions of its [white] people..." Plessy v Ferguson, 163 U.S. 537, 550 (1896). Once before, the Court held that the barriers of segregation must fall due to voluntary action: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of the individuals." Id., at 551.

Today, the proponents of Proposal 2 say that the traditions or votes of Michigan may ban all government action to overcome the barriers of de facto segregation.

We know the results. Plessy soon led to ethnic cleansing on American soil. Black citizens were driven from neighborhoods where they had lived for years; schools were forcibly segregated; many all-black schools were shut down; and lynchings spread across the South. For those who say it can never happen again, Proposition 209 has already driven large numbers of black, Latino and Native American students out of the most selective universities in the largest state in the Union.

Proposal 2 is a major step backward. It is a path that the nation should not travel again. Review the facts as to what happened in 1970. Consider the turmoil that would have been created-and the progress that would never have occurred if Proposal 2 had been the law at that time. This Court should reject Proposal 2's state's-rights attempt to override Hunter and Grutter and should strike down Proposal 2 because it obviously violates the Equal Protection Clause and does so in a radical and dangerous way.

II PROPOSAL 2 VIOLATES THE EQUAL PROTECTION CLAUSE BY MANDATING DIFFERENT ADMISSION AND EDUCATIONAL POLICIES FOR BLACK, LATINO, AND NATIVE AMERICAN STUDENTS.

A. The Court must look behind the words of Proposal 2 by evaluating them in light of the reality of higher education today.

Proposal 2's sole substantive change in Michigan law is, as noted above, its three-word word ban on "granting preferential treatment" to persons based on their race, national origin or gender.

The Ninth Circuit dismissed the claim that Proposition 209 intentionally discriminated against minority students on the basis of its language alone: "A law that prohibits the State from classifying individuals by race and gender a fortiori does not classify individuals by race and gender." Coalition for Economic Equity, 122 F 3d at 702.

Yet the bitter lessons of our history demonstrate, if nothing else, that a court cannot accept a law's professions of benign intent as the Alpha and Omega of judicial inquiry. Louisiana once passed a law that required separate but equal accommodations on street cars. Other states enacted laws that adopted "grandfather clauses," "literacy tests," "freedom of choice plans," "state's rights," "local customs" and a host of other seemingly neutral justifications for flagrant discrimination.

In Brown and all the cases that followed it, the Court held that it would decide the fate of laws challenged under the Equal Protection Clause not on the basis of their words alone, but on the reality of what those laws did:
We consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Brown v Board of Education, 347 U.S. 483, 492-493 (1954).

As profound as that new standard was, it was not, of course, a panacea. The Plessy Court claimed to look at reality. But it did so through glasses colored by the overwhelming prejudice that had taken hold of white America by the 1890s. Every Justice, save one, declared that if segregation "stamps the colored race with a badge of inferiority," that is "solely because the colored race chooses to put that construction upon it." Plessy, supra, 163 U.S. at 551. Among other things, Justice Harlan's dissent is justly remembered for his courageous rebuke to his colleagues that they should not have been "so wanting in candor" as to fail to recognize the Louisiana law's obvious intent of stigmatizing and burdening one race and one race alone. Id., at 557.

In analyzing Proposal 2, this Court should combine Brown's demand to look at reality with the honesty and courage of Brown and of Justice Harlan's dissent.

B. Proposal 2 mandates different policies for the admission of minority students than are required for other categories of students.

The reality of admissions at Michigan and every other selective school in the state and the nation is summarized in the statement of facts above. The students who apply to these schools come from every racial group; from families that are rich, poor, and in-between; from urban, suburban, and rural areas; from other countries and from this one; and from every region of the state and the nation. The secondary schools from which they graduated vary from elite preparatory schools with numerous college-level courses to public schools in the urban centers which provide only the barest essentials of a secondary education.

Without a uniform standard for judging "ability" or "promise" among students from widely varying backgrounds, admissions officials at selective universities use a whole series of criteria to take account of differences and to assure that they have a "well-rounded" class in which students from a wide variety of backgrounds can interact. As set forth in Bakke and Grutter and in the statement of facts above, the Civil Rights Movement achieved access for minority students to selective universities by adding the consideration of race and the goal of racial diversity to these systems.

Because the educational and test score differences between whites and underrepresented minorities were so great, the plus factors needed were greater than those that had been used for poor white students in the past. Moreover, because racism has been so deep in this country, the policies of affirmative action by race were far more controversial than the equivalent policies used for admitting poor and working-class white students.

What is absolutely invidious about the substantive command of Proposal 2 is that it allows the universities full discretion to take account of any factor causing educational inequality except race--the factor that everyone concedes causes the greatest educational inequality in the United States. Similarly, it allows universities full discretion to adopt explicit measures designed to assure a class that is diverse in every way except the one that has been most difficult and most important-diversity by race. Behind the profession of "no preferences," Proposal 2 allows the universities to continue giving favorable consideration to every factor except race-and forces them to go through the charade of pretending to consider applicants without even looking at their race.[FN15]

> FN15. The absurdity of this charade can be shown by one example. Suppose the young Barack Obama had applied for law school after Proposal 2. Further suppose that he decided to submit his book Dreams from My Father in place of a required autobiographical essay. In order to consider his application without "considering his race," the censors mandated by Proposal 2 would have to delete almost every word in the book. The fate of Obama's hypothetical application illustrates the point that the supposedly color-blind supporters of Proposal 2 have absolutely failed to recognize. The biological fact of a prospective student's race is irrelevant to his qualifications; but the social fact of his or her race and of racism is almost certainly an essential fact in evaluating the experience and opportunities that the student has had. Indeed, in his own book, Creating Equality, Connerly repeatedly refers to his race in order to explain what he knew and what he did.

In its Opinion, the district court rightly recognized that the two leaders of the campaign in favor of Proposal 2 identified two differing purposes for that law. The statements of both leaders reveal the invidious purpose of this amendment.

Jennifer Gratz, who comes from a lower-middle-class suburb of Detroit, conceded that income caused great inequalities in education and that she would not only support but welcome admissions standards at the University of Michigan that admitted persons from lower socio-economic backgrounds with lower average scores and grades than those from a more privileged background. But when asked whether there were inequalities in education that were caused by race, Gratz repeatedly refused to answer (R. 222-38, Dep of Gratz, 102-107).

Ward Connerly, the other primary leader of the campaign to adopt Proposal 2, conceded virtually every aspect of

racial inequality set forth in this brief's statement of facts. As a result, he recognized that Proposal 2 would drive down the number of black, Latino and Native American students at the University of Michigan and at other selective schools in the state. But, he declared, that was necessary in order to administer a dose of "tough love" to black and Latino students:

...the only way we're going to close this academic gap between black and Latino on the one hand and Asian and white on the other, is not to keep papering it over with preference, but to apply the tough love that's necessary to get black and Latino students up to the bar.

R. 246, Dist Ct Op, at 41, citing R. 221-1, Connerly Dep, at 120.

The district court properly expressed contempt for the rationale offered by Gratz-who wanted a larger "slice of the pie" for herself and other white students- the rationale offered by Connerly-who believed that "There is virtue in tossing minority students into the deep end and letting them sink or swim on their own (regardless that some might drown in the meantime)...." (R. 246, Dist Ct Op, at 41).

What is shocking, however, is that the district court then asserted that the purposes offered by Gratz and Connerly were non-discriminatory purposes. In what alternate universe, however, can a law that is intended to mandate special policies of "tough love" for categories of students that are defined by race be nondiscriminatory? Similarly, how can a law be non-discriminatory when its purpose is to allow universities to recognize every other form of inequality and the need for every type of diversity except the inequality that is deepest and the type of diversity that has been the hardest to achieve?

There is no doubt what the real substance of the debate on Proposal 2 was. Beneath the cry of "no preferences," the supporters of Proposal 2 asserted that "less qualified" black and Latino students were being admitted while "more qualified" white students were being rejected. This is factually false and insulting to the minority students who have overcome massive inequality in order to be admitted to and graduate from the university. But even the terms of debate reveal the racial focus of Proposal 2-it aims not at excluding "unqualified" students, but at excluding only one category of supposedly "unqualified" students-those who happen to be racial minorities.

That racist policy is the sum and total of Proposal 2.

Proposal 2 is an embarrassment to the State of Michigan and an affront to minority students-and it should be struck down by this Court as a clear and substantive violation of the Equal Protection Clause of the Fourteenth Amendment.

C. The district court erred as a matter of law in failing to recognize the invidious racial purpose of Proposal 2.

The traditional factors considered by the Supreme Court in determining challenges to statutes under the Equal Protection Clause make it even clearer that Proposal 2 has an invidious intent.

In the defining precedent, which involved a challenge to a city's decision to block a road in a way that prohibited residents from a black area from going through a predominantly white area, the Supreme Court held if one of the reasons for the particular ordinance was racial discrimination, the statute as a whole was unconstitutional. Village of Arlington Heights v Metropolitan Housing Development Corporation, 429 US 252, 265-266 (1977). [FN16] In that case, the Court directed the lower courts to look beyond the words of the statute to its effects and to the circumstances surrounding its enactment. In some cases, the Court held, the differing impact of the law on one race rather than another might be so great that the purpose was apparent from the impact alone. Id., at 266. In most cases, however, the Court held that in determining whether the law had an invidious purpose, the lower courts should also examine factors like "the background ofthe decision," "the specific sequence ofthe events leading up to the challenged decision," the departures, if any, from the normal substantive and procedural standards, and the statements of the act's sponsors. Id., at 267-268.

FN16. In Arthur v Toledo, 782 F.2d 565, 574 (6th Cir. 1986), this Circuit modified the Arlington standard for laws adopted by popular referenda by holding that "absent 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 context." In Buckeye Comm. Hope Foundation v City of Cuyahoga Falls, 263 F.3d 627, 638 n.2 (2001), *rev on other grounds* 538 U.S. 188 (2003), this Circuit then sharply criticized the Arthur standard and held that the "[p]laintiffs do not have to show that the challenged action rested solely on racially discriminatory purposes" in order to show a violation of the Equal Protection Clause. Id., at 634.

Whether Arthur is still good law need not be decided because it does not, in any event govern the facts present here. In Arthur, the Court upheld a facially neutral referendum that rejected approval for the construction of sewer lines. In this case, the referendum in question has an explicit racial focus. It bans "race preferences"-and only race preferences. By definition this law has a racial purpose: the only question is whether it has a benign or an invidious racial purpose.

Judged by any of these standards--and more surely by all of them together-- the substantive provisions of Proposal 2 violate the Equal Protection Clause.

The district court held that the depositions in evidence clearly established a factual question as to whether the law would adversely impact minority students (R. 246, Dist. Ct. Op., at 40). The district court then went further, declaring that "...if affirmative action programs have had a positive effect on university admissions of minority students, it is difficult to see how Proposal 2 could not have a disparate impact on minorities" (R. 246, Dist. Ct. Op., at 40). But those findings, as true as they are, miss the point.

Arlington asks whether "...the impact ofthe official action...bears more heavily on one race than another." Id., 429 U.S. at 564. Judged by that standard, the adverse impact of Proposal 2 is infinite: no white student will be excluded from a college or university. By definition, every student excluded will be either black, Latino or Native American. On this so-called civil rights provision, minority residents will bear one hundred percent of the burden of this policy. If ever there were a case where the differential impact was great enough to infer purpose from impact, Id., at 466, a 100 percent difference in burden should be such a case.

Moreover, as set forth above the two leading proponents of Proposal 2 have made clear that they knew of this discriminatory impact and that they supported Proposal 2 not in spite of its consequences for minority students but because of those consequences.[FN17] Gratz wants to reserve more slots for supposedly more qualified white students-while Connerly wants to administer a dose of "tough love" to minority students. Both have thus clearly stated that they have a racial goal in mind-even though they do not agree on the precise nature of that goal.

FN17. The district court cited language from the Supreme Court that mere awareness of the disparate consequences was not adequate to show a discriminatory intent. Personnel Administrator of Massachusetts v Feeney, 442 U.S. 256, 279 (1979). In that case, the Massachusetts Legislature established an absolute veterans preference. Predictably, this had an enormously disparate impact on women. Yet the Court sustained it because the law's objective-assuring jobs for those who served in the military-was a well-recognized, non-discriminatory goal. In this case, however, there is no purpose for Proposal 2 other than to drive down minority admissions and to deliver a dose of "tough love" to minority students.

The district court was certainly right in asserting that the racially-targeted fraud used by the supporters of Proposal 2 lends "some credence to the idea that ulterior motives were at work" (R. 246, Dist. Ct. Op., at 42). But it failed to recognize that the entire point of this law was not simply to overrule Grutter, but to prevent the adoption of any affirmative action plan of any kind in the future. To that end, it broke from a 150-year-old tradition of leaving all aca-

demic matters within the purview of the governing boards.

Finally, the district court is lacking candor when it says that the supporters of Proposal 2 appealed to "fairness and just treatment" (R. 246, Dist. Ct. Op., at 42). It is true that the supporters of Proposal 2 used those words-but they made clear that "fairness and justice" could only be obtained by the end of "race preferences." The message was clear: supposedly unqualified black and Latino students were taking the place of more deserving white students. The focus was explicitly racial: no other group of purportedly unqualified students was targeted. And the message got through: two out of every three white voters cast ballots in favor of Proposal 2, while 9 out of 10 black voters cast ballots against it.[FN18]

> FN18. In numerous contexts, the Court has cited the racial composition of the votes as evidence of whether a law is, or is not, discriminatory. See, e.g., Crawford v Board of Educ. Of City of Los Angeles, 458 U.S. 527, 545 (1982).

Proposal 2 has already done immense harm to the racial climate in Michigan. It has vastly strengthened the racist myth that minority students are unqualified. It has reduced the chance that Michigan's universities will graduate the next Colin Powell, Condolezza Rice or Barack Obama. Even more importantly, it has reduced the chances of tens of thousands of minority youth to obtain an education that everyone knows will change their lives.

Contrary to the opinion of the district court, it is not necessary to "impugn the motives" of 58 percent of Michigan's electorate (R. 246, Dist. Ct. Op., at 42). As this Court has held, the question is not the subjective intent of the voters, but an objective review of the law's purpose. Arthur v Toledo, 782 F.2d 565, 574 (6th Cir. 1986). Proposal 2's clear racial focus, the one hundred percent difference in its impact on minority versus non-minority students, the statements of its sponsors, the departures from the state's 150-year tradition of academic independence, and the racially-polarized nature of the vote all demonstrate Proposal 2's invidious intent.

There is no real dispute over that. The question is the one that faced the first Justice Harlan-having the candor and courage to recognize the purpose that everyone knows was there. The plaintiffs ask this Court to strike down Proposal 2 because it was clearly intended to impose different policies on categories of students defined by race and was in particular aimed at driving down the number of minority students in Michigan's most selective public universities.

III PROPOSAL 2'S BAN ON GENDER-BASED AFFIRMATIVE ACTION VIOLATES THE EQUAL PROTECTION CLAUSE IN THE SAME WAYS THAT ITS BAN ON RACE-BASED AFFIRMATIVE ACTION VIOLATES THAT CLAUSE.

Affirmative action opened up schools and entire professions to women who had never before been admitted in any significant numbers. Indeed, the policy of affirmative action for women has been so successful in admissions to higher education that it has largely been rendered unnecessary in that field, except in sciences, engineering and a few other disciplines where age-old exclusion has not yet been overcome (R. 222-4,5,6, Dep. of Spencer, at 208-211).[FN19]

> FN19. There is neither time nor need here to analyze why affirmative action by gender has been so successful so much more quickly than affirmative action based on race. But two points can be made. First, there has never been the degree of segregation by gender in the public schools like that imposed by race. Second, because segregation by gender in social life generally has also been far less, there are not the cultural differences on standardized tests in the nearly the same degree as there are based on race.

Nevertheless, the abridgement of rights by gender that Proposal 2 has imposed violates the Fourteenth Amendment in ways analogous to race. By depriving public bodies of any power to use gender-based affirmative action, Proposal 2 has excluded women and their supporters from the political processes available to all other groups. Moreover, by mandating a policy of "tough love" for women applicants in the sciences, engineering and similar fields, the Proposal

has mandated a policy for a category of applicants and students defined by gender that can be justified only by an "exceedingly persuasive justification." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 754 (2004).

Even though equality in admissions for women has progressed far beyond that for race, the hostile climate created by special laws outlawing affirmative action for women can lead to a backwards slide.

Apart from the large difference in degree of impact, there is one difference between the gender classification and the race classification. In dicta in Hunter, the Supreme Court declared that "The majority needs no protection against discrimination, and, if it did, a referendum might be bothersome, but no more than that." Hunter, supra, 393 U.S. at 391.

The proponents of Proposal 2 asserted, but the district court did not adopt or reject, the claim that Hunter did not apply to gender at all because women are a slight majority of Michigan's population. Yet this is clearly basing far too much on two sentences from an opinion rendered long before gender was recognized as a class entitled to special protection under the Equal Protection Clause. In fact, the entire point of recognizing women as a special class under that Clause is because the degree of past discrimination demonstrated that it, too, was a discrete and insular class that needed special protection from the majoritarian democracy.[FN20]

> FN20. Even as to race, the Supreme Court's dictum that the majority needs no protection is clearly dated. There are now cities and states where minorities are the majority of the population but not of the electorate. Today, the Hunter doctrine should be understood to apply to suspect and intermediate classes, not simply to those who are a numerical minority among the population or the electorate.

The Coalition plaintiffs thus ask that the Court strike down Proposal 2 as to gender for the same reasons that it should be struck down as to race.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the Coalition plaintiffs ask that the Court reverse the district court and hold that Michigan Proposal 2 violates the Equal Protection Clause as applied to university admissions as to both race and gender because it imposes a far more onerous burden on minorities and women seeking change and because it imposes more onerous substantive policies on classes of students defined by race or gender.

Appendix not available.

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, et al., Defendants-Appellees. MICHAEL COX, Michigan Attorney General, Intervenor-Appellee.,
2009 WL 1581786 (C.A.6) (Appellate Brief)

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