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Affirmative Action at the Supreme Court Today

By
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Notre Dame Law School Federalist Society
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Thank you for that kind introduction.* It is always a pleasure for me to return to Notre Dame Law School, an institution that is very dear to me. As the father of two children who earned their law degrees from this school, and as the recipient of an honorary doctorate degree a few years ago, I regard Notre Dame Law School as an academic home away from home for me and my family. I am especially pleased to be addressing the Federalist Society, an organization that plays a vital role on this and other campuses across the nation in fostering respectful, reasoned debate about a range of legal topics.

Today, I would like to talk to you about Schuette v. Coalition to Defend Affirmative Action, a case the Supreme Court handed down last term. The Court in Schuette had to determine whether a voter-approved amendment to the constitution of the State of Michigan, which eliminated racial preferences in college admissions, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The case gained significant media attention because of its implications for affirmative action programs, but it was perhaps more important because of its strong vindication of the right of the states to decide questions where

* The views expressed herein are my own, and do not necessarily reflect the view of my colleagues or of the United States Court of Appeals. I wish to acknowledge, with thanks, the assistance of Jason Barnes, my legal extern, in preparing these remarks.

1 Schuette v. BAMN, 134 S. Ct. 1623 (2014).
the federal Constitution is silent. And while these two issues garnered the headlines, *Schuette* is important for a third reason as well: the decision exemplifies the importance of language to the judicial process. As we will see, the case involves the Justices parsing the text of the Constitution, engaging the prose of existing judicial precedent, and carefully crafting their own writing in an effort to shape the future of equal protection jurisprudence. Such an emphasis on language is part and parcel of the judicial role and of the practice of law generally.

*Schuette* originated in your neighbor state of Michigan, which has been the source of many recent affirmative action cases, but Michigan is not the only state to have played an important role in the history of affirmative action jurisprudence. California, located within the jurisdiction of my court, has also been at the forefront. Ten years before Michigan voters went to the polls, California voters amended their state constitution to prohibit racial preferences in university admissions by passing Proposition 209, which gave rise to a case called *Coalition for Economic Equity v. Wilson* (commonly referred to as the Prop. 209 case). As it happens, I wrote the opinion for a unanimous panel in that case upholding the

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3 *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 718 (9th Cir. 1997).
right of the people of California to enact Proposition 209. Accordingly, I will
begin my discussion of the constitutional question in Schuette—“whether, and in
what manner, voters in the States may choose to prohibit the consideration of racial
and other preferences in governmental decisions?”—with my own experience in
the Prop. 209 case in California.

I

On November 5, 1996, California voters approved Proposition 209 by a
margin of 54 to 46 percent, with nearly 9 million Californians casting ballots. In
passing Prop. 209, California voters amended their state constitution to read:
“[T]he 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.”
The day after the election, several groups filed a complaint in federal district court
alleging that Prop. 209 violated the Equal Protection Clause of the Fourteenth
Amendment. The trial judge agreed with the plaintiffs and issued an injunction.

4 Schuette, 134 S. Ct. at 1630.
5 4,736,180 people voted in favor of the initiative, and 3,986,196 voted against it.
Coal. for Econ. Equity, 122 F.3d at 718.
6 Cal. Const. art. 1§ 31(a).
7 The reasoning was twofold: First, Proposition 209 “elimination of ‘permissible
race- and gender conscious affirmative action programs would reduce
opportunities...for women and minorities.” Coal. for Econ. Equity v. Wilson, 110
California appealed that decision, and the case arrived at the United States Court of Appeals for the Ninth Circuit.

II

Before I move to the merits of the equal protection claims presented in the Prop. 209 case and Schuette, I should give a brief overview of the relevant doctrines implicated by these cases.

A

We begin, as always, with the text. The Equal Protection Clause of the Fourteenth Amendment reads: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” \(^8\) Of course, the requirement of “equal protection” does not mean the state may never draw distinctions among classes of people. In fact, most classifications only need a rational basis to be compatible with the Constitution.

However, there are a few classifications that demand heightened scrutiny. For instance, the Supreme Court has said, “[r]acial and ethnic distinctions of any sort are inherently suspect.” \(^9\) Therefore, any classification based on race must pass

\(^8\) U.S. Const. amend. XIV, § 1—Equal Protect.
the most exacting judicial scrutiny: it must serve a compelling governmental interest and be narrowly tailored to achieve that interest.

In a line of affirmative action cases, the Supreme Court has held that the Equal Protection Clause permits narrowly tailored race-based preferences that serve the compelling state interest of educational diversity. However, as the Court has made clear, the ultimate goal of the Equal Protection Clause is “to do away with all governmentally imposed discrimination on the basis of race.”

You may find yourself wondering how the California and Michigan constitutional amendments, prohibiting race-based or sex-based preferential treatment, could ever be deemed to violate equal protection. In fact, these amendments simply codify into their respective state constitutions the very purpose of the Equal Protection Clause. “As a matter of ‘conventional’ equal protection analysis,” you would be correct: “[T]here is simply no doubt that [these amendments] are constitutional.”

B

10 See, e.g., id. (Powell, J., concurring); Grutter, 539 U.S. 306; Fisher v. University of Texas, 133 S.Ct. 2411 (2013).
12 Coal. for Econ. Equity, 110 F.3d at 1439.
But there is a second strand of equal protection analysis, called the “political process” doctrine,\(^{13}\) which concerns itself with how the state structures its decision-making process on “racial issues.” To understand what the “political process” doctrine is and when it is triggered, it is helpful to examine the cases from which it arose. Before I begin, I want to emphasize that this forthcoming discussion reflects my understanding of these cases at the time of the Prop. 209 case—pre-\textit{Schuette.}\(^{1}\)

The Supreme Court first applied the “political process doctrine” in a case called \textit{Hunter v. Erickson}. There, the Court held that an amendment to the Charter of the City of Akron, Ohio, preventing the city council from enacting ordinances dealing with racial discrimination in housing, was unconstitutional. The Court’s rationale was twofold. First, the initiative dealt \textit{only} with racial housing matters, thus having the effect of treating racial housing matters \textit{differently} than other housing matters and other issues relating to race.\(^{14}\) Second, the initiative changed

\(^{13}\) Or, alternatively, the “Hunter Doctrine”—after \textit{Hunter v. Erickson}, 393 U.S. 385 (1969), the first Supreme Court case it was articulated in.

\(^{14}\) “Here…there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.” \textit{Hunter}, 393 U.S. at 389.
the decision-making process in such a way that it made it more difficult for those who ostensibly benefited from such a program to enact legislation.\footnote{The initiative “disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor….plac[ing] a special burden on racial minorities.” \textit{Id.} at 391.}

In a second case, called \textit{Washington v. Seattle School District No. 1}, the Court applied the “political process” doctrine to desegregative public school busing. In 1978, the Seattle School Board adopted a plan of mandatory school busing to improve the racial integration of its schools. Opponents then passed a statewide initiative to stop such busing. The school board then sued, alleging an equal protection violation. The Court held that an initiative precluding such busing was unconstitutional. It did so for two reasons. First, desegregative busing “inure[d] primarily to the benefit of the minority, and [was] designed for that purpose.”\footnote{\textit{Washington v. Seattle Sch. Dist. No. 1}, 458 U.S. 457, 472 (1982).} Second, the initiative “use[d] the racial nature of an issue to define the governmental decisionmaking structure,”\footnote{\textit{Id.} at 484.} thereby imposing “direct and undeniable burdens on minority interests.”\footnote{\textit{Id.} at 470.}
As these cases demonstrate, prior to *Schuette*, the “political-process” doctrine stood for the principle that state action which structures political institutions or allocates governmental power “nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process,” violates the Equal Protection Clause.\(^{19}\)

III

And so we arrive at the Prop. 209 case, *Coalition for Economic Equity v. Wilson*. The constitutionality of Proposition 209 turned on whether it could be distinguished from the initiatives in *Seattle* and *Hunter*. My opinion for the Ninth Circuit held that Prop. 209 was, indeed, distinguishable on two grounds.

A

First, in order to violate the “political process doctrine,” it must be shown that the state “reallocate[d] [decision-making] authority in a discriminatory manner.”\(^{20}\) In *Crawford v. Board of Education*, the Supreme Court recognized an explicit distinction “between state action that discriminates on the basis of race and

\(^{19}\) *Id.* at 470.

\(^{20}\) *Coal. for Econ. Equity*, 122 F.3d at 707.
state action that addresses, in neutral fashion, race-related matters.”\textsuperscript{21} Whereas in \textit{Hunter} and \textit{Seattle}, the state had erected barriers to enacting policies to remedy racial discrimination in discrete areas like housing and busing, Prop. 209 prohibited “\textit{all} [State] instruments from discriminating against or granting preferential treatment to \textit{anyone} on the basis of race.”\textsuperscript{22} Such measure, in other words, repealed all race-preference policies and restored racial neutrality in precisely the way \textit{Crawford} said was permissible.

B

Second, as our cases have consistently held, “equal protection” is an individual guarantee.\textsuperscript{23} As I put it in our opinion, “[t]he ‘political structure’ cases do not create some paradoxical exception to this [element] of any equal protection violation.”\textsuperscript{24} In \textit{Hunter} and \textit{Seattle}, “the lawmaking procedure made it more difficult” for [certain individuals] to obtain protection against \textit{unequal} treatment.”\textsuperscript{25} In contrast, Prop. 209 made it more difficult for anyone to receive \textit{preferential}
treatment. “Impediments to preferential treatment do not deny equal protection,” we said.  

C

Thus, as Prop. 209 reallocated decision-making authority in a neutral fashion and did not burden an individual’s right to equal treatment, our opinion for the court held that it did not violate the Equal Protection Clause.  

As I said at the time, we must not lose “sight of the forest for the trees” and remember that the Fourteenth Amendment “does not require what it barely permits.”

IV

Now let’s return to Schuette, the Michigan case that was before the Court this term. As I mentioned, Michigan voters, by passing Proposal 2 by a margin of

26 Id. at 708.

27 An alternative argument dealt with the fact that the benefitted class, women and minorities, taken together constitutes a majority of the electorate. “When the electorate votes up or down on [Prop. 209], it is hard to conceive how members of the majority have been denied the vote.” Coal. for Econ. Equity, 122 F.3d at 704. Moreover, even Hunter itself opines that “the majority needs no protection from discrimination,” 393 U.S. at 560, “in spite of our long line of cases that point to equal protection being an individual right.” Coal. for Econ. Equity, 122 F.3d at 704–05. Additionally, it is important to note that the panel accepted, “without questioning, the district court’s finding that proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender based preferential treatment from local entities.” Id. at 705.

28 Id. at 709
58 to 42 percent, amended their constitution to prohibit all government entities from discriminating on various grounds, including race. A district court upheld the constitutionality of Proposal 2. A three-judge panel of the Sixth Circuit reversed in a 2-1 decision, but then the Sixth Circuit agreed to rehear the case en banc, meaning that all fifteen eligible judges reheard the case.

The Sixth Circuit’s en banc panel, by a vote of 8-7, reversed the district court, as had the three judge panel, holding that Michigan’s constitutional amendment violated the Equal Protection Clause under the “political-process” doctrine. First, it said, the amendment changed the decision-making authority. Second, it dealt only with racial preferences. Lastly, it “lodged [the decision-making authority] at the most remote level of Michigan’s government, the state constitution,” making it more difficult for supporters of these affirmative action programs to have their policy preference enacted.

The Sixth Circuit’s holding directly contradicted our opinion in the Prop. 209 case, leading to a circuit split. The Supreme Court issued a writ of certiorari to

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30 Judges Cole, Martin, Daughtrey, Moore, Clay, White, Stranch, and Donald voted in the majority. Then-Chief Judge Batchelder and Judges Boggs, Gibbons, Rogers, Sutton, Cook, and Griffin all dissented.

31 *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.* at 484.
resolve this disagreement among the circuits and to clarify equal protection jurisprudence.

V

Well, the Supreme Court, by a vote of 6-2, reversed the Sixth Circuit, explicitly vindicating our opinion in the Prop. 209 case.\textsuperscript{32} Despite this widespread agreement on the result, however, the Court displayed anything but consensus in its reasoning: there were five opinions written in the case and not one was able to procure a majority.

Justice Kennedy wrote the lead opinion—referred to as the plurality opinion—and was joined by Chief Justice Roberts and Justice Alito. Justice Sotomayor wrote the lone dissent, which Justice Ginsburg joined. Writing separately, Justice Scalia and Justice Breyer each authored opinions concurring only in judgment. Opinions concurring only in judgment usually indicate sharp disagreement among the Justices in their reasoning. This case was no exception.

For the sake of brevity, I will confine my discussion to the opinions that comprise the judgment of the court. I will focus, in particular, on the plurality opinion and Justice Scalia’s concurring opinion because I believe understanding the agreements and disagreements between those two opinions will be most

\textsuperscript{32} Justice Kagan recused herself.
edifying; however, I will be happy to answer any questions regarding the other opinions during the Q&A.

A

“The battleground for [Schuette],” just as it had been for us in the Prop. 209 case, “is the so-called political process doctrine.” The Court first had to determine if the political-process doctrine applied before analyzing its implications in Schuette.

Justice Breyer, writing only for himself, concluded that the political process doctrine does not apply because the restructuring in Schuette was not, in fact, a political restructuring—it “took decisionmaking authority away from [an administrative body] and placed it in the hands of [a political body].”

In both the plurality opinion and Justice Scalia’s concurring opinion, the application of the political-process cases is not so simple. In entertaining the possibility of extending the political-process doctrine to Schuette, both opinions raise a number of constitutional issues.

1

In their respective opinions, both Justice Scalia and Justice Kennedy seriously question whether some of the language in Seattle, one of the political

33 Schuette, 134 S. Ct. at 1640 (Scalia, J., concurring in judgment).
34 Id. at 1650 (Breyer, J., concurring in judgment).
process cases, is compatible with the Court’s traditional equal protection jurisprudence.

The specific language that poses problems for Justices Scalia and Kennedy arises from when the Seattle Court, in applying the political process doctrine, determined that the initiative: (1) “inure[d] primarily to the benefit of the minority”;35 (2) focused on the “racial nature of an issue”;36 and (3) “burden[ed] minority interests.”37

Both Justice Kennedy’s opinion for a plurality of the Court and Justice Scalia’s concurring opinion emphasize that these determinations by the Court, if required by Seattle, conflict with our settled equal protection jurisprudence. Expressing his agreement with Justice Kennedy, Justice Scalia writes:

No good can come of such random judicial musing…. For one thing, it involves judges in the dirty business of dividing the nation into racial blocks. [Moreover,] the exercise promotes the noxious fiction that, knowing only a person’s color or ethnicity, we can be sure that he has a predetermined set of policy interests.38

But the language of Seattle appears to urge, if not to require, the Court to do just that. While the internal coherence of the Court’s equal protection jurisprudence is

35 Seattle Sch. Dist. No. 1, 458 U.S. at 472.
36 Id. at 470.
37 Id. at 484.
38 Schuette, 134 S. Ct. at 1643 (Scalia, J., concurring in judgment) (internal quotation marks omitted).
important to both the plurality opinion and concurring opinion, it is not the only concern for these two Justices.

2

Extending the political process doctrine to voter-enacted amendments to state constitutions raises additional constitutional problems with regard to state sovereignty and our democratic process.

Expressing concern for state sovereignty, Justice Scalia writes: “[The political process doctrine], [taken to the limits of its logic… is the gaping exception that nearly swallows the rule of structural state sovereignty…. The mere existence of a subordinate’s discretion over the matter would work as a kind of reverse pre-emption.”

In the plurality opinion, Justice Kennedy time and again reiterates his concern for the democratic process. In a most telling passage, Justice Kennedy writes:

Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters’ reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

39 Id. at 1646 (Scalia, J., concurring in judgment).
40 Id. at 1637.
But Justice Kennedy does not restrict himself to the collective democratic process, for it is his belief in the individual voter that is the basis for his strong deference to the democratic process. As he states in his opinion, “It is demeaning … to presume that … voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.” Justice Kennedy, in declining to extend the political-process doctrine to Schuette, preserves the power of the people to decide this issue for themselves.

Therefore, Justice Kennedy and Justice Scalia agree that extending the language of Seattle to the question before the Court in Schuette could present serious constitutional problems: (1) it would contravene traditional equal protection jurisprudence; (2) it would threaten state sovereignty; and (3) it would restrict the democratic process.

B

With these serious constitutional concerns established, Justices Scalia and Kennedy are faced with the question of how to proceed with Hunter and Seattle. There are two traditional avenues to deal with an objectionable precedent. The Court can either distinguish the current case from the precedent, or, of course, it

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41 Id. (emphasis added).
can overrule the precedent. The choice between the aforementioned avenues is the fundamental disagreement between Justices Scalia and Kennedy.

In the plurality opinion, Justice Kennedy chooses to distinguish *Seattle* from *Schuette*. First, Justice Kennedy addresses the problematic language in *Seattle*:

> [The] expansive language [in *Seattle*] does not provide a proper guide for decisions and should not be deemed authoritative or controlling…. *Seattle* is best understood as a case in which the state action … had the serious risk, if not purpose, of causing specific injuries on account of race.\(^{42}\)

With this understanding of *Seattle*, Justice Kennedy distinguishes the political-process cases from the issue presented in *Schuette*:

Here there was no infliction of a specific injury of the kind at issue in [the political-process cases]. Here there is no precedent for extending [such] cases to restrict the right of Michigan voters to determine that race-based preferences granted by Michigan governmental entities should be ended.\(^{43}\)

Having distinguished *Schuette* from the political process cases, Justice Kennedy concludes—“There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside *Michigan laws* that commit this policy determination to the *voters.*”\(^{44}\)

By contrast, Justice Scalia, in his concurring opinion, would have overruled the political-process cases. Expressing vehemently his frustration with the

\(^{42}\) *Id.* at 1634, 1633.

\(^{43}\) *Id.* at 1636.

\(^{44}\) *Id.* at 1638 (emphasis added).
plurality’s interpretation, which he views as a dereliction of the Court’s duty,

Justice Scalia writes:

Though [the plurality], too, disavows the political-process-doctrine basis on which Hunter and Seattle were decided . . . it does not take the next step of overruling those cases. Rather, it reinterprets them beyond recognition…. I do not agree with [the plurality’s] reinterpretation of Seattle and Hunter, which makes them stand . . . for [a] cloudy and doctrinally anomalous proposition.\(^{45}\)

But as this conclusion is objectionable to Justice Scalia, for the reasons I have mentioned, among others, he would overrule the political process doctrine outright because it is, in his words: “Patently atextual, unadministrable, and contrary to our traditional equal-protection jurisprudence.”\(^{46}\) Indicating his alternative course of action, Justice Scalia continues:

I would instead reaffirm that the ordinary principles of our law [and] of our democratic heritage require plaintiffs alleging equal protection violations stemming from facially neutral acts to prove intent and causation.\(^{47}\)

Under such framework, this case is easy. Recalling my line from the Prop. 209 case, Justice Scalia writes: “[A] law that prohibits the State from classifying individuals by race . . . a fortiori does not classify individuals by race.”\(^{48}\)

\(^{45}\) Id. at 1641-1642, 1640.
\(^{46}\) Id. at 1643 (Scalia, J., concurring in judgment).
\(^{47}\) Id. at 1640.
\(^{48}\) Id. at 1648 (quoting Coal. for Econ. Equity, 122 F. 3d at 702 (O’Scannlain, J.)).
Michigan’s constitutional amendment, therefore, is facially neutral and does not violate equal protection.

C

So where does Schuette leave us? The judgment is clear: State constitutional amendments that bar racial (and presumably other fixed) preferences in college admissions do not violate equal protection. But the principles and reasoning that dictate that result are far from clear. The plurality declined to overrule the political-process cases, so they remain good law. But is the political process doctrine still efficacious in practice, or, as Justice Sotomayor warns, has the plurality opinion’s interpretation of Hunter and Seattle effectively “cast aside the political-process doctrine sub silentio?”

As a jurist, I always regret such a fractured result from the Court. For it is the rationale offered in the Court’s definitive opinion that will guide all federal judges, such as myself, when we decide future cases. Indeed, as a judge on the U.S. Court of Appeals for the Ninth Circuit, I may, in fact, be tasked one day with solving these very riddles. Though you can rest assured that, as an appellate judge, I will do my duty to adhere to this precedent faithfully, I will withhold my personal reflections on these questions until such a day.

49 Id. at 1664 (Sotomayor, J., dissenting).
In our exploration of Schuette, we truly see the pivotal role of language in our judicial process. Although Schuette is by no means unique in this regard, it is exceptional in scope. At the outset, we confronted the specific language of the Fourteenth Amendment in order to understand what it permits, or rather, in this case, what it requires. But our venture into the textual analysis did not stop there: we then explored how the Justices parsed the language of our prior opinions—Seattle and Hunter—separating reasoning central to the holdings from superfluous dicta. Finally, in crafting an opinion for the Court, the Justices must balance a desire to procure a majority with the knowledge that it is the specific reasoning articulated in the Court’s opinion that will steer federal judges in future cases. Regardless of which method of legal interpretation you subscribe to—from Originalism to Purposivism—textual interpretation is the central mechanism that motivates our jurisprudence.

Thank you! I will be happy now to answer any questions you may have.