Civil Rights

The Parade of Horribles Lives: *Schuette v. Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary*

*By Gail Heriot**

Note from the Editor:

This article is about the U.S. Supreme Court case *Schuette v. Coalition to Defend Affirmative Action*. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about *Schuette*, affirmative action, and other civil rights issues. To this end, we offer links below to different perspectives on the case, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Brief of Respondents (BAMN), Schuette v. Coalition to Defend Affirmative Action, No. 12-682 (argued Oct. 15, 2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-682_resp.authcheckdam.pdf
- *Mission Statement*, Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN): http://www.bamn.com/about-bamn
- Schuette v. Coalition to Defend Affirmative Action *Fact Sheet*, American Civil Liberties Union: https://www.aclu.org/sites/default/files/assets/schuette_fact_sheet_final_2_2.pdf
- Girardeau Spann, *Schuette symposium: Racial supremacy*, SCOTUSblog (Sep. 11, 2013, 1:29 PM): http://www.scotusblog.com/2013/09/schuette-symposium-racial-supremacy/

If you are tired of Court watchers who like to hedge their bets, you might appreciate this: I predict a reversal in *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary*. It seems unlikely that the Court granted certiorari in order to congratulate the Sixth Circuit on its keen legal insight. But I can't help wondering why Supreme Court intervention has been necessary. How did the Sixth Circuit, sitting *en banc*, arrive at the profoundly counter-intuitive conclusion it did? And what does it say about our legal culture that the 8-7 vote broke down precisely on party lines?[1]

The case concerns the Michigan Civil Rights Initiative ("MCRI")—a voter initiative passed in 2006 by a wide margin. Its core provision prohibits the state 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." In other words, it enshrines in the Michigan Constitution the principle that the state should not engage in (among other things) race discrimination. For exactly that reason, the Sixth Circuit found it unconstitutional.

Let me just repeat that in case you weren't paying attention: By a vote of 8 to 7, the Sixth Circuit held that laws that prohibit race discrimination are unconstitutional. Do you understand it so far? I hope not, because if that sounds ordinary and unobjectionable, I would be deeply troubled.

MCRI was passed in the wake of the Supreme Court's 2003 decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003). In that case, the Court decided that the Constitution did not forbid the University of Michigan Law School from granting African Americans, Hispanics and American Indians very large admissions preferences. Michigan voters decided that if the Constitution did not forbid race-preferential admissions, they would. And they did.

There is nothing remarkable about that. The fact that the Constitution does not forbid something does not mean it is required. The Constitution does not forbid state universities from admitting only students who can carve the federal tax code on the head of a pin. But voters in direct democracy states can amend the state constitution to impose a more sensible policy if they so choose.

One of MCRI's more conspicuous opponents was the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (self-described as "BAMN")—an organization whose very name bespeaks its extremism. BAMN is a Detroit-based offshoot of the Revolutionary Workers League, and is, to put it as blandly as possible, controversial.

Just one among dozens of examples of its willingness to use "any means necessary" was its attempt to intimidate the Michigan Board of Canvassers into refusing to certify MCRI for the ballot. BAMN brought in busloads of protesters who shouted down officials, jumped on chairs, and stomped their feet, flipping over a table in the process. As the director of elections for the Michigan Secretary of State put it, "Never before have I seen such absolutely incredible and unprofessional behavior from lawyers urging this disruption."[2]

BAMN's co-chair and attorney saw things differently:

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"We cannot allow our opponents to determine what our tactics should be," she said. "Our tactics win. That's the bottom line." They did not, however, win before the Board of Canvassers. Board members voted to certify the initiative for the ballot as the law required them to do. The following November, the voters approved it 58% to 42%.

The day after the election BAMN led a group of activists, including numerous locals of the American Federation of State, County and Municipal Employees, into a new theater of action—the federal courts. It filed a lawsuit that few thought had much of a chance. Its core argument, based on what has been called the "political re-structuring" line of Supreme Court case (see *infra*) had already been rejected by both the Ninth Circuit and the California Supreme Court in connection with the California Civil Rights Initiative (on which MCRI was modeled) a decade earlier.[3] Judge O'Scannlain put the point well in *Coalition for Economic Equity v. Wilson*: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."[4]

A second lawsuit—filed by a group of students, faculty and prospective students—was later consolidated with the BAMN action. A motley crew of anti-MCRI litigants are now bound together in a cause that fittingly bears BAMN's name.

Anyone who argues, as the respondents do, that the Constitution's Equal Protection Clause forbids voters from prohibiting the state from engaging in discrimination based on race faces an uphill battle. The Court has made it clear that the "central purpose" of the Equal Protection Clause "'is the prevention of official conduct discriminating on the basis of race.'"[5]

Indeed, at least four members of this Court over the past several decades—Justices Douglas, Stewart, Scalia, and Thomas—have taken the position that the Equal Protection Clause is a flat ban on race discrimination.[6] For the Sixth Circuit to be right, these justices would have to be not just wrong, but very wrong. The Constitution would have to protect specially the very thing that they believed it prohibited.

Here is their argument's core: By adopting a policy against race discrimination in the state constitution, Michigan is discriminating against racial minorities who might wish to lobby for preferential treatment. Other interest groups—veterans, public employees, fisherman, etc.—can lobby for special treatment without restraint. But a racial group can do so effectively only if it first successfully lobbies to repeal the state constitutional provision. Such a "political restructuring" is unconstitutional—or so the argument runs.

The argument fundamentally misconstrues the issue. MCRI doesn't discriminate against racial minorities. It discriminates against *race discrimination*—the way the strict scrutiny doctrine discriminates against race discrimination. Members of racial minorities are as free as anyone (including members of racial majorities) to lobby for preferential treatment. They just can't lobby for it based on their race, sex, etc. Nor can they be disadvantaged on those bases. MCRI is a two-way street.[7]

Moreover, all laws work a political restructuring, no matter what level they are promulgated. Consider the Equal Credit Opportunity Act of 1974.[8] Under its provisions, it is illegal to discriminate by race in the provision of credit. When Congress passed that law, it effectively pre-empted the Michigan Legislature from passing legislation that might require banks to give minority members credit at preferential rates. If minority members had wanted such a statute, they would have been required to first lobby to repeal the federal legislation that mandates equality.

That would not have ended the matter. In turn, if the Michigan Legislature had enacted a mandatory one-point preferential rate, it would have pre-empted a state agency from adopting regulations requiring lenders to give under-represented minorities a two-point preference. Again, repeal would be necessary to secure the greater advantage. In the end, one would be hard-pressed to come up with a single civil rights enactment that would not work the kind of political restructuring that the Sixth Circuit held is forbidden.

So what possibly could have led that court to hold MCRI unconstitutional? There is indeed a history here—two cases in which the Supreme Court appeared to buy an argument that laws that work a "political re-structuring" may be unconstitutional.

The more recent was *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), a case about a voter initiative that prohibited school districts from assigning a student to a school other than the closest (or next closest) to his home. The list of exceptions permitted by the initiative conspicuously did not include racial integration.

The Court's 5-4 decision holding the initiative unconstitutional is not a model of clarity. But one thing that all nine Court members agreed upon was that the argument adopted in this case should have been rejected.

In his dissent, Justice Powell expressed fear that the majority opinion's logic could lead to absurd results:

> "[I]f the admissions committee of a state law school developed an affirmative-action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that higher authority traditionally dictated admissions policies . . . . If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the equal protection components of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas."[9]

The majority denied Powell's assertion and made it clear their intent was not to cover laws like MCRI: "The statements evidence a basic misunderstanding of our decision . . . . It is evident . . . that the horribles paraded by the dissent . . . are entirely unrelated to this case."[10]

Note Powell's hypothetical: It is precisely what happened in this case. The "affirmative action plan" of a "state law school" "came under fire." When the Court declined to take action in *Grutter*, a "higher authority"—the people of Michigan—intervened. Note also that the majority rejected Powell's concerns as a "parad[e]" of "horribles" that were "entirely unrelated to this case." No one would claim that the limiting principle behind *Seattle School District* is easy to discern. But the one thing that all Justices agreed on is that it would be absurd to outlaw measures like MCRI.

Interestingly, a very similar case, *Crawford v. Board of Education of Los Angeles*[11] came out the other way. In *Crawford*, the California Supreme Court had held that the state constitution prohibited "de facto" as well as "de jure" discrimination and affirmed a lower court's desegregation order on that basis. California voters subsequently passed an initiative prohibiting state courts from ordering school desegregation in the absence of a violation of the U.S. Constitution as interpreted by the federal courts. In an opinion by Justice Powell, the Supreme Court upheld the initiative. It stated:

> We agree with the California Court of Appeal in rejecting the contention that, once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court.[12]

Seattle School District was based on *Hunter v. Erickson*, 393 U.S. 385 (1969), and the "political re-structuring" argument therein. But the situation in *Hunter* was the opposite of this case. It concerned an amendment to the City of Akron's charter repealing a fair housing ordinance and making re-promulgation difficult. It thus thwarted Akron's efforts to discourage racial discrimination by private citizens, thereby lending aid and encouragement to those private discriminators. Does the Sixth Circuit majority believe that a statute that forbids discrimination is the equivalent of one that encourages it? Shouldn't the fact that applying *Hunter*'s logic to MCRI would make all federal and state anti-discrimination laws unconstitutional be enough to make them stop, take a deep breath and re-think things?

Alas, Powell's parade of horribles is alive and well and marching up the Supreme Court's steps. It will likely be a disappointing trip for them. Still, I can't say I feel good about the exercise. I keep wondering where the parade will turn up next.

Endnotes

1 Judges Martin, Daughtrey, Moore, Clay , White, Stranch and Donald joined Judge Cole's majority opinion in full. All are appointees of Democratic Presidents, except Judge White. Judge White was originally nominated by President Clinton in 1997, but her nomination was not acted upon, chiefly as a result of the objections of Senator Spencer Abraham (R-Mich.). In 2008, she was re-nominated by President George W. Bush at the insistence of Senator Carl Levin (D-Mich.), who was then her cousin-in-law, as part of a deal to break the nomination logjam in the then-Democratic-controlled Senate. I have therefore classed her as a Democratic appointee. Judges Boggs, Batchelder, Gibbons, Rogers, Sutton, Cook and Griffin, all appointees of Republican Presidents, dissented.

2 Ben LeFebvre, *Wham BAMN: Group Stirs Controversy in Fight for Civil Rights*, Metro Times, Jan. 11, 2006. See Courtney Moulds, *Occupation Protests University Admissions Policies for Minority Students*, The Daily Californian, May 11, 2012 (describing BAMN's occupation of Berkeley's Office of Admissions.).

3 See *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997); *Coral Construction Inc. v. City of San Francisco*, 50 Cal. 4th 315, 113 Cal. Rptr. 3d 279, 235 P.3d 947 (2010). In addition, the argument was rejected by a Sixth Circuit panel when this case came up at the preliminary injunction stage. See *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

4 122 F.3d at 709.

5 *Washington v. Seattle School District No 1.* , 458 U.S. 457 (1982) (quoting *Washington v. Davis,* 426 U.S. 229 (1976)).

6 *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 522 (1980) (Stewart, J., dissenting); *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting).

7 The Sixth Circuit apparently believes that racial minority members are already protected against discrimination in college and university admissions and hence MCRI has only downside potential for them. As Asian American applicants know only too well, this is untrue. See Thomas Espenshade & Alexandria Walton Radford, No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission And Campus Life (2009) (noting large disparities between the academic credentials of Asian Americans who are offered admissions to elite school and other successful applicants). Indeed, diversity admissions policies have potential downsides for all groups, including African Americans and Hispanics. Under *Grutter v. Bollinger*, 539 U.S. 306 (2003), a college or university may discriminate on the basis of race in order to reap whatever educational benefits racial diversity may have for its students. An institution that is largely African American (as historically black colleges and universities frequently are) is thus presumably free to discriminate in *favor* of whites and *against* African Americans. MCRI on the other hand would prevent that. Interestingly, in the area of sex, non-traditional affirmative action preferences for men have become common. See Gail Heriot & Alison Somin, *Affirmative Action for Men?: Strange Silences and Strange Bedfellows in the Public Debate over Discrimination Against Women in College Admissions*, 12 Engage 14 (2011). MCRI would protect against that too—as well as against other shifts in political and constitutional fashion.

8 15 U.S.C. § 1691.

9 *Seattle School District*, 458 U.S. at 499 n.14 (Powell, J., dissenting, joined by three other Justices).

10 *Id.* at 840 n.23.

11 458 U.S. 527 (1982).

12 *Id.* at 535.