The Current Status of Affirmative Action in Admissions

The United States Supreme Court has issued its long-awaited decision addressing, once again, the issue of affirmative action in higher education admissions. *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary (BAMN) et al*. 2014 WL 1577512 (April 22, 2014). As is true of so many important rulings, the *Schuette* decision must first be approached in the context of the Court's previous affirmative action rulings.

In 2003, the Supreme Court decided two cases involving race preferences in higher education in Michigan. In the first case, the Court was presented with an admissions policy for the law school at the University of Michigan. The policy allowed consideration of an applicant's race in a limited way. Race was one several factors that could be taken into account in an individualized assessment of the contribution an applicant might make to diversity in the student body. The Court upheld this use of race against a challenge that it offended the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. The Court applied the "strict scrutiny" analysis applicable to Equal Protection challenges involving racial classifications and

found that the school had the requisite "compelling interest" in its use of race because of the broad "educational benefits that flowed from a diverse student body." *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325 (2003).

On the same day that it decided *Grutter*, the Court also decided a companion case involving undergraduate admissions criteria at the University of Michigan. Here, race played a more important role in admissions, in that it resulted in the assignment on the basis of race of a predetermined number of "points" that significantly advanced a candidate toward acceptance. The Court again acknowledged that the benefits to students of being a part of a diverse freshman class constituted a compelling state interest. However, it found the plan constitutionally deficient when reviewed under the second component of the "strict scrutiny" standard, namely, that the policy in question must be "narrowly tailored" to serve the identified compelling interest. The automatic use of "racial" points and the substantial impact of such a system on admissions decisions meant that race preference plan was too prominent to be considered "narrowly tailored." Stated differently, this system was overbroad and did not use the least restrictive means to achieve its permissible objectives. *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411 (2003).

After the *Gratz* and *Grutter* decisions, the University of Michigan modified its admission policies to bring them more in line with the law school admission criteria upheld by the Supreme Court. Then, in 2006, the voters of Michigan approved, by a 58 percent in favor and 42 percent opposed vote, an amendment (Art. I, § 26) to the Michigan state constitution. The relevant part of § 26 states as follows:

> The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or 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.

Before taking up *Schuette*, an additional case should be mentioned. Just last year, the Supreme Court added to the body of jurisprudence regarding affirmative action and admissions in a case from Texas. *Fisher v. University of Texas at Austin*, 570 U.S. 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013). In *Fisher*, the Court reaffirmed and amplified the "narrowly tailored" part of the constitutional strict scrutiny analysis. It emphasized that a university must demonstrate the necessity of using race or ethnicity in admissions to achieve a heterogeneous student population and show that other, race neutral alternatives were considered and found insufficient. It further intimated that some credible evidence would need to be offered by a university in support of its claim that it carried out this process of evaluating alternatives.

Back in Michigan, the *Schuette* plaintiffs filed suit claiming that the Art. I, § 26 violated the Equal Protection clause. The plaintiffs' argument depended initially upon what is called the "political-process doctrine." This is a complex doctrine that deals with the issue of when it is permissible for the political process to be utilized to adopt initiatives inflicting specific injury upon minorities. While this doctrine was examined in great detail in *Schuette,* it is sufficient to simply report here that the Supreme Court did not view the "political-process doctrine" as being applicable to the *Schuette* case. This case was understood by the Court as involving the broader question of whether voters may decide to continue or to end race-conscious preferences previously granted by institutions in the state. The Court modified and limited, but did not overrule, the political-process doctrine" in *Schuette.*

Of perhaps more immediate concern to higher education, the Supreme Court made it clear that the rationale articulated in *Grutter, Gratz, and Fisher* was still intact. A public university may continue to use race as a limited, non-dispositive admission criteria (assuming it can meet the more stringent obligations established recently for the "narrowly tailored" determination) in the interest of achieving the benefits of a diverse student body. Indeed, the Court said explicitly that *Schuette* was "not about the constitutionality, or the merits, of race-conscious admissions policies in higher education." *Id*. at 8.

The Court also made it clear, however, that a state is not obligated to use race as an admission criteria if it chooses not to do so. The critical issue presented in *Schuette* is who will make this decision on behalf of each state. The *Schuette* plaintiffs contended that it is unconstitutional to allow the voters of the state to make this decision; the decision must be made by the courts. The Supreme Court, however, firmly rejected this argument. Its perspective on this matter is worth quoting at length:

> The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible,

> functioning democracy. One of those premises is that a democracy has the capacity - and the duty - to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rationale deliberation to rise above those flaws and injustices. That process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues. It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage. An informed public can, and must, rise above this. The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine ... This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.

Schuette at 16.

A number of states, the Court noted, prohibit the use of race as an admission criterion for its public universities. These states include California, Florida, and Washington (but not Alabama). The Court observed further that the states barring consideration of race in admissions are currently engaged in a process of experimenting with a wide variety of alternative approaches aimed at obtaining the beneficial aspects of a diverse student body. It encouraged this experimentation by stating that "universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." *Schuette* at 1.

The composition of the Supreme Court's 6-2 majority in *Schuette* is interesting. The majority opinion was written by Justice Kennedy. Chief Justice Roberts and Justice Alito joined in the opinion, though the Chief Justice also wrote a separate concurring opinion. Justices Scalia and Thomas joined the majority opinion, but Justice Scalia wrote a concurring opinion in which Justice Thomas joined. Justices Scalia and Thomas would have gone further and completely overruled the "political-process doctrine." Interestingly, Justice Breyer, normally a "liberal" Justice, also joined the majority decision with a concurring opinion. Justices Sotomajor and Ginsburg dissented. Justice Kagan took no part in the decision.

For an institution of higher education formulating or continuing admissions policies seeking to allow race to constitute a non-determinative factor in the interest of promoting diversity among it students, *Schuette* did not break new ground. *Gratz*, *Grutter*, and *Fisher* remain governing precedent, at least in states lacking a constitutional provision such as was adopted in Michigan.