IS THERE STILL “EQUAL PROTECTION” IN THE AGE OF “DIVERSITY”?

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Introduction

- Today’s agenda
  - Introduction
  - Proposal 2 and The Sixth Circuit’s Decision
  - The Supreme Court and the Hunter Doctrine
  - Effects
Introduction

- Fourteenth Amendment, § 1
  - “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)
Introduction

- Questions
  - Will the Court change the meaning of “diversity”?
  - What effect will the cases have on the work of diversity professionals?
  - What is the measure of diversity?
Introduction

- Question of the Day
  - What are the practices that promote diversity, but do not amount to discrimination? Can you name any?
Proposal 2

- **Grutter v. Bollinger**
  - In *Grutter*, the Court held that universities cannot establish quotas for members of certain racial groups or provide special treatment to their applications, but the Court allowed universities more flexibility to consider race or ethnicity as a “plus” factor in terms of consideration of other individualized factors along with other relevant factors. *Grutter v. Bollinger*, 539 US 306, 334 (2003).
Proposal 2

- **Michigan Civil Rights Initiative (Proposal 2)**
  - An amendment to the Michigan Constitution that would prohibit the University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district from discriminating against, or granting preferential treatment to, any individual or group on the basis or race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
Proposal 2

- **Coalition to Defend Affirmative Action, et. al. v. The Regents of the University of Michigan, et. al.**
  - At the district court level, the equal protection argument was not persuasive.
  - “Equal access” versus “equal opportunity”
    - Is there a difference?
The Sixth Circuit

- 3 Judge Panel
  - Reversed the District Court

- En Banc
  - Sixth Circuit holds Proposal 2 violates the 14th Amendment

Next Stop: The US Supreme Court
The Supreme Court

The *Hunter* Doctrine

- **The principle:** “[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

- The extension of the *Hunter* Doctrine: “But the Fourteenth Amendment also reaches ‘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.” *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467 (1982).
The Supreme Court

- What does it mean?
  - Other states have voter-initiated bans
    - California, Nebraska, Oklahoma, Washington, Arizona

- Ninth Circuit Conflict
Effects

- The Argument in the Supreme Court
  - If Grutter is good law, are there any areas other than education where affirmative action would not be forbidden to achieve a goal other than overcoming the effects of past discrimination?
Effects

- Fisher v. University of Texas
  - Requires the University of Texas to prove it has a compelling interest for its use of race in the admissions process.

- Can they do it?
Effects

- The “re-definition” of diversity in higher education

- Use of factors other than race
  - Socio-economic?
  - Personal background?
Conclusion

- Answer the Question of the Day
  - What are the practices that promote diversity, but do not amount to discrimination?

- Real-world examples
Conclusion

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Bibliography

- **Cases**
  - *Coalition to Defend Affirmative Action, et. al. v. The Regents of the University of Michigan, et. al.*, 701 F.3d 466 (6th Cir. 2012)
  - *Coalition to Defend Affirmative Action, et. al. v. Brown, et. al.*, 674 F.3d 1128 (9th Cir. 2012)

- **Books**

- **Other Material**