The New Great Dissenter: On Affirmative Action, Sotomayor Gets It Right

With her dissent of this week's Schuette v. Coalition to Defend Affirmative Action decision, Justice Sonia Sotomayor spoke for, embodied, embraced and evoked the minority whose interests were at stake. (Patrick Semansky/AP)

Our constitutional conversation, as led by the Supreme Court, depends wholly on strong dissenters. They deepen our understanding of the charter and bring passion to the conversation. They also offer predictive guidance about the future impact of the Court's choices.

Justice Robert H. Jackson's dissent in the Japanese internment case, *Korematsu v. United States*, warned that undue obeisance to President Franklin D. Roosevelt's claim of military necessity was a dangerous mistake, and years later the Court acknowledged that error. Massachusetts' Justice Benjamin Curtis famously castigated the majority in the *Dred Scott* decision, which declared that all blacks — slaves as well as free — could never become U.S. citizens. Years later, the Civil War Amendments proved Curtis prescient. Justice John Harlan's dissent in *Plessy v. Ferguson*, which upheld public racial segregation under the "separate but equal" doctrine, watered the ground that would give rise to the decision in the *Brown v. Board of Education* case. And Justices Thurgood Marshall and William Brennan vastly enriched our constitutional vision, and our political agenda, by arguing, all in dissent, that the Constitution protects the right to education, the right not to be executed by the state, and the need to use racial decision-making to redress the history of racial exclusion.

With her opinion in this week's Michigan affirmative action case, *Schuette v. Coalition to Defend Affirmative Action*, Justice Sonia Sotomayor has joined the list of the Court's most formidable dissenters, and indisputably established herself as Thurgood Marshall's rightful heir. Sotomayor cast doubt on the logic and anti-historicism of cases rejecting all rationales for corrective race-specific remedies but diversity, and at the same time compellingly demonstrated that in misconstruing the court's precedents, the non-dissenters drove yet another nail into that lonely diversity rationale. Moreover, in a powerful echo of Marshall's practice of teaching from his personal experiences, Sotomayor challenged a court enamored with post-racialism to step into her shoes, and to appreciate that but for old-fashioned affirmative action, she would not be among them. She spoke for, embodied, embraced and evoked the minority whose interests were at stake in Schuette.

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The Michigan case turned on the fundamental constitutional principle that judicial solicitude is necessary to protect racial minorities lest their interests get swamped at the ballot box. Courts have long looked skeptically at rearrangements of democratic processes that effectively undermine unpopular minority interests. In 1960 the Court struck an Alabama law that turned Tuskegee into what one Justice described as an