Supreme Court Ruling Exposes Continuing Division on Use of Race in Higher Education Admissions

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Today's ruling in *Schuette v. Coalition to Defend Affirmative Action* shows that the justices on the U.S. Supreme Court remain fundamentally divided about the future of race-conscious admission policies in higher education. While the Court's holding on the right of Michigan voters to choose to prohibit the consideration of race in admissions will have limited immediate impact on most colleges and universities in the United States, the diversity of views and sharp disagreements among the justices indicate that the Court may decide to revisit the larger constitutional issues in the years ahead.

When the Supreme Court decided *Fisher v. University of Texas* last June, many college and university administrators breathed a sigh of relief. They had expected the Court's five conservative justices to undo existing rules on race-conscious admissions. Instead, seven of the justices joined in an opinion that appeared to preserve the status quo and accepted, for now, the Court's earlier affirmative action rulings as a "given."

Such consensus, however, came at a cost. Notwithstanding the suggestion of the U.S. Department of Justice and Department of Education to the contrary in September 2013, the ruling in *Fisher* made it harder to defend race-conscious admissions programs in several important ways: by requiring each school to articulate a "reasoned, principled explanation" for its interest in the educational benefits of diversity, limiting the deference that courts will apply in reviewing challenged admissions procedures, requiring schools to prove the absence of workable race-neutral alternatives, and discouraging the expeditious resolution of lawsuits through summary judgment.

Today's ruling in *Schuette* provides further evidence of a deep divide among the justices. At issue was the constitutionality of an amendment to Michigan's constitution, enacted pursuant to a ballot proposal, that prohibited race-based preferences at state colleges and universities. The U.S. Court of Appeals for the Sixth Circuit had declared the amendment unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because it impermissibly burdened the ability of racial minorities to achieve their goals through the political process.

The Supreme Court reversed. Joined by Chief Justice Roberts and Justice Alito, Justice Kennedy authored the controlling opinion. Noting that the case did not directly address "the constitutionality, or the merits, of race-conscious policies in higher education," Justice Kennedy held that the U.S. Constitution does not prohibit Michigan voters from determining through a ballot initiative whether to continue race-based preferences in public education. "Democracy," he wrote, "does not presume that some subjects are either too divisive or too profound for public debate."

Three justices — Justices Breyer, Ginsburg, and Sotomayor — reaffirmed their view that race-conscious admissions programs are allowed under the U.S. Constitution. (Justice Kagan recused herself.) Justice Breyer concurred in the Court's judgment, explaining that he saw no constitutional problem with removing decisionmaking authority from "unelected faculty members and administrators" and placing it "in the hands of the voters." But he explained that he continues to believe that "the Constitution permits, though it does not require, the use of the kind of race-conscious programs that are now barred by the Michigan Constitution."

Justices Sotomayor (joined by Justice Ginsburg), dissented, stating that a "majority of the Michigan electorate changed the basic rules of the political process in that State in a manner that uniquely disadvantaged racial minorities." Tweaking an earlier line from Chief Justice Roberts, Justice Sotomayor wrote, "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." In response, Chief Justice Roberts filed a short opinion stating that it "does more harm than good to question the openness and candor of those on either

side of the debate." For his part, Justice Scalia (joined by Justice Thomas) issued a concurring opinion describing the Court's affirmative action jurisprudence as "sorry" and Justice Sotomayor's dissent as "shameful" for purportedly comparing Michigan voters with those responsible for Jim Crow (a comparison that Justice Sotomayor rejected in a footnote).

The disagreements that the Court temporarily papered over in *Fisher* were bound to reemerge, and the divergent opinions in *Schuette* show that the Court remains highly unsettled about the future of race-conscious admission policies in higher education. Some justices, like Justices Scalia and Thomas, believe they should end now. Others, like Justice Sotomayor, believe they remain essential "to achieve a diverse student body when race-neutral alternatives have failed." Combined with the inherent political volatility of race-based preferences, these unresolved disagreements among the justices suggest that we will likely see more litigation in this area in the years ahead, at all levels of the judiciary.

Foley Hoag offers compliance and strategic planning issues for counsel, administrators, and policymakers in higher education on a broad range of issues. For more on key compliance measures following the Supreme Court's ruling in *Fisher v. University of Texas*, click here.

On behalf of our client the Asian American Legal Defense and Education Fund, a leading civil rights organization, Foley Hoag has filed amicus briefs in the U.S. Supreme Court and U.S. Court of Appeals for the Fifth Circuit urging those courts to affirm the constitutionality of the undergraduate admissions program at the University of Texas.

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