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Race-Based Preferences and the Supreme Court

Charles J. Russo, J.D., Ed.D.

The legal status of race-conscious remedies present challenges for education leaders, policymakers, and lawmakers.

So-called race-conscious remedies ensure that all citizens are considered fairly and equally for employment and education opportunities. The legal status of race-conscious remedies continues to present challenges for education leaders, policymakers, and lawmakers.

For example, in a recent case, *Schuette v. Coalition to Defend Affirmative Action* (2014), a fractured Supreme Court upheld a state constitutional amendment prohibiting the use of race in a variety of public arenas.

As author of the opinion on behalf of the three-member plurality of the Supreme Court, including Chief Justice Roberts and Justice Alito, Justice Kennedy began by establishing that “[t]he Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.” (p. 1629).

In examining the facts, Justice Kennedy pointed out that *Schuette* arose largely as a response to the 2003 companion cases *Grutter v. Bollinger* and *Gratz v. Bollinger* which upheld and invalidated, respectively, the use of affirmative action plans in admissions programs at the University of Michigan. Unhappy with these cases, citizens initiated a 2006 ballot proposal called Proposal 2, which passed by a margin of 58% to 42%. The enactment became an amendment to the Michigan Constitution and in broad terms states in Section 26 that the state (which includes “any public college, university, or community college, school district”) “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.”

Critics of Proposal 2 quickly filed suit claiming that the State of Michigan unfairly disadvantaged those who sought to use the political process via a ballot initiative to mandate racial preferences. However, a federal trial court granted the state’s motions for summary judgment (*BAMN v. Regents of University of Michigan* 2008a) and later denied a motion for reconsideration (*BAMN v. Regents of University of Michigan*, 2008b).

On appeal, the Sixth Circuit invalidated Proposal 2 on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment by denying minorities the opportunity to engage in the political lives of their communities (*BAMN v. Regents of University of Michigan* 2011). An en banc panel of the Sixth Circuit, on further review, in an eight-to-seven judgment, agreed that Proposal 2 violated the Equal Protection Clause. Relying on the political process doctrine, the court contended that insofar as structures such as Proposal 2 that are designed to impose “special burdens on the ability of minority groups to achieve beneficial legislation” (*BAMN v. Regents of University of Michigan*, 2012, p. 474) are subject to strict scrutiny, the highest level of analysis, it was unconstitutional.

Prior to *Schuette*, a similar dispute arose in California with the opposite result. The Ninth Circuit upheld another voter-approved initiative, Proposal 209, under which “(a) 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” (*Coalition for Affirmative Action v. Brown*

2012, p, 1132). In light of this split between the circuits, the Supreme Court granted the State of Michigan's appeal (*Schuetz v. Coalition to Defend Affirmative Action*, 2013) and reversed in its favor.

Supreme Court Opinions

PLURALITY

At the outset of his rationale, Justice Kennedy pointed out that “[b]efore the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education” (p. 1630). Recognizing that race-conscious admissions plans present complex questions, he indicated that the dispute did not disturb the permissible use of race in some circumstances. Rather, Kennedy repeated a theme that ran throughout his judgment: the dispute was not over

the permissible use of such policies in admissions but whether and how state voters can elect to forbid governmental officials from using race in education and other arenas.

Justice Kennedy chided the Sixth Circuit for unnecessarily extending the rationale of one of the Supreme Court's earlier judgments, *Washington v. Seattle School District No. 1* (1982). In *Seattle* the Court ruled that insofar as a voter initiative impermissibly classified persons due to race in attempting to end mandatory bussing to achieve racial integration, it violated the equal protection rights of minority students. Kennedy thus explained that it was necessary to review a trilogy of Supreme Court cases culminating in *Seattle* because of their impact on *Schuetz*.

In *Reitman v. Mulkey* (1967) the Supreme Court invalidated an amendment to California's constitution that attempted to prohibit the

state legislature from interfering with the rights of property owners to rent or sell to others regardless of their reasons. The *Mulkey* Court struck down the amendment in viewing it as involving the state in private acts of discrimination.

In *Hunter v. Erickson* (1969), the Supreme Court vitiated an amendment to a city charter in Ohio that obligated city council ordinances regulating specified real estate transactions on basis of race, color, religion, national origin, or ancestry to be approved by a majority of voters. In ordering public officials to enforce fair-housing mandates, the Court rejected the ordinance as placing an unfair burden on minorities in what it described as the “governmental process” (p. 562).

Returning to *Seattle*, Justice Kennedy pointed out that the disputed voter initiative that sought to end mandatory bussing was part of a settlement agreement designed to reduce racial imbalances even absent a finding of de jure segregation. Yet, in *Seattle*, the Justices rejected the initiative because it would have violated the Equal Protection Clause by burdening the interests of minorities.

Justice Kennedy criticized the analyses of both the Supreme Court in *Seattle* and the Sixth Circuit as exceeding the boundaries needed to resolve *Schuetz* in pursuit of protecting the interests of minorities. He voiced a key concern that the over-reliance by the lower courts on *Seattle* may have validated racial divisions by disempowering voters from adopting courses of permissible action forbidding race-based preferences.

Justice Kennedy reasoned that unlike *Mulkey*, *Hunter*, and *Seattle*, *Schuetz* did not focus on how to redress injuries based on race. Rather, he added that *Schuetz* was concerned with whether voters could decide the future of race-based preferences. In so doing, Justice Kennedy indicated that Michigan voters enacted a state constitutional

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amendment bypassing public officials whom they deemed unresponsive to their concerns.

Aware of the need for free and open debate remain on sensitive issues, Justice Kennedy posited that invalidating Proposal 2 would have impeded and demeaned the democratic process by presuming that voters were incapable of resolving important issues of policy decently and reasonably. He suggested that citizens have the right, and duty, to engage in such discourse consistent with their free speech rights under the First Amendment.

Rounding out his rationale, Justice Kennedy reiterated that *Mukley*, *Hunter*, and *Seattle* were inapplicable in *Schuette* because they involved the use of governmentally imposed political restrictions that may have caused harm based on race. Instead, Kennedy wrote that in *Schuette* the issue was whether voters could instruct the government to eschew a course of action in relying on race in a manner they deemed unwise due to fears that it could lead to resentment and hostility. He specified that although the fears voiced by the majority of voters may not have come to pass about race based preferences, the issue is subject to debate.

In sum, Justice Kennedy determined that *Schuette* “is not about *how* the debate about racial preferences should be resolved. It is about *who* may resolve it” (p. 1638). He thus concluded that insofar as democracy allows debate over sensitive issues such as racial preferences, this was a matter best left to the will of the voters in the State of Michigan.

CONCURRENCES

Chief Justice Roberts. The Chief Justice devoted his two paragraph concurrence to rebutting 11 pages of Justice Sotomayor’s dissent which argued in favor of racial preferences in higher education. To this end, Roberts pointedly responded to

Justice Sotomayor that if anything, racial preferences “have the debilitating effect of reinforcing precisely that doubt [about whether minority students truly belong on campuses], and—if so—that the preferences do more harm than good” (pp. 1638-39).

Justice Scalia. Justice Scalia’s concurrence, joined by Justice Thomas, wondered whether, in light of Justice Sotomayor’s dissent, those who voted to end racial preferences could, paradoxically, have been accused of discrimination even as they sought equal treatment for all regardless of race. He would have gone further than the Court by overturning both *Hunter* and *Seattle* while disavowing the political process doctrine and its reliance on race-conscious remedies.

Justice Breyer. In his three-page concurrence, Justice Breyer agreed that insofar as Proposal 2 afforded voters, rather than non-elected campus officials, decision making over racial preferences, it was constitutional.

DISSENT

Justice Sotomayor’s 27-page dissent, joined by Justice Ginsburg, was

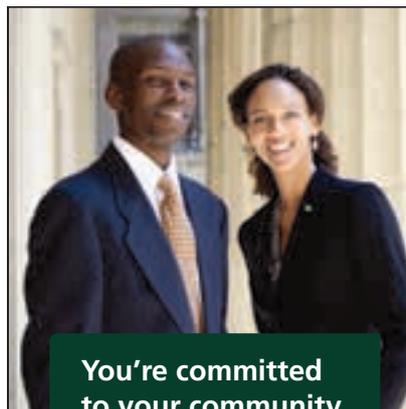
about three times the length of the plurality. Her main point seemed to be that public officials essentially should be free to discriminate based on race by providing special advantages to minority groups, despite the wishes of the majority of voters grounded on the notion that “race matters” (p. 1676).

Discussion

It is important to recognize that less than a majority of Justices joined in the Supreme Court’s judgment in *Schuette*—resulting in the plurality. Accordingly, *Schuette* is of limited precedential value because it is binding only on the parties in a suit and, here, the Sixth Circuit, which consists of Michigan, Ohio, Kentucky, and Tennessee.

Yet, to the extent that *Schuette* is a decision of the Supreme Court, education leaders, regardless where they work and live, must be mindful of its holding because it is some indication of where the Justices may be headed on racial preferences and particularly with regard to the political process doctrine.

As broad-based as Proposal 2 is, though, touching on a variety of public programs, as is often the case



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in disputes involving race-conscious remedies, *Schuetz* leaves more questions unresolved than answered. The lack of clarity resulting from *Schuetz* is mostly because the plurality limited its order to acknowledging that states may allow voters to forbid the use of race in specified circumstances but are not obligated to do so.

Post-*Schuetz* uncertainty is likely to lead to additional litigation insofar as the Supreme Court stopped short of resolving the ultimate question of whether race-based preferences in education and other areas of public life are acceptable under the Equal Protection Clause. Consequently, to the extent that education leaders may wish to take race into account in such areas as student assignments and hiring, *Schuetz* seems to make these tasks more difficult because the rules are not entirely clear.

Amid disputes over the future of race-conscious remedies, an interesting dynamic in *Schuetz* was the interplay between the members of the Supreme Court over the appropriateness of race-conscious remedies, especially as they play out in education under the guise of the political process doctrine. As in many other areas such as religion, the tension between the Justices

continues to represent a deep divide on the High Court bench.

Perhaps the key outcome of *Schuetz* is that if one combines the votes of the members of the plurality with Justice Scalia's concurrence, which was joined by Justice Thomas, a bare majority of the Supreme Court seems to be willing to eliminate the political process doctrine. If the Court were to move away from this doctrine, it may make it easier for those who disfavor programs designed to afford race-based preferences in education and other public arenas to initiate legal challenges.

At the bottom line, it may be that the most significant outcome of *Schuetz* is that it might make it easier for those who question the appropriateness of racial preferences to challenge such remedies that are designed to reach the elusive goal of equity by calling for laws and policies to enhance opportunities for all regardless of race. Still, it remains to be seen whether this will come to pass.

Conclusion

Insofar as issues involving race remain highly charged, the pursuit of equity has become a seemingly unending saga that is not much closer to resolution as a result of *Schuetz*. Thus, although *Schuetz*

may signal the demise of the political process doctrine, the final quest for racial equity is far from over.

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TRADITIONAL (SCOREKEEPER) CFO vs STRATEGIC CFO

Scorekeeper CFO

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- **Strategic partner:** Teams with the chief academic officer, or CAO, to integrate financial and instructional perspectives
- **Planner:** Looks long term and addresses sustainability
- **Strategist:** Makes the budget a tool for accomplishing strategic goals

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