SCHOLARS
STRATEGY NETWORK

How Race-Neutral Rulings by the Supreme Court Perpetuate Inequalities

Cedric Merlin Powell, University of Louisville Brandeis School of Law

In these polarized and racially divisive times, hateful rhetoric underpins politics rooted in fear, contrived emergencies, and rationalized racism. Politicians wielding poisonous language have weakened U.S. political and social institutions. Equally striking, however, is the way the United States Supreme Court has legitimized inequality by using the opposite kind of rhetoric – ostensibly race-neutral rhetoric – while at the same time relying on an overly narrow definition of structural inequality.

Two recent decisions illustrate these points, and underscore why these trends, if not taken seriously, could entrench justifications of inequality in all segments of American society. American public discussion around race, affirmative action, and structural inequality need to include an analysis of how neutral processes contribute to and perpetuate racism and structural inequalities.

The Demise of Affirmative Action

Since the first major challenge to race-conscious remedies in college admissions – *Regents of the University of California v. Bakke* (1978) – the Supreme Court has offered only tepid support for measures that address the present-day effects of past discrimination. Nearly all of the Court's decisions about race since *Bakke* have adopted neutral rhetoric that portrays racial diversity as an "add on" that contributes to rich dialogue in the classroom. This neutral description of diversity as a First Amendment value in the marketplace of ideas does little to advance equality.

To date, eight states (California, Michigan, Nebraska, Arizona, Oklahoma, Florida, Washington, and New Hampshire) have abolished race-based affirmative action in higher education. Recently, in the 2014 case *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court held that voters may amend state constitutions to prohibit the consideration of race in all state decision-making. This includes admissions decisions in post-secondary education, contracting, and any area where it was previously possible to consider race as one of many factors to help eradicate deeply rooted systemic inequalities.

The *Schuette* decision is disturbing because it gives voters the power to determine the meaning of the Fourteenth Amendment, which promises all citizens "equal protection of the laws." Under the guise of equal opportunity, openness, and fair process, the Court has opened the door for citizens in the states to dismantle the incremental gains of affirmative action. Justice Scalia, in his concurring opinion in *Schuette*, praises the citizens of Michigan for embracing the "express encouragement" from the Court to prohibit race-conscious remedies in all state decision-making. What is particularly troubling about his opinion is that it re-envisions federal divisions of authority to give each state "near-limitless sovereignty" in designing governmental powers. This could lead to an expansion of state-level practices that undermines the rights of less powerful groups. In essence, the *Schuette* decision is a new articulation of the doctrine of states' rights.

More broadly, since 2005 one of the hallmarks of the Supreme Court under Chief Justice Roberts has been a redefining of the scope of governmental powers. In this redefinition, the Court ignores structural inequality and instead focuses on the supposedly neutral results of processes that, in fact, may reinforce inequalities. The Court gives citizens the power to prohibit their state government from explicitly discussing and addressing racial inequalities in public policymaking. This is problematic because **race must be considered and discussed** at least, as one factor among many in order for governments at all levels to be able address the history and persistence of racial discrimination in many spheres of American life.

An even more disturbing aspect of these recent Court decisions about states' rights is the precedent they set for allowing voting citizens, not judges, to interpret basic protections defined by the U.S. Constitution. This development means that the constitutional rights of Americans can be diminished or abrogated by mere shifts in public opinion. Many rights will no longer be understood as permanently guaranteed by the Constitution and subject to judicial enforcement.

The Demise of Voting Rights and the New Federalism

In its pivotal 2013 decision in *Shelby County* v. *Holder*, the Supreme Court overturned Section 4 of the Voting Rights Act, relaxing previous requirements that counties with histories of abusing voting rights had to get federal approval before implementing new election rules. In this decision, the Court disregarded past discrimination and, instead, focused on how to determine the level of current discrimination that would justify burdening states with federal supervision. This new standard guts enforcement of core provisions of the Voting Rights Act. In the aftermath, many states have devised a variety of supposedly neutral laws and new voting procedures that disproportionately weaken the voting rights of African-Americans and other people of color.

Nationwide efforts to ensure equal rights are now much more difficult. Given the Court's determination to protect state autonomy, federal efforts to prevent discrimination will be held unconstitutional if rights advocates cannot prove that there is current, clear evidence of intentional racial discrimination by public officials. No longer is it enough to show pervasive discriminatory impact, advocates have to prove that officials wrote laws with the explicit *intent* to discriminate against specified groups.

Why did the Court make these changes? The majority of Justices reasoned that federal pre-clearance enforcement under the Voting Rights Act was no longer necessary because the country has made so much racial progress since 1965. This means that the states with histories of depriving African-American citizens of their fundamental right to vote cannot given extra scrutiny. There must be "current data of [voting rights discrimination] reflecting current needs."

Both *Schuette* and *Shelby County* illustrate ways in which the Supreme Court disregards the present-day effects of past discrimination. By presuming racially neutral policies and equal access to the political process, the Court simply presumes out of existence all inequalities not currently attributable to overtly racially motivated government actions. Thus race-conscious remedies for systemic injustices – a sobering development in our racially troubled times.

Read more in Cedric M. Powell, "Affirmative Action and Critical Race Theory" in *Affirmative Action: Contemporary Perspectives* Vol. 2, edited by James Beckman (Praeger, 2014), 267-98.