

Passages Friendly

Supporting Equal Access to Law in Florida

November/December
2015

A Publication of The Friends of the

Rupert J. Smith Law Library of St. Lucie County Florida



November/December 2015

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Published since September 2011 for the purpose of promoting intelligent education of the Bar and general public about law as a basis for growth of justice and the common welfare, while combating the indifference which might hinder such growth.

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On The Cover
“Ornaments” Pastel on sanded paper
By Paul Nucci

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On Behalf of the Publisher

By James T. Walker
President, Friends of the
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Fla. Stat. §921.002(1)(b): “The primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system, but is subordinate to the goal of punishment.”

“Prison Guard: ‘The clothes got laundry numbers on them. You remember your number and always wear the ones that has your number. Any man forgets his number spends a night in the box.

These here spoons you keep with you. Any man loses his spoon spends a night in the box.

There’s no playing grab-ass or fighting in the building. You got a grudge against another man, you fight him Saturday afternoon. Any man playing grab-ass or fighting in the building spends a night in the box.

First bell’s at five minutes of eight when you will get in your bunk. Last bell is at eight. Any man not in his bunk at eight spends the night in the box.

There is no smoking in the prone position in bed. To smoke you must have both legs over the side of your bunk. Any man caught smoking in the prone position in bed... spends a night in the box.

You get two sheets. Every Saturday, you put the clean sheet on the top... the top sheet on the bottom... and the bottom sheet you turn in to the laundry boy. Any man turns in the wrong sheet spends a night in the box.

No one’ll sit in the bunks with dirty pants on. Any man with dirty pants on sitting on the bunks spends a night in the box.

Any man don’t bring back his empty pop bottle spends a night in the box.

Any man loud talking spends a night in the box.

You got questions, you come to me.

I’m Carr, the floor walker. I’m responsible for order in here. Any man don’t keep order spends a night in...’

Luke: *‘... the box.’*

Prison Guard: *‘I hope you ain’t going to be a hard case.’*

Luke: *(smiles, shakes head)*

Dir. Stuart Rosenberg. Warner Bros., 1967,

“Cool Hand Luke”

In 2015, The Miami Herald introduced readers to the “shower treatment.” Prison guards reportedly used it on one Darren Rainey. Rainey, diagnosed schizophrenic, was serving a two year term for drug possession in the mental health unit at Dade Correctional. In that respect, he was similar to 15-20% of US prison inmates who suffer from mental illness. “Over-Criminalization in Florida: An Analysis of Nonviolent Third-degree Felonies”, Florida Tax Watch (April, 2014). He had a reputation as a difficult

prisoner. One day, his guards charged that he defecated in his cell. After that, “They threw him a bar of soap, locked the door, then turned on the water, which was cranked up to more than 180 degrees. According to Hempstead and other inmates interviewed by the Herald over the past year, the officers laughed and taunted Rainey as he begged for forgiveness, gasping for air in the scalding steam. They then left, and when they returned nearly two hours later, Rainey was dead, with pieces of his skin floating in the water.” “The inmate who exposed Florida prisons’ culture of cruelty.” The Miami Herald (August 8, 2015).

Where punishment, not rehabilitation, is the goal of Florida justice, inmates receive a lot of that, according to anecdotal evidence (hard statistical data is lacking—the Department of Corrections does not collect and track numbers on inmate abuse and those held in solitary confinement). There are claims of “inmates being starved, beaten, sexually assaulted, mentally tortured by officers and gassed for no reason. Officers putting laxatives in inmates’ food, urinating on their clothing and toothbrushes and paying inmates to attack other inmates. Sick inmates begging for medical care, only to be told they were faking. Even basic necessities like soap and toilet paper were often rationed to make their lives more miserable.” The Miami Herald, supra. After such disclosures by one inmate, Herald Hempstead, DOC transferred him to a remote facility, known as one of the toughest in Florida, Columbia Correctional, where he is now kept in a 12 by 10 cell and “... in the summer, when temperatures climb to 90 degrees or more, inmates sleep on the concrete floor, along with rodents and insects.”

The regime of punishment includes use of solitary confinement. “Prisoners held in solitary confinement in Florida state prisons can be there for months on end. They are detained in nearly complete isolation, entitled to leave their cell three times per week to take a shower, and, only after thirty days, an additional three hours per week to exercise. Children in state prison may be subjected to solitary confinement and endure long periods without exercise, educational instruction, contact with their families or any rehabilitative programs and services... Although children and mentally ill prisoners are particularly susceptible to the devastating physical and psychological effects of total isolation, they are dramatically overrepresented in solitary confinement. Neither Florida law nor its correctional regulations applies solitary confinement any differently to children or those who are seriously mentally ill, as compared to other prisoners, demonstrating a willful blindness to the particularity of these populations.” Ebenstein, “The Sad State of Solitary in Florida: Is There Hope for This Human Rights Violation?” Voting Rights Project, ACLU. This included, for example, one Elliott Yorke, a ninety year old inmate held at Columbia Correction, who is deaf and non-verbal, communicating mostly through writing, and who walks with the aid of a wheeled walker. Baxter, “Ninety Years Old,

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On Behalf of the Publisher

Deaf, and in the Hole in a Florida Prison”; Solitary Watch (July 10, 2014). Half of all prison suicides occur among prisoners held in solitary. Guards use it at punishment to dispense with ‘disruptive behavior—such as talking back, being out of place, failure to obey an order, failing to report to work or school, or refusing to change housing units or cells.’ Grimm, “Florida still sticks juvenile inmates in the box”, Miami Herald (June 12, 2015).

Life in a punishment-based prison facility is well-described in these terms, “Possessions are removed, family excluded, sexual desire frustrated. The sex ratio is at its most forbidding for normal sex, 100% of one sex versus zero of the opposite sex. Sexual deviancy increases. Life is unpleasant. Sanity depends on mental toughness. Worries remain. Most prisoners are unhappy, many of them most of the time. Pagan, satanic, racist and occult religious texts are much more popular in prison than outside. Many contemplate, attempt, or commit suicide or self-mutilation. The suicide rate for American prisons is five to fifteen times greater than it is for the general American population. Fewer chaplains and programs for inmates exist than in prior years.” Gleissner, “Some Reasons Why Incarceration Does Not Work Very Well”, Corrections.com (February 28, 2011).

Eighty-seven percent of all inmates are eventually released back into the community, See Florida Dept. of Corrections Recidivism Report (May 2014), “yet fewer than one-fourth of released inmates received substance abuse or mental health counseling that could have helped them live law-abiding lives after their release.” News, Barney Bishop (April 9, 2014). It is therefore fair to wonder about the fruit of such punishment. After all, we encounter these people in normal day to day life. Floridians must literally live with the consequences of punishment-based justice. So what does it actually accomplish? Florida’s preoccupation with punishment has the results which might be expected of it: almost 30% of those released are back in prison within three years. See Florida Dept. of Corrections Recidivism Report (May 2014). Almost half of prisoners entering the prison system in 2013 were former inmates, recidivists. See News, Barney Bishop, supra.

To get perspective on what that means, it is useful to compare Florida’s justice system with New York’s. In 2000, Florida and New York were nearly identical in their rates of incarceration and overall prison population, each with a headcount of around 70,000 inmates. Fourteen years later, Florida’s prison population had increased to 102,467, while New York’s had fallen to 54,600, and “one factor that could help explain the differing experience of the two states was their divergent philosophies on criminal justice. Florida’s system... does not give sufficient attention to the role of rehabilitation in reducing crime.” Strickland, “Florida’s Criminal Justice System: Tough on Crime—and Taxpayers”, Inweekly (October 9, 2015). Unfortunately, “with an emphasis on punishment rather

than rehabilitation, U.S. prisoners are often released with no better skills to cope in society and are offered little support after their release, increasing the chances of reoffending.” Deady, “Incarceration and Recidivism: Lessons from Abroad”, Pell Center (March 2014).

An even better way to understand the system Floridians have created is to compare “punishment justice” with its direct opposite. Norway, for example, uses the “normalization approach.” In contrast to Florida prisons, the “Norwegian penal philosophy is that traditional, repressive prisons do not work, and that treating prisoners humanely improves their chances of reintegrating in society. This is achieved by a ‘guiding principle of normality,’ meaning that with the exception of freedom of movement, prisoners retain all other rights and life in the prison should resemble life on the outside to the greatest extent possible. Within the walls of Halden, one of the newest maximum-security prisons in Norway, are cells with flat-screen televisions and mini-fridges, long windows to let in more sunlight, and shared living rooms and kitchens ‘to create a sense of family,’ according to Hans Henrik Hoiland, one of the prison’s architects. Prisoners are not left to their own devices upon release, either. There is a safety net. The government guarantees it will do everything possible to ensure that released prisoners have housing, employment, education, as well as health care and addiction treatment, if needed.” Deady, supra. Does it work? Norway’s recidivism rate is 20%, one of the lowest rates in the world. Deady, supra. Is that important? Well, “by reducing the rate of offenders who return to prison, we keep our communities safer, our families more intact, and we’re able to begin reinvesting incarceration costs to other critical services.” Kentucky Gov. Steve Beshear, Jan 4, 2011. And Florida annually spends \$255 million on reoffenders. Barney, supra.

In conclusion, it is difficult to avoid a sense that Florida’s system of criminal justice is a failure. If the purpose of the Department of Corrections is to “correct” offenders, that does not appear to be happening. Based on punishment as the primary goal, there are grounds for thinking it may be administered in ways that are inhumane and brutal. Inmates are exposed to harsh, long sentences that have little to do with actual correction. The conditions, including imposition of solitary confinement, impose psychological penalties that ill-prepare these people for surviving as productive citizens in a competitive world. The rest of us reap the consequences in the form of more crime and higher public costs resulting from expensive reincarceration. How much better things would be were Fla. Stat. §921.002(1)(b), above, to read, instead: “The primary purpose of sentencing is to rehabilitate the offender. Punishment is a desired goal of the criminal justice





By The Hon. F. Shields
McManus, Circuit Judge

Application of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, in Florida

Examples from Orders on Motions in Limine Part II

This article will present the second part of a basic review of Florida’s new rules governing the admissibility of expert testimony as well as give some examples of the application of the rules and offer some practice pointers.

AMENDMENT TO SECTION 90.702, FLORIDA STATUTES

In 2013, the Florida Legislature amended Section 90.702 of the Florida Evidence Code to adopt the standards for expert testimony as provided in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The *Daubert* test applies not only to “new or novel” scientific evidence, but to all other expert opinion testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). The legislature specifically intends for trial judges to apply to all expert testimony principles which are in conformity with *Daubert* and *Kumho Tire*. The judge must be a gatekeeper to exclude evidence which is unreliable and may confuse or mislead the jury.

A key question to be answered in any *Daubert* inquiry is whether the proposed testimony qualifies as “scientific knowledge” as it is understood and applied in the field of science to aid the trier of fact with information that actually can be or has been tested within the scientific method. *Id.* “General acceptance” from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (the *Frye* test) can also have a bearing on the inquiry, as can error rates and whether the theory or technique has been subjected to peer review and publication. *Daubert*, at 593-594. However, “general acceptance in the scientific community” alone is no longer a sufficient basis for the admissibility of expert testimony. It is simply one factor among several.

Subjective belief and unsupported speculation are henceforth inadmissible. *Id.* at 590. Pure opinion testimony is prohibited. The Legislature expressed its intent to “prohibit in the courts of this state pure opinion testimony as provided in *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).” Ch. 2013-107, § 1, Laws of Fla. (2013) (Preamble to § 90.702). No longer will pure opinion or *ipse dixit* expert testimony be admissible as the Florida courts had allowed under the *Frye* test. *Perez v. Bell South Telecommunications, Inc.*, 138 So.3d 492 (Fla. 3d DCA 2014).

CHANGES IN TRIAL PRACTICE

The focus of a hearing on a motion in limine will necessarily be less on the qualifications of the expert and more on the testimony of the expert. *Daubert* and its progeny, as well as the orders of Florida trial courts cited here, illustrate how the courts are to focus on the testimony and on the chain of logic it embodies, not just on the credentials of the proffered expert. The expert must articulate his or her reasoning to the trial court to be allowed to testify about the opinion to the jury. The witness must use understandable language, not technical jargon, to explain the facts on which he/she relied and the methodology used.

The Florida practitioner will experience more frequent and substantive challenges to offers of expert opinions than under the former expert witness rules. It is necessary to consider

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Application of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, in Florida

this at the start of the case and also to make changes whenever new issues come into focus. It is most critical that the witness be properly prepared. This includes providing extensive factual materials to the witness and discussing the methodology used in arriving at opinions and what the scientific foundations are for the opinion. If a motion in limine is filed to exclude an expert opinion, the party offering the opinion must present evidence to defend it. “The burden of laying a proper foundation for the admissibility of expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence.” *Hall v. United Ins. Co. of America*, 367 F.3d 1255, 1261 (11th Cir. 2004); see also *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1268 (Fla. 2003) (“The proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology.”) (Citing *Murray v. State*, 692 So.2d 157, 161 (Fla. 1997).



The lawyer must prepare the witness for the discovery deposition. Frequently, the most qualified experts are not the most qualified forensic witnesses. They must be reminded to be careful in their choice of words to use the right legal terminology. Their opinions must be “more likely than not” and “probable”, not “possible”, and never “speculation”. The witness cannot hide behind jargon but must explain it in layman’s terms. Often motions in limine will be based on the deposition. A qualified witness who gives a sloppy exposition of opinions will set the stage for exclusion of some or all opinions. Some cross examination of one’s own witness will be needed to show the opinions are not just the witness’s opinion but are based on scientific principles and methods which are applied to the facts of the case. The lawyer must prepare for the motion in limine with scientific literature which supports the expert’s opinions.

Conversely, when the opponent’s expert and the opinions are disclosed, the lawyer must do research and solicit help from experts. Questions can be prepared according

to the four *Daubert* considerations: testing, peer review, error rates, and acceptability in the relevant scientific community. If the expert engaged in research, he or she should be asked if it was independent of the development of opinions for the case. The expert should be asked to disprove alternative explanations. He or she should be challenged about any extrapolation from an accepted premise to an unfounded conclusion. Questions should be asked to reveal unprofessional carelessness in review of the evidence. The deposition and research need to be done soon enough before trial to timely schedule motions in limine. See *Booker v. Sumter County Sheriff’s Office/North American Risk Services*, ___ So.3d ___, 40 Fla. L. Weekly D1291, 2015WL3444359 (Fla. 1st DCA 2015) (affirming judge’s finding that an objection to a CME opinion was untimely when made four days before the final hearing).

EXPERT SELECTION

The selection of the expert must match the qualifications to the facts and issues of the case. This is particularly important in medical and engineering issues. An M.D. degree or a Ph.D. does not automatically qualify an expert’s opinion. The witness must have demonstrable credentials suitable to the particular issue. Thus, for example, an expert in biomechanics holding a medical degree who is not a treater may be able to testify on accident reconstruction but not be able to render an opinion on the cause of injury. Also the expert’s qualifications must be current to the applicable date of the event.

AN ABSTRACT OF TRIAL ORDERS

Accident Reconstruction

Cruz v. City of Tampa, 2014 WL 4473497 (13th Judicial Circuit, Hillsborough County, Fla., 2014)

This trial order gives a very good explanation of the *Daubert* standard and demonstrates how a motion in limine hearing is conducted. It is well worth reading.

Dr. Michael Freeman, a licensed chiropractor, Ph.D. in epidemiology, holding a Swedish doctorate in medical research, but never a practicing medical doctor, opined that plaintiff’s neck injuries were caused by low-speed rear-end collision. The opinion was excluded as an epidemiological opinion because it lacked explicit quantitative evaluation of all factors. It was excluded as a medical opinion because it did not address the physical examinations and x-rays of the plaintiff.

Andrews v. Crowell, 2014 WL 7778437 (7th Judicial Circuit, St. Johns County, Fla. 2014)

Dr. Michael Freeman’s opinions regarding the causation of plaintiff’s injuries as well as the probabilities that

Alto Lee Adams, Jr.: A Great Floridian

By Rene Arteaga



In 2013, Florida Supreme Court Justice Alto Lee Adams, Jr. was selected as “A Great Floridian” and his family was honored by receiving the award from Governor Rick Scott. In 2012, the United States Congress passed a bill, signed by President Obama, to name the new federal courthouse in Fort Pierce in honor of Alto Adams. United States Representative Tom Rooney introduced the bill, Public Law No: 112-180, that named the federal courthouse after Judge Adams and in a press release he stated:

“Chief Justice Adams set the standard for judicial excellence and community service, and he is remembered fondly throughout St. Lucie County and the State of Florida,” Rooney said. “I’m proud to see him getting the recognition he deserves with the “Great Floridian” award and the new courthouse named in his honor.”



Florida Supreme Court Justice
Alto Lee Adams, Jr.

This “Great Floridian” was born in 1899 in Walton County Florida outside DeFuniak Springs. He grew up on a farm in a faith based environment. He learned the Lord’s Prayer in public school, as well as the Ten Commandments. According to his autobiography, “The Fourth Quarter,” he claims no one seemed to know enough to be aware that it was wrong to do so. The neighbors in his community helped each other build their homes. The host family would provide dinner for their volunteers. The same held true when a neighbor became ill and could not take care of their crops, they would all rally together and do the work required. It is believed his grass roots in DeFuniak Springs became the founding principles he later utilized throughout his life.

In 1914, O. R. Hewett, a former teacher, returned to the teaching profession and wanted to organize a junior high school but did not have enough students. Alto’s father was on the school board and Mr. Hewitt advised him they needed ten students but he could only find nine. Mr. Hewitt knew Alto was an accomplished reader because he allowed Alto to use his home library, where he read Shakespeare. Mr. Hewett approached Alto’s father for permission to promote Alto from seventh to ninth grade. When school started, Alto was his tenth student.

Mr. Hewett was influential in directing Alto towards his ambition to become a lawyer. He encouraged him

to write papers. He expanded Alto’s imagination by assigning compositions on the biography of animals and inanimate things. He also encouraged Alto to debate and taught him to plan and outline his presentations. During those school years, Alto debated on a weekly basis and was given opportunity to compete with other students from neighboring schools.

After completing the tenth grade, Alto’s father wanted him to become a farmer. He was given the choice of forty acres of land, a mule and wagon or \$500 to attend college. It was a difficult decision, yet, he opted to attend college and his father fully supported his decision. Fate once again provided a guiding hand for Alto. While still in high school, he heard Professor A. E. Arnold from the University of Florida Law School deliver a commencement address to his school’s graduating class. Alto was inspired by the Professor’s words. Arnold told the class to learn to think and to learn to think clearly and distinctively without confusion of thought.

In 1918, due to the war, Alto and all other able-bodied students enlisted in the service. He chose the Navy and was billeted at the University of Florida. Professor Arnold learned of Alto’s aspiration to become a lawyer and he was allowed to attend classes. He enrolled in University of Florida Law School and graduated in 1921.

Alto Adams began practicing law in Pensacola, trading his services for gophers and dry goods. A few years later, he decided to move to Fort Pierce because it had a courthouse. Like much of Florida, Fort Pierce had a land sale boom in 1924 and 1925. Rather than take advantage of the land boom, Alto headed in a different direction. He was seeking every opportunity to establish himself as a trial attorney. He would take any case just to practice law and build his reputation. Then he was engaged by the John Ashley family to represent them in the inquest of Ashley’s and his associates’ death. Ashley, a notorious bandit, died with several of his gang members in Indian River County while being placed under arrest. Alto practiced criminal law during those early years in Fort Pierce but he relinquished that practice as time evolved. Alto moved into a civil practice and given the fast change in the economic development, it created a lot of work.

By the mid 1930’s economic conditions began to improve and Alto started a land and citrus business with his friend Thad Carlton, also a lawyer in Fort Pierce. He purchased land for \$1.50 per acre and their cattle and citrus business flourished. The Adams Ranch was established in 1937 and over the years it has grown to 65,000 acres spread over multiple counties. Today it is dubbed “The Ranch of 10,000 Hammocks”.

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Alto Lee Adams, Jr. A Great Floridian

In 1938, the St. Lucie Bar Association wanted to petition the Governor to appoint Alto Adams as Attorney General of Florida following the death of Attorney General Cary D. Landis. Alto was honored but requested time to review. He took that opportunity to discuss the proposition with Governor Cone, a personal friend. He was told that the selection for attorney general was taken but a vacancy for a Circuit Judge was opening and if he wished, he would be appointed. Alto inquired if the appointment came with any specific endorsement obligations, of which the Governor replied, “none”.

In 1938, he became a Circuit Judge of the Ninth Judicial Circuit. He served for two years until, in 1940, Governor Cone appointed him to the Florida Supreme Court. He served on the Supreme Court for almost 12 years, including two year as Chief Justice from 1949 to 1951. The Judge wrote many opinions specifically in the area of property rights.

In 1952, he resigned from the Supreme Court to devote his time to family and business. Judge Adams sought the office of Governor of Florida but he did not win the Democratic primary. Deciding to leave the practice of law, Judge Adams joined forces with his son-in-law in the construction industry. Their construction business focused on communications including the world’s largest radio telescope in Puerto Rico and the highly classified Atlantic Undersea Test and Evaluation center for the U.S. Navy and British Admiralty in the Bahamas. Meanwhile, the Adams Ranch was successfully managed by his son “Bud” Adams, a very accomplished man in his own right. Alto was involved in a variety of businesses; insurance, agriculture, construction, beer distribution, cattle and oil. His businesses operated nationally and internationally.

In 1967, Governor Claude Kirk re-appointed Judge Adams to the Florida Supreme Court. He remained on the bench for another three years when he retired at age 70. Judge Adams passed in 1988, and Kirk eulogized, “He was a great friend, a great jurist and a great man of the land.”

I asked his son, Alto “Bud” Adams, to describe the main attributes of the Judge. He responded, “He was always upbeat and his highest priority was his family.” In the Judges’ book, “The Fourth Quarter,” he says, “For myself, I have tried my very best to make my mark as high as I could and at the same time retain the nobility of character that my father inculcated in me.”

This Great Floridian’s legacy lives on and all Floridians were honored and blessed to have such a man presiding as Chief Justice of the Florida Supreme Court.

Rene Arteaga is Vice President of TD Bank as a Financial Store Sales Manager in Fort Pierce. He is deeply committed to the Treasure Coast through participating in community services - St Lucie Medical Center Board of

Trustees, Castle of the Treasure Coast Foundation Board/ Treasurer, Friends of Rupert J Smith Library Treasurer/ Member, Member of the Economic Development Council of St Lucie County, Past Chairman of the St Lucie County Chamber of Commerce, Past Chairman New Horizons of Treasure Coast, Past President of the Rotary Club Port St Lucie, Past Division Chair for United Way of St Lucie County, Past Vice Chair of March of Dimes Walk, Past Board Member of Hospice. He is a recipient of the Rotary International’s Paul Harris Fellowship Award attesting to his “service above self.”

Last Issue’s Cryptoquote Answer

PE PG HAEEX EF XPGV GBRPSN B NLPYEJ
DBS EMBS EF KFSTADS BS PSSFKASE FSA.
-RFYEBPXA

It is better to risk saving a guilty man than to condemn an innocent one. -Voltaire

Poet’s Corner

The Hangman At Home

By Carl Sandburg

What does a hangman think about
When he goes home at night from work?
When he sits down with his wife and
Children for a cup of coffee and a
Plate of ham and eggs, do they ask
Him if it was a good day’s work
And everything went well or do they
Stay off some topics and talk about
The weather, baseball, politics
And the comic strips in the papers
And the movies? Do they look at his
Hands when he reaches for the coffee
Or the ham and eggs? If the little
Ones say, Daddy, play horse, here’s
A rope—does he answer like a joke:
I seen enough rope for today?
Or does his face light up like a
Bonfire of joy and does he say:
It’s a good and dandy world we live
'In. And if a white face moon looks
In through a window where a baby girl
Sleeps and the moon-gleams mix with
Baby ears and baby hair—the hangman—
How does he act then? It must be easy
For him. Anything is easy for a hangman,
I guess.

Friendly Passages is proud to present the winning submission from this year's Alto Adams Legal Writing Contest.

The Remainder of the Political Process Doctrine in the Wake of *Schuette v. Coalition to Defend*

By Allison J. Evans



*The political process doctrine prevents states and the majority from “alter[ing] the procedures of government to target racial minorities” such that it places a “special burden on racial minorities [to affect change] within the governmental process,” which restricts the minority from meaningful participation in the political system, which is granted to each individual under the Fourteenth Amendment of the Constitution.*¹

I. Introduction

Equality is considered a foundational principle to American democracy—every person is created equal under the law—which began with Plato and Aristotle.² Aristotle, building on the work of Plato, presented two concepts that have dominated the Western thought: (1) equality in morals means: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness; and (2) equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.³ While the principle of equality for all people is novel, the framers of the Constitution did not intend to write this principle into existence at the expansive capacity Americans believe it to be.⁴ Even from the conception of the United States of America, there has been discrimination, which was governmentally sanctioned.⁵ Slavery was going strong when the Constitution was ratified, and there was no intention by the framers of the Constitution to change that until the 1800's.⁶ Women were not considered equal to men at the time the Constitution was formed; and the Constitution blatantly showed favoritism to land owners when it came to voting rights and power.⁷ However, equality is a concept with which the American judicial system continually struggles. Currently, gay marriage is a prime example of an equal protection issue that our country is facing.⁸ According to an article published online at USA Today on March 27, 2015: “four states seeking to maintain bans against same-sex marriage, told the Supreme Court Friday that the democratic process should decide the issue, not judicial dictate.”⁹ However, gay rights activists, opposed to the ban, argue that marriage is a fundamental right that should be held by all Americans, and is protected under the Fourteenth Amendment to the Constitution.¹⁰ Currently, each American at the ballot box—where Americans believe their voices can be heard—debates issues of equality, as it pertains to everything from gay marriage rights to allowing some preferential treatment to minorities for admissions into public universities.¹¹

Equality at the ballot box is a promise guaranteed by the Constitution and this nation's long fought history to eradicate the scars of slavery in order to achieve racial equality, and through the battle of gender stereotypes for achieving gender equality.¹² The key to achieving racial and gender equality is access to meaningful participation in the political process. Racial minorities, in particular, have relied on corrective measures—such as affirmative action—to balance the scales from the inequalities of our past.¹³ Just recently, however, the voting majority has diminished some of these corrective measures. For instance, in *Schuette v. Coalition to Defend Affirmative Action*, the voters of Michigan passed a constitutional referendum to abolish affirmative action in all aspects of governmental decision-making, affecting everything from admissions into state schools, bids for government contracts, and government employment.¹⁴ The majority effectively eliminated racial plus factors in admissions processes to public universities in the State of Michigan.¹⁵ This imbalance creates tension between recognizing the will of the voters to abolish affirmative action—necessitated in the long history of governmentally sanctioned public and private discrimination—and equal protection grounded by the case law establishing the political process doctrine.

The political process doctrine is embedded within the Equal Protection Clause of the Fourteenth Amendment.¹⁶ Its purpose is to protect the racial minority from the majority changing the rules in the middle of the game as it pertains to a political process that has been established.¹⁷ While the Supreme Court, on several occasions, has considered the constitutionality of race-based preferences, the Court “has not analyzed the degree to which the Equal Protection Clause, particularly the political process doctrine, might restrict the means to abolish such preferences.”¹⁸ It has been argued by legal scholars, “due to the Supreme Court's inconsistency, minorities could have a harder time gaining admission to selective state universities.”¹⁹ Some scholars have even concluded that the seven states that have affirmative action bans have seen dramatic declines in the percentages of minorities who are attending college.²⁰ According to an article published online in the New York Times, in 2011, nineteen percent of Michigan's college-aged residents were African American, however, only five percent of college freshman at the University of Michigan were African American, and seven percent of freshmen at Michigan State were African American.²¹

This article will first examine what the political process is and how it has been defined in the eyes of constitutional law scholars. Next, this article will examine *Schuette v. Coalition to Defend Affirmative Action*, and the Court's interpretation of the political process doctrine in 2014. This article will then take a step back, looking at the constitutional provisions and case law that came before *Schuette*. Finally, this article will explore what is left of

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the political process doctrine in the wake of *Schuetzte*, and how, if at all, the political process doctrine is able to influence future law making. In connection with the future of the political process doctrine, this article will look at the problems that are likely to arise due to the lack of concrete guidance provided by the Supreme Court in *Schuetzte*.

II. What is the Political Process Doctrine?

The political process doctrine is a unique and sometimes controversial doctrine; it “resides at the intersection of Equal Protection Clause jurisprudence, including the ‘state action’ doctrine, which normally requires governmental, as opposed to private, discrimination to trigger an Equal Protection Clause violation, and First Amendment principles, which protect robust public discourse in the political marketplace.”²² This doctrine is a less-familiar branch of the equal protection doctrine, in part due to its complex position within the Constitution.²³ The political process doctrine focuses on the discriminatory effect of governmental restructuring.²⁴

According to the Fourteenth Amendment, “a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation,”²⁵ is at the heart of the equal protection doctrine. The Fourteenth Amendment provides protection to all racial groups in order for each group to receive meaningful participation in the political process.²⁶ Accordingly, “all explicit racial classifications, including benign racial classifications, receive strict scrutiny review.”²⁷ Unlike traditional equal protection analysis that focuses on discriminatory intent, the political process doctrine focuses on the discriminatory effect.²⁸ The political process doctrine is a limitation on the majority from overburdening the minority and not allowing meaningful access to the political process.²⁹ Its purpose is also to regulate the restructuring of the political system, so that the majority cannot exclude minority groups from access to the political process.³⁰ This has a two-part inquiry: (1) is the law racial in character, meaning does the law “regulate a racial subject matter” and “regulates the subject matter to the detriment of the racial minority;” and (2) does the governmental reconstruction create an asymmetric burden on the ability of the minority groups to advocate for meaningful legislation.³¹ If both prongs are satisfied, the court must apply strict scrutiny; meaning the law must be narrowly tailored to a compelling government interest to survive an equal protection challenge.³²

III. Leading Up to *Schuetzte*

In 2003, the Supreme Court reviewed two cases, *Gratz v. Bollinger*³³ and *Grutter v. Bollinger*,³⁴ to determine

the constitutionality of the admissions system at the undergraduate level and the law school of the University of Michigan.³⁵ These cases addressed the issue of using a racial preference system when evaluating admissions of students into Michigan state schools.³⁶ The Court looked at each school’s admissions process and looked at how each process and requirements were tailored.³⁷ The Court upheld *Grutter* based on the constitutionality of affirmative action preferences in public universities.³⁸ However, the admissions plan presented in *Gratz* by Michigan’s undergraduate admissions process was held to be unconstitutional as a violation of the Equal Protection Clause because of the points system the school was using to evaluate each student.³⁹

Upon the Supreme Court’s ruling, there was a statewide debate on the question of racial preferences in academic admissions policies.⁴⁰ “Michigan activists opposed to these preferences responded by successfully pursuing a state constitutional amendment via a referendum question known as the Michigan Civil Rights Initiative or Proposition 2.”⁴¹ In 2006, the voters adopted Proposal 2, creating an amendment to the State Constitution, which prohibited “state and governmental entities in Michigan from granting certain preferences, including race-based preferences. . . .”⁴² The amendment, formally known as Proposal 2, known as Article I, section 26 stated:

- (1) 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.
- (2) The 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.
- (3) For the purpose of this section ‘state’ includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in subsection 1.⁴³

The amendment was challenged in two separate cases, which were later consolidated.⁴⁴ In 2008, the United States District Court for the Eastern District of Michigan granted summary judgment to Michigan, which upheld the amendment.⁴⁵ The case proceeded to the Sixth

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Circuit Court of Appeals, which reversed the District Court's decision; holding that the amendment to the state constitution was in violation of the principles stated in *Washington v. Seattle School District No. 1*.⁴⁶ The Supreme Court of the United States then granted certiorari.

IV. *Schuetz v. Coalition to Defend Affirmative Action*

The Court first clarified what the *Schuetz* case was not addressing—the case was not about the constitutionality of race-conscious admission plans.⁴⁷ The Court announced that the question presented in this case “concerns not the permissibility of race-conscious admissions policies under the Constitution, but whether, and in what manner, voters in the State may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”⁴⁸ Justice Kennedy stated that the State of Michigan, through the State Constitution, invested independent boards of trustees with the plenary power, including the admissions policies, over the public universities.⁴⁹ Justice Kennedy explained that the Court of Appeals relied primarily on *Seattle*'s holding because it deemed *Seattle* as the controlling case; however, the Circuit Court wrongly relied on *Seattle* because that case presented a different issue.⁵⁰ The Court explained the Circuit Court's mistake by analyzing *Reitman v. Mulkey* (a case involving private discrimination in housing),⁵¹ *Hunter v. Erickson* (a case involving housing discrimination entangled in state action),⁵² and *Seattle* (a case involving discrimination in education) in the context of this case's issue.⁵³

The Court began its analysis with *Reitman*—a case about a couple that was discriminated against based on their race and was not allowed to rent an apartment.⁵⁴ The Supreme Court held that the amendment operated to insinuate California into discrimination by encouraging private racial discrimination.⁵⁵ However, three Justices reasoned that California wanted to stay neutral so that the State was not a party to the discrimination, and therefore, left it up to the voters.⁵⁶

In *Hunter*, a woman was told she was not able to view a home for sale because of her race in Akron, Ohio.⁵⁷ The Supreme Court rejected Akron's flawed justification for the discrimination because by Akron's admission, there was a targeted nature to the charter amendment.⁵⁸ The Court stated that the city's charter amendment “placed a special burden on racial minorities within the governmental process,” which created an invidious intent to injure a racial minority.⁵⁹ The Court then concluded that in both *Reitman* and *Hunter*, there was a demonstrated injury based on race, which the State either encouraged or participated in, causing the injury to be aggravated.⁶⁰ It is

this race-based injury, which became the triggering prong of the political process doctrine.⁶¹

The third case the Court discussed was *Seattle*, which was a case about a policy implemented by the school board to try to desegregate schools, but did so by pairing students of different races in different schools and switching their locations in order to balance the schools racially.⁶² According to the Court, *Seattle* is best understood as a case in which the state action had a serious risk, if not purpose, of causing injury, using race.⁶³ However, Justice Kennedy criticized the *Seattle* decision and explained that the Court went beyond the analysis needed to resolve the case by focusing on Justice Harlan's wording in *Hunter*, which “established a new and far-reaching rationale.”⁶⁴ Justice Kennedy explained that when looking at the broad reading of *Seattle*, any state action that happens to be racially focused and an action that makes it more difficult for racial minorities to gain access to legislation is subject to strict scrutiny—and this reading must be rejected.⁶⁵

The plurality expressed its concerns about the expansive language and the lack of proper guidance.⁶⁶ Individuals of the same racial group cannot be presumed to think the same or have the same political needs; therefore, governmental action that classifies people in these groups creates the danger of perpetuating racial divisions.⁶⁷ This risk is embedded and inherent in the *Seattle* analysis.⁶⁸ The Court concluded:

[*Reitman*], *Hunter*, and *Seattle* are not precedents that stand for the conclusion that Michigan's voters must be disempowered from acting. Those cases were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.⁶⁹

According to the *Schuetz* Court, the facts presented in the *Schuetz* case are not consistent with state action that encourages injury to racial minority groups.⁷⁰ That encouragement requirement, which the Court found in *Reitman*, *Hunter*, and *Seattle*, is the important factor for applying the political process doctrine.⁷¹ The Supreme Court overruled the Sixth Circuit Court; however the political process doctrine managed to survive, but in diminished form.⁷²

The plurality focused on the fact that Michigan voters exercised their privilege to enact the amendment to the Michigan Constitution, which is a basic exercise of their democratic power.⁷³ Chief Justice Roberts explained that Michigan voters, who adopted their own fundamental law for equal protection, could not also offend the Equal Protection Clause simultaneously.⁷⁴ Roberts opined that when state actors are providing facially neutral equal protection, there could not be a constitutional violation.⁷⁵ The concurrence would also take the *Schuetz* holding

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anyone would sustain a back injury from an accident of this nature were excluded. His opinions regarding the speed of the defendant's vehicle at the time of impact and the Plaintiff's occupant kinematics were allowed. Dr. Freeman never examined the plaintiff and never read his deposition testimony. Dr. Freeman examined the plaintiff's medical records. Dr. Freeman arrived at his opinion that plaintiff's injuries were caused by the accident by attempting to apply a statistical analysis to the plaintiff's injuries, consideration of the plaintiff's preexisting conditions, plaintiff's post-accident medical care, and the likelihood that anyone would sustain an injury from this type of accident. Dr. Freeman stated that this is within the realm of epidemiology. He also based his opinion on the temporal relation between the crash and the complaint of pain. The court rejected these reasons as unscientific.

Sterrett v. State Farm Mut. Auto. Ins. Co., 2015 WL 4977702 (15th Judicial Circuit, Palm Beach County, Fla., 2015)

Charles E. "Ted" Bain, M.D., offered opinions on accident reconstruction, biomechanics, occupant kinematics, and injury causation. He had education, training and experience in emergency medicine and accident reconstruction. Based on Dr. Bain's affidavits and deposition, the court found his opinions were admissible because they were based on the evidence of the crash and the medical records. He used a widely accepted simulation software developed to model vehicle collision impact scenarios. His report gave specific details of his methodology which utilized facts in the record. The claim that he used facts in dispute goes to the weight of the evidence, not to admissibility.

Godfrey v. Beck, 2014 WL 6075952 (18th Judicial Circuit, Seminole County, Fla., 2014)

David Gushue, Ph.D., a biomechanical engineer, did not inspect the vehicles but he was allowed to testify to general causation, testifying to the Delta V forces that occurred in the vehicular collision at issue and how a hypothetical person's body would respond to that force. His comparison of the accelerations and forces experienced by motorist to everyday activities of daily living was admissible because it used values in peer-reviewed literature established through testing of persons and cadavers. Dr. Gushue could not give a specific opinion, however, as to whether the collision caused motorist's specific injuries as he was not qualified to give medical opinion.

Construction

Warehouse 1050 Corp. v. Florida Sol Corp., 2014 WL

7715562 (11th Circuit Court, Miami-Dade County, Fla., 2014)

John Hosford, a certified roofing contractor, was offered to opine that a television cable was improperly installed, and this caused damage to the roof and the interior during a hurricane. The court excluded the testimony entirely. The witness inspected the roof 8 years after it was repaired and did not know the age of the roof and did not rule out that the damaged roof leaked for other reasons. He did not calculate wind speeds and wind resistance of the roof or explain how the lifting of the cable would affect the roof. He read a book about hurricane damage caused by different hurricanes. The court found that he did nothing more than what jurors would be doing: considering the testimony and the evidence.

Yampol v. Schindler Elevator Corp., 2014 WL 7337779 (11th Judicial Circuit, Miami-Dade County, Fla., 2014)

"In support of his claim, plaintiff seeks to call Dan Carey to testify and provide an opinion regarding the potential cause(s) of the noise vibrations emanating from the elevators into plaintiff's apartment, as well as the manner(s) in which the noise and vibration may be mitigated, ameliorated and/or eliminated. Specifically, Mr. Carey's deposition testimony and report provides that the direct bolt design of the subject elevators' connection to the break and worm gear, if not properly aligned, can create vibration in the motor and machine that can transfer into the floor. Further, Mr. Carey opines that the isolation pads did not appear to have much of an isolation effect. In addition, Mr. Carey opines as to the manner in which the noise and vibration may be mitigated, ameliorated and/or eliminated."

"Carey's testimony is inadmissible under Fla. Stat. § 90.702 because Mr. Carey's opinion as to potential causes of the alleged noise and vibration as well as ways in which the alleged noise and vibration may be mitigated (sic) ameliorated, or mitigated is based on his pure opinion, and not based on sufficient facts or data, let alone reliable principles or methods that were reliably applied to the facts of this case. Mr. Carey opined that the direct bolt design and isolation pads could cause the alleged noise and vibration plaintiff complains of and recommendations that could mitigate noise and vibration without the use or application of any tested formula or scientific basis."

Gelland v. Bill, 2014 WL 662459 (15th Judicial Circuit, Palm Beach County, Fla., 2014)

James R. Ipser, Ph.D., testified that there should be signs in areas that have bicycle lanes adjacent to parking lanes to warn that opening car doors may hit bicyclists. Dr. Ipser also opined that the bicycle lane in question should be six (6) to seven (7) feet in width, rather than five (5) feet, in order to prevent accidents much like the one that

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brought about this litigation. Dr. Ipser's opinions had not been peer reviewed, they were not generally accepted in the relevant community, and there was no literature to support his opinions. Dr. Ipser did not explain why Palm Beach County should have posted a non-existent, unapproved sign of that nature. He also did not provide reasoning or support why the bike lane should be six (6) or seven (7) feet wide, when it is only required by the FDOT to be five (5) feet wide. The Court found that these two opinions were not reliable and would not assist the trier of fact.

Medical

Jensen v. Southern Baptist Hosp. of Florida Inc., 2013 WL 10124080 (4th Judicial Circuit, Duval County, Fla., 2013)

James Halperin, M.D., an orthopedic surgeon, performed a compulsory medical examination and reviewed medical records and depositions of witnesses and experts. He opined that the patient did not sustain an injury as a result of a venipuncture procedure, that she did not have, and never had Reflex Sympathetic Dystrophy ("RSD"), and that she was faking or has a psychological issue. The plaintiff's motion in limine was denied. The court found Dr. Halperin had sufficient facts and data on which to base his testimony. While his opinion was based on experience the court found he was very qualified being not only an experienced hand surgeon but also Associate Director of a reflex sympathetic dystrophy clinic. The court cited *U.S. v. Frazier*, 387 F.3d 1244, 1260-61 (11th Cir. 2004); *Hendrix ex rel. G.P. v. Evenflo Co., Inc.*, 609 F.3d 1183, 1201 (11th Cir. 2010) ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). Dr. Halperin sufficiently explained how Mrs. Jensen's symptoms were inconsistent with the symptoms which would have resulted if such an injury had occurred. Dr. Halperin's criteria for RSD listed many of the same symptoms as the AMA Guidelines.

Freudberg v. Martin Memorial Medical Center, Inc., et al. (19th Judicial Circuit, Martin County, Fla., 2015)

Dr. Frank Kevin Yoo, a board certified neurosurgeon, gave opinions in his discovery deposition that had the patient not been discharged in the morning and was she in the hospital when suffering a stroke in the cerebellum, her chances of survival would be better. He also opined that a CT scan in the morning would have revealed a stroke event. The court granted a motion in limine. The opinions were based on a review of the medical records including the report of the CT scan of the brain. Dr. Yoo did not

read any depositions or view the image of the CT scan. He provided no reliable methodology for his conclusions. Dr. Yoo failed to make a differential diagnosis to rule out other alternative hypotheses. He said his opinions were based on his experience. He did not review any medical literature much less cite any as a basis of his opinion. This was "pure opinion" and speculative without support of any published studies.

In contrast, Gordon Sze, M.D., a professor of neuroradiology, did testify without objection that had a CT scan been done in the morning it would not have shown signs of a stroke. His opinion was based on his review of the CT scans done 12 and 24 hours later, as well as his review of the medical records, and the depositions of the patient's husband, the treating doctors, paramedic, and nurses. He explained how the CT scans that were done showed different shades of black, grey and white which revealed an initial damage to brain tissue without bleeding overlaid by a white area indicating a recent bleed. He said this demonstrated that the diagnosis was first an ischemic stroke (a blockage not a bleed) which later started to hemorrhage when the blockage resolved. He correlated that to the patient's lack of symptoms in the morning and sudden deterioration in the evening. He testified that an ischemic stroke would not be visible on a CT scan in the morning because it takes several hours for an infarct to the brain to develop enough to be seen on a CT scan. He ruled out other diagnoses.

Wallace Taylor v. Caroline R. Ervin, Case No. 312013CA000449 (19th Judicial Circuit, Indian River County, Fla., 2015)

Dr. Hany Abdel, a treating physician of plaintiff, board certified physician in internal medicine and a family practitioner, opined that plaintiff contracted an infection in his bloodstream due to defendant's battery on the plaintiff and that the infection went to plaintiff's previously implanted prosthetic hip, necessitating its removal and replacement. The Court excluded these opinions because they were not based on sufficient data or facts. Even assuming plaintiff had an infection, which was disputed, the court found that the witness had not considered alternative hypotheses for plaintiff's condition and failed

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Cryptoquote

A GP VMGRTZKO ZXN FLGR A GP GBN LGQT.
PD RLGBEYVAQABV AY JTMJTRKGO. - LTB-
MD NGQAN RLXMTGK

For the impatient, e-mail your answer to nora@rjlawlibrary.org for confirmation. For the patient, the decoded quote will appear in the next issue.

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further and out-right overrule *Seattle*, rather than reinterpreting it beyond recognition.⁷⁶

In her dissent, Justice Sotomayor, joined by Justice Ginsburg, reasoned that the *Schuetz* holding was doing more than reinterpreting the *Seattle* holding.⁷⁷ Rather, she viewed the plurality opinion to permit the Michigan voters to change the rules; in doing so the Court placed no constitutional limitations on the voting majority to affect a racial minority group's exercise of political power.⁷⁸ There is a fundamental protection in the process, which is designed to secure the right of all citizens to participate meaningfully and equally in self-government.⁷⁹ Michigan allowed the minority to access the political process, however the majority changed the rules of the process in order to make it more difficult for the minority group to foster racial integration.⁸⁰ If the majority wanted to eliminate race-sensitive admissions policies, the voters could have persuaded the existing educational board members; they could have facilitated the removal of board members; or they could have reached out and persuaded alumni to speak out and help their cause.⁸¹ However, the voters chose to reconfigure the existing political process in Michigan in a manner that burdened racial minorities.⁸²

The dissent relied on the precedent, which forbids “political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else.”⁸³ It is this reconstruction, burdening the racial minority, which triggers the strict scrutiny in the political process doctrine.⁸⁴ Therefore, because the plurality of the Court determined otherwise, the political process doctrine no longer “guarantees that the majority may not win by stacking the political process against the minority groups permanently.”⁸⁵

V. History of the Political Process Doctrine

The political process doctrine is entrenched in the Equal Protection Clause of the Fourteenth Amendment, which states: “No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.”⁸⁶ The Court has recognized that “[t]he central purpose of the Equal Protection Clause ... is the prevention of official conduct discriminating on the basis of race.”⁸⁷ The political process doctrine is designed to place limitations on the majority in order to protect the minority from intentional discrimination and access to meaningful and equal participation in self-government.⁸⁸

a. State Entanglement in Private Discrimination

In *Reitman v. Mulkey*, a husband and wife alleged that petitioners had refused to rent them an apartment solely on account of their race.⁸⁹ *Reitman* was consolidated with *Prendergast v. Snyder*, which involved a husband and

wife seeking to enjoin eviction from their apartment after alleging the eviction was motivated by racial prejudice.⁹⁰ In 1964, Proposition 14 was placed on the ballot for a statewide vote; it proposed:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.⁹¹

The trial court in *Reitman* granted the petitioner's motion for summary judgment based on the adoption of Proposal 14—later codified into section 26 of the California Constitution, which rendered the California Civil Code in question null and void.⁹² The trial court in *Prendergast* determined it was “unnecessary to consider the validity of Proposition 14 because it concluded that judicial enforcement of an eviction based on racial grounds would in any event violate the Equal Protection Clause of the United States Constitution.”⁹³ The Supreme Court of California, considering both cases, reversed *Reitman*—holding section 26, formally Proposal 14, invalid because it denied equal protection of the laws, which was guaranteed by the Fourteenth Amendment—and affirming the judgment in *Prendergast*.⁹⁴

Upon granting certiorari, the Supreme Court affirmed the California Supreme Court's ruling.⁹⁵ The Supreme Court looked at the reasoning of the California Supreme Court, which held that section 26 unconstitutionally involved the State in racial discrimination, which is a violation of the Fourteenth Amendment.⁹⁶ The Court determined that there could be no sound reason to reverse the California Supreme Court's judgment.⁹⁷ The Court agreed with the California Supreme Court by first rejecting the notion that a state is required to have a statute that prohibits racial discrimination.⁹⁸ The California Supreme Court's reasoning also concluded that section 26's purpose was to authorize private discrimination in the housing market, and section 26's ultimate impact would have significant State involvement in private discrimination, which is in contradiction to the Fourteenth Amendment.⁹⁹

Justice White reasoned, “...[t]his Court has never attempted the “impossible task” of formulating an infallible test for determining whether the State “in any of its manifestations” has become significantly involved in private discrimination.”¹⁰⁰ However, the California Supreme Court took it upon itself to make that determination and the Supreme Court affirmed.¹⁰¹ Like in *Reitman*, *Hunter v. Erickson*, involved private discrimination in the housing market.

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b. A State May Not Change the Game

In 1964, the Akron City Council, of Akron, Ohio, enacted a fair housing ordinance that was “premised on the recognition of the social and economic losses which flow[ed] from substandard, ghetto housing and its tendency to breed discrimination and segregation . . .”¹⁰² Mrs. Hunter complained to the Commission on Equal Opportunity in Housing, stating that a real estate agent refused to show her homes because the agent claimed the owners of the homes “did not wish . . . their houses [to be] shown to negroes.”¹⁰³ The Commission, however, in reply to Mrs. Hunter’s complaint stated that the fair housing act was unavailable to her because the Akron City Charter had been amended—known as Akron City Charter Section 137—the amendment nullified the anti-discrimination housing ordinance.¹⁰⁴ Ultimately, the Supreme Court of Ohio determined that the amended charter was repugnant to the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁵ In reviewing Akron’s Charter amendment and the Ohio Supreme Court’s decision, the Supreme Court determined “that an amendment to the Akron, Ohio, City Charter which prevented the city council from implementing any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of the majority of the city’s voters violated the Equal Protection Clause.”¹⁰⁶ The Court explained that by singling out a category of antidiscrimination laws, which required a special form of approval, the referendum illicitly “places special burdens on racial minorities within the governmental process.”¹⁰⁷

c. Racial Focus Triggers the Political Process Doctrine

After the Supreme Court determined the *Hunter* case was not moot under the Civil Rights Act of 1968, it applied the *Reitman* precedent to the Akron City Charter amendment.¹⁰⁸ The Court found that unlike *Reitman*, in this case “there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.”¹⁰⁹ The majority determined that the Akron Charter clearly made it substantially more difficult to secure enactment of ordinances which otherwise would be subject to section 137, as well as suspended the existing anti-discrimination housing ordinance.¹¹⁰ According to the Court, section 137 would disadvantage those who would benefit from laws barring racial discrimination.¹¹¹ Further, while the law on its face treats people in an identical manner, in actuality the law’s impact hurts the minority.¹¹² In conclusion, the Court developed the essence of the political process doctrine: “[a] State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”¹¹³

Following *Reitman* and *Hunter*, the Court next addressed the political process doctrine in the context of Seattle’s racially imbalanced schools.

The segregated housing patterns in Seattle, created racially imbalanced schools.¹¹⁴ Since 1963, the School Board had permitted students in District One to transfer schools to cure the racial imbalance of each school.¹¹⁵ However, voluntary transfers were not enough and the District was pressured to accelerate its program of desegregation.¹¹⁶ In response, the District created a “magnet” program to encourage voluntary student transfers.¹¹⁷ The program was unsuccessful and the racial imbalance actually increased between 1970-71 and 1977-78.¹¹⁸ Therefore, the District decided that a mandatory reassignment of students was necessary for the racial imbalance to be eliminated.¹¹⁹ The School Board came up with the Seattle Plan, which used school busses to reassign the students.¹²⁰ The goal was to “pair” and “trade” predominantly minority with predominantly white attendance areas; but the Plan assessed students based on attendance rather than on race.¹²¹ The result of the Plan was roughly equal numbers of white and minority students in each elementary school.¹²² It allowed most students to attend a school near their homes for roughly half of their academic careers.¹²³

In 1977, after the Seattle Plan had been adopted, a number of Seattle residents who opposed the desegregation strategy formed the Citizens for Voluntary Integration Committee (CiVIC).¹²⁴ The group attempted to enjoin implementation of the Seattle Plan through litigation in state court; after those efforts failed, the group drafted a statewide initiative designed to terminate the mandatory bussing plan.¹²⁵ The proposal, Initiative 350, stated that “no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence.”¹²⁶ In the November 1987 general election, the proposal received enough signatures to be placed on the Washington ballot.¹²⁷ Initiative 350 was passed on November 8, 1978; just two months after the Seattle Plan went into effect.¹²⁸ District One, together with two other school districts, initiated a suit against the State of Washington in the Western District Court, challenging Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment.¹²⁹ The District Court held Initiative 350 unconstitutional for three reasons: (1) “the initiative established an impermissible racial classification in violation of *Hunter v. Erickson* and *Lee v. Nyquist*,”¹³⁰ (2) a factor for the purpose of Initiative 350 was racial discrimination; and (3) Initiative 350 was unconstitutionally overbroad.¹³¹ The Ninth Circuit affirmed the lower court’s decision, based solely on the first line of reasoning.¹³²

In reviewing the Ninth Circuit’s opinion, the Supreme Court stated that the Fourteenth Amendment required “a political structure that treats all individuals as equals.”¹³³

Essential Attributes of an Effective Mediator: Impasse Avoidance Abilities in Monetary

By Edmund J. Sikorski, Jr. J.D.



Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

Over the time spectrum of mediating monetary claims, impasse causing problems can be categorized as Front End, Middle, and Late. The focus of this article is to discuss some of the symptoms and prescriptions to deal with signs of impending impasse in each category.

Front End Impasse

1. An argument over which side makes the first offer. (Who goes first)

While there is no right or wrong way to get the bargaining process started, the traditional approach is to have the claimant make the first offer. (Claimant goes first)

However the real question is: “Why go first?”

Studies have demonstrated that the party that made the first offer shifted less from the initial offer than the party that responded to it. This is known as the “first offer advantage”. The explanation for it has to do with the concept of “anchoring”. The first offer sets the anchor and establishes the negotiating neighborhood. No other number has the psychological power of the first offer. No other psychological principle has the same punch as the anchoring effect. (End Note 1).

The impasse avoidance prescription of the mediator is to intelligently discuss the advantages and disadvantages of the foregoing so that the disputants can make an informed calculated decision over how to proceed or get locked up on the issue of “who goes first”.

2. Either or both parties make an unprincipled “out of the ball park” offer that exceeds or ignores their own “best day in court” case valuations and the receiving party declares a) that the mediation is a waste of time; b) that the opposite party is not negotiating in good faith; c) that the receiving party refuses to respond unless the offering party gives them a new number – thus attempting to have the other side bid against themselves.

The impasse avoidance prescription of the mediator is to point out that it may be much more productive for each party to start the negotiation by making a “principled” offer, e.g. the defendant in a personal injury action may make an offer that is based on a line-by-line analysis of the plaintiff’s schedule of damages with a stated amount allowed for each category of damage claimed by the plaintiff.

In addition, no mediator should ever ask any of the parties to bid against themselves. Parties simply do not negotiate in this manner. The unwary mediator who ventures into this trap will instantly lose credibility and impasse will surely follow.

MID-POINT Impasse

1. “It’s not the money, it’s the principle”

If the declarant literally means that statement, the case will not settle without unconditional surrender by the other side. However, given the reality that through 2013 here in the 19th Circuit (Florida), only 1.9% of all cases were disposed of by trial, it is highly unlikely that the declarant really believes the statement made. (End note 2).

The impasse avoidance prescription is for the mediator to encourage review and reassessment of damage calculation. Those words usually mean that the other side has not offered an amount of money to settle that does justice to the loss suffered and the other side is taking it personally (emotionally). This statement also means that the other side’s range of settlement is so far out of the ball park that it feels personal.

2. “We want them to know we’re serious” “We don’t want to move too fast too soon” “They aren’t getting it”

The above are all variations on a central theme that signal mid mediation impasse. The underlying assumption of the declarant is that by making small moves, it will result in the other party making larger moves. This tactic is recognized as a hardball tactic (End note 3) that is likely to breed a small move by the other side and the speaker’s frustration will increase as impasse begins to appear eminent.

The underlying problem is that the negotiating principle of reciprocity is being ignored. (End note 4). If the speaker is indeed getting close to his/her bottom line then this might be the correct strategy – but if this is a result of frustration with the length of the process and arises mid mediation, the speaker is employing a counter-productive strategy.

The mediator’s prescription is to encourage the parties to re-think their strategy of movement and develop a systematic scripted plan of movement that is not dependent on the other side’s movement. Negotiation is really a dance where both parties must make reciprocal movements if the dance is to be successfully completed or end. Reciprocal movements have two components: a) time, and b) distance. Time so that the negotiators can continually re-evaluate rather than react, and distance, i.e., how far will they increase the offer or decrease the

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The Remainder of the Political Process Doctrine in the Wake of *Schuetz v. Coalition to Defend*

According to the Court, a political majority generally may restructure the political process to make it more difficult for others to secure the benefits of governmental action.¹³⁴ However, “a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process.”¹³⁵ The Court concluded that the Court of Appeals correctly focused on *Hunter* and *Lee*, and Initiative 350 was unconstitutional because it did not attempt to allocate governmental power on any general principle.¹³⁶ Justice Blackmun explained that because Initiative 350 had a racial focus, it triggered the application of the *Hunter* doctrine.¹³⁷ Along with triggering the doctrine, the initiative removed the authority to address only racial problems from the existing decision-making process in a way that made it more difficult for the minority interest to be addressed.¹³⁸ This action resulted, as in *Hunter*, in a modification of the decision-making authority—over racial issues—from one level of government to another.¹³⁹ Finally, the Supreme Court reiterated that when a factually neutral piece of legislation is subjected to an equal protection analysis, an investigation into the intent is necessary to determine whether the legislation is designed in some way to accord disparate treatment on the basis of race.¹⁴⁰ While Washington could have reserved the right to allocate all decisions in the area of education to state officials, it chose a more elaborate system.¹⁴¹ Having done so, the State is obligated to operate within the limitations of that system and within the confines of the Fourteenth Amendment.¹⁴²

VI. What is left of the Political Process Doctrine in the wake of *Schuetz*?

The purpose of the political process doctrine is to identify a particular kind of decision-making structure as intrinsically suspect.¹⁴³ However, the *Schuetz* Court frames *Hunter* and *Seattle* as merely concerned with concrete racial injuries, not unequal political process.¹⁴⁴ This analysis means strict scrutiny only applies if the actions taken by the majority produce a demonstrable harm beyond increased difficulty for enacting favorable legislation to the group.¹⁴⁵

Justice Kennedy “declared that the policies struck down in *Seattle* and *Hunter* were government actions...”¹⁴⁶ that “had the serious risk, if not purpose of causing specific injuries on account of race.”¹⁴⁷ By defining the scope of *Seattle* and *Hunter* in a way that distinguished the initiative in *Schuetz*, Justice Kennedy tried to separate the cases to justify the Court’s plurality opinion. However, many commentators conclude that he did not separate *Schuetz* from *Seattle* and *Hunter*, but changed the political process doctrine.

In *Schuetz*, the Supreme Court upheld Michigan’s constitutional amendment that prohibited public

universities from using race as a factor in the admissions process.¹⁴⁸ According to Daniel Fisher, the *Schuetz* decision stops “just short of obliterating the so-called ‘political process’ doctrine.”¹⁴⁹ Other scholars opine that Justice Kennedy simply reasoned *Seattle* out of existence.¹⁵⁰ In essence, the Court has allowed majority voters to pull certain matters out of the hands of state and local governing bodies, which once had the authority to make the decisions pertaining to these matters.¹⁵¹

According to some, the plurality in *Schuetz* seemed to abandon the political-process doctrine, and, in its place, the Justices introduced a new test.¹⁵² This new test asked whether the law “had the serious risk, if not purpose, of causing specific injuries on account of race.”¹⁵³ By not clearly defining the term “injury on account of race,” this new test may prove difficult for courts to apply.¹⁵⁴ This “new test” may simply require the same type of race-based analysis¹⁵⁵ that the plurality rejected when trying to apply the political process doctrine.¹⁵⁶ The test “turns on the question of which effects count as injuries based on race.”¹⁵⁷ However, “injury on the basis of race” does not have a clear and self-evident meaning.¹⁵⁸ Under this new test, the courts will be forced to play referee as to the boundaries of the public debate on race.¹⁵⁹ It is this lack of grounding in a doctrine that could increase the risk that judges will impose their own subjective opinions.¹⁶⁰

The plurality seems to focus on the good faith public debate aspect; however, there is reason to question if a good faith analysis should have a place in an equal protection question.¹⁶¹ Different states have adopted different policies as it pertains to race in the educational system, and that fact does not mean that all policies are per se constitutional.¹⁶² Yet, as it pertains to affirmative action, can there be a valid affirmative action program that also does not offend both the political process doctrine and the Fourteenth Amendment of the Constitution?¹⁶³ Many questions remain, which are likely to be litigated in the future. For instance, if a piece of legislation is able to satisfy the Court’s criteria and equal protection, how does good faith fall into the picture? When and how should courts address a claim that injury has been made on race? The Court in *Schuetz* left these questions unanswered.

VII. Conclusion

Equal protection jurisprudence, which is grounded in the Fourteenth Amendment, provides protection to all racial groups in order for each group to receive meaningful participation in the political process.¹⁶⁴ The plurality asserted, without a clear explanation, that *Schuetz* did not present the “infliction of a specific injury of the kind at issue in [*Reitman*] and *Hunter* and in the history of the Seattle schools.”¹⁶⁵ However, the Court did not clearly draw the line.¹⁶⁶ Chief Justice Roberts advocated in *Schuetz* that the Court should have taken the holding further, by over-ruling the *Hunter* and *Seattle* decisions.¹⁶⁷ He explained that the first problem with the political process doctrine is the triggering prong—which gives

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Upholding Wire-Tap Evidence: The First Case

By Richard Wires

Given the current controversy over the existence and extent of wire-tapping by the government on private communications it is interesting to recall the first major federal decision allowing use of evidence obtained by tapping telephone lines in a criminal prosecution. A number of related convictions were narrowly upheld by the Supreme Court in 1928 despite the strong dissent by a distinguished group of justices. The case showed the majority of the court unwilling to apply Fourth Amendment protections in a way recognizing the new technologies of modern life. That the appellants were part of a big bootlegging operation, its organizer known as the “king” of bootleggers in his region, seems to give the decision a moralistic basis as well.

Roy Olmstead was born in rural Nebraska in 1886 but at eighteen moved to Seattle. At twenty-one he joined the city’s police force and rose quickly to the rank of lieutenant. Caught in 1920 bringing in boatloads of Canadian liquor, he was fined and lost his job, since Washington in 1916 had become a dry state. He then expanded his bootlegging operation into a well-organized business, with over fifty employees, forbidden to carry arms, and no one participating in any other form of criminal activity. Nor was the liquor diluted to make more money. Consequently the organization had a substantial clientele. Estimates placed the group’s income at over \$2 million a year, more than a dozen times that amount in today’s dollars, and Olmstead serving as the chief executive received half the profits. Naturally such a flourishing enterprise could not escape the attention of federal law enforcement.

Over several months in 1924 federal agents tapped Olmstead’s telephone and those of others even though wire-tapping under Washington state law was a criminal act. They had no warrant but did it from the street and a nearby building. Based on such evidence a federal grand jury in January 1925 indicted Olmstead for violating federal liquor laws and conspiracy; a total of 90 people were charged; proceedings were delayed and when the trial began in early 1926 only 47 of those indicted faced prosecution. The Olmstead case was the biggest trial under the Prohibition laws. Some defendants pled guilty and charges against others were dismissed. But 21 were found guilty and 7 acquitted. Olmstead was sentenced to four years in prison and fined \$8000. Some of those convicted filed appeals citing their Fourth and Fifth Amendment rights against both illegal searches and self-incrimination. When the Ninth Circuit Court upheld the convictions in 1927 the cases then went to Washington on appeal.

The Supreme Court heard the arguments in February 1928 and issued its ruling on 4 June upholding the convictions 5-4: Olmstead et al. v. United States (277 U.S. 438). Chief Justice William Howard Taft wrote the opinion but

dissenting were probably the most respected members of the Supreme Court: Oliver Wendell Holmes, Jr., Harlan Stone, Louis Brandeis, Pierce Butler.

At issue was whether the agents’ actions had violated protections under the Fourth Amendment and therefore made the evidence they acquired inadmissible in a federal court. Items or information obtained by any illegal means could not be used against a defendant. In *Boyd v. United States* (116 U.S. 616, 1886) the court had invalidated a law dealing with gathering evidence because it violated rights guaranteed under the Fourth and Fifth Amendments. A more directly applicable federal ruling came in *Weeks v. United States* (232 U.S. 383, 1914) involving the mail and actual searching and seizure. Because the defendant had sent lottery tickets by post, he was arrested and his house searched, items seized without a warrant then used against him. The court held unanimously that the search and seizure were illegal and the evidence could not be admitted. It declared that prosecutors must have “clean hands” and applied the exclusionary rule: federal courts cannot admit evidence that was not obtained legally. Its rule was not binding on the state courts, of course, and whether any given act is illegal man change.

Taft and the majority concluded that without a violation of the Fourth Amendment there could be no question of self-incrimination under the Fifth. He and the other justices then followed a narrow construction of the Fourth Amendment, disregarding new conditions and technologies, and declined to interpret and apply its intent to a rapidly changing America. Nor were they prepared to approach the appeal as a whole. Instead they dealt only with specific points while side-stepping others. First the chief justice reviewed the case’s facts. He noted that agents had not entered the main defendant’s premises and had conducted no searches or seizures in the normal sense. They had listened on telephone lines the defendant himself did not own. He rejected the comparison of telephone conversations to sealed letters saying postal items were protected by specific laws. No such statutes safeguarded the privacy of communications by telegraph or telephone, and the method of acquiring the evidence, wire-tapping, was not illegal under the federal law, so that the information obtained could be admitted in federal criminal prosecutions. That under Washington state law wire-tapping was an illegal act, and that federal agents had committed a state crime to acquire the evidence, were regarded in this matter as beyond the Supreme Court’s purview.

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Roy Olmstead



Upholding Wire-Tap Evidence: The First Case

Brandeis offered the most comprehensive and cogent dissent to the opinion prepared by Taft. He argued that the protections in the Fourth and Fifth Amendments are both a fundamental and broad right. “To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.” Modern technology had made telephone calls analogous to sealed letters; evidence from intrusions into private conversations should therefore be inadmissible. He also asserted that government agents under the Eighteenth (Prohibition) Amendment had not been authorized to violate state laws. Even if the government did not order the agents’ activities, under the concept of entering court with clean hands it should not profit from its agents’ crimes, for it too may then be identified as a lawbreaker. His implication seems to be that the Supreme Court was condoning the crimes of the agents. The justice said the government must respect laws just as it expects individuals to do. (Breaking his silence at his sentencing Timothy McVeigh years later used Brandeis’s words to criticize the government’s actions.)

The dissenting justices split on the right of the Supreme Court to consider the state law in deciding the appeal. Allowing the illegally obtained evidence had tainted the prosecution’s case and clearly bothered Holmes; Butler thought the court should deal only with the narrow question of constitutional protections. In effect he like the majority chose to dodge a key issue. Yet all the dissenters agreed that the Fourth Amendment should be given a broad construction. As Butler wrote, “Under the principles established and applied by this court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words.”

Olmstead served his sentence plus time for his fine and was released in May 1931. Two years later Prohibition or the “Noble Experiment” was repealed. Then when President Franklin Roosevelt included him among the pardons he granted at Christmas 1935, his costs were remitted, and a claim for \$100,000 in unpaid liquor taxes was dropped by the Internal Revenue Service. Olmstead lived quietly until his death at seventy-nine in 1966.

Unfortunately the approach of the Supreme Court in the appeal was perfunctory. The majority of justices apparently so wanted to uphold convictions of the notorious gang of bootleggers that they adopted a narrow construction of every important point. They got around the well-established clean hands principle by saying they could not consider the state law. At issue was not its constitutionality or its application, however, but its existence as an essential fact in the case. The prosecution



had used evidence it got illegally. Saying the agents’ actions were not criminal under federal law side-stepped the issue. What if the federal agents had meanwhile been arrested by state authorities and convicted in state courts of their crimes? Would the evidence still be admissible? Clearly the protections guaranteed under the Fourth Amendment were also construed in narrowest terms. The majority of justices failed to regard privacy in modern means of communication as an important right and one analogous to past holdings with respect to privacy in sealed letters. By maintaining the need for a specific law protecting privacy in telephone communications they avoided having to reason and interpret. And at a time when Prohibition was becoming increasingly controversial, the majority backed strict enforcement, perhaps letting the nature of Olmstead’s activities influence their judgment. It is surprising that the decision stood for so many years. Had there been greater interest in the wire-tapping issue and its implications, and in more conscientious consideration of key points, today’s debate over such activity and its legality might have had more useful precedents.

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The Remainder of the political Process Doctrine in the Wake of Schuette v. Coalition to Defend

the court the task of determining whether a law changes policymaking authority when it concerns a racial issue.¹⁶⁸ Roberts concluded, “no good can come of such random judicial musing.”¹⁶⁹ The second part of the test then requires a court to determine whether the challenged legislation puts effective decision making authority over the racial issue at a different level of government than it had previously been.¹⁷⁰ While the Court determined in *Hunter* and *Seattle* that the reallocation of government decision-making at issue in both these cases was unconstitutional when experimenting with the allocation of legislative power, a separate line of cases emphasizes that the Court should give deference to the states when experimenting with the allocation of legislative power.¹⁷¹ So the questions remain: Did the Court merely limit the political process doctrine as described in *Seattle*? Should the Court have overturned *Hunter* and *Seattle* and created a new test? Or has the Court destroyed protection for racial minority groups by allowing Michigan voters to change the level of government determining race-sensitive admissions processes in the middle of the game?

It seems that the Court has tried to narrow the scope, particularly the triggering prong, of the political process doctrine, but in doing so it has provided less guidance for lower courts.¹⁷² There seems to still be some race-based analysis required in determining the injury.¹⁷³ It is unclear as to the level of harm the injury needs to reach in order to trigger the political process doctrine; however, it is clear that it needs to be more than a mere racial issue. It is this race-based analysis to determine if the injury triggers the political process doctrine that will most likely be problematic for courts to apply on a case-by-case basis, due to the lack of guidance on the standard. The Court’s goal was to ground a rule in Equal Protection jurisprudence, which would establish a constitutional violation merely by making it more difficult to enact legislation for a minority group.¹⁷⁴ However, by trying to limit the application of the political process doctrine, the Court at minimum has muddied the water and created less guidance for lower courts to follow. It can be argued that this step backwards could result in general racial discrimination,¹⁷⁵ not only in the education admission

process. The *Schuette* decision paved the way for the majority to rearrange an existing decision-making process in order to limit access to the political process for racial minorities.¹⁷⁶ This could be the beginning of the end to race-based affirmative action all together.¹⁷⁷

At minimum, the Court has created less guidance for lower courts to determine when to apply the political process doctrine to a racial issue involving the rearrangement of the decision-making system. The Court had clearly retreated from the expansive *Hunter* and *Seattle* doctrine, but the ramifications of this step back are unclear moving forward. The Court will most certainly need to clarify the scope of the political process doctrine. However, it may take too long for the Court to determine the outcome of the political process doctrine to save affirmative action from eradication.

Endnotes for this article can be found on page 25 of the online edition of Friendly Passages

Allison Evans attends Barry University Dwayne O. Andreas School of Law. She received her undergraduate degrees from the Pennsylvania State University and is originally from Battle Creek, Michigan. Allison selected her topic for a seminar writing class that was directed at looking into recent Supreme Court decisions. Being from Michigan, the underlying circumstances for the article topic appealed to Allison, as well as the Constitutional issue of the political process doctrine.



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Application of Daubert v. Merrell Dow Pharmaceuticals Inc., in Florida

to rule out other potential causes. She did not review any of plaintiff's medical records or any medical literature but rather relied upon her experience, the plaintiff's anecdotal account of his illness, and temporal proximity of the battery to the onset of hip symptoms.

Judge F. Shields McManus is a Nineteenth Judicial Circuit Court Judge appointed in 2007 and elected in 2010. Since then he has been assigned to many divisions and has a broad judicial experience. Judge McManus is a graduate of FSU and FSU College of Law. He is active in the legal community and has sat on several boards and served as president. Additionally, Judge McManus is active in educational, charitable and civic organizations in Stuart and Martin Counties.



Barry Law School Sweeps Awards in Legal Writing Competition



Allison Evans, from Barry University Dwayne O. Andreas School of Law, is the winner of the First Annual Alto Adams Writing Competition for Florida Law Students. Also from Barry, Braulio Rodriguez and Adrianna LaKam took Honorable Mentions in the contest. The contest was established this year by the Friends of the Rupert J. Smith Law Library of St. Lucie County and sponsored by the generous contribution of the Adams Family. Alto Adams was a Florida Supreme Court Justice, rancher and businessman from Fort Pierce.

The Competition was judged by the Honorable Burton Conner and the Honorable Mark Klingensmith of the Fourth District Court of Appeal. The Second Annual Alto Adams Writing Competition has already begun and more information can be found at the Law Library's website: <http://www.rjlawlibrary.org>. The rules are printed on the back cover of this issue of "Friendly Passages."

Thanksgiving & Abraham Lincoln

By Katie Everlove-Stone



The annual feast is fast approaching, and I'm already thinking about what interesting and yummy twists I can add to our Thanksgiving dinner. Thanksgiving is easily one of the best holidays ever. You gorge on delicious food while surrounded by your family and consider all the good things in your life. What could be better?

The first Thanksgiving took place in southeastern Massachusetts in November, 1621, after an agreement was reached between the settlers and the Wampanoag tribe of Native Americans. The agreement provided that each of the parties would defend the other against other Native American tribes. The feast lasted three days and included deer, corn, and shellfish.

Thanksgiving did not catch on as an annual holiday until 1863, when Abraham Lincoln declared a national day to give thanks for "general blessings". He did this in response to a request from magazine editor Sarah Josepha Hale, who was 74 at the time. She said she had requested a national fixed day of thanksgiving each year for the previous 15 years. Previous presidents had declared national days of thanksgiving as far back as George Washington, but Lincoln was the first to make it a fixed, permanent holiday across all states in the union. Secretary of State William Seward wrote the original Proclamation of Thanksgiving on October 3, 1863. Seward wrote that although the country was at war, the economy was vastly improving in the Union. He went on to state that these blessings "should be solemnly, reverently and gratefully acknowledged as with one heart and one voice by the whole American People. I do therefore invite my fellow citizens in every part of the United States, and also those who are at sea and those who are sojourning in foreign lands, to set apart and observe the last Thursday of November next, as a day of Thanksgiving and Praise to our beneficent Father who dwelleth in the Heavens."



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Essential Attributes of an Effective Mediator: Impasse Avoidance Abilities in Monetary Claims

demand to keep the dance going. The longer the dance goes, the more likely an agreement will be reached as long as both parties keep the distance closing until the end of the dance when time and distance are reduced to zero and the dance is over. People tend to be more sensitive to the rate of concessions than they are to the magnitude of concessions. (End Note 5) This dance pattern is even predictable. (End Note 6)

The foregoing does not imply the moves be equal (that is a clear signal that the meeting is in the middle of the negotiating gap) but that the moves are sufficient to keep the negotiating parties in the mood to continue the dance until one or both sides reach their best numbers and the distance gap is narrowed to something that can be bridged to agreement.

3. “Nobody gets free discovery” “I’m not going to do their homework for them”

The stark reality is that withholding of information in the mediation context is an exercise in futility for 3 basic reasons:

First: The mediation model is totally dependent on full disclosure—all parties must have access to the same information. In fact, Rule 10.230(f) {Florida Rules for Certified & Court Appointed Mediators} requires it.

Second: Well over 98% of cases settle before actual trial meaning that the withheld information either comes out at some time before trial or the withheld information was/is irrelevant or useless.

Third: In the context of insured claims the reality is that carriers will not pay money to resolve the claim without documentation of damage, injuries, and treatment.

The mediator’s prescription is to review the forgoing reasoning and encourage the free flow of information.

Late-Point Impasse

Symptoms

1. “Let’s just cut to the chase. This case isn’t going to settle”
- 2 “Tell them we’re not going any higher/lower”
3. I don’t have any more room to move ”

The commonality in the above indicators is the expression of a high degree of frustration with the negotiating process. These perceptions often drive one party or the

other to quit making proposals and guarantee impasse without the parties reaching their best numbers.

Prescription

1. Help the parties slow down, create additional options, and/or chunk up their respective remaining available range (if they indeed have any remaining range) into multiple moves without getting beyond their acceptable range of settlement. The central idea is to narrow the gap to make it more attractive to close any remaining gap.

2. Ask the parties if they would consider and/or suggest a bracket in which they could continue the negotiating process.

3. If indeed the parties have reached their best numbers and a seemingly unbridgeable gap still exists, the mediator may then ask the parties to focus on their best alternatives to a negotiated settlement agreement (BATNA) by employing a decision tree analysis to bring new focus to evaluation probabilities and requesting each party to review their respective positions asking the following questions:

4. “How likely do you believe you are to prevail (expressed as a percentage) if mediation fails and the case is resolved through adjudication?”

5. The mediator then adds the two responses together. If the sum of the responses exceeds 100%, this reveals that one or both parties are overconfident about their chances of success, because the chance of plaintiff’s success plus the chance of defendant’s success logically must equal 100%. End note 7.

6. “Assuming that you actually lose the case in court, how would you explain the

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Essential Attributes of an Effective Mediator: Impasse Avoidance Abilities in Monetary Claims

reasoning of the judge (or jury) that would most likely be provided to support this adverse judgment?"

Asking a lawyer to identify weakness in his/her case is not likely to cause him to access ideas or information that was not previously considered. However, requesting the generation of a specific explanation for an undesirable judicial determination can increase its perceived plausibility and often reduce, if not eliminate, optimistic overconfidence. End Note 8.

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Endnotes for this article can be found on page 25 of the online edition of Friendly Passages



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1982	The 35 th Annual RPPTL Legislative and Case Law Update	1/31/2017	8/1

Alto Adams Jr. Legal Writing Contest Rules

The Friends of the Rupert J. Smith Law Library invite all students currently enrolled in an accredited Florida Law School to compete in the Second Annual Justice Alto Adams Writing Competition.

Papers should be a scholarly endeavor and must have a legal theme on a topic of your choice. The papers will be judged on legal reasoning, the difficulty or novelty of the legal issue addressed, general standards expected of serious work, and include a reference to a recognized citation system as well as the Fla.R.App.Pro. Rule 9.800. The paper must be long enough to accommodate a well-treated topic but not exceed 5000 words. A student may submit a work that has been written as a school assignment but nothing that has been previously published.

Your papers should be double spaced and submitted electronically by email to lucielaw@bellsouth.net with the subject line "Justice Alto Adams Writing Competition 2015" between September 20, 2015 and March 15, 2016. The winner will be awarded \$ 1000 and published in "Friendly Passages" magazine which is electronically circulated to most members of the Florida Bar. The prize money is sponsored by the Adams family and the Port St. Lucie Bar Association.

Please email Jim Walker at JimW@jimwalkerlaw.com with any questions. We look forward to receiving your entry.

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- End Note 1.** See “First Offer” Barry Goldman, Michigan Bar Journal June 2015 and authorities cited therein. See also Psychological Principles in Negotiating Civil Settlement; Birke & Fox, Harvard Negotiation Law Review Spring 1999, Vol 4:1
- End Note 2:** Florida State Summary reporting System
- End Note 3.** Top 10 list of hardball tactics Harvard Program on Negotiation Daily Blog August 24, 2015
- End Note 4.** Psychological Principles in Negotiating Civil Settlements *Birke and Fox* Harvard Negotiation Law Review Vol. 4:1 Spring 1999 pp 41
- End Note 5.** Ibid, p.43
- End Note 6.** www.pictureitsettled.com
- End Note 7.** Psychological Impediments to Mediation Success. Korobkin; Ohio State Journal on Dispute Resolution Vol. 21:2 2006 p.290
- End Note 8.** Ibid p. 297



Library Holiday Closings

November 26, 27, 28, & 29. Thanksgiving
 December 24, 25, 26, 27. Christmas
 December 31 through January 3. New Year

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Endnotes

1. Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1632, 1651 (2014).
2. See Peter Western, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).
3. See Peter Western, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).
4. *Id.*
5. *Id.*
6. The Constitution and Slavery, *Constitutional Rights Foundation*, (last visited March 29, 2015 6:55PM), <http://www.crf-usa.org/black-history-month/the-constitution-and-slavery>.
7. Women did not receive the right to vote until the Nineteenth Amendment was passed in June 4, 1919 (see <http://www.ourdocuments.gov/doc.php?flash=true&doc=63>). Voting power was established in the Great Compromise on July 16, 1787; (see generally Farrand, Max. *The Framing of the Constitution of the United States*. New Haven: Yale University Press, 1913. Chapter 7; and Rossiter, Clinton. *1787: The Grand Convention*. New York: Macmillan, 1966. Chapter 10).
8. Richard Wolf, *States Defend Gay Marriage Bands as Democratic Actions*, USA TODAY, (March 27, 2015) (last visited March 29, 2015 7:00 PM), <http://www.usatoday.com/story/news/nation/2015/03/27/supreme-court-gay-marriage-states/70552570/>.
9. *Id.*
10. *Id.*
11. Western, *supra* note 2, at 594.
12. Western, *supra* note 2, at 565.
13. See Morgan Mottley, *Chalk Talk: Taking a Step Back from Civil Rights: The Supreme Court’s Approval of Affirmative Action Bans*, 44 J.L. & EDUC. 155 (2015).
14. See Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014).
15. See Mottley, *supra* note 13.
16. Hunter v. Erickson, 393 U.S. 385, 393 (1969).
17. *Schuette*, 134 S. Ct. at 1653.
18. *The Supreme Court 2013 Term: Leading Case: Constitutional Law: Fourteenth Amendment -- Equal Protection Clause -- Political-Process Doctrine -- Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 128 HARV. L. REV. 281, 281 (2014) [hereinafter The Supreme Court].
19. Mottley, *supra* note 13, at 159.
20. Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (April 22, 2014), <http://www.nytimes.com>.

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com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=3.

21. Ford Fessenden & Josh Keller, *How Minorities Have Fared in States With Affirmative Action Bans*, N.Y. TIMES (April 22, 2014), <http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html>.

22. Rodney A. Smolla, 1 Smolla & Nimmer on Freedom of Speech § 13:43 (2014).

23. Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1024 (1996).

24. Christopher E. D'Alessio, *A Bridge Too Far: The Limits of the Political Process Doctrine in Schuette v. Coalition to Defend Affirmative Action*, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 103, 108 (2013).

25. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) (quoting *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (Stevens, J., concurring)).

26. *Schuette*, 134 S. Ct. at 1651.

27. D'Alessio, *supra* note 24, at 107; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

28. D'Alessio, *supra* note 24.

29. *Schuette*, 134 S. Ct. at 1651.

30. *Id.*

31. D'Alessio, *supra* note 24, at 111; *see also* Vikram, *supra* note 23.

32. *Id.*

33. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

34. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

35. *Schuette*, 134 S. Ct. at 1629.

36. *See Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

37. *See Gratz v. Bollinger*, 539 U.S. 244 (2003); *see Grutter v. Bollinger*, 539 U.S. 306 (2003).

38. *Grutter*, 539 U.S. at 325. The law school's admission plan had a more limited use of race-based preferences. *Schuette*, 134 S. Ct. at 1629. The Court determined that the law school's admission process, of a plus factor rather than a points system, was not a violation of the Fourteenth Amendment. "The Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343.

39. *Gratz*, 539 U.S. at 270. The Court determined whether the universities in Michigan, which used racial preferences in undergraduate admissions violated the Equal Protection Clause of

the Fourteenth Amendment of the Constitution. The admissions process had specific guidelines for each applicant and they were referred to as "SCUGA" Factors. It was under the U category that students could receive extra points for being a minority. The Supreme Court determined that the freshman admissions policies were not narrowly tailored to achieve the school's compelling interest of diversity, and the admission process violated the Equal Protection Clause. *Gratz*, 539 U.S. at 249-55, 275-76.

40. *Schuette*, 134 S. Ct. at 1629.

41. David E. Bernstein, "Reverse Carolene Products," *The End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, 2014 Cato Sup. Ct. Rev. 261, 261 (2013-2014).

42. *Schuette*, 134 S. Ct. at 1629.

43. M.I. CONST. art. I, § 26.

44. *Schuette*, 134 S. Ct. at 1629-30.

45. *Id.* at 1630.

46. *Id.* at 1630; *reversing based on* *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), *infra*. Page 18- 21; *see generally* *Coalition to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012) (en banc).

47. *Schuette*, 134 S. Ct. at 1630.

48. *Id.* at 1630.

49. M.I. CONST. art. VIII, § 5; *explained in Schuette*, 134 S. Ct. at 1631.

50. *Schuette*, 134 S. Ct. at 1631.

51. *See Reitman v. Mulkey*, 378 U.S. 369 (1967); *see infra*. Page 15-16.

52. *See Hunter v. Erickson*, 393 U.S. 381 (1969); *see infra*. Page 16-17.

53. *Schuette*, 134 S. Ct. at 1631-1638.

54. *Reitman*, 378 U.S. at 372.

55. *Schuette*, 134 S. Ct. at 1631.

56. *Reitman*, 378 U.S. at 389; *see generally Schuette*, 134 S. Ct. at 1631.

57. *Hunter*, 393 U.S. at 386.

58. *Schuette*, 134 S. Ct. at 1632; (*citing Hunter*, 393 U.S. at 392).

59. *Schuette*, 134 S. Ct. at 1632 (*citing Hunter*, 393 U.S. at 391).

60. *Schuette*, 134 S. Ct. at 1632.

61. *Id.* at 1643.

62. *Seattle*, 458 U.S. at 460-61.

63. *Schuette*, 134 S. Ct. at 1633.

64. *Id.* at 1634.

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65. *Id.* at 1634-35.
66. *Id.*
67. *Id.* at 1634-35.
68. *Schuetz*, 134 S. Ct. at 1635.
69. *Id.* at 1637-38.
70. *Id.* at 1637.
71. *Id.*
72. Bernstein, *supra* note 41, at 262.
73. *Id.* at 1636; see also Ann K. Wooster, *Equal Protection and Due Process Clause Challenges Based on Racial Discrimination—Supreme Court Cases*, 172 A.L.R. Fed. 1, at §17 (2001).
74. *Schuetz*, 134 S. Ct. at 1639.
75. *Id.* at 1640.
76. *Id.* at 1642.
77. *Id.* at 1651-53
78. *Id.*
79. *Id.* at 1651.
80. *Schuetz*, 134 S. Ct. at 1652.
81. *Id.* at 1653.
82. *Id.*
83. *Id.*
84. *Id.* at 1654.
85. *Id.*
86. U.S. CONST. amend. XIV, §1.
87. *Washington v. Davis*, 426 U.S. 229, 239 (1976).
88. *Schuetz*, 134 S. Ct. at 1651.
89. *Reitman*, 378 U.S. at 372.
90. *Id.*
91. Cal. CONST. Art. I, § 26
92. *Reitman*, 378 U.S. at 372.
93. *Id.* at 373.
94. *Id.*
95. *Id.*
96. *Id.* at 376; see generally Wooster, *supra* note 73.
97. *Reitman*, 378 U.S. at 376.
98. *Id.*
99. *Id.*
100. *Id.* at 378.
101. *Id.* at 378-79, 381.
102. *Hunter*, 393 U.S. at 386.
103. *Id.* at 387.
104. *Id.*
105. *Id.*
106. Wooster, *supra* note 73; interpreting *Hunter*, 393 U.S. 365 (1969).
107. *Hunter*, 393 U.S. at 391.
108. *Id.* at 389.
109. *Hunter*, 393 U.S. at 389.
110. *Id.* at 389-90.
111. *Id.* at 390-91.
112. *Id.*
113. *Id.* at 393.
114. *Seattle*, 458 U.S. at 460.
115. *Id.*
116. *Id.* at 460-61.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Seattle*, 458 U.S. 461.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 462.
126. Wash. Rev. Code § 28A.26.010; see generally *Hunter*, 393 U.S. at 462.
127. *Seattle*, 458 U.S. at 463.
128. *Id.*
129. *Id.* at 464.
130. *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970).
131. *Seattle*, 458 U.S. 465-466.
132. *Id.* at 466.

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133. *Mobile*, 446 U.S. at 84; *see generally Seattle*, 458 U.S. at 467.

134. *Seattle*, 458 U.S. at 470.

135. *Id.*

136. *Id.*; *citing Hunter*, 393 U.S. at 395.

137. *Seattle*, 458 U.S. at 474.

138. *Id.*

139. *Id.*

140. *Id.* at 484.

141. *Id.* at 487.

142. *Id.*

143. The Supreme Court, *supra* note 18, at 286.

144. *Id.*

145. *Id.*

146. Mottley, *supra* note 13, at 158.

147. *Schuette*, 134 S. Ct. at 1633.

148. The Supreme Court, *supra* note 18.

149. Daniel Fisher, *Michigan Voters Win, Affirmative Action Loses At Supreme Court*, *Forbes*, <http://www.forbes.com/sites/danielfisher/2014/04/22/michigan-voters-win-affirmative-action-loses-at-supreme-court/>.

150. Jay S. Goodman, *Feature: Affirmative Action Takes Another Supreme Court Hit*, 63 RI BAR J. 27, 29 (2015).

151. *Id.*

152. *Id.*

153. *Schuette*, 134 S. Ct. at 1633.

154. The Supreme Court, *supra* note 103, at 281

155. The plurality opinion explained that the political process doctrine, under *Seattle* and *Hunter*, would require courts to “define individuals according to race.” *Schuette*, 134 S. Ct. at 1634. It would be this requirement of defining individuals based on their race that would require the courts to rely on “demeaning stereotypes” associated with each race, while presuming that each individual of that specific racial group would share the same political interests. *Schuette*, 134 S. Ct. at 1635. This assumption could create incentives for partisans “to cast the debate in terms of racial advantages or disadvantages,” and Justice Kennedy objected to the fact that these inquires would not be guided by any “clear legal standards.” *Schuette*, 134 S. Ct. at 1635. Finally, Justice Kennedy explained that he saw “no apparent limiting standards” regarding the broad reading of *Seattle*, by accepting a triggering prong of simply a “racial focus” to an injury. *Schuette*, 134 S. Ct. at 1635. *See generally* The

Supreme Court, *supra* note 18, at 284.

156. The Supreme Court, *supra* note 18.

157. The Supreme Court, *supra* note 18, at 287.

158. The Supreme Court, *supra* note 18, at 290.

159. Michael Kegan, “*Unelected Faculty*”: *Schuette v. Coalition and the Limits of Academic Freedom*, 5 CAL. L. REV. CIRCUIT 286, 289 (2014).

160. *Id.*

161. *Id.* at 288-89.

162. *Id.* 289.

163. D’Alessio, *supra* note 24, at 120.

164. *Schuette*, 134S. Ct. at 1651.

165. *Schuette*, 134 S. Ct. at 1636 (plurality opinion); *see generally* The Supreme Court, *supra* note 18, at 289.

166. The Supreme Court, *supra* note 18, at 289.

167. *Schuette*, 134 S. Ct. at 1641.

168. *Id.* at 1643.

169. *Id.*

170. *Id.* at 1645.

171. *Id.* at 1645-46.

172. The Supreme Court, *supra* note 18, at 289.

173. The Supreme Court, *supra* note 18, at 289.

174. The Supreme Court, *supra* note 18, at 289.

175. Mottley, *supra* note 13, at 161.

176. *See Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

177. Mark Walsh, *The Future of Race*, 100-JUN ABA J. 22, 22 (2014).

