

THE CHRONICLE

of Higher Education

Legal

[Home](#) [News](#) [Administration](#) [Legal](#)



July 1, 2011

U.S. Appeals Court Overturns Michigan Ban on Affirmative Action at Public Colleges

By Ryan Brown

A federal appeals court ruled on Friday that an amendment to the Michigan Constitution prohibiting affirmative action in the state's public colleges and universities is unconstitutional, overturning a ban on preferential admissions [adopted by voters in 2006](#).

In a 2-to-1 vote, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit ruled that Proposal 2, as the ballot measure was known, deprived members of racial minority groups in Michigan of their 14th Amendment right to equal protection under the law by embedding the issue of affirmative action into the state's Constitution, where it was prohibitively difficult for a minority group to challenge.

"This ruling is a tremendous victory for affirmative action," said George Washington, a lawyer for the plaintiffs, the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary (commonly known as BAMN). "It means that literally thousands of black, Latino, and Native American students who would never have had the chance to go to public universities in the state of Michigan now have that chance."

The ruling, which overturned a [2008 decision](#) by a federal district-court judge, concerns a ballot measure that passed with 58 percent of the vote.

Friday's [decision](#) caps a five-year campaign by BAMN to [challenge the Michigan law](#). It also raises a new set of legal questions for states with constitutional bans on preferential admissions and hiring. California, Washington, and Nebraska have similar laws, but they are not directly challenged by the new ruling, which is limited to the states in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee).

"Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities," wrote Judge Ransey

Guy Cole Jr. in the majority opinion, on which he was joined by Judge Martha Craig Daughtrey. Judge Julia Smith Gibbons delivered a separate opinion that concurred in part but rejected the majority's assertion that Proposal 2 violated the equal-protection rights of minority residents of Michigan.

Michael E. Rosman, general counsel of the Center for Individual Rights, a nonprofit Washington law group that helped represent one of the defendants, said that the reasoning applied by the court was unsound.

"Proposal 2 is a constitutional provision that basically requires equal protection under the law," he said. "To say that the provision violates the equal-protection clause is, at the very least, counterintuitive."

Michigan's attorney general, Bill Schuette, said in a written statement that he would appeal the ruling to the full Sixth Circuit, which includes 16 judges and is considered more conservative over all than the three-judge panel that ruled on Friday. Two members of the panel, Judge Cole and Judge Daughtrey, were appointed by a Democratic president, Bill Clinton.

"Entrance to our great universities must be based upon merit, and I will continue the fight for equality, fairness, and rule of law," Mr. Schuette said in the statement.

Representatives of Michigan State University said they did not yet know if the ruling would affect admissions procedures for the coming year.


"As a party to the litigation, we are in the process of carefully reviewing this complex opinion," said Heather C. Swain, interim vice president for university relations, in a written statement. "This is a significant issue that impacts universities, and we need to give it thoughtful consideration."

ComDISQUS
Powered by DISQUS



Add a comment

Log in to post
with your Chronicle account:


Don't have an account? [Create one now.](#)
Or log in using one of these alternatives:



Showing 40 of 41 comments

Sort by **Oldest first** Follow comments:  by e-mail  by RSS

Real-time updating is **enabled**. [\(Pause\)](#)

 **Gerard Harbison** 6 days ago

What a truly bizarre ruling. A constitutional amendment against discrimination is struck down because, according to the panel, it prevents minorities from asserting their 14th amendment rights against discrimination.

21 people liked this. [Like](#)



rickinchina09 4 days ago in reply to Gerard Harbison

Yes, you're correct but it makes perfect sense to those with ulterior motives, who are driven by misguided cause for social justice wherein adherents do not wish to be confused by the facts, much less the principles.

14 people liked this. [Like](#)



seraphpendragon 6 days ago

The court doesn't have the power to rule an amendment to the constitution as unconstitutional. That's the legislative/executive check and balance against the judiciary. :-]

3 people liked this. [Like](#)



CU_Alum 6 days ago in reply to seraphpendragon

This is a "federal" court overturning a provision of a "state" constitution on the ground that it conflicts with the "federal" constitution. Federal courts do indeed have that authority. If they didn't, states could violate the federal constitution freely as long as they did so in amendments to their own constitutions.

19 people liked this. [Like](#)



CU_Alum 6 days ago in reply to CU_Alum

Let me add that state constitutions cannot conflict with any federal laws. The U.S. Constitution is not the only higher authority with which they must comply. If the Michigan amendment conflicts with a federal statute, then the statute must prevail.

6 people liked this. [Like](#)



cdwickstrom 6 days ago in reply to seraphpendragon

Quite the contrary, as many a state has found. State constitutions don't have the ability to impose action that would deny a right guaranteed by the National Constitution. That would be tantamount to state "nullification" of nationally guaranteed rights, which is precisely what the 14th amendment to the National constitution forbids. In every case, National Constitution trumps state constitutions. There is even a part of the National Constitution that says so. Its called the "supremacy clause". That is the basis for the Federal Courts being able to tell state courts, and legislatures and executives "No." That is right out of Constitutional Law 101.

5 people liked this. [Like](#)



jffoster 6 days ago in reply to cdwickstrom

Actually, it's right out of 9th grade civics. Or at least it was in the 1950s in public schools in the South. But then everybody know public schools are no good, and that Southern schools are no good.

1 person liked this. [Like](#)



dashwood 6 days ago

Let me get this straight. A state constitutional amendment designed to create equal protection of the law is deemed a violation of the equal protection clause? This is utter nonsense. Indeed, in previous decisions the courts have ruled that states may give preferences to create diversity under narrowly-defined circumstances, but they are not required to do so. Is the reasoning that state institutions are now required to use racial and gender preferences, else they be in violation of the U.S. equal protection clause? This sounds like convoluted thinking in the mode of "in order to save the village we had to destroy it." Hopefully intelligent heads will prevail and the full circuit (or the U.S. Supreme Court) will overturn this ill-conceived and unjust decision.

30 people liked this. [Like](#)



11122741 6 days ago in reply to dashwood

Two Clinton appointees: what did you expect, they never had intellectual congress with that amendment or any other logical proposition either.

8 people liked this. [Like](#)

[Load more comments](#)



manoflamancha 2 days ago in reply to 11122741

Everyone knows, Clinton was really our first black president, QED.

[Like](#)



CU_Alum 6 days ago in reply to dashwood

It might be incorrect, but it is not "utter nonsense". Even if the Michigan amendment was "designed to create equal protection of the law" as you say, it may not have actually done what it was designed to do. Alternatively, it may have pursued the same goal as the U.S. Constitution but in a way that conflicted with it. Either way, the proper result would be to strike down the Michigan provision.

5 people liked this. [Like](#)



Christina Jeffrey 6 days ago

Go figure...I think the US Supreme Court will over-rule this.

8 people liked this. [Like](#)



johngoss 3 days ago in reply to Christina Jeffrey

How does this case relate to the two Michigan cases last decade wherein the US Spureme Court ruled that preferential admissions policies at the undergraduate level were inappropriate yet they are appropriate for professional (e.g., law) schools? Just curious.

[Like](#)



major_ray 6 days ago

As a Black scholar who competed toe to toe with America's brightest, I can tell you that in most cases racism appears to be institutionalized. Blacks are often "Barracked" even when they outperform all others in their peer group. This is my opinion and my personal experience. You do not have to be the President to experience this. If the President, who is half white gets "wacked" in public, what do you think happens to me in private. I also get "wacked" twice for being twice as Black. Stop pretending people.

21 people liked this. [Like](#)



Gerard Harbison 6 days ago in reply to major_ray

What exactly has the President outperformed? Certainly not his own economic projections.
Obama is a failed President. It's being understated because of his race, not overstated.

22 people liked this. [Like](#)



Valentino Martinez 6 days ago

And the pendulum swings, not to the right--but to righteousness.

2 people liked this. [Like](#)



Seth Davi 6 days ago

Are minorities really having a hard time getting into places like Saginaw Valley State and Northern Michigan? Or is this about affirmative action at MSU and Michigan?

No one's whining about reinstating AA in Cali because, well, honestly, if a student can't get into one of the lesser Cal States, there's an implicit understanding that said student does not belong at a university at all. I assume this is about opening access to Michigan's flagship campuses.

3 people liked this. [Like](#)



druce 5 days ago

Look, it's not the victories in court that should decide what's best for society, but the heart of a society in the first place: Isn't it time to "un-divide" this country by race, and sunset this law whose job is clearly done?

Mainstream should mean equality for all. Time to end protectionism! Time to grow up America!

7 people liked this. [Like](#)



Nader Daou 5 days ago

The whole "Affirmative Action" business is nothing but an affirmation of racism. To continue to refer to Americans as "White", "Black", "Native Americans", "Immigrants", "Latino", etc... and provision IN THE CONSTITUTION a special and different treatment for each ethnic group, wether a minority or a majority, is indeed a great shame! Equality should be on the basis of one law and one constitution that governs EVERY American regardless of ethnicity, race, religion, gender, etc... These amendments and couter-amendments are not but the result of lobbying groups whose interests change from one time to another...

In the case of access to higher education, the provision in the laws should be to grant access to every American, rather than to specify racial Quotas... This will only allow a certain number of a Racial or Ethnic group to get access... and what about the rest, who may be eligible as well, but turned down for being over quota???

You may ask how would be possible? It costs and awful lot of money!! Yet, it still costs a fraction of the cost of wars, and even a tinier fraction of the defense budget! It costs much less that the money spent on social welfare, crime fighting, prisons, etc... because these individuals who were denied education cannot find jobs, turned into a life in crime, or ended up in prisons.... Think about it, the solution cannot be in fixing the pieces... the whole system needs to be -re-engineered.

7 people liked this. [Like](#)



Dick Malott 5 days ago

I hope the new ruling sticks but am not optimistic.

1 person liked this. [Like](#)**rickinchina09** 4 days ago in reply to Dick Malott

Hurrah, one waving his pom-poms without so much as a reason why. But I am heartened by your pessimism as I surely hope it does not hold up. Enough pseudo-socially progressive legislation which only acts as a disservice to all it affects.

6 people liked this. [Like](#)**rickinchina09** 4 days ago

Affirmative action as it has been applied in college admissions in the past four decades is itself unconstitutional, or at the very least contrary to equal consideration under the law. Anyone without a contrived social justice agenda can plainly see this. The problem with affirmative action proponents is that they purport to operate from high principles and yet continually dodge the issue of what really motivates them--a self-serving desire to gain preferred consideration for certain minority youth. They neatly sidestep the glaring reality that students of Asian descent are shunned to the same extent as Whites, regardless of whether they speak a home language other than English which is arguably more difficult to transition from than Spanish. Just as they neatly ignore the fact that a highly disproportionate number of students of Asian descent gain regular admission to the nation's finest universities and colleges. Of course, we know it doesn't serve their ends to indignant in this regard or to acknowledge the very real likelihood that these same students work harder to earn the grades and scores they receive. Never mind, too, that White students from the lower SES strata must struggle to the same extent to gain admission in most of those finer institutions as well. Never mind that when one teases out the SES and racial/ethnic data from the College Board for the SAT scores, Black and Hispanic students in the highest SES still have not outperformed much lower income White and Asian families. In what must be one of the supreme paradoxes of this forced experiment in social engineering, affirmative action in admissions far too often undercuts those it was intended to serve by giving them false hopes for comparable academic achievement. Ultimately, it undermines the egalitarian values that compel them to act and breeds distrust and disgust in those students who are not so favored.

17 people liked this. [Like](#)**sosyologokhan** 4 days ago

This is also consistent with the prior Supreme Court cases which ruled that affirmative action policies could be used in order to increase diverse student body at college campuses. I am also wondering if California Proposition 209 could face the similar issue in the future. In California (along with Texas), racial/ethnic, gender or social class preferences on college admissions are still prohibited. Texas has tried to solve this by using the Top 10% plan which seems to work out.

[Like](#)**rickinchina09** 3 days ago in reply to sosyologokhan

The Texas Plan enables the top 10 percent in each high school's graduating class to attend the state's most competitive universities and colleges. This means that a Black student zoned to a low-income, inner city, mostly one-race high school which offers fewer A.P. courses can at least be given equal consideration in the admissions process as their peers more fortunate to attend higher income, suburban, diverse high schools with more A.P. courses. In other words, it offsets an imbalance that the less fortunate student has little control over. But I'm not sure if Asian and White students are given equal consideration under this plan--if they are, great. If not, then that's a serious flaw as any number of rural and semi-rural predominantly White high schools are also at a comparative disadvantage in the state. And Asian, especially Southeast Asian, students are represented in many inner city high schools as well.

1 person liked this. [Like](#)**manoflancha** 3 days ago

Apparently, the Fourteenth Amendment is being used to guarantee preferential treatment, not equal protection, and there's the rub. Are we to have meritocracy as a guiding principle for higher education, or

simply equality, which will guarantee a lower education! The battle lines have been drawn. A word of caution to lawyer George Washington representing the plaintiffs (any means necessary seems to be a deliberate threat!): socialism is very expensive, so it may best to wait and see if we recover from the current malaise, if indeed we ever recover. For sure, lowering standards will not help in the recovery of competitiveness.

9 people liked this. [Like](#)



11232247 3 days ago

Fascinating discussion, although I have long suspected that both sides of the political spectrum have been quietly acknowledging that a certain racial minority group in America cannot now (and may never) compete with the rest of society on any cognitively level playing field. Admittedly, this is both patronizing and chauvinistic, but we have seen it done by liberals and conservatives alike. Res ipsa loquitur.

Affirmative action (quotas, preferences, racial norming, correcting for past discrimination, etc, etc, etc.) only seems like the logical outcome of this cultural acknowledgement. Without legal quotas, a certain unnamed group of our society will forever be denied access to the best jobs, schools, and positions in America. Certainly not as individuals, but most assuredly as a group.

4 people liked this. [Like](#)



jimislew 3 days ago

"It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." - Justice O'Connor, Grutter vs. Bollinger et. al. (2003)
Can we get there in seventeen years?

3 people liked this. [Like](#)



yuzhoutong 3 days ago

"It means that literally thousands of black, Latino, and Native American students who would never have had." I don't know why the lawyer mentioned "Native American students" to boost his position. Is there any statistics showing that AA helped Native Americans enter college that they could not otherwise?

[Like](#)



lgarvin7 3 days ago

The admissions process has always been designed to honor certain "preferences" - Are Dad, mom or grandpa alumni (check), any family members big donors (check), sports (check), outstanding SAT scores (check), foreign born (check), powerful essay (check), attend a high-ranking high school (check), lots of AP courses (check), live in an underrepresented geographical region (check) etc... Come on people, do you really think it has ever been based purely on merit? Also, if the high-quality research data can be trusted from the Chronicle and others, the discrepancies in the quality of K-12 for minority communities not only still exist but the gap is widening. Black and minority students are more likely to attend segregated schools with high concentrations of poverty, less qualified teachers, and a less demanding curriculum. Non-Hispanic whites still make up 73 percent of those in college while Blacks are only 12 percent, Asians 7 percent and Hispanics 6 percent. (Census Data) Can we really argue that there is no longer any need for affirmative action? Living in denial about the socio-economic reality of so many minorities does not negate it. Besides, once a minority gets to college, that doesn't mean they will succeed since the deck is often stacked against them. Maybe those who are so threatened can take solace in that - a spot may open for a non-minority soon enough.

2 people liked this. [Like](#)



11232247 3 days ago in reply to lgarvin7

This is a red herring argument. Assume for a moment that African-American standardized test scores (ACT, SAT, LSAT, GRE, GMEDs, Iowa Basic Skills, etc, etc, etc) for the past thirty years have NOT all

been running a consistent 1 standard deviation beneath white/Asian test scores.

Now try to imagine the need for any affirmative action program in the entire country. If this particular minority group could cognitively compete with other ethnic or racial groups, its members would not need [reader's euphemism of choice]. Sadly, it cannot. As it stands, the mentioned group is clearly not capable of competing (and may never be) and is therefore in need of government sponsored [reader's euphemism of choice].

3 people liked this. [Like](#)



eugene859 2 days ago in reply to Igarvin7

Since you quote "census data" as your source, I think you have made some errors in citing it. The latest source for college enrollment in the U.S. by race that I am aware of is "School Enrollment in the United States: 2008" (Current Population Reports, P20-564) which was just released in June.

<http://www.census.gov/prod/201...> . According to Table 5 on p.13, non-Hispanic "Whites alone" were 66% of those enrolled in college that year (12,300 out of 18,596, #s in 000s), significantly lower than the 73% figure you cited. The 2008 census report also shows that 13% of those enrolled in college were Black or African-American, and 7% (all figures rounded) were Asian; 12% were Hispanic (of any race - regarded as an ethnicity separately per OMB regulations). Your figures for Asians and blacks are not significantly different than mine here; perhaps you were using the 2006 report.

How do these figures compare to the racial/ethnic composition of the total population? Since the school enrollment report is based on the American Community Survey and Current Population Survey, I looked up 2008 ACS population data for comparability -- "apples to apples." The estimated proportion of the U.S. population in 2008 that was "White alone, not Hispanic" was 65%. Black: 12% ; Asian: 4% ; and "Hispanic (of any race)?" 15 percent. Therefore, compared to the population as a whole, African-Americans were just 1% above (likely within the margin of error) their ratio of those enrolled. Asians were significantly over-represented in the student population, and Hispanics were underrepresented by three points. Of course, these data from the ACS and the CPS are based on sample surveys, but for space considerations I will refer anyone interested in the methodology, confidence intervals, etc. to: <http://factfinder.census.gov/> .

By the way, the same 2008 report shows that females were 55% of those enrolled; shall we now have preferences for male students?

[Like](#)



eugene859 2 days ago in reply to eugene859

Thus, Igarvin, either your demographic data source is faulty, or you believe that blacks and Hispanics should be enrolled in college in numbers greater than their proportion of the total population.

[Like](#)



rickinchina09 2 days ago in reply to Igarvin7

You are engaging in wishful thinking, and I say this giving you the benefit of the considerable doubt. More likely you have a social agenda to defend. Legacy admissions are unfair, too, but can be exploited by minority parents as well. Athletes who don't and shouldn't have "scholar" attached to their status abound, as we all know, and should have been reexamined long ago. But they do support actual scholar-athletes in sports such as crew and lacrosse which do not pay their own way or generate revenue. Your claim that most Black and Hispanic students do not have access to equivalent educational opportunities is no longer true. I have repeatedly seen firsthand over the past three decades in several states how these minorities tend to shy away from A.P. coursework, earn lower GPAs in school with a diverse student body, and participate in athletics and band rather than academic decathlon and science-math contests. No one is forcing them out of these opportunities. Moreover, most Blacks are now positioned in the middle class. The only denial is coming from liberals locked in a '60s mindset.

1 person liked this. [Like](#)



saluki87 3 days ago

I don't think this ruling will get passed the Supreme Court, if it gets there while the Courts has its current

justices. I read the entire ruling and while I wouldn't call it bizarre or shocking, like some have, it's certainly a strange ruling and is a unique application of law. I think because of the broader implications beyond university affirmative action it will be overturned.

1 person liked this. [Like](#)



macbaldy 15 minutes ago in reply to saluki87

Didn't have the opportunity to read the actual ruling but the second paragraph of this article, if accurate, has implications that coincide with your sense of a "strange ruling". If somehow this amendment was inadequately formulated, it's uniqueness on such a basis would warrant remedy. This ruling may or may not pass muster before the SCOTUS, but also it may not have broad applicability since it's apparently specific to the Michigan context.

[Like](#)



wb2ldj 3 days ago

Age discrimination has gone on unchanged all of my lifetime and no one seems to care. GS

1 person liked this. [Like](#)



wb2ldj 3 days ago

Age discrimination has been a problem in higher education since before i was an undergrad and nobody seems to care. In most cases, only young adults need apply. GS

[Like](#)



eugene859 2 days ago

Is there no "reasonable" middle between extreme polemic positions, even on The Chronicle Web site? I don't think Obama is a "socialist" out to destroy America, and I voted for Clinton twice so I don't dismiss his judicial appointees. But, I also think Affirmative Action often leads to "reverse discrimination" and that 30 years of school admissions and hiring preferences is enough.

2 people liked this. [Like](#)



michosenone 2 days ago

Many of Michigan's public universities never used affirmative action in their admissions process, and instead encourage those that qualify to attend with scholarship money. The media only highlights the admissions process and leaves out the fact that this amendment prohibited public universities from offering scholarship dollars to minorities, international students, and women. I believe it was an unintended consequence, but am glad it was repealed.

2 people liked this. [Like](#)



Ray Reinhard 2 days ago

The court's decision is Orwellian newspeak in the extreme: "equality is discrimination," "non-discrimination is inequality." Herewith is the relevant text of Michigan's Prop 2: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." How can the prohibition of discrimination against these specified individuals or groups constitute an unconstitutional failure to provide equal protection? Note that preferential treatment is merely the flip side of discrimination; i.e., to discriminate against Blacks is ipso facto to grant preferential treatment to all other races. Further, the original intent of "affirmative action" was to take extraordinary steps to ensure that all individuals or groups were treated EQUALLY -- not to grant preferential treatment to (discriminate against) certain individuals or groups. This decision turns the meaning of equal protection on its head; the sooner it is overturned the

better.

Like

Copyright 2011. All rights reserved.

The Chronicle of Higher Education 1255 Twenty-Third St, N.W. Washington, D.C. 20037