An Easy Decision on Racial Preferences

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Date: April 23, 2014

Today the Supreme Court finally ruled on *Schuette v. Coalition to Defend Affirmative Action*, in which Cato filed a brief last summer. This is the case involving a challenge to a voter-approved Michigan state constitutional amendment that bans racial discrimination (including racial preferences) in higher education. The U.S. Court of Appeals for the Sixth Circuit had somehow manage to conclude that such a law violates the Fourteenth Amendment's Equal Protection Clause, which … requires that state governments treat everyone equally, regardless of race. The ruling was fractured – six justices voted to reverse the lower court, but for three separate reasons, plus a separate concurrence from Chief Justice John Roberts to respond to the two-justice dissent – but ultimately achieved the correct result: Michigan's Proposal 2 stands.

But really *Schuette* is a much easier case than the above description might indicate. Indeed, it's no surprise that six justices found that a state constitutional provision prohibiting racial discrimination complies with the federal constitutional provision that prohibits state racial discrimination. To hold otherwise would be to torture the English language to the point where constitutional text is absolutely meaningless. The only surprise – or, rather, the lamentable pity – is that Justices Sonia Sotomayor and Ruth Bader Ginsburg somehow agreed with the lower court's confused determination that the Constitution requires what it barely tolerates (racial preferences in university admissions).

To quote the conclusion of Justice Antonin Scalia's concurring opinion, for himself and Justice Clarence Thomas:

As Justice Harlan observed nearly a century ago, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896) (dissenting opinion). The people of Michigan wish the same for their governing charter. It would be shameful for us to stand in their way.

This case was so easy precisely because it didn't involve the fraught question of whether states can pursue race-conscious measures in order to achieve (some mythical) diversity. Instead, it was about the democratic process and whether voters can rein in the powers of their state government. The answer to that question, like the answer to the question of whether the Equal Protection Clause mandates racial preferences, is self-evident.

Here's the full decision, which begins with a plurality opinion by Justice Anthony Kennedy, for himself, the chief justice, and Justice Samuel Alito.

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