



***Schuette v. BAMN: Implications for
Affirmative Action Policies***

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Overview

In the wake of last year's much-publicized decision in *Fisher v. University of Texas at Austin*, 570 U.S. ____ (2013), this past April the Supreme Court of the United States issued a decision rejecting a federal constitutional challenge to the State of Michigan's constitutional prohibition on the use of race-based preferences in governmental decisions, including the admissions process of state universities, in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al.*, 572 U.S. ____ (2014) (Kennedy, J.).

Schuette involved the enactment of a state law in Michigan that, *inter alia*, prohibited public colleges and universities within the state from granting preferential treatment based on race (or sex) in the admissions process. While the amendment also banned the use of race as a factor in Michigan's employment policies and in public contracting, the Court's decision addressed only the way in which the amendment affected public education. Thirty-six amici curiae briefs were filed with the Court by professional associations, universities, individual states, public interest organizations, national educational organizations, university professors, scholars, and political scientists.¹

¹ In comparison, 90 amicus briefs were filed with the Court in *Fisher*, among which were briefs from similar groups and industries in addition to briefs from Fortune 500 corporations and small business owners and organizations.

This White Paper focuses on the impact of the *Schuette* decision on the developing landscape of affirmative action policies in higher education, including the decision’s relationship with the Court’s previous decision in *Fisher*. It also addresses the possible implications of the decision in the employer hiring and contract arena.

Summary of the *Schuette* Decision: Voters in the State of Michigan May Determine Whether to Continue or Prohibit a Policy of Race-Based Preferences

In 2006, voters in the State of Michigan amended the State Constitution by enacting Proposal 2 by a margin of 58% to 42%. Proposal 2 became Article I, Section 26 of the Michigan Constitution. The amendment, in relevant part, prohibits the state—including state colleges and universities—from “discriminat[ing] against, or grant[ing] 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.”

I. *Schuette* Did Not Affect Affirmative Action or Diversity Initiatives

The Supreme Court’s *Schuette* decision did not curtail the viability of affirmative action policies or diversity initiatives in the admissions context. Indeed, the plurality opinion by Justice Kennedy expressly stated that the Court’s holding did not “concern the permissibility of race-conscious admissions policies under the Constitution.” *Fisher*, unlike *Schuette*, addressed the complex issues arising from the use of race-conscious admissions policies in higher education. Neither case, however, challenged or disturbed the principle recognized by the Supreme Court in *Schuette* that “the consideration of race is permissible, provided that certain conditions are met.” Simply put, this acknowledgment recognizes that the holding of *Grutter v. Bollinger*, 539 U.S. 306 (2003) (O’Connor, J.) (which the Court reaffirmed in *Fisher*), which determined that

securing the educational benefits of diversity in higher education can be a compelling governmental interest, endures post-*Schuette*.²

A. *Schuette* Did Not Involve Injury Caused on Account of Race

In reaching its decision, the Court distinguished the facts underlying the *Schuette* case from three legal precedents upon which the Sixth Circuit relied in holding that Section 26 of the Michigan Constitution violated the Equal Protection Clause of the Fourteenth Amendment. The factual backdrop to *Schuette*, unlike the cases addressed by the Sixth Circuit, did not involve “hurt or injury [] inflicted on racial minorities by the encouragement or command of laws or other state action,” i.e., instances when the Michigan Constitution mandates judicial redress.

For example, *Reitman v. Mulkey*, 387 U.S. 369 (1967), involved an amendment to the California State Constitution that prohibited state interference with residential property owners’ right to decline to sell or rent on any basis. Determining that the amendment constitutionally authorized the private right to discriminate, while simultaneously thrusting the state into private racial discrimination, the Court concluded that the amendment encouraged discrimination, resulting in “real and specific injury.” It accordingly held that the constitutional provision constituted a denial of equal protection.

Likewise, in *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court held unconstitutional a city charter amendment that overturned a fair housing ordinance passed by the City of Akron, Ohio and required all other antidiscrimination ordinances—and only antidiscrimination ordinances—

² Through the progression from *Grutter* to *Fisher*, and now to *Schuette*, the composition of the Court has remained largely constant and the Justices—individually and as a group—have remained consistent in their respective positions on the issue of race-conscious admissions programs in the context of higher education.

to be approved by referendum. The Court’s decision in *Hunter* was based upon facts of “widespread racial discrimination in the sale and rental of housing,” which in turn led to segregated housing and individuals living in dangerous and deplorable conditions. Specifically, the Court found that the charter amendment and its singling out of antidiscrimination ordinances ran the impermissible risk of, if it did not in fact directly intend, injury specifically targeting racial minorities. In short, *Hunter* simply stands for the principle that “the State may not alter the procedures of government to target racial minorities.”

The final precedent that the Court distinguished from *Schuette* was *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). In *Seattle*, voters opposed the state’s implementation of a mandatory busing program intended to remedy “racial isolation of minority students in local schools” by passing a state initiative to bar busing for the purpose of desegregation. The Court explained that, in line with *Mulkey* and *Hunter*, the state’s action in *Seattle* had the effect, if not the intent, of causing injury on the basis of race.³

Each of these cases shared the common denominator of state action that was taken in racially charged circumstances and that was designed to inflict, or had the effect of inflicting, specific injuries on individuals on the basis of race. Although the state action in *Schuette* occurred in circumstances where political discourse on the application of race-conscious admissions programs or diversity initiatives remained central to the legal, business, and social landscape, the plurality held that the state action—passing Section 26 of the Michigan Constitution—did not

³ The Court rejected the Sixth Circuit’s broad reading of *Seattle* that “any state action with a ‘racial focus’ that makes it ‘more difficult for certain racial minorities than for other groups’ to ‘achieve legislation that is in their interest’ is subject to strict scrutiny.” It likewise rejected the interpretation of *Seattle* that it is the Court’s province to declare which political policies serve the interests of any given racially defined group.

involve the infliction, or likely infliction, of specific hurt or injuries on racial minorities. For this reason, the Court determined that *Mulkey*, *Hunter*, and *Seattle* had no bearing on whether Michigan voters had to be politically restricted from engaging in the political process to determine whether to continue policies of race-based preferences.

Indeed, the Court expressly stated that the issue in *Schuette* “is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.” Because there were no specific injuries against minorities in the underlying facts of *Schuette*, the availability of remedies did not play a significant role in the Court’s decision. The Court did, however, recognize that “when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts.”

B. The Facts in *Schuette* Called Only for the Resolution of Whether Voters Could Opt to Prohibit Race-Conscious Admissions Policies

Having determined that Michigan voters’ enactment of Section 26 did not involve “hurt or injury [] inflicted on racial minorities by the encouragement or command of laws or other state action,” the Supreme Court analogized the factual scenario of *Schuette* to longstanding court decisions concerning similar state-enacted policies.

In 1997, the Ninth Circuit held in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) that a California constitutional amendment prohibiting the use of racial preferences in public education did not violate the Equal Protection Clause. Thirteen years later, in *Coral Construction, Inc. v. City and County of San Francisco*, 235 P.3d 947 (Cal. 2010), the California

Supreme Court upheld the same constitutional amendment in the context of public contracting, determining that the amendment did not violate the *Seattle* holding. The question at issue in those cases, as in *Schuetz*, was whether and by what means voters may choose to prohibit the use of race-based preferences in government works, and particularly in school admissions.

Notably, even in *Grutter*, the Court acknowledged that some states, namely California, Florida, and Washington, prohibited the use of racial preferences in the admissions process by state law. Universities in those states have since experimented with the implementation of race-neutral alternatives to secure diverse student bodies.

At its core, under the plurality's reasoning, *Schuetz* is about fundamental principles of democracy—the right to engage in the electorate process, to debate and discuss the delicate and complex issues confronting contemporary society, and to have voters effect change in policies. According to the plurality, the Court steps in to override that democratic policy only where the state action that results encourages or brings about hurt or injury to racial minorities.

Concurring in the judgment, Justice Antonin Scalia, joined by Justice Clarence Thomas, parted ways from the plurality's analysis of *Hunter* and *Seattle*, instead urging that the precedents should be overruled. Also taking issue with the plurality's endorsement of “the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact,” Justices Scalia and Thomas advocated for the reaffirmation of “ordinary principles of our law [and] of our democratic heritage” that in order to sustain a claim of equal protection violations

arising from facially neutral acts, intent and causation must be proved, “not merely the existence of racial disparity.”

Also concurring in the judgment, Justice Stephen Breyer stated his continued belief 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.” Justice Breyer rejected the applicability of *Hunter* and *Seattle* to the circumstances of *Schuette* because the former precedents “involved efforts to manipulate the political process” in a way that was absent in *Schuette*. Because *Schuette* did not involve the reordering of the political process, but instead shifted the “decisionmaking mechanism . . . from an administrative process to an electoral process,” the minority’s ability to participate meaningfully in the political process was not diminished and, therefore, the enactment of Section 26 of the Michigan Constitution was constitutional.⁴

II. The *Schuette* Dissent Emphasized the Prevalence of Race Issues in Current Society

Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, dissented in *Schuette*. In a lengthy dissent that exceeded the pages of the plurality and concurring opinions combined, Justice Sotomayor argued that race remains a prevalent issue in American society. The dissent contended that the plurality and concurring Justices “fundamentally misunderstand the nature of the injustice worked” by the state’s enactment of Section 26 of the Michigan Constitution. Specifically, the dissent asserted that the amendment unconstitutionally permitted the majority to

⁴ Chief Justice Roberts also filed a concurring opinion that challenged the arguments raised by the dissenting Justices, as discussed in further detail below. The concurrence rejected the dissent’s premise that it is “‘out of touch with reality,’ to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt [racial discrimination], and—if so—that the preferences do more harm than good.” The Chief Justice stated that reasonable people could “disagree in good faith on this issue,” but that questioning the good faith of one side or the other of the debate does more harm than good in the long run.

“stack[] the political process against minority groups, forcing the minority alone to surmount unique obstacles in pursuit of its goals.” Further, according to the dissent, *Schuette*’s holding that the decision of whether to continue a policy of race-based preferences should be determined by the voters in the absence of any intended or actual injury to minorities was at odds with *Fisher*’s and *Grutter*’s recognition “that race-sensitive admissions policies are necessary to achieve a diverse student body when race-neutral alternatives have failed.”

In essence, the dissent maintained that the plurality’s decision ignored “the importance of diversity in institutions of higher education” and revealed the Supreme Court’s ignorance of the realities of race in our general society. The dissenting Justices pointed out that diversity in institutions of higher education “ensures that the next generation moves beyond the stereotypes, the assumptions, and the superficial perceptions that students coming from less-heterogeneous communities may harbor, consciously or not, about people who do not look like them.” Diversity in higher education, the dissent expounds, also expands an individual’s views and provides a pathway to leadership that is open to all individuals, regardless of race or ethnicity.

Exploring the Legal Landscape Post-*Schuette* and Its Significance for Employers

By permitting voters the choice of whether to prohibit race-based preferences through the democratic process, the *Schuette* holding has the potential to spur affirmative action opponents to campaign for the enactment of state constitutional amendments similar to Michigan’s Section 26, or similar to state laws in California, Florida, and Washington prohibiting race-conscious admissions decisions that were recognized by the Court in *Grutter*. Yet, only four states, Nebraska, Arizona, New Hampshire, and Oklahoma, have passed statutes or constitutional

amendments prohibiting the use of race-based preferences in the admissions process since Michigan first passed Section 26 in 2006.

Although the Court addressed Michigan's constitutional amendment only in the context of higher education admissions, *Schuette* may, however, have important implications for public contracting and public employment. The Court's implicit endorsement in *Schuette* of California's enactment of a similar constitutional amendment prohibiting the use of racial preferences in public contracting may serve as a foundation for that step in the future. Any such legislative efforts are thus likely to pass constitutional muster in the wake of *Schuette*.

Notably, in the context of diversity in the private sector, the Court has held that voluntary affirmative action plans do not violate federal law, namely, Title VII of the Civil Rights Act of 1964. For instance, in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208 (1979), the court held that an employer's affirmative action plan mirrored Title VII's purpose of "break[ing] down old patterns of racial segregation and hierarchy." Favorably citing *Weber* in support, the Court likewise held, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987), that an affirmative action plan that took an individual's sex into account did not violate Title VII. The Court affirmed its reasoning in *Johnson* in 2009 when it decided *Ricci v. DeStefano*, 557 U.S. 557 (2009). Accordingly, voluntary affirmative action plans in the private sector have been and continue to be accepted under federal law.

Updating *Fisher*: On the Road Back to the Supreme Court?

Last year, in *Fisher* the Court addressed a challenge to the use of race by The University of Texas at Austin's (the "University's") admissions process. Initially, the case involved two white women who sued the University after they were denied admission, claiming that the University's admissions policy discriminated against them. Abigail Fisher pursued the case to the Supreme Court. The Court did not rule on the constitutionality of the University's admissions plan. Instead, the Court remanded the case so that the courts below could apply the proper legal standard - strict scrutiny - to determine whether the University's admissions plan was narrowly tailored to achieve the compelling interest of diversity in higher education.

On November 13, 2013, the Fifth Circuit once again heard oral arguments in *Fisher*. On remand, the University asked that the case be remanded to the district court for further proceedings on the narrow-tailoring analysis called for by the Supreme Court and further factual development on threshold issues, while Ms. Fisher contended that the Fifth Circuit should apply the proper legal standard of strict scrutiny articulated by the Supreme Court to the existing summary judgment record. On July 15, 2014, a divided Fifth Circuit panel ruled on *Fisher* and, for the second time, upheld the University's race-conscious admissions program, even under the strict scrutiny and narrow-tailoring analysis mandated by the Supreme Court.

Although the Fifth Circuit's decision in *Fisher* is not binding on any other circuit, its handling of the case and the conclusions it reached about the constitutionality of the University's admissions plan may have ramifications on similar litigation in other jurisdictions. Moreover, the Fifth Circuit's ruling may set the stage for another journey to the Supreme Court. Should *Fisher* again be granted certiorari by the Court, the Court will once again have the opportunity—which was

not available in *Schuette* given the issue before the Court and the underlying facts giving rise to the case—to evaluate the constitutionality of race-conscious university admissions policies and to examine its holding in *Grutter*.

The Court, however, has twice affirmed *Grutter*'s holding that diversity is a compelling interest in higher education. Thus, even if the Court were to reverse the Fifth Circuit and ultimately hold that the University's plan violated the Equal Protection Clause on narrow-tailoring grounds, *Grutter*'s holding that diversity is a compelling state interest would be unaffected. And in all events, universities (and employers) would remain at liberty, under *Grutter*, to experiment with race-neutral policies or initiatives designed to achieve the compelling interest of diversity in institutions of higher education and in the workplace.

Conclusion

Schuette, although involving a prohibition on racial preferences in higher education admissions, did not involve any specific race-conscious admissions policies. *Schuette* therefore did not provide, as expressly noted by the Supreme Court, an opportunity to address the merits or constitutionality of such race-conscious policies.⁵ As it stands, affirmative action and diversity initiatives remain a viable means by which institutions of higher education may secure the compelling interest of diversity in their student bodies. Moreover, the Supreme Court has left the door open to the use of race-neutral alternatives as a means of securing diversity in those jurisdictions where race-based preferences have been banned.

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⁵ Indeed, by its own terms, *Schuette* concerns “whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.” The Court did not alter or call into question its precedents holding that student body diversity is a compelling state interest and that consideration of race in the admissions process is permitted, provided that the requisite showing is made.



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