Schuette v. BAMN: What the Supreme Court's Decision Means for Higher Education Institutions Pursuing Diversity Goals

A Case Analysis

April 28, 2014

Prepared on Behalf of the College Board's Access and Diversity Collaborative

On April 22, 2014, in a 6-2 decision, the U.S. Supreme Court upheld Michigan's voter ban on the otherwise lawful use of race, ethnicity, and gender by the state's public entities, including race-conscious admission decisions at the state's public institutions of higher education.[1] No single opinion of the eight voting Justices commanded a majority in *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigration Rights and Fight for Equality By Any Means Necessary (BAMN)*.[2] Underlying rationales, even among similarly positioned Justices, differed widely. But, the bottom line is clear: after *Schuette*, the U.S. Constitution permits voters through the ballot box to deprive public colleges and universities of their otherwise available discretion to consider race in admissions so long as the voters' purpose (and the likely impact of their vote) is not to inflict harm to individuals on the basis of race.

This analysis provides an overview of the Court's ruling and the different opinions, closing with a brief discussion of the key takeaways for institutions and systems of higher education pursuing mission-focused diversity goals, which are:

1. The federal legal landscape regarding the lawfulness of race-conscious admission policies remains intact – even as Members of Court reveal key differences on those issues.
2. The use of race-neutral strategies continues to be central to the Court's jurisprudence regarding diversity in higher education.
3. Questions regarding racial categories persist – with implications for the design of diversity policies.
4. Voter bans in other states are likely valid, given their apparent similarities to the Michigan ban.
5. The court of public opinion matters.

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[1] *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN),* No. 12-682 (U.S. April 22, 2014), available at: http://www.supremecourt.gov/opinions/13pdf/12-682_j4ek.pdf.

[2] Only eight Justices participated in the decision because Justice Kagan recused herself from participating.

The Court's Ruling

Six Justices agreed that Proposition 2 – Michigan's state constitutional amendment approved by voters in 2006 that prohibited race, ethnicity, gender and other discrimination or "preferential treatment" by its public higher education institutions (and others) – was valid under the 14th Amendment to the U.S. Constitution, thereby reversing the Sixth Circuit Court of Appeals decision.[3] Even though six Justices agreed on this result, however, no opinion garnered more than three votes. Consequently, none of the opinions' *reasoning* will be binding on and precedential in future cases, though the arguments may have influence.

The Sixth Circuit had followed the "political process" doctrine, reflected in a line of U.S. Supreme Court decisions that subjected to strict judicial scrutiny any political structure or regime that placed extra burdens on minority groups in their efforts to achieve their political goals. In precedents involving fair housing and school desegregation leading up to *Schuette*, the Court had struck down voter-approved policies that established a more burdensome or challenging level of access to government action on behalf of minority interests. The argument by plaintiffs challenging the voter ban in this case was that Michigan's action fell squarely within this line of precedent. They asserted that a supporter of legally permissible race-conscious admissions could only effect change in Michigan through a constitutional amendment, while a supporter of other considerations in admissions policies (e.g., legacies) could pursue multiple, less difficult pathways such as lobbying admissions committees, petitioning university leadership, and influencing schools' governing boards.

Justice Kennedy (in a plurality opinion joined by Chief Justice Roberts and Justice Alito) found that nothing in federal constitutional law authorized federal courts to set aside a decision by state voters regarding "whether a policy of race-based preferences should be continued" absent a likelihood that such a policy had an aim or would be used to cause harm to individuals (or a group of individuals) on the basis of race or ethnicity. Said differently, the plurality accepted the view that, absent evidence of race-based motive or harm that would likely follow, voters could lawfully exercise their policymaking authority and instruct state governments (and public higher education institutions, in particular) not to follow a "course of race-defined and race-based preferences." Justice Kennedy also expressed concerns about how the judiciary would evaluate claims that certain minority groups might have particular, distinct political interests, challenging the idea that all minority groups support race-conscious practices. (***Chief Justice Roberts*** joined Justice Kennedy's opinion in full, but also wrote separately to express disapproval of Justice Sotomayor's characterization of the plurality's position.)

More starkly, ***Justice Scalia*** (joined by Justice Thomas) agreed with the plurality that Proposition 2 should be upheld, but would have based this result on the simple reasoning that "any law expressly requiring state actors to afford all persons equal protection of the laws . . . does not – *cannot* – deny to any person . . . equal protection of the laws, . . . regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court." In his view, a law that "neither says nor implies that persons are to be treated differently on account of their race is not a racial classification" subject to the most probing judicial scrutiny, and should be upheld if aimed at any legitimate purpose at all. Justice Scalia would have overruled the political process doctrine entirely rather than reconfigure it, as he asserted that the plurality had done.

[3] The Court's decision relates only to a state voter ban and the public institutions affected by that action – and *not* to private institutions. The decision has broader implications, however, that do relate to private institutions, as discussed below.

Justice Breyer was the only Justice voting to uphold Proposition 2 in *Schuette* who also joined the *Grutter v. Bollinger* (2003) majority that upheld the University of Michigan Law School's race-conscious admission policy. He limited his discussion "to circumstances in which decision making is moved from an unelected administrative body to a politically responsive one." For him, the political process doctrine, as put forward by the plaintiffs, did "not easily fit this case" because, unlike earlier cases, Proposition 2 "[did] not involve a reordering of the *political* process . . . the movement of decision making from one political level to another." Nor did Proposition 2 seek to remedy discrimination or its "direct effects." Instead, university governing boards had already delegated admissions decisions associated with the educational benefits of diversity "to unelected faculty members and administrators," thereby already effectively removing minorities from the process before Proposition 2 was passed. In his view, the people and their elected representatives are permitted to use race-conscious admissions and to choose not to use them – so Proposition 2 should stand.

Justice Sotomayor (joined by Justice Ginsburg) offered a fiery dissent, noting both the continued importance of race in America and the positive impact that race-conscious admissions have on institutions' ability to meet their diversity-dependent goals. She argued that Proposition 2 "reconfigure[d] the existing political process in Michigan in a manner that burdened racial minorities," specifically creating "two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the states universities: one for persons interested in race-sensitive admissions policies and one for everyone else." Justice Sotomayor agreed with Justice Scalia on one point: in her words, "the plurality has rewritten [the political process doctrine] precedents beyond recognition."

Notably, despite the strong disagreements among the Justices regarding the viability and applicability of the political process doctrine, all eight Justices agreed that the case was, as Justice Kennedy unequivocally expressed, "not about the constitutionality, or the merits, of race-conscious admissions policies in higher education." That said, several Justices in *Schuette* offered non-binding commentary on that issue, revealing fissures among the Justices not apparent in last year's decision in *Fisher v. University of Texas at Austin* (which involved a challenge to race-conscious admissions policies).[4]

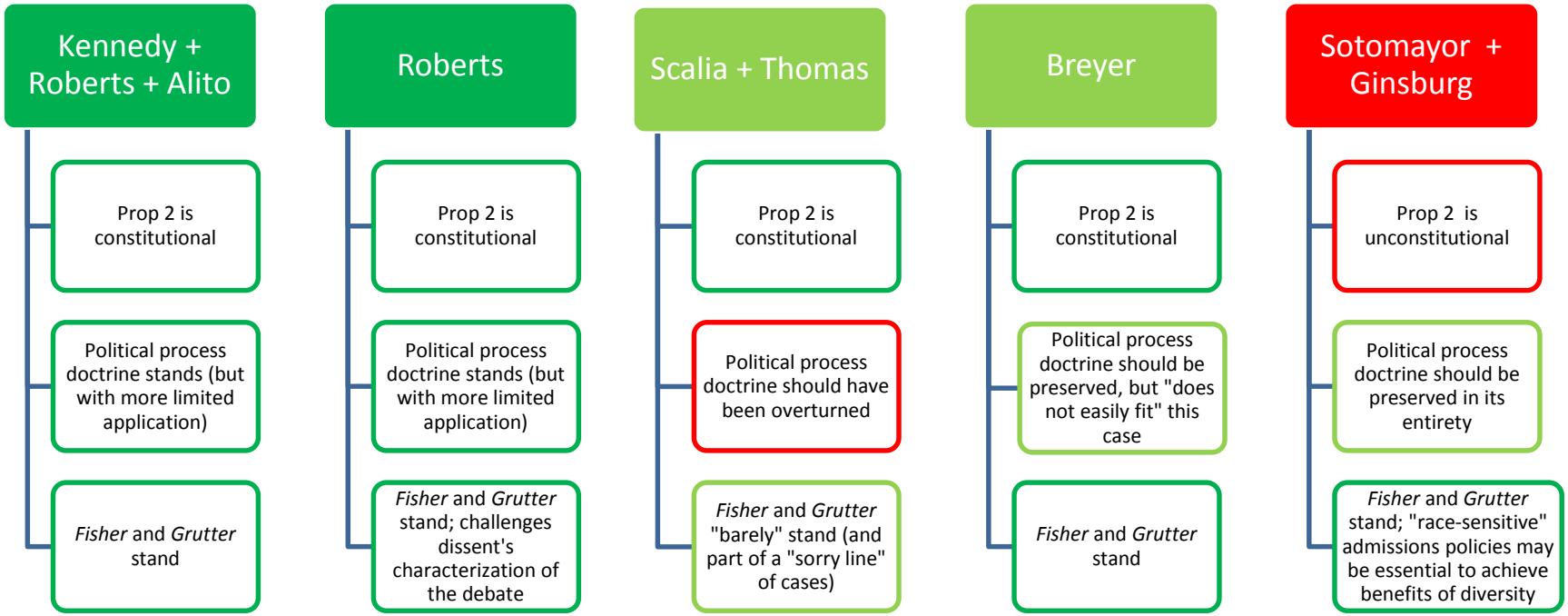
The chart on the next page compares the different opinions on the central issues in the case.

[4] For a full discussion of *Fisher* and its implications, see *Understanding Fisher v. the University of Texas: Policy Implications of What the U.S. Supreme Court Did (and Didn't) Say About Diversity and the Use of Race and Ethnicity in College Admissions* (The College Board, 2013), https://diversitycollaborative.collegeboard.org/sites/default/files/document-library/diversity-collaborative-understanding-fisher.pdf.

Breaking down the votes and opinions in *Schuette v. BAMN: A Case Overview*

Even though six Justices voted for the final result in the case, no opinion garnered more than three votes. Consequently, none of the opinions' *reasoning* will be binding and precedential in future cases, though the arguments may have influence.

The following chart maps the five different opinions, identifying the Justices' conclusions and reasoning on three key issues: (1) whether Prop 2 is constitutional; (2) whether the political process doctrine should be preserved; and (3) whether *Grutter* and *Fisher* remain intact.



Key:

- Agrees with plurality's conclusion on this issue and reasoning
- Agrees with plurality's conclusion, but uses different reasoning
- Disagrees with plurality's conclusion

Key Takeaways

1. The federal legal landscape regarding the lawfulness of race-conscious admission policies remains intact – even as Members of Court reveal key differences on those issues.

All eight Justices explicitly affirmed that the *Schuette* decision does not affect the standards or precedents associated with the lawfulness of race-conscious enrollment policies pursuant to federal law. (Justice Scalia, with his usual flair, wrote that the case is "at least, not quite" about race-conscious admissions.) Further, Justice Kennedy, for the plurality, specifically referenced his recent *Fisher* opinion on behalf of seven Justices, observing that the Court in that case "did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met." (Justice Kennedy also noted that "as in *Fisher,* that principle [was] not challenged" in *Schuette.*) Thus, the principles set forth in and rulings of the Court in *Grutter, Gratz,* and *Fisher* remain intact.

That said, *Schuette* exposes the fissures among Justices on these issues – differences that, for the most part, were not apparent in the 2013 compromise majority opinion in *Fisher* (from which only Justice Ginsburg dissented). Illustratively, along the liberal-to-conservative spectrum:

- Justice Sotomayor, in a 58 page dissent, suggested that the plurality is "out of touch with reality" to "leave race out of the picture entirely and let the voters sort it out." She provided charts that showed decreasing minority enrollment in states with voter bans like Proposition 2, observing that "[w]e should not turn a blind eye to something we cannot help but see." And she dedicated an entire section of her opinion to the underlying "substantive policy at issue" not directly implicated in the Court's decision (what she calls the merits of "race-sensitive admissions"), concluding that "[c]olleges and universities must be free to prioritize the goal of diversity."

- Justice Breyer noted that the "serious education problems that faced Americans at the time this Court decided *Grutter* [in 2003] endure."

- Justice Kennedy recognized that race-conscious policies present "difficult and delicate issues," and that the "historical background of race in America that has been a source of tragedy and persisting injustice . . . demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and dignity."

- Chief Justice Roberts expressed the view that one is not "out of touch with reality" when concluding that "racial preferences may themselves . . . do more harm than good" and that, on these issues, "[p]eople can disagree in good faith."

- Justice Scalia described *Grutter* and *Fisher* as part of a "sorry line of cases" that "barely – only provisionally" permit consideration of race in admissions decisions. He also reminded readers of the possibility that "*Grutter*'s bell may soon toll" – alluding to Justice O'Connor's observation in *Grutter* that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today."

2. The use of race-neutral strategies continues to be central to the Court's jurisprudence regarding diversity in higher education.

Schuette echoes the heightened importance that *Fisher* placed on race-neutral strategies as part of an institution's development of its diversity policies. Under *Fisher,* institutions that pursue race-conscious admission policies must undertake "serious, good faith consideration of workable race-neutral alternatives" in order to determine that "no workable race-neutral alternative would produce the educational benefits of diversity." And, if "a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense," then the *Fisher* Court instructed that an institution may not consider race. Justice Kennedy's plurality opinion in *Schuette* emphasized the role that states can play as "laboratories for experimentation," particularly for issues as "contested and complex" as race-conscious policies and practices. And, Justice Scalia, nodding back to language in *Grutter,* opined that institutions in states without voter initiatives "can *and should* draw on the most promising aspects of these race-neutral alternatives as they develop."[5]

More specifically addressing actual race-neutral efforts by other institutions and systems, Justice Sotomayor observed that the University of California "has spent over a half-billion dollars on programs and policies designed to increase diversity . . . Still, it has been unable to meet its diversity goals . . . [and the 1996 California voter ban] has completely changed the character of the university." This comment may have implications for what a "workable" alternative should entail, particularly on the question of what "tolerable administrative expense" may mean.

3. Questions regarding racial categories persist – with implications for the design of diversity policies.

Writing for the plurality, Justice Kennedy expressed the view that the federal judiciary was ill equipped to "announce [as part of the political process doctrine] what particular issues of public policy should be classified as advantageous to some group defined by race" and what public policies "minorities . . . consider to be in their interest." Calling attention to the absence of meaningful, enforceable standards in that context, he also recognized that racial "lines are becoming more blurred" and that, as a consequence, "the attempt to define race-based categories . . . raises serious questions *of its own*" (emphasis added). That passing but pointed observation may have consequences for institutions of higher education as they, too, wrestle with the taxonomy and terminology that surrounds race. At a minimum, consistent with recent Court precedent,[6] it provides a reminder about the care that should be exercised in crafting the language of admission policies that address racial and ethnic subgroups, as well as institutional statements regarding the value of diversity to higher education institutions.

[5] The Court's entire discussion of race-conscious and race-neutral policies implicitly raises (but does not resolve) questions regarding what, precisely, those terms mean and how they are to be applied under federal law. More specifically, unanswered questions persist regarding the legal distinctions among "race-conscious" policies and programs (Kennedy, Breyer, Roberts), "race-based preferences" (Kennedy), "race-based" policies (Scalia), "race-sensitive" policies (Sotomayor), and more. *See generally Race Neutral Policies in Higher Education: From Theory to Action* (The College Board, 2008).

[6] See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

4. Voter bans in other states are likely valid, given their apparent similarities to the Michigan ban.

Although not definitively resolved by the Court, the *Schuette* decision likely insulates current voter bans in other states from successful challenge, given similarities in state laws and relevant histories.[7] Coupled with Justice Scalia's sweeping opinion, Justice Kennedy suggests as much, with his pointed reference to "other long-settled rulings on similar state policies [in California]," and his concern that a decision striking down the Michigan voter ban "in essence would announce a finding that the past 15 years of state public debate on this issue have been improper."

5. The court of public opinion matters.

Although differing in legal rationales, each of the opinions among the Justices voting to uphold the Michigan voter ban endorses the fundamental role of voters in the exercise of democratic self-government. As Justice Kennedy observes, "Our constitutional system embraces the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure." Justice Breyer agrees, in more limited fashion, but with equal force: "The Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of race-conscious programs [designed to promote diversity and inclusion]."

Thus, especially with respect to public institutions addressing these issues, this decision highlights the importance of conducting meaningful and sustained stakeholder engagement (with appropriate transparency and public engagement) regarding the goals, rationales, and evidence supporting admission strategies and policies aimed at creating diversity on campus – including, in particular, those involving race- and ethnicity-conscious considerations.

Conclusion

Schuette creates no new rules with direct or immediate implications for college and universities. But, as Justice O'Connor reminded us not so long ago in *Grutter*, "context matters." And viewed against the larger backdrop of the relevant line of U.S. Supreme Court cases – most particularly since the 2003 *Grutter* and *Gratz* decisions – *Schuette* continues a trend of incrementally more rigorous review and growing Court skepticism of the need for consideration of race and ethnicity in policy making, including in admissions practices. That said, race-conscious enrollment policies and practices remain lawful – and viable – if certain conditions are met, Justice Scalia's broadsides notwithstanding. The devil is decidedly in those details, which should be carefully assessed by institutions of higher education that are pursuing diversity goals through race- and ethnicity-conscious means.

Finally, a point of reflection. Over 35 years ago in *Bakke v. Regents of the University of California,* which involved a challenge to a race-conscious medical school admissions policy, Justice Powell authored an

[7] See Coleman, Lipper, & Keith, *Beyond Federal Law: Trends and Principles Associated with State Laws Banning the Consideration of Race, Ethnicity, and Sex Among Public Education Institutions* (AAAS, 2012), available at: http://php.aaas.org/programs/centers/capacity/documents/BeyondFedLaw.pdf. Four other states – California, Nebraska, Arizona, and Oklahoma – have implemented voter-initiated state constitutional bans. Florida has adopted a similar ban relating to admissions through administrative regulation, although other practices are also influenced by an executive order; New Hampshire through a state statute; and Washington through a state statute initiated by a voter ballot initiative.

opinion that no other Justice joined, but that established the foundation for decades of higher education policy and law. In a landmark opinion, he affirmed the educational benefits of diversity in higher education and the prospective importance of appropriate race- and ethnicity-conscious admission practices in achieving those aims. He wrote, "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." Fast forward to 2014. In Justice Kennedy's plurality opinion in *Schuette*, he, too, embraced principles that support a robust exchange of ideas – albeit with a different focus and with decidedly different policy implications. Yet, the underlying point of commonality between these two "centrist" Justices should not be missed. Both decidedly embrace the importance of preserving enterprises that invite and promote respectful (if passionate) debate on sensitive topics. The challenge – whether in the institutional setting or in campaigns that end at the ballot box – lies in ensuring that facts inform that debate, and that meaningful engagement and dialogue flourish.

This guidance was prepared by EducationCounsel LLC on behalf of the College Board's Access & Diversity Collaborative. The Collaborative provides general policy, practice, legal and strategic guidance to colleges, universities, and state systems of higher education to support their independent development and implementation of access- and diversity-related enrollment policies. For more information regarding the Collaborative, please visit http://diversitycollaborative.collegeboard.org/

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This guidance is provided for informational and policy planning purposes only. It does not constitute specific legal advice. Legal counsel should be consulted to address institution-specific legal issues.

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