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Sensus Communis, Voter-Inflicted Harms, and *Schuette v. BAMN*

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8.1 INTRODUCTION

Appellate court opinions are often criticized for establishing difficult or shaky precedent as a result of imperfect reasoning. These sorts of criticisms rest on the assumption that had the judges or Justices considered possible implications more fully, they could have crafted an opinion more easily applied and more immune to manipulation by future courts. While there certainly are opinions whose reasoning could have been more thorough or more thoroughly explained, there are also those whose reasoning has become difficult to follow not because of any error or ineptitude on the part of those who authored them but because the very foundation of judgment, the *sensus communis*, has shifted. In this chapter, inspired by eighteenth-century rhetorician and philosopher of law Giambattista Vico, I explore the role that prerational judgment, embodied in the sensus communis, plays in the authoring and interpretation of what will become unintentionally difficult precedent, using the 2014 United States Supreme Court case *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)* and its relevant precedent as my example.

In *Schuette v. BAMN* (2014), a plurality of the Court ruled that Michigan's 2006 voter-approved constitutional amendment removing the power to implement affirmative action plans from universities and government entities was not a violation of the Equal Protection Clause. Critical to the judgment was the plurality's insistence that *Schuette* was unlike earlier cases where voters had restricted the state's ability to implement race-conscious policies because, unlike in those cases, the voters' action in *Schuette* didn't implicate "injury by reason of race" but mere policy preference (an argument the losing side had made in each of those earlier cases) (*Schuette v. BAMN*, 2014, p. 314).

I argue that Vico's sensus communis helps explain both why those earlier cases didn't anticipate *Schuette* and why the *Schuette* plurality could discern a stark line between those historical cases and the one before it. Vico (2020, p. 142) defines

sensus communis as "judgment without reflection," shared by an entire community, which evolves but endures. Importantly, sensus communis is "sedimented in language itself," such that a community's values and judgments are confined and animated by its language (Schaeffer, 2019, p. 35). Vico stresses that in confronting pressing issues, communities necessarily rely upon the sensus communis and, in so doing, simultaneously revise it. Vico's sensus communis is particularly useful when thinking about judicial precedent in a common-law system because it reminds us that law is inherently rhetorical and necessarily responsive to and rooted in its own historical context. But beyond that, if sensus communis is indeed embedded in our language, the concept reminds us that a court's precise use of language and careful reasoning cannot possibly guard against shifts in the sensus communis that will render past opinions "inadequate" because it is both the values and the language itself that have shifted. While it's not particularly novel to suggest that language changes (appellate courts agonize over this regularly), Vico's sensus communis helps us to see not only how the meaning of particular words and phrases shifts but that the "standard of judgment" embedded in language does too. Law and eloquence do not stand still.

In what follows, I begin by describing Vico's notion of sensus communis and the conflict that helped forge it, relying heavily on Vico scholar John Schaeffer's extensive body of work on the subject. I then suggest how Vico's sensus communis might aid legal and rhetorical scholars in appraising judicial precedent. I proceed to apply these insights to my analysis of *Schuette* and the precedent the Court uses to decide the case. I argue that in the opinions that preceded *Schuette*, the Court was accustomed to the evils the majority could undertake to preserve white dominance and maintain the status quo. Those Courts could not have anticipated the extent to which the future Court would understand that dynamic as a problem of another time. Further, I demonstrate how critics of that precedent similarly fail to account for the role of sensus communis in those earlier cases (and in their own appraisal of them) through their insistence that those opinions should have anticipated our controversies and the shifts in language that accompanied them. Vico's sensus communis, then, not only helps us to understand court opinions as rhetorical struggles that respond to and articulate the sensus communis but also reminds us how interpreting precedent is always an act of forging our current sensus communis.

8.2 VICO'S SENSUS COMMUNIS: COMMUNAL, RHETORICAL, AND PRERATIONAL

Giambattista Vico was a professor of eloquence at the University of Naples from 1699 to 1741. There he trained university students to qualify in law, the practice of which was markedly different from our own. During Vico's time, Naples' legal system did not have a written code and wouldn't until 1806. Thus, for Vico's students the practice of law would have required arguing from precedents and customs that

were predominantly preserved in oral tradition (Schaeffer, 1990, p. 47). Beyond being able to recall and draw on copious amounts of information to make connections and argue for their clients, legal practitioners had to be able to think quickly, as criminal trials often occurred within twenty-four hours of arrest. To prepare students for this oral, adversative practice, Vico trained them in eloquence, modeled after the ancient Romans. Vico saw the ability to invent arguments, drawn from tradition and common opinion, as critical not only to the practice of law but also to participation in public life.

Though this was the tradition in which Vico taught and his students practiced, Cartesian thought was challenging that tradition and the constitution of Naples's legal system. Reformers sought to enact a legal code based on abstracted reason, unencumbered by common opinion and history. As John Schaeffer (1990, p. 52) relates, in "substituting Cartesian rationality for consensus the reformers were able to shift the whole basis of legal theory from tradition to the present." Vico was concerned with the way the Cartesian method, as employed in the push to codify law, would vacate the communal and historical aspects of law. He feared that the more specific and detached the legal codes, the less those arguing legal cases would have to reference general values and public interest. When law is a highly technical matter in which each particular instance is contemplated and addressed by code, there is no need to refer to community values or to history, as all is spelled out and available for private manipulation. In his version of Roman history, Vico (2018, p. 69) decries the point when the citizens came to realize that "law was nothing but their private self-advantage, and stopped taking an interest in the common welfare." It was because Vico saw codification as abstracting law and removing it from the realm of public good that he resisted it.

Thus, under pressure from Cartesian reformers, Vico set out to defend his method of education and the common law system currently in place in Naples. It was in the midst of this conflict that Vico formed and refined his unique conception of sensus communis. While sensus communis translates to "common sense," Vico's understanding of the term far outstrips that translation and is in stark contrast with notions of common sense circulating at Vico's time (Bayer, 2008; Schaeffer, 2004). Vico's sensus communis is inherently rhetorical, communal, and prerational. In contrast, Descartes' *bon sens* (good sense) is the individual's faculty for directing the mind from simple to more complex ideas, using binomial thinking to get there. While with Descartes' bon sens, history, common opinion, and the thinker's embeddedness in these things falls away, Vico's sensus communis is wholly dependent on them.

Vico (2018, p. 13) first defined sensus communis as "the standard of practical judgment" and "the guiding principle of eloquence." When he says that sensus communis is the standard for practical judgment, he means that this common fund of values is that from which we "make sense" of the new. Presented with a new case, the orator must draw comparisons and craft metaphors that ring true and that are

rooted in the community and its past. This is because the audience is necessarily embedded in the sensus communis and so too is the rhetor.

While Aristotle's *doxa*, understood as common opinion, bears some resemblance to Vico's sensus communis, Vico's later elaboration of sensus communis as historically bound, linguistically embedded, and inescapable distinguishes it from that earlier concept. For Vico, sensus communis is foundational to human affairs. Indeed, in *The New Science*, Vico sought to explain the historical origins of the sensus communis and what we take to be natural law, which, for him, was a rhetorical phenomenon, not a philosophical one (Schaeffer, 2019). Vico writes in *The New Science* that sensus communis is "judgment without reflection, sensed in common by a whole order, a whole people, a whole nation, or the whole of humankind" (Vico, 2020, p. 142). He posits that the sensus communis emerges from a community's historical and ongoing confrontation with "human necessities and advantages" (p. 141). As the community confronts these circumstances, it necessarily develops new assumptions, decisions, institutions, and values (sensus communis). Notably, these things are not the product of isolated philosophic consideration but are developed ad hoc, out of necessity and in response to pressing needs. As new "necessities and advantages" present themselves, the sensus communis continues to be both the basis of judgment and the result of the struggle. Thus, the sensus communis is a force for measured, history-bound change. As Schaeffer explains, when communities confront novel circumstances, they must engage in both "linguistic inventiveness [and] social innovation so that new solutions [are] acceptable within the terms of the sensus communis" (Schaeffer, 2019, p. 100). Importantly, then, common values aren't merely *conveyed* through language, they are embedded in language and its rhythms and affective force. And those values aren't derived from philosophical confrontation but from necessity. For Vico, as Schaeffer (2019) understands him, a community doesn't set out to determine and define its values. Those values (the sensus communis) are forged through necessity – through confronting complications and attempting to resolve them. Thus, they form before rational judgment (and become, themselves, the basis for judgment). As Schaeffer (2019, p. 74) writes, for Vico "values and assumptions [are] sedimented in language itself, even beyond conscious apprehension." So, language, custom, and institutions arise from a community's perceptions, its needs, and its responses to those things. What has been created must always control future perception and response, though literacy – the ability to reference and analyze the thoughts of the past – opens all of that up to more reflection and contemplation.

8.3 SENSUS COMMUNIS AND OUR LAW

Vico's insights about sensus communis are helpful in situating legal texts and their authors. Generally, a rhetorical orientation toward law presumes that law itself is rhetorical (neither an isolated system of rational thought nor an impenetrable

exercise of power) and that law and culture necessarily inflect each other (and, in some ways, cannot be neatly separated) (Hasian Jr. et al., 1996). It rejects the notion that law can be scientized in the way the reformers of Vico's time had hoped it could be. What Vico's notion of sensus communis adds is a particular appreciation for the way that any given legal claim, creation, or resolution (for example, a citizen's invocation of their constitutional rights, legislation, a court opinion) is a product of history and of its time and that the very language used is necessarily derived from and directed toward the sensus communis. Law is communal and reactive. Legal thought, reasoning, and language are necessarily tied to the histories and conflicts that forged them. There is no legal thought, no legal principle outside the sensus communis. The sensus communis is the metric by which we wage and evaluate legal claims, and the resolution of those claims is subsumed into that sensus communis. Thus, Vico's sensus communis reminds us that law and its language are not "above" the conflicts that emerge in and over the sensus communis; to the contrary, they are necessarily a part of them. Law is bound to and bound up in the sensus communis not just in terms of values but in language and expression – eloquence itself.

Of course, Vico's sensus communis poses some difficulties if we understand him to mean that the values embedded in the sensus communis are universal, settled, and durable. Given Vico's preoccupation with the evolution of sensus communis and the linguistic inventiveness required to evolve that sensus communis, I don't take that to be his meaning. Rather, I understand him to be relating something similar to what Marianne Constable (2014) does when she writes that law's language binds us. Constable, in contrast to those who would construe legal speech as directed at a distant state, argues that all legal claims are directed to the *we* of law. Law is fundamentally about our being and living together; its language binds *us* together and is a means by which we shape (and contest the shape of) that communal undertaking. It is precisely for this reason that people turn to law to consider and challenge the assumptions and values which seem to undergird our living together (as Vico would have it, our sensus communis). Law is the official language of our communal enterprise and is invoked and contested on these grounds. Constable (2014, p. 134) writes, "Claims of injustice or of justice made in the name of law recall hearers to what a speaker takes, perhaps mistakenly, to be the common practices and judgments of the two or, rather, of the 'community' to which they both belong." This certainly doesn't mean that law is always reflective of community values. Rather, because law, by design, binds us together, it is necessarily a powerful avenue for contesting the substances of those bonds.

Law does, in its way, acknowledge that it is a site and means of contest. But the scientized notion of law, which infects law now just as it did in Vico's time, suggests that law already contains all the answers when, in fact, Vico's notion of sensus communis shows us that this isn't true. There are always new "necessities and advantages," and this is why the sensus communis necessarily evolves. That we

share this law in common and that it is supposed to address our universal principles and values binds us together and requires our constant negotiation of our law and our world. Legal pleas and resolutions are directed toward the sensus communis from the sensus communis. This doesn't mean that everybody agrees. It means that we have a sense of shared institutions and values. The assessment of what those are may be faulty, but the sense of them and the drive to cohere those shared values is still there, as is the language in which they are embedded. Thus, at the point of legal contest, we find ourselves both awash in the sensus communis and engaged in the negotiation of it.

Like the rest of us, judges are not above the sensus communis in which we find ourselves and toward which we direct our arguments. Judges and Justices can guess at, but cannot know, what will seem common, fanciful, or banal decades from now. Relatedly, they cannot predict the turns in language, as the standard of judgment, that will accompany those changes. They, like we, inhabit the sensus communis and its attendant language. According to Vico, we cannot escape the sensus communis in which we find ourselves. In fact, we aren't even able to see how common it is until after the fact. That poses a difficulty for those writing precedent with the idea that it will be precedent. Authors cannot know the new cases that will arise or the shifts in the sensus communis that will have occurred by the time those conflicts arise. Similarly, while judges and Justices can be attentive to and precise with their language, they cannot predict how language will shift to accommodate new values and necessities. If the sensus communis is embedded in language itself, authors of judicial opinions are hopelessly bound to that standard and its historical context. Those who author appellate opinions know they are in the midst of a struggle and that the opinion they issue will resolve the immediate issue before the court. What they don't know is how their resolution of the immediate issue will eventually settle into the sensus communis – what elements from the opinion and the context in which it arose will be sedimented into the sensus communis and what will be cast along the wayside. They cannot anticipate how future conflicts will necessitate linguistic inventions that change the very standard of judgment.

Vico reminds us that while the Supreme Court picks its cases, it doesn't pick our struggles (what Vico calls our "necessities and advantages"). Law is forged through inevitable confrontation of the novel, the unaccounted for, not the places where we simply apply the apparent and uncomplicated sensus communis but those where we struggle to do so. This insight is particularly helpful in appraising judicial precedent from the present. It reminds us that our common law system isn't just about consistency and predictability; it is about a history of which we are inevitably a part. It requires that we confront and contemplate the sensus communis of those who preceded us to *make sense* of what is now before us and that we be humbled by the knowledge that we inevitably inhabit our current moment. Judges and Justices engage the sensus communis in the process of issuing opinions and deciding cases (with varying degrees of attention to those histories and struggles). And we do this

every time we evaluate or analyze an opinion. Vico reminds us that in that evaluation we must be mindful of our own position and historical location. Vico (2020, p. 127) writes in *The New Science* of the "vanity of the learned, who want what they know to be as ancient as the world." Schaeffer (2001, p. 15) summarizes that Vico is here implying that "the understanding which moderns bring to a text cannot be retrojected into its past." Vico's sensus communis, then, helps us to reject an uncomplicated originalism that seeks to project from the present a certainty about the struggles of the past. It reminds us that appellate opinions arise amidst conflict; they sediment into certainty but do not begin there and cannot predict what uncertainties and necessities will arise in the future. Generally, then, Vico's sensus communis can help us to appraise court opinions more fairly – not only to situate them within their time but also to consider them as wrestling in and over the sensus communis. Rather than assuming that they should be *above* the common sense of the time or that they should have anticipated *our* conflicts and their attendant language, we can understand appellate opinions as confronting the needs and necessities of their time and, in so doing, revising communal values without full appreciation of the extent to which they would do so. In particular, Vico's sensus communis can help us to remember that it is not only values and conflicts that shift, but the very language that encapsulates and animates them.

8.4 SITUATING *SCHUETTE*'S PREDECESSORS

I turn now to *Schuette v. BAMN* (2014) and its predecessors to demonstrate how we might employ Vico's insights about sensus communis when analyzing and evaluating judicial precedent. I begin by describing the facts of the *Schuette* case. I then describe the precedent upon which the plurality relies to decide *Schuette*, discussing those decisions in their historical context and in relation to each other. I then analyze how the *Schuette* plurality reads this precedent as well as how commentators have criticized the earlier decisions for their failure to provide clear guidance to the *Schuette* Court. I argue that previous opinions could not have anticipated the degree to which the future Court would reject the notion that individuals could be discriminated against as members of a group; I also argue that previous opinions could not have anticipated a time when, to find discrimination by the majority, you'd have to locate intent with respect to each voter. Critics of this precedent miss the extent to which this assumption – that it was commonplace that the majority would work to preserve its superiority at the expense of minorities and that this work needn't necessarily be motivated by overt and conscious bias to be understood as discriminatory – was embedded in the sensus communis, the very standards of language, of those earlier opinions.

In 2006, Michigan voters adopted, with 58 percent of the vote, a constitutional amendment (Proposal 2) that barred Michigan's public universities from using race-conscious admissions policies. While other states had already enacted

voter-supported bans on affirmative action, the Michigan ban was legally distinct in that, per the Michigan state constitution, the universities' boards of trustees are invested with authority over the universities, including admissions policies. Thus, the voters had singled out race-conscious admissions, and only race-conscious admissions, as outside the scope of the boards' constitutionally mandated discretion. The plaintiffs challenged Proposal 2 on Equal Protection grounds, arguing that, by removing race-conscious admissions decisions and no others from the boards' purview, the state was discriminating on the basis of race. While the Sixth Circuit Court of Appeals determined that Proposal 2 did violate the Fourteenth Amendment's Equal Protection Clause, in *Schuette v. BAMN* (2014) the United States Supreme Court upheld Proposal 2, with six Justices concurring in the judgment and two dissenting. The plurality opinion, authored by Justice Kennedy, was joined by Justices Roberts and Alito. In total, there were five separate opinions authored in the case. The fractured opinions suggest the difficulty the Justices had in reasoning the outcome of the case. We might, then, suspect that this difficulty was caused by either the relative novelty of the question presented by *Schuette* or the lack of clarity provided by the precedent. My analysis, however, demonstrates something different – that the Court's difficulty in deciding *Schuette* is, in part, attributable to the dramatic shift in sensus communis around majority-inflicted racial injury that occurred between when the last relevant precedent was authored and when *Schuette* was decided.

Indeed, *Schuette* was not the first time the Court had been asked to review voters' concerted efforts to roll back a state's attempts to address racial discrimination and inequity. Against the immediate and then fading backdrop of the civil rights movement, the Court had been asked to consider such efforts from the late 1960s on. Three decisions consume the bulk of the *Schuette* plurality's opinion: *Reitman v. Mulkey* (*Mulkey*) (1967), *Hunter v. Erickson* (*Hunter*) (1969), and *Washington v. Seattle School District No. 1* (*Seattle*) (1982). Like *Schuette*, each case confronts what were, at the time, controversial state actions designed to combat racial oppression and subordination. *Mulkey* and *Hunter* consider fair housing and *Seattle* integrative busing. By the time of *Schuette*, however, the controversy around those actions had receded – the wisdom of fair housing and the impracticality of integrative busing had settled into the sensus communis. This enabled the *Schuette* plurality, situated within its contemporaneous sensus communis, to understand its case, concerning affirmative action, as something entirely different from the precedent.

Schuette and these earlier cases are unique in the Court's Equal Protection jurisprudence in that they concern actions that *would not* have raised any potential Equal Protections violations had they concerned mere state inaction rather than voter-led efforts to single out state-led policies aimed at stemming the effects of discrimination for differential treatment. In the case of *Schuette*, for example, the claim was not that Equal Protection *required* the state to implement affirmative

action in their university admission policies; rather, the Equal Protection claim was based on the notion that voters could not single out race-sensitive admissions policies for differential treatment while otherwise leaving the board's discretion, which was mandated by state constitution, untouched. The allegation of racial discrimination lay in the differential treatment of race-based policies, not in the state's drawing of racial distinctions itself. The decision in *Students for Fair Admissions v. Harvard* (2023), in which the Court held that university affirmative action policies are unconstitutional, is a more typical example of an Equal Protection claim. There, the plaintiffs claimed that affirmative action policies violated Equal Protection because they drew impermissible distinctions on the basis of race.

The Equal Protection clause of the Fourteenth Amendment, ratified in the wake of the Civil War, declares that no state may "deny to any person within its jurisdiction the equal protection of the laws" (US Constitution Amendment XIV, § 2). While the Court refused to understand the clause as banning racial segregation in *Plessy v. Ferguson* (1896) (upholding the notion of "separate but equal"), it overturned that decision in *Brown v. Board of Education of Topeka* (1954). It has since then applied what has come to be known as "strict scrutiny" to any state action that draws distinctions on the basis of race. That standard requires that a state narrowly tailor race-based distinctions to further a compelling governmental interest. In essence, this has meant that a state is not permitted to draw distinctions on the basis of race unless it has an exceedingly convincing, nondiscriminatory reason for doing so and unless it can show that any race-neutral measure would not suffice to accomplish the same ends. As the Court's Equal Protection jurisprudence regarding race-based distinctions has developed, it has held that the Equal Protection Clause prohibits state actions that are demonstrably racially motivated or engineered (*Washington v. Davis*, 1976). In other words, the Court has understood the Equal Protection clause to prohibit states from drawing unjustifiable race-based distinctions, not to proactively require the end of racial inequity.

In a sense, *Schuette* and its predecessors concern whether the voters of a state may work to rescind a state's proactive steps to address racial inequity (steps that are neither constitutionally mandated nor constitutionally prohibited). These cases demonstrate the tension between the state's duty to right racial wrongs and the majority's prerogative to maintain the racial status quo. Through understanding *Schuette* and its predecessors – *Mulkey*, *Hunter*, and *Seattle* – not as mere reflections of common opinion but manifestations of the struggle over sensus communis, we are able to appraise all four more fairly. I now turn to each of those opinions.

In the 1960s, in *Mulkey* and *Hunter*, the Court twice, and in quick succession, reviewed voter actions designed to roll back fair housing legislation, finding them in violation of the Equal Protection Clause both times. The debate over the impacts of neighborhood segregation and the wisdom of prohibiting discrimination in housing was ripe at the time. In July 1967, President Lyndon Johnson commissioned the

National Advisory Commission on Civil Disorders (more commonly known as the Kerner Commission) to investigate the causes of urban riots in Black and Latino neighborhoods across the country. The commission's report famously declared: "Our nation is moving toward two societies, one black, one white – separate and unequal" (The National Advisory Commission on Civil Disorders, 2016, p. 1). It found that white racism, which led to segregated neighborhoods and lack of economic opportunity in those neighborhoods, was a primary cause of the riots. The report argued that ending neighborhood segregation was the only way to address the underlying inequities that inspired unrest and violence. About a month after the report was released, Dr. Martin Luther King Jr. was assassinated; days later, the Fair Housing Act, barring discrimination in the provision of housing, was signed into federal law.

The Supreme Court's decisions in *Mulkey* and *Hunter* came in the midst of these riots and the simmering debate over pursuing fair housing. The sensus communis over the wisdom of fair housing legislation had not yet settled, but the existence of segregated housing patterns (and the desire of many to maintain that system) was well known. *Mulkey*, decided in May 1967 by a margin of 5–4, concerned California's voters' enactment of a constitutional amendment that made it illegal for the state to abridge the right of property owners to exercise "absolute discretion" in the lease and sale of real estate. The Court found the amendment violated the Equal Protection Clause. Prior to the passage of the amendment, the California legislature had enacted one law that forbade restrictive covenants and another that prohibited racial discrimination in the sale or rental of residential real estate with more than four units. The amendment, then, was a reaction to the legislature's efforts to pursue fairer housing. Like *Schuette*, then, *Mulkey* concerned *not* the constitutionality of legislative inaction, but the constitutionality of voters' efforts to roll back legislative action. Because there was, as of yet, no federal law requiring fair housing, California wasn't compelled to ensure it. Had the California legislature failed to pass fair housing laws, California citizens would have been free to continue to discriminate in the sale and lease of housing. The question, then, was not whether federal law prohibited Californians from discriminating in the provision of housing; it was whether the State of California itself had violated the Equal Protection Clause, had itself engaged in invidious discrimination, by passing a constitutional amendment that proclaimed and protected the right to discriminate in the provision of housing. In reaching its decision, the Court stressed the necessity of "asses[ing] the *potential impact* of official action in determining whether a State has *significantly involved* itself with invidious discrimination" (*Reitman v. Mulkey*, 1967, pp. 379–380). In so doing, it relied on a line of case law in which the Court had struck down subtle state actions that were designed to distance the state from "official" discrimination while, nonetheless, promoting it. The *Mulkey* majority opinion breezes through five previous opinions without spending much time parsing the discriminatory action at work. Among the unconstitutional actions it

cites are when New Orleans city officials made public statements about not permitting Black patrons to seek desegregated service in restaurants though they never passed an official ordinance to that effect and when a state statute gave a state political party's executive committee power to "prescribe the qualifications of its members for voting" in primaries, effectively restricting primary voting to white party members (*Reitman v. Mulkey*, 1967, pp. 379–380). Through these citations, the Court seemed to be intimating that either a narrow view of state action or the abstracted application of a "neutrality principle" might miss pernicious discriminatory state action. At the same time, it was conveying the many creative ways states had worked to promote discrimination while attempting to skirt constitutional scrutiny. In spending relatively little time discussing each opinion, the Court also seemed to be suggesting how commonplace and predictable this behavior was. The Court situated California's voters' actions squarely in this history, finding that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State" (*Reitman v. Mulkey*, 1967, p. 381). The majority opinion in *Mulkey*, then, reflects the common sense of the time (supported by social and judicial history) that state promotion of racial discrimination emerges in diverse and insidious forms and that such actions are regrettably common.

Justice Harlan's dissent provides further insight into the debates of the time and the contests over the sensus communis. Harlan rejected the majority's analysis, finding that the amendment was neutral on its face and that its constitutionality was to be determined "by what the law does, not by what those who voted for it wanted it to do" (*Reitman v. Mulkey*, 1967, p. 391). Harlan began and ended his dissent by stressing his concern that the majority's decision would impede racial progress. He opened by fretting that the decision would "actually serve to handicap progress in the extremely difficult field of racial concerns" in the long run (p. 387). And he closed by predicting that "the doctrine underlying this decision may hamper, if not preclude, attempts to deal with the delicate and troublesome problems of race relations through the legislative process" (p. 395). Harlan's dissent is reminiscent of the refrain "go slow" and reflects an ongoing and contentious debate at the time, as memorialized in King's "Letter from Birmingham Jail" (1963) and Nina Simone's "Mississippi Goddamn" (1964), among many others. It shows how there seemed to be a settling, though not yet settled, consensus that fair housing *was* an issue of racial equity ("go slow" suggests a recognition of a problem and a refusal to pursue it promptly) and how contentious the pursuit of that goal was. The rhetorical conflict surrounding *Mulkey* and the as yet unsettled sensus communis around the wisdom of guaranteeing fair housing would later be elided by the *Schuette* plurality, flattened into the ahistorical, uncontested notion that ensuring fair housing is common sense.

The Court's 8–1 decision in *Hunter v. Erickson*, decided in January 1969, concerned a similar effort to roll back fair housing protections. Though it was decided

only two years after *Mulkey*, there had been significant national developments in the discussion around fair housing in the interim. *Hunter* came on the heels of the release of the Kerner Report and the passage of the Fair Housing Act. The case concerned voters' efforts to thwart a city council's fair housing ordinance and any future efforts to pass a similar ordinance. In 1964, the city of Akron, Ohio, passed a fair housing ordinance. Voters subsequently passed an amendment to the Akron city charter which vitiated the fair housing ordinance and required that any ordinance that regulated the sale or lease of real estate on the basis of "race, color, religion, national origin or ancestry" be approved by the voters in a regular or general election (not a special one). While the city argued that the case was distinct from *Mulkey* because the voters' amendment didn't declare a right to discriminate, the Court found that because the amendment "treat[ed] racial housing matters differently from other racial and housing matters" (by requiring that these matters be subjected to a special procedure outside the normal referendum process), it created a suspect racial classification (*Hunter v. Erickson*, 1969, p. 389). The Court was unimpressed with the city's argument that the amendment reflected a "public decision to move slowly in the delicate area of race relations" (p. 392), noting that the voters adopted a more "complex system" than a broadly applicable system for considering ordinances and insisting that "the 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" (p. 393). The opinion presumes, without elaboration, that fair housing legislation benefits minorities, which is why the Court was able to find that the city's efforts to treat racial housing matters differently than all others was necessarily a "meaningful and unjustified distinctio[n] based on race" (p. 391). This was a reasonable presumption, though it was not without detractors, as white Southern politicians had spent decades claiming that segregation was to the benefit of both white and Black Americans (Epps-Robertson, 2016). Though it's now relatively uncontroversial to suggest that racial discrimination in the provision of housing is to the detriment of people of color – despite evidence of the continuing prevalence of the practice (United States Department of Justice, 2021) – *Mulkey* and *Hunter* themselves remind us that the sensus communis around the issue was still unsettled at the time of those decisions.

In a concurrence, Justice Harlan noted that the "city's principal argument in support of the charter amendment relies on the undisputed fact that fair housing legislation may often be expected to raise the passions of the community to their highest pitch" (*Reitman v. Mulkey*, 1967, p. 395). Rather than a justification for the amendment's differential treatment of fair housing matters, Harlan saw the obviousness of the controversy as proof of the amendment's discriminatory purpose, reasoning that "the charter amendment [would] have its real impact only when fair housing [did] not arouse extraordinary controversy" because it would tip the scales against fair housing *even* when majority support had shifted in favor of it

(pp. 395–396). Harlan, then, takes the sensus communis that communities must "go slow" in pursuing fair housing to show how voters had leveraged that common opinion to preclude future progress, even when (and if) public opinion (the sensus communis) had shifted.

The next time the Court heard a case concerning voters' efforts to frustrate a state's attempts to address racial discrimination was in 1982 in *Washington v. Seattle School District No. 1*. The case concerned a statewide initiative to ban mandatory busing for the purposes of integration and was targeted, specifically, at the Seattle school district's voluntary efforts to desegregate its schools. The Court held the state's action in violation of the Equal Protection Clause by a 5–4 margin. Busing for the purposes of desegregation had been controversial since courts had first imposed it as a remedy to school districts' Equal Protection violations. Like the controversy around fair housing, that controversy has largely receded into the background. Unlike fair housing, the reason it has done so is because the practice has largely been abandoned (in part because of the Supreme Court's 2007 opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* (*Parents Involved*), which I discuss later) and is regarded by many as a relic of history. This sentiment is well reflected by an exchange between Kamala Harris and Joe Biden during a 2019 Democratic presidential primary debate. In that debate, Harris attacked Biden for his history of opposing desegregative busing in the 1970s and 1980s, noting that she had been a beneficiary of the practice (Paz, 2019). However, when pressed after the debate about her current position on busing, she demurred, locating the practice and the controversy over it in the past: "I have asked [Biden] and have yet to hear him agree that busing that was court-ordered and mandated in most places and in that era in which I was bused, was necessary" (Martin & Glueck, 2019). In positioning their quibble over the past practice of busing, Harris locates the practice and its necessity in the past. Though the controversy over busing has receded, at the time of *Seattle* it was ripe; busing, both court-ordered and district-adopted, was still a primary way of addressing the racial segregation that plagued – and still plagues (United States Government Accountability Office, 2022) – many schools across the country.

In 1978 the Seattle school district implemented a desegregation plan that included busing and reassignments which resulted in "the reassignment of roughly equal numbers of white and minority students, and allow[ed] most students to spend roughly half their academic careers attending a school near their homes" (*Washington v. Seattle*, 1982, p. 461). As the program was being developed, disgruntled Seattle residents formed the Citizens for Voluntary Integration Committee (CiVIC) which sought, first, to enjoin enforcement of the desegregation plan and, after that failed, to pass a *statewide* initiative banning mandatory busing for the purposes of integration. The initiative passed with 66 percent of the vote. While the general facts appear similar to *Hunter* (voters overturning and creating a more arduous process for reinstituting a measure designed to pursue racial equality), the

Court obviously struggled with how divided public opinion about integrative busing was. A 1981 Gallup poll found 17 percent of white respondents in favor of desegregative busing (with 78 percent opposed) and 60 percent of Black respondents in favor (with 30 percent opposed) (Steadman, 1981). The Court was presented with a clear rupture in the sensus communis. If it was to find an Equal Protection violation, it would have to find that the voters' action discriminated on the basis of race even though it could not say that minorities were universally invested in integrative busing or that everybody who opposed integrative busing did so for racially motivated reasons. Accordingly, the Court noted that while "proponents of mandatory integration cannot be classified by race," its own cases "suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose" (*Washington v. Seattle*, 1982, p. 472). Its reasoning, then, rested not on assigning preference for integrative busing to minorities but on the Court's own, at that point, relatively uncontroversial conclusions (dating back to *Brown v. Board of Education*) that desegregated schools benefit minority students, and that segregation harms them. Essentially, the Court focused on the racial *injury* of segregation rather than the particular remedy (integrative busing) to reach the conclusion that the voters' initiative "burden[ed] minority interests" (*Washington v. Seattle*, 1982, p. 474). Rooting its opinion in the established sensus communis over the harms of racial segregation in education, the Court was able to assign race-based intent and effect to the voters' action.

As had the *Hunter* Court, the *Seattle* Court focused on the complicated process voters had devised to insulate integrative busing from school boards' control. It stressed that by removing the option of integrative busing from school boards' discretion, the voters had "expressly require[d] those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action," as they would have to appeal to the voters or legislature of the entire state rather than the school board about this, and only this, school assignment matter (*Washington v. Seattle*, 1982, p. 474). It noted that the voters' initiative to ban integrative busing singled out "racially-conscious legislation" for "peculiar and disadvantageous treatment" (p. 485) and stressed that "when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously curtails the operation of those political processes ordinarily relied upon to protect minorities" (p. 486). Again, the Court's analysis rests on the harm – prejudice that led to highly segregated schools – and not so much the remedy – integrative busing – to reach the conclusion that, in singling out integrative busing for differential treatment, the voters' action discriminated against minorities. For the Court to have concluded otherwise and imply that minorities were universally in support of integrative busing would have been to willfully ignore what it knew about the sensus communis and the controversy aroused by integrative

busing; it also would have imposed a favorable opinion of integrative busing on an entire class of people. As it had in *Mulkey* and *Hunter*, the *Seattle* Court understood the measure voters sought to eviscerate as addressing the effects of racial prejudice. Its analysis assumed the continued and significant impacts of that prejudice (something the *Schuette* plurality would reject). Though integrative busing was, as described in *Seattle*, widely controversial at the time of the decision, that controversy wasn't a reason for the court to uphold the voters' action. The opinion looked to the Court like *Mulkey* and *Hunter* before it because it was yet another example of voters seeking to preserve the racial status quo and to prevent the state from addressing race-based injury. School segregation was a well-established injury. What to do about that injury was less well established and less sedimented in the sensus communis. The *Seattle* court was attempting to navigate these realities.

Mulkey, *Hunter*, and *Seattle* can be characterized as cases in which the Court confronted voter-enacted impediments to addressing racial injury; they each involve a state action that would otherwise be constitutionally permissible but was not because the majority of voters singled out that racial issue for special treatment. The facts of *Schuette* would seem to fit this pattern well, but the Court's inability to understand affirmative action as anything other than the infliction of harmful racial categories would be the difference in the outcome. As I explain below, this inability is attributable both to the plurality's flattening of the struggles over sensus communis memorialized in the precedent it cites as well as its inability to understand the *Schuette* case itself as being about the sensus communis over Equal Protection.

8.5 MAKING SENSE OF *SCHUETTE V. BAMN*

As I've indicated, *Mulkey*, *Hunter*, and *Seattle* are the primary precedents with which the *Schuette* plurality opinion wrestles. In comparison to the amount of time it spends discussing *Seattle*, the *Schuette* opinion (*Schuette v. BAMN*, 2014) devotes relatively little text to distinguishing *Mulkey* and *Hunter*. In its brief review of these two opinions, the *Schuette* plurality casts them as uncomplicated cases where the voters had sanctioned the racist practices of individuals. This characterization flattens the historical struggle over fair housing and abstracts the opinions from the sensus communis in which they were formed. The *Schuette* plurality mentions the plaintiffs' particular circumstances in both cases (specific acts of racial discrimination in the provision of housing) and finds that in *Mulkey* and *Hunter* "there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated" (*Schuette v. BAMN*, 2014, p. 304). Interestingly, this construction locates the primary harm and action with individuals (those who would discriminate in the provision of housing) and assigns the state the role of "aggravating" the underlying problem. This is a markedly different characterization than that of earlier courts who declared in *Mulkey* that the voters' action had rendered the "right to discriminate" "one of the basic policies of the State"

(*Reitman v. Mulkey*, 1967, p. 381) and in *Hunter* that the voters' action "constitute[d] a real, substantial, and invidious denial of the equal protection of the laws" (*Hunter v. Erickson*, 1969, p. 392). By eschewing the opinions' own characterizations of the evils at work and locating the action with those who would discriminate in the provision of housing, the *Schuette* plurality abstracts those opinions from the sensus communis in which they were formed, minimizing the common opinion of those times that the majority was regularly and perniciously involved in preserving white supremacy. In the *Schuette* plurality's characterization, racism is wrought by individuals, not the majority or the state. This depiction also buttresses the *Schuette* plurality's tortured description of *Seattle* and serves to distinguish all three cases from how the plurality understands the Michigan voters' actions, which it sees as neutral democratic policymaking in action.

The *Schuette* plurality opinion describes *Seattle* as a case in which the "state action in question (the bar on busing enacted by the State's voters) had the serious risk, if not purpose, of causing specific injuries on account of race" (*Schuette v. BAMN*, 2014, p. 305). That determination poses some difficulty for the plurality because the Court ruled in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) that the Seattle district's integrative plan was unconstitutional because, in its determination, the district had not been subject to de jure segregation and, absent that determination, its plan failed to advance a compelling state interest in a way that was narrowly tailored. *Parents Involved*, then, rejected the *Seattle* Court's underlying premise that integrative busing was to the benefit of minority students by declaring that to classify students by race for the purpose of school assignment was, absent a finding of de jure segregation, presumptively to inflict injury on the basis of race. In other words, where the *Seattle* Court had found that integrative busing was to the benefit of minority students, the *Parents Involved* Court found that it harms all students (including minority students). The *Schuette* plurality opinion attempts to confront this complication by declaring that "we must understand *Seattle* as *Seattle* understood itself," as a case in which neither party "challenged the propriety of race-conscious student assignments for the purposes of achieving integration" (*Schuette v. BAMN*, 2014, p. 306). From there, the plurality concludes that, in *Seattle*, "the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit" (p. 306). The *Schuette* plurality, then, seems to accept that, in the *Seattle* past, schools that were segregated through state action harmed minority students and that Seattle had such schools. In this way, the *Schuette* plurality assigns discriminatory action to specific actors – in *Mulkey* and *Hunter*, those who would discriminate in the provision of housing and in *Seattle*, the Seattle school district itself – and assigns to voters the role of "aggravating" racial injury. This move works to emphasize the role of individual bad actors in inflicting discrimination and to distance the states' and voters' roles in that work, abstracting those earlier opinions from the sensus communis of the time that the majority will often work to preserve white

dominance and that the courts should be attuned to this danger. It also draws a distinction between historic, specific racial injuries that must be remedied (housing discrimination and state-sponsored school segregation) and racial disparities whose root causes are less easily assigned. This distinction aids the plurality in its aim of articulating a sensus communis that both majority-imposed and state-sponsored racial injuries are things of the past.

The *Schuette* plurality's selective historical contextualizing of *Seattle* elides how controversial integrative busing was both at the time of that decision (1982) and when *Parents Involved* was decided (*Parents Involved in Community Schools v. Seattle School District No. 1*, 2007). In so doing, the plurality opinion renders the racial injury in *Seattle* clear and uncomplicated (like its assessment of *Mulkey* and *Hunter*) and a relic of the past. The plurality, then, imposes the current sensus communis over the obvious harms of housing discrimination and state-imposed school segregation on those previous cases, eliding the controversies engendered by the specific remedies the states in those cases sought to undertake. This elision renders the voters' "aggravating" actions in each case patently discriminatory. It also sets the plurality's opinion and the *Schuette* controversy in a new era – one where housing discrimination and school segregation are past problems duly acknowledged and addressed by law. In turn, this move articulates the present as one where race-based injuries have largely been alleviated and where classification on the basis of race itself is the primary evil the legal system must guard against.

This past/present divide aids the plurality in distinguishing the Michigan voters' efforts to remove affirmative action from the purview of university boards with the Washington voters' efforts to remove integrative busing from the purview of school boards. The opinion suggests that to find for the plaintiffs would require accepting the proposition that "all individuals of the same race think alike" (*Schuette v. BAMN*, 2014, p. 308) and would encourage "the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage" (p. 309). The implication is that affirmative action, unlike fair housing or the integrative busing of yore, is an issue with neutral racial implications about which reasonable people disagree. What this implication denies is the possibility of any underlying race-based injury. While discriminatory housing practices and racially segregated schools are cast as clear race-based injuries that can be aggravated by voter action, the history of discrimination in higher education and the persistence of racial inequities in higher education admissions and attainment are, for the *Schuette* plurality, beside the point.

In rendering Seattle's integrative busing plan less a controversial measure to achieve racial balance in schools and more a necessary antidote to insidious, state-sponsored segregation, the *Schuette* plurality could represent controversy over affirmative action as something of a different kind, something untethered to racial injury and prejudice. If affirmative action is nothing more than a policy preference (about which many reasonable people disagree and to which we cannot assign race-

based purpose, benefit, or preference), the voters' action is merely democratic decision-making in action.

Though the *Schuette* plurality declares at the outset that the case "is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education" (*Schuette v. BAMN*, 2014, p. 300), its decision, and particularly its treatment of *Seattle*, suggests the opposite – that the outcome of the case was contingent on the Court's negative assessment of affirmative action itself. The plurality closes by declaring: "What is at stake here is not whether injury will be inflicted but whether government can be instructed not to follow a course that entails, first, the definition of racial categories and, second, the grant of favored status to persons in some racial categories and not others" (p. 300). This description draws into question the plurality's insistence that its assessment of affirmative action is not contingent on the outcome of the case. While the *Seattle* Court understood that integrative busing was controversial, that didn't keep it from acknowledging the underlying purpose of integrative busing, the injury it was designed to address, and the complex process voters had used to remove busing from school boards' purview. The difference between *Seattle* and *Schuette*, then, might be attributed not to the controversy around the respective policies but to the Justices' own opinions about those policies (as informed by those public controversies). In other words, the difference may be that the plurality of the Justices on the *Schuette* Court were interested in tipping the sensus communis toward a colorblind field of vision while the majority of the Justices on the *Seattle* Court still inhabited a sensus communis where it was common sense that the white majority might work to preserve its privilege, even absent overt racial animus.

At the time of *Washington v. Seattle School District No. 1* (1982), court-ordered busing was still relatively common and the Supreme Court continuously upheld the practice even in the face of public outcry. While public opinion was divided, the Court itself may have understood busing as a valuable tool in combatting segregation (especially when other methods like neighborhood integration were abandoned by the federal government). On the other hand, at the time of *Schuette v. BAMN* (2014), the Court had already begun to erode the constitutional basis for affirmative action, which may explain why the *Schuette* plurality could only envision the practice of affirmative action itself as inflicting racial injury (rather than the other way around). That the plurality understood the drawing of racial classifications as racial injury may also explain the plurality's tortured reading of *Seattle*. By explaining the *Seattle* Court's decision only in terms of de jure segregation and the Court's historic intervention in that presumed bygone practice, the *Schuette* plurality could draw a stark line between the era when race-based remedies were necessary and the present, where they are suspect and harmful. In this way, the plurality tries to fit history into its own sensus communis around Equal Protection – an understanding that we are past the era where racial classifications can combat prejudice because underlying state-backed prejudice has been confronted and vanquished.

The Court's assessment of affirmative action is perhaps more widely accepted than it sometimes appears. While Steve Sanders claims that "anybody who can read a poll knows that affirmative action is supported by an overwhelming number of blacks" (Sanders, 2016, p. 1448), in truth it is somewhat difficult to determine where the plurality's description lies within the (as yet) unsettled sensus communis. In 2014, the year *Schuette* was decided, Pew researchers asked respondents this question: "In general, do you think affirmative action programs designed to increase the number of black and minority students on college campuses are a good thing or a bad thing?" In the poll, 84 percent of Black respondents declared them a good thing, while 80 percent of Hispanic respondents and 55 percent of white respondents did (Drake, 2014). That polling would suggest that affirmative action was even more popular among Black Americans at the time of *Schuette* than desegregative busing was at the time of *Seattle*, where a poll found 60 percent of Black respondents in favor of desegregative busing (Steadman, 1981). But the wording of polling questions concerning approval for affirmative action has significant impact on outcomes. A 2021 Gallup poll asked respondents: "Do you generally favor or oppose affirmative action programs for racial minorities?" In that poll, 79 percent of Hispanic adults responded in favor, 69 percent of Black adults responded in favor, and 57 percent of white adults responded in favor (these are not tremendously different results than the 2014 poll) (Saad, 2021). However, in a 2022 Pew poll, when asked if race or ethnicity should be a factor in college admissions decisions, 39 percent of Black adults responded yes, while 37 percent of Asian adults, 31 percent of Hispanic adults, and 21 percent of white adults did (Gómez, 2022). These results suggest that when polling questions move from the level of abstraction to more specifically referencing the mechanics of affirmative action, support plummets. So, while polling data contemporaneous to *Schuette* suggests broad minority support for affirmative action, the wording of that polling question should give us pause. Perhaps, then, the *Schuette* plurality was right – Michigan voters' removal of affirmative action from university boards' otherwise complete discretion over admissions policies is not a violation of Equal Protection but a mere manifestation of democracy in action. And yet, the Court's precedent suggests that the analysis shouldn't rest on the popularity of a given practice but upon the racial injury effected when, through voter action, a practice designed to address racial injury is rendered more difficult to enact than any similar non-race-based practice.

Certainly, as I've suggested, we can (and should) attribute the outcome in the *Schuette* case both to the shifting composition of the Court and to the rise of what some critics have termed the Court's colorblind approach to the Equal Protection claims, where it tends to view any racial classification, whether designed to address historical and present inequities or to exacerbate inequities, as suspect (Roberts, 2014). However, some have criticized the precedent upon which the *Schuette* plurality relied for its failure to provide clear guidance as to the application of Equal Protection. Sanders argues that a "significant weakness" of the cases

preceding *Schuette* "is the court's relative delicacy and indirection about the racial dynamics behind the challenged measures in those cases" (Sanders, 2016, p. 1438). He goes on: "The *Hunter* and *Seattle* opinions can be criticized for the Court's unwillingness to be more forthcoming and candid about the racial prejudice it perceived behind the restructurings" (p. 1438). Similarly, David Bernstein argues the court could have named the "substantial racist component" behind the voters' actions in *Mulkey* and *Hunter* but did not (Bernstein, 2013, p. 264).

Like the *Schuette* plurality opinion itself, these criticisms seem to abstract *Mulkey*, *Hunter*, and *Seattle* from their historical contexts. Suggesting that those earlier Courts should have predicted the colorblind approach that would come to dominate the Court's evaluation of Equal Protection claims, Sanders and Bernstein seem to want those earlier Courts to have anticipated the turns in both language and values that would develop around Equal Protection law. Bernstein charges that

> the *Mulkey* and *Hunter* Courts could have simply ruled that the referenda in question had discriminatory intent and discriminatory effects. From approximately 1948 to 1972, however, and to some extent through 1982, the Supreme Court openly allied with the civil rights movement but tried to do so without either overtly accusing anti-civil rights forces of racism or massively disrupting the federal–state-balance. (Bernstein, 2013, p. 278)

It's not clear that either decision Bernstein references fails to establish discriminatory intent and effects. In *Mulkey*, when the Court says that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market" and that this renders "the right to discriminate" one of the "basic policies of the State," the Court is clearly indicating the intended and actual effect of the amendment (*Reitman v. Mulkey*, 1967, p. 381). Bernstein's criticism seems more leveled at the Court's failure to assign the term "racist" to the amendment and the voters than its analysis of a clear violation of Equal Protection. Bernstein may have perceived that the Court handled the matter "delicately" less because the Court failed to outline the nature of the violation and more because the amendment looks egregious to us now (and didn't to many at the time of its passage). Similarly, the *Hunter* Court is clear that the Akron voters had singled out fair housing in an effort to place "special burdens on racial minorities within the governmental process" (*Hunter v. Erickson*, 1969, p. 391), explicitly holding that the amendment "discriminate[d] against minorities" (p. 393). Bernstein is correct that the Court failed to label the Akron voters themselves racist, electing to label the amendment itself discriminatory. But whether that's a "weakness" the Court should have avoided, as Sanders claims and Bernstein suggests, is less clear.

Bernstein and Sanders are right that in all three opinions – *Mulkey*, *Hunter*, and *Seattle* – the Court avoids labeling the voters' actions racist or even racially motivated. The Court's reticence to assign the label racist to each individual voter, especially in the case of *Seattle*, makes sense given that such a sweeping

generalization would have been unsupported by evidence (though, undoubtedly, a significant portion of those opposed to busing were opposed to desegregation). After all, in *Seattle*, polling reflected that 30 percent of Black adults opposed desegregative busing, an opinion the Court may have known was shared by prominent civil rights activists including preeminent civil rights lawyer and scholar Derrick Bell (Cobb, 2021). Further, it's notable that at the time of *Mulkey* and *Hunter*, Southern politicians had been articulating the position that one could be a segregationist without being a racist. George Wallace proclaimed in 1964: "A racist is one who despises someone because of his color, and an Alabama segregationist is one who conscientiously believes that it is in the best interest of Negro and white to have a separate education and social order" (Bernard, 2022). While almost nobody would entertain the proposition now, at the time of *Mulkey*, the Warren Court had spent more than a decade combatting that very idea – that segregation and separation on the basis of race could be distinguished from the maintenance of white supremacy and the perpetuation of inequality – by chronicling the effects of segregation. The Court understood its role in confronting and altering the sensus communis around "separate but equal." So, while Bernstein is correct in indicating that the Court was navigating common opinion and controversy of the time, his suggestion that it could have just labeled the actions in question in *Mulkey* and *Hunter* racist seems ahistorical, as that label wouldn't have had the same relevance as it does in current judicial and cultural reasoning (because the meaning of the term was contested in different ways than it is today) and wouldn't have aided in resolving the underlying legal question (because the opinions already establish the creation of a suspect racial classification and discriminatory effect of that classification).

8.6 CONCLUSION

Reading these opinions through Vico's sensus communis reminds us that the *Mulkey*, *Hunter*, and *Seattle* Courts were accustomed to the particular sorts of evils the majority could undertake in the name of democratic action and in the service of preserving the racial status quo. *Schuette*, its precedent, and the criticisms of those precedents draw into stark relief how the *Schuette* plurality had to engage the settled sensus communis over the historical importance of Equal Protection, while continuing to revise its present meaning, all as a result of confronting a new necessity – the question of whether a state's voters can discriminate in their treatment of state universities' authority with respect to affirmative action. To achieve this result, the *Schuette* plurality worked to insulate the racial injuries of the past from any relationship to the present. In suggesting that *Seattle* concerned de jure segregation (something *Parents Involved* strenuously argued against), the opinion renders *Seattle* part of the kind of legally backed discrimination and segregation that we have moved past and beyond. In the *Schuette* plurality opinion, de jure segregation is classed with overt housing discrimination, and those issues are located in the Court's and

our past. This move enables the plurality to articulate our present and future as one where it is possible for all to live as individuals untainted by stereotypes, where "the only way to stop discriminating on the basis of race is to stop discriminating on the basis of race" (*Parents Involved in Community Schools v. Seattle School District No. 1*, 2007, p. 748).

It's easy enough to assess precedent for its failure to be completely responsive to our current controversies. I would imagine that it's far more difficult to formulate precedent with an eye toward what future controversies might arise and the language in which those controversies will be unavoidably embedded. Certainly, we should continue to discuss how precedent does or doesn't respond to our current situation, but we should do so with an appreciation for the sensus communis out of which that precedent emerged and with an appreciation for how our discussions themselves either do or don't account for our history. Thus, our common law system and its reliance on precedent provides an opportunity to continually revisit our history and to struggle over what it was and what we value.

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