

December 2015

Schuette, Facial Neutrality, and the Constitution

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Recommended Citation

Strasser, Mark (2015) "Schuette, Facial Neutrality, and the Constitution," *Tennessee Journal of Race, Gender, & Social Justice*: Vol. 4: Iss. 2, Article 2.

DOI: <https://doi.org/10.70658/2693-3225.1067>

Available at: <https://ir.law.utk.edu/rgsj/vol4/iss2/2>

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Schuetz, Facial Neutrality, and the Constitution

Cover Page Footnote

Trustees Professor of Law, Capital University Law School, Columbus, Ohio.

SCHUETTE, FACIAL NEUTRALITY, AND THE CONSTITUTION

Mark Strasser

TABLE OF CONTENTS

I. Introduction	127
II. The Developing Jurisprudence	128
A. Setting the Stage	129
B. Modern Equal Protection Jurisprudence	135
C. The Court’s Growing Modesty	138
D. Disparate Impact	141
III. <i>Schuette</i> and Constitutional Protections	144
A. <i>Schuette</i> and Electoral Process Guarantees	145
B. The Michigan Amendment and Equal Protection Guarantees	151
IV. Conclusion	154

I. INTRODUCTION

Equal protection jurisprudence continues to evolve. Historically, legislatures were permitted to classify on the basis of race as long as the regulations were reasonable,¹ although modern equal protection jurisprudence now prohibits racial classifications unless narrowly tailored to promote compelling state interests.² The Court’s recent decision in *Schuette v. Coalition to Defend Affirmative Action*³ expressly disavows that it is modifying the existing equal protection

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¹ See *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.”).

² See *Johnson v. California*, 543 U.S. 499, 505 (2005) (“[A]ll racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.’ Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”) (alteration in original) (emphasis added) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

³ 134 S. Ct. 1623 (2014).

jurisprudence,⁴ while nonetheless employing an approach that had previously been rejected in a few different respects. As to whether the Court has radically altered the existing equal protection jurisprudence in any of these respects *sub silentio* or, instead, has simply suspended the accepted constitutional rules in this particular case, this remains to be seen.

Part II of this article discusses the developing equal protection jurisprudence with respect to racial classifications, noting the Court's avowed modesty with respect to its ability to determine which racial classifications are non-invidious. Part III discusses *Schuette* and the ways in which that opinion may implicitly have rejected the prevailing approach to equal protection analysis. The article concludes that although it remains to be seen whether there have been important modifications to the existing jurisprudence, the *Schuette* approach is regrettable for a number of reasons, not least of which is that the integrity of the jurisprudence and, perhaps, the Court has thereby been cast into doubt.

II. THE DEVELOPING JURISPRUDENCE

Historically, the Court viewed racial classifications as permissible as long as they were rationally related to a legitimate state interest.⁵ However, modern equal protection jurisprudence treats all express racial classifications as suspect,⁶ at least in part, because the Court is unwilling to distinguish between invidious and benevolent classifications.⁷ Classifications not expressly discriminating on the basis of race but nonetheless having a disparate racial impact will not trigger such scrutiny absent sufficient evidence of discriminatory purpose.

⁴ See *id.* at 1630 (“[I]t is important to note [that] this case is not about . . . the constitutionality, or the merits, of race-conscious admissions policies in higher education.”).

⁵ See *Plessy*, 163 U.S. at 550 (“[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”).

⁶ See *Adarand*, 515 U.S. at 227 (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

⁷ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”).

A. *Setting the Stage*

Plessy v. Ferguson is a seminal case in equal protection jurisprudence if only because its approach has been so completely discredited.⁸ At issue was a suit by Homer Plessy, who “was seven-eighths Caucasian and one-eighth African blood,”⁹ whose “mixture of colored blood was not discernible in him.”¹⁰ Plessy had bought a first-class seat in a Louisiana railway car and had sat in the section reserved for whites.¹¹ After making his ancestry clear to the conductor,¹² Plessy was told that he had to vacate his seat.¹³ Plessy refused, was forcibly ejected from the train, and was then imprisoned to await trial.¹⁴ If convicted, he faced fine or imprisonment.¹⁵

The challenged statute read:

[A]ll railway companies carrying passengers in their coaches in this state, shall provide equal but separate

⁸ Chris Edelson, *Judging in a Vacuum, or, Once More, without Feeling: How Justice Scalia's Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson*, 45 AKRON L. REV. 513, 514 (2012) (“Plessy was discredited by the *Brown v. Board of Education* (I) decision in 1954, formally overruled two years later, and now occupies a special place of dishonor in the historical record Plessy is universally scorned.”).

⁹ *Plessy*, 163 U.S. at 541.

¹⁰ *Id.* See also Mark Golub, *Plessy as “Passing”: Judicial Responses to Ambiguously Raced Bodies in Plessy v. Ferguson*, 39 LAW & SOC’Y REV. 563 (2005) (“What is less-known about the case is that the appellant Homer Plessy was, by all appearances, a white man.”).

¹¹ *Plessy*, 163 U.S. at 538 (“[O]n June 7, 1892, he engaged and paid for a first-class passage on the East Louisiana Railway, from New Orleans to Covington, in the same state, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated.”).

¹² See Honorable John Minor Wisdom, *Plessy v. Ferguson - 100 Years Later*, 53 WASH. & LEE L. REV. 9, 15 (1996) (“Plessy boarded in New Orleans a train bound for Covington, Louisiana. He informed the conductor that he was a Negro as he took his seat in a coach reserved for white passengers.”).

¹³ *Plessy*, 163 U.S. at 538 (“[P]etitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach, and occupy another seat, in a coach assigned by said company for persons not of the white race . . .”).

¹⁴ *Id.* at 542 (“[H]aving refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.”).

¹⁵ *Id.* at 541 (“[A]ny passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison . . .”).

accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations . . . No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.¹⁶

The Court explained that a “statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races . . . has no tendency to destroy the legal equality of the two races”¹⁷ That conclusion was important because the “object of the [Fourteenth Amendment] was undoubtedly to enforce the absolute equality of the two races before the law”¹⁸ But if the mere “legal distinction”¹⁹ between the races did not impact legal equality, then the Fourteenth Amendment guarantees would not have been abrogated, because that amendment was not in addition “intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”²⁰ The Court concluded that the statute was not constitutionally offensive because it was passed “with a view to the promotion of [the populace’s] comfort, and the preservation of the public peace and good order.”²¹

Plessy argued that “the enforced separation of the two races stamps the colored race with a badge of inferiority.”²² But the Court rejected that laws requiring segregation “necessarily imply the inferiority of either race to the other”²³ Indeed, the Court reasoned that if someone were to feel stigmatized by such a law, “it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”²⁴ Here, the Court seemed to treat the law as neutral because the law applied equally to both races²⁵ and mandated that the separate accommodations be equal.²⁶

¹⁶ *Id.* at 540.

¹⁷ *Id.* at 543.

¹⁸ *Id.* at 544.

¹⁹ *Id.* at 543.

²⁰ *Id.* at 544.

²¹ *Id.* at 550.

²² *Id.* at 551.

²³ *Id.* at 544.

²⁴ *Id.* at 551.

²⁵ See also *Ex parte Plessy*, 45 La. Ann. 80, 87 (1892), *aff’d sub nom. Plessy*, 163 U.S. 537 (“The charge is simply that he did ‘then and there, unlawfully, insist on

In his dissent, Justice Harlan suggested that the Court was blinding itself to the purpose behind the statute:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But . . . [e]very one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.²⁷

Even if the state's purpose was to keep the races apart, whether the state was attempting to stigmatize or to imply the inferiority of one of the races was a separate issue.²⁸ Perhaps the state's motivation was not invidious.²⁹

going into a coach to which, by race, he did not belong.' Obviously, if the fact charged be proved, the penalty would be the same whether the accused were white or colored."); *cf.* *Pace v. Alabama*, 106 U.S. 583, 585 (1883) ("Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.").

²⁶ Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412 (2011) ("[I]t was not an unreasonable interpretation of the text of the Equal Protection Clause to assume its indifference to a law that, on its face, treated members of all races analogously. That, too, was the structure of the 1890 Louisiana Separate Car Act challenged in *Plessy*. It required railway coaches operating in the state to provide 'separate' accommodations for white and 'colored' passengers, but it also required that those accommodations be 'equal.'"). *But see* Stephen J. Caldas, *The Plessy and Grutter Decisions: A Study in Contrast and Comparison*, 67 OHIO ST. L.J. 67, 77 (2006) ("[W]e know that the accommodations to which blacks were relegated were not only separate, but were almost always unequal.").

²⁷ *Plessy*, 163 U.S. at 556-57.

²⁸ *See* Greene, *supra* note 26, at 414 ("A law providing for separate public accommodations may be race neutral in a formal sense.").

²⁹ *But see Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) ("What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"); *Ex Parte Plessy*, 45 La. Ann. at 87.

Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations.

Some commentators have criticized the *Plessy* Court for having failed to take social context into account when assessing whether such a law was in fact stigmatizing.³⁰ Yet, there is reason to think that the Court was not merely being willfully blind³¹ but was instead accepting the state's views about racial superiority and inferiority.³²

A different section of the law stated that “any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison.”³³ How might this provision be triggered? Suppose that two individuals of different races wished to be seated together, e.g., because a slave owner wished to travel with his slave.³⁴ Or, perhaps, a railroad official might stand idly by while a drunken white man went into the non-white car to terrorize the people therein.³⁵ A railroad officer who was tempted to permit crossing of the racial boundaries set up by the state might be subjected to penalty.³⁶ This part of the section need not imply particular views about racial

³⁰ Edelson, *supra* note 8, at 520 (“[T]he *Plessy* Court failed to take relevant social and historical context into account.”); Goodwin Liu, “*History Will Be Heard*”: An Appraisal of the *Seattle/Louisville* Decision, 2 HARV. L. & POL’Y REV. 53, 63 (2008) (describing the *Plessy* Court as “refusing to confront the social meaning of segregation”); Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063, 1077 (2013) (“[T]his was an argument that might as well have been made by a Martian for its extreme de-contextualization of the practice.”).

³¹ See Greene, *supra* note 26, at 414 (“The third common critique of *Plessy*, then, follows Justice Harlan’s lead: the majority’s error was willfully remaining blind to the social meaning of segregation, that blacks are and should remain a permanent underclass.”).

³² See *infra* notes 42-54 and accompanying text.

³³ See *Plessy*, 163 U.S. at 541.

³⁴ See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1343 (1996) (noting that in the 1840s “slaves traveling with their masters were allowed in cars otherwise reserved for white persons”).

³⁵ See *Hillman v. Ga. R. & Banking Co.*, 56 S.E. 68, 69 (Ga. 1906) (“[A] passenger car set apart for colored passengers, as provided by law, was invaded by a drunken person, who was guilty of violent conduct, terrorizing the occupants of the car, and compelling the plaintiff to leave his seat and ride on the platform, while the conductor remained idly by and neither protected the passengers nor arrested or ejected the offender.”)

³⁶ Cf. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting) (noting that the government “forbid[s] citizens of the white and black races from traveling in the same public conveyance, and . . . punish[es] officers of railroad companies for permitting persons of the two races to . . . occupy the same passenger coach”).

superiority, since it would apply to any instance in which a railroad official did not fulfill his duty.³⁷

Railroad officials had the legal duty to assign individuals to the “proper” cars and might be fined or imprisoned for failing to perform that duty. In order to fulfill their responsibilities, railroad personnel would have to make judgments about who belonged in which car. Such judgments would not be infallible, for example, Plessy would presumably have been permitted to sit in the railroad car reserved for whites had he not volunteered facts about his ancestry.³⁸

Suppose that a railroad official decided that a particular individual belonged to one race and then directed that individual to go to a particular railroad car. Suppose further that the individual refused to go to the assigned car, claiming that he did not belong there. The railroad official was authorized to refuse to permit the individual to ride the train.³⁹ But an official who wrongly refused to permit an individual to ride a train might fear that his good faith attempt to follow the law might nonetheless be punished. Louisiana law protected such officials—“for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.”⁴⁰

The *Plessy* Court commented on Louisiana’s attempt to shield railroad personnel from punishment: “[W]e are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs is a valid exercise of the legislative power.”⁴¹ Indeed, the attorney representing the state had conceded to the *Plessy* Court that “such part of the act as exempts from liability the railway company and its officers is unconstitutional.”⁴² Basically, the power to refuse service to someone who insisted on going to the other car “implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular

³⁷ Greene, *supra* note 26, at 415 (“A reasonable judge could infer odious intent in *Plessy*, but the Separate Car Act required equality on its face and conferred no discretion on train conductors.”).

³⁸ See *supra* note 11 and accompanying text.

³⁹ *Plessy*, 163 U.S. at 541 (“[S]hould any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train.”).

⁴⁰ *Id.* at 541.

⁴¹ *Id.* at 548-49.

⁴² *Id.* at 549.

state, is to be deemed a white, and who a colored, person.”⁴³ An individual who was wrongly told that he could not sit in the car reserved for whites would have an action for damages,⁴⁴ and the Court was striking down the immunity afforded to the railroad precisely because these reputational interests were considered property interests⁴⁵ that could not be abrogated by statute without offending constitutional guarantees.⁴⁶

Plessy had argued that “the reputation of belonging to the dominant race, in this instance the white race, is ‘property,’ in the same sense that a right of action or of inheritance is property.”⁴⁷ The Court seemed to accept that argument,⁴⁸ but believed it inapplicable to the present case because Plessy was not being assigned to the incorrect car.⁴⁹ But Plessy had not been claiming that he had been deprived of his property interest in whiteness⁵⁰ by virtue of having been assigned to the wrong car.⁵¹ Rather, he had been suggesting that because the law enforced segregation and, in addition, recognized a property interest in correctly being described as white⁵² but not in correctly being described as non-white,⁵³ the law was stigmatizing.

⁴³ *Id.*

⁴⁴ *See id.* at 549 (“If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called ‘property.’ Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.”).

⁴⁵ *See id.*

⁴⁶ *Id.* at 549 (“Such part of the act as exempts from liability the railway company and its officers is unconstitutional.”).

⁴⁷ *Id.* at 553. *See also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1726 (1993) (“Whiteness—the right to white identity as embraced by the law—is property if by property one means all of a person’s legal rights.”).

⁴⁸ *See Plessy*, 163 U.S. at 549.

⁴⁹ *Id.* (“This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.”).

⁵⁰ *See id.* at 553 (“[W]e are unable to see how this statute deprives him of, or in any way affects his right to, such property.”). *Cf.* Harris, *supra* note 47, at 1736 (“[W]hiteness as public reputation and personal property was affirmed”).

⁵¹ *Plessy*, 163 U.S. at 549 (“[I]f he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.”).

⁵² *See id.* (“[T]he reputation of belonging to the dominant race, in this instance the white race, is ‘property . . .’”). *See also* *May v. Shreveport Traction Co.*, 53 So. 671, 674 (La. 1910) (“We now apply to the case another doctrine, which is also well established, to wit, that, to charge a white person, in this part of the world, with being a negro, is an insult, which must, of necessity, humiliate, and may materially injure, the person to whom the charge is applied.”); *Wolfe v. Ga. Ry. & Elec. Co.*, 58 S.E.

The *Plessy* Court suggested both that individuals had a constitutionally protected interest in being correctly classified as white *and* that those who believed that the law was stigmatizing because it implied the inferiority of non-whites were simply putting their own construction on the law. But those views are not reconcilable. If the law recognized a property interest in correctly being classified as white but not incorrectly being classified as belonging to another race, then the stigmatization could not merely be attributed to the construction that non-whites put on the law, but also to the denial of the equality of the races by the law itself.

B. Modern Equal Protection Jurisprudence

*Brown v. Board of Education*⁵⁴ expressly repudiated *Plessy*.⁵⁵ At issue was whether states could maintain racially separate schools where the schools were substantially equal in a number of respects.⁵⁶ The Court noted that “the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors,”⁵⁷ and then sought to examine “the effect of segregation itself on public education.”⁵⁸

899, 903 (Ga. App. 1907) (“In *Flood v. News & Courier Company*, 71 S.C. 112, 50 S. E. 637, the Supreme Court of South Carolina held that to publish in a newspaper of a white man that he is colored is libelous per se, and cites numerous authorities to sustain its position. To the same effect was the decision of the Supreme Court of Louisiana in *Upton v. Times–Democrat Pub. Co.*, 104 La. 141, 28 South. 970; and in *Southern Ry v. Thurman*, 28 Ky. Law Rep. 699, 90 S. W. 240, 2 L. R. A. (N. S.) 1108, the Court of Appeals of Kentucky held that a cause of action was set out.”).

⁵³ *Cf. Harris*, *supra* note 47, at 1736 (“A Black person, however, could not sue for defamation if she was called ‘white.’ Because the law expressed and reinforced the social hierarchy as it existed, it was presumed that no harm could flow from such a reversal.”). *See also Plessy*, 163 U.S. at 560 (Harlan, J., dissenting) (“What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?”).

⁵⁴ 347 U.S. 483 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka*, Kan., 349 U.S. 294 (1955).

⁵⁵ *Id.* at 494-95.

⁵⁶ *Id.* at 493 (“We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”).

⁵⁷ *Id.* at 492.

⁵⁸ *Id.*

The Court focused in particular on the effects on minority schoolchildren who were told that they could not attend school with white children. “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁵⁹ Here, the Court suggested that the feelings were not chosen by the children themselves but instead were generated by the fact of segregation.⁶⁰ In this way, the Court could distinguish and reject the *Plessy* Court’s claim that those complaining of the segregation themselves chose to feel stigmatized.⁶¹ The Court then held that “the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”⁶²

The *Brown* Court categorically rejected racially segregated schools—“Separate educational facilities are inherently unequal”—but was not entirely clear about the basis for that rejection. The Court emphasized the feelings of inferiority generated by racial segregation—the “feeling of inferiority as to their status in the community . . . may affect their hearts and minds in a way unlikely ever to be undone.”⁶³ But the Court’s focusing on the psychological harm thereby caused raises the issue of whether race-conscious measures would also offend constitutional guarantees if they did not contribute to inferiority but, instead, to feelings of equality or superiority.⁶⁴ If race-conscious policies are per se unconstitutional⁶⁵ or

⁵⁹ *Id.* at 494.

⁶⁰ John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of Brown, the Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631, 690 (2008) (“*Plessy* says that if segregation is stigmatic, that is only ‘because the colored race chooses to put that construction upon it.’ Conversely, *Brown* asserts that segregation is stigmatic in effect—it generates ‘a feeling of inferiority.’”).

⁶¹ *Brown*, 347 U.S. at 494-95 (“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”).

⁶² *Id.* at 495.

⁶³ *Id.* at 494.

⁶⁴ *Cf.* Preston C. Green, III et. al., *Parents Involved, School Assignment Plans, and the Equal Protection Clause the Case for Special Constitutional Rules*, 76 BROOK. L. REV. 503, 566 (2011) (“Given the purpose of the Fourteenth Amendment to broaden opportunity, these contextual factors should ultimately consider whether any race-conscious plan primarily works to equalize or deny opportunity on the basis of race.”); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 (1986) (“In the end, the uncertain extent to which affirmative action diminishes the accomplishments of blacks must be

if expressly race-conscious measures trigger strict scrutiny whether or not they contribute to feelings of inferiority,⁶⁶ then *Brown's* emphasis on feelings of inferiority is better understood as a strategic inclusion to counteract *Plessy*⁶⁷ rather than as the basis for holding segregation unconstitutional.⁶⁸

Some issues have been conflated in *Plessy* and *Brown* that should be kept separate. One issue is whether the state intends to impose a stigma⁶⁹ and another is whether a particular group feels stigmatized.⁷⁰ The two may but need not coincide, for example, because the state did not intend to stigmatize but may nonetheless have done so, or because the state intended to stigmatize but was unsuccessful in that attempt.

In his dissent, Justice Harlan focused on the state's purpose behind requiring separation in railway cars.⁷¹ Purpose has been an important focus of the Court when deciding equal protection cases, for example, in *Hunter v. Erickson*,⁷² the Court examined a city charter amendment

balanced against the stigmatization that occurs when blacks are virtually absent from important institutions in the society. The presence of blacks across the broad spectrum of institutional settings upsets conventional stereotypes about the place of the Negro and acculturates the public to the idea that blacks can and must participate in all areas of our national life. This positive result of affirmative action outweighs any stigma that the policy causes.”).

⁶⁵ But see Guy-Uriel E. Charles, *Affirmative Action and Colorblindness from the Original Position*, 78 TUL. L. REV. 2009, 2009 (2004) (“[T]he [Grutter] Court rejected the argument that the Constitution is colorblind and that classifications based upon race, except in extremely narrow circumstances, are per se unconstitutional.”).

⁶⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“We apply strict scrutiny to all racial classifications.”).

⁶⁷ Edelson, *supra* note 8, at 542 (“The *Brown* Court was directly responding to, and rejecting, *Plessy's* conclusion that African Americans “chose” to be offended by segregation.”).

⁶⁸ Various commentators have criticized the *Brown* Court for its use of sociological studies to support its holding. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1488 (2004) (“*Brown's* critics assailed the Court as ‘the nine sociologists’ and accused the justices of ‘writing Gunnar Myrdal’s “social dynamics” into the Constitution.’”) (quoting Herbert Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 37 (1959)).

⁶⁹ Ronald S. Sullivan Jr., *Multiple Ironies: Brown at 50*, 47 HOW. L.J. 29, 36 (2003) (“The notion of ‘stamping’ an individual or a race with a ‘badge of inferiority’ is an external process. That is to say, to stamp is an act of impressing (in this case, a badge of inferiority), but to impress a badge does not prefigure how the person or group wearing the badge is affected.”).

⁷⁰ *Id.* (“The “feelings of inferiority” vocabulary makes a radically different assertion than the “badge of inferiority” vocabulary.”).

⁷¹ See *supra* note 29 and accompanying text.

⁷² 393 U.S. 385 (1969).

which precluded the city council from adopting housing antidiscrimination protections absent ratification by the voters.

The amendment read:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.⁷³

The *Hunter* Court noted that the charter amendment involved “an explicitly racial classification treating racial housing matters differently from other racial and housing matters.”⁷⁴ The Court was confident that it understood the amendment’s effects, because it “disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor.”⁷⁵ Reasoning that the “majority needs no protection against discrimination,”⁷⁶ the Court understood that “the reality is that the law’s impact falls on the minority.”⁷⁷ The charter amendment “discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.”⁷⁸

C. The Court’s Growing Modesty

One of the noteworthy features of *Hunter* and some of the other cases involving racial discrimination was the Court’s confidence that it could distinguish between cases involving *invidious* racial discrimination⁷⁹ and those that did not involve such discrimination.⁸⁰

⁷³ *Id.* at 387 (citing Akron City Charter §137).

⁷⁴ *Id.* at 389.

⁷⁵ *Id.* at 391.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 393.

⁷⁹ *See also* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which

At one point, the Court imposed intermediate scrutiny with respect to benign rather than invidious racial classifications,⁸¹ but the Court lost confidence that it could determine with sufficient accuracy whether racial classifications were adopted to promote malevolent rather than benign purposes.⁸²

In *City of Richmond v. J.A. Croson Co.*,⁸³ the plurality reasoned that “[a]bsent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”⁸⁴ The *Croson* plurality did not thereby suggest that racial classifications are per se unconstitutional but instead explained that

the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool . . . [and also] ensur[ing] that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.⁸⁵

Croson involved racial classifications adopted by the City of Richmond.⁸⁶ A separate issue was whether federal racial

justifies this classification.”); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (“There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race.”).

⁸⁰ See *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 566 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (“We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.”).

⁸¹ *Id.* at 564-65 (“We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”).

⁸² See *infra* notes 84-93 and accompanying text.

⁸³ 488 U.S. 469 (1989).

⁸⁴ *Id.* at 493.

⁸⁵ *Id.*

⁸⁶ *Id.* at 477 (“On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's).”).

classifications would also trigger strict scrutiny. In *Metro Broadcasting*, the Court distinguished between classifications adopted on the state or local level and classifications adopted on the federal level: “[R]ace-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.”⁸⁷ The Court announced that

benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.⁸⁸

The use of intermediate scrutiny for federal, race-conscious, benign classifications was rejected five years later in *Adarand Constructors, Inc. v. Peña*.⁸⁹ The *Adarand* Court reasoned that “despite the surface appeal of holding ‘benign’ racial classifications to a lower standard, because ‘it may not always be clear that a so-called preference is in fact benign,’”⁹⁰ the better constitutional approach is to say that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”⁹¹ The Court thus made clear that “classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”⁹²

The Court’s employing strict scrutiny when examining racial classifications does not entail that such classifications never pass constitutional muster.⁹³ In *Grutter v. Bollinger*,⁹⁴ the Court upheld the

⁸⁷ *Metro Broadcasting*, 497 U.S. at 565.

⁸⁸ *Id.* at 564-65.

⁸⁹ 515 U.S. 200 (1995).

⁹⁰ *Id.* at 226 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)). *But see id.* at 245 (Stevens, J., dissenting) (“The consistency that the Court espouses would . . . treat a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive factor.”).

⁹¹ *Id.* at 227.

⁹² *Id.*

⁹³ *But see id.* at 239 (Scalia, J., concurring) (“In my view, government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”) (quoting *City of*

University of Michigan Law School's express use of race in its admissions policies.⁹⁵ Nonetheless, the scrutiny is strict and the Court's "review of whether such requirements have been met . . . entail[s] "a most searching examination."⁹⁶ Such classifications will only rarely pass muster—"[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."⁹⁷

D. Disparate Impact

The Court's very close scrutiny of express racial classifications is in marked contrast to its approach when no express racial classifications are employed, even when the classification at issue has a substantial disparate impact on the basis of race. At issue in *Washington v. Davis*⁹⁸ was the constitutionality of one of the tests used to determine who could become a member of the District of Columbia Police Department.⁹⁹ A disproportionate number of minority candidates failed to achieve a passing score on the test,¹⁰⁰ and the test had not been validated to establish that it was a good predictor of success as a police officer.¹⁰¹ However, there was no evidence that the purpose behind the adoption of the test had been to exclude on the basis of race.¹⁰²

Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment)).

⁹⁴ 539 U.S. 306 (2003).

⁹⁵ *Id.* at 343 ("[T]he 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.").

⁹⁶ *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995)).

⁹⁷ *Id.* (citing *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

⁹⁸ 426 U.S. 229 (1976).

⁹⁹ *See id.* at 234-35 ("[T]he police recruit was required to satisfy certain physical and character standards, to be a high school graduate or its equivalent, and to receive a grade of at least 40 out of 80 on "Test 21," which is "an examination that is used generally throughout the federal service," which "was developed by the Civil Service Commission, not the Police Department," and which was "designed to test verbal ability, vocabulary, reading and comprehension.").

¹⁰⁰ *Id.* at 237 (stating that "the critical fact was . . . that a far greater proportion of blacks four times as many failed the test than did whites").

¹⁰¹ *Id.* at 267 ("[T]here is no proof of a correlation either direct or indirect between Test 21 and performance of the job of being a police officer.").

¹⁰² *Id.* at 235 ("The District Court noted that there was no claim of 'an intentional discrimination or purposeful discriminatory acts' but only a claim that Test 21 bore

The Court explained that “a law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”¹⁰³ That did not mean that disparate impact was irrelevant,¹⁰⁴ but “[s]tanding alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”¹⁰⁵

The Court has suggested that in extremely unusual cases disparate impact can be enough to establish invidious intent, for example, if “the conclusion cannot be resisted that no reason for [the discrimination] exists except hostility to the race and nationality to which the petitioners belong.”¹⁰⁶ However, even great disparate impact will not establish the necessary intent to discriminate.

Consider *Personnel Administrator of Massachusetts v. Feeney*.¹⁰⁷ While the Court admitted that “when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work,”¹⁰⁸ the Court nonetheless reaffirmed “the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results.”¹⁰⁹

At issue in *Feeney* was whether a preference for veterans in state employment involved invidious discrimination on the basis of gender.¹¹⁰ The *Feeney* Court noted that at the time the litigation commenced, over 98% of those qualifying for the preference were male.¹¹¹ Nonetheless, “the definition of ‘veterans’ in the statute has always been neutral as to gender,”¹¹² which meant that the classification was neutral on its face. Facial neutrality did not end the analysis, because “[i]f the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real

no relationship to job performance and ‘has a highly discriminatory impact in screening out black candidates.’”).

¹⁰³ *Id.* at 242.

¹⁰⁴ *Id.* (“Disproportionate impact is not irrelevant.”).

¹⁰⁵ *Id.* (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

¹⁰⁶ See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

¹⁰⁷ 442 U.S. 256 (1979).

¹⁰⁸ *Id.* at 273.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 271 (“The sole question for decision on this appeal is whether Massachusetts, in granting an absolute lifetime preference to veterans, has discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.”).

¹¹¹ *Id.* at 270.

¹¹² *Id.* at 275.

classification made by the law was in fact not neutral.”¹¹³ However, the Court rejected that the purpose behind adoption of the statute had been to discriminate on the basis of sex,¹¹⁴ which meant that higher scrutiny was not even triggered.¹¹⁵

Certainly, the state legislature would have been aware that by its enacting this employment preference, many more men than women would have been given an advantage.¹¹⁶ But that did not end the inquiry. For Feeney to establish sex discrimination, she had to show that “the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹¹⁷

The Court explained the approach to take when a classification, neutral on its face, was challenged as a violation of equal protection guarantees:

When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.¹¹⁸

Thus, if the classification does not involve gender, then the next question is whether the neutral statute nonetheless reflects invidious discrimination, i.e., reflects a purpose to discriminate. If no purpose to discriminate can be established, then the Constitution is not

¹¹³ *Id.* at 275 (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

¹¹⁴ *Id.* at 281 (“The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate on the basis of sex.”).

¹¹⁵ *See id.* at 277-78 (“But the District Court found, and the appellee has not disputed, that this legislative choice was legitimate. The basic distinction between veterans and nonveterans, having been found not gender-based, and the goals of the preference having been found worthy, ch. 31 must be analyzed as is any other neutral law that casts a greater burden upon women as a group than upon men as a group.”).

¹¹⁶ *See id.* at 278 (“And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men.”).

¹¹⁷ *Id.* at 279.

¹¹⁸ *Id.* at 274.

offended,¹¹⁹ assuming that the classification is rationally related to a legitimate state interest.¹²⁰

The same analysis is used with respect to a classification alleged discriminating on the basis of race.¹²¹ If a race-neutral statute is challenged as a violation of equal protection guarantees because of its disparate racial impact, it is possible that the purpose behind the statute's adoption was to discriminate on the basis of race.¹²² However, because "purposeful discrimination is 'the condition that offends the Constitution,'"¹²³ disparate racial impact without a showing of invidious purpose will not be constitutionally offensive.

Modern equal protection jurisprudence incorporates two principles: because it is difficult for the Court to determine with confidence whether the purpose behind the adoption of racial classifications was benign rather than invidious, (1) all racial classifications will be subject to strict scrutiny, but (2) absent a showing of a purpose to discriminate on the basis of race, classifications having a disparate racial impact will merely be examined in light of rational basis review.¹²⁴

III. *SCHUETTE* AND CONSTITUTIONAL PROTECTIONS

*Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights*¹²⁵ involved a challenge to a Michigan ban on racial preferences. The plurality addressed whether the referendum establishing the ban violated electoral process and, more generally, equal protection guarantees. When explaining why the referendum passed constitutional muster, the plurality modified rather than applied the existing jurisprudence, which leaves open whether *Schuette* will represent an important doctrinal shift or, instead, an instance in which members of the Court were not sufficiently attentive to the prevailing

¹¹⁹ See *id.* ("[P]urposeful discrimination is 'the condition that offends the Constitution.'") (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

¹²⁰ See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985) ("[I]f the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.").

¹²¹ See *Feeney*, 442 U.S. at 273-74.

¹²² See *id.* at 273 ("[W]hen a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work.").

¹²³ *Id.* at 274 (citing *Swann*, 402 U.S. at 16).

¹²⁴ See *supra* notes 84-93 and accompanying text.

¹²⁵ 134 S. Ct. 1623 (2014).

constitutional approach when classifications expressly including race are at issue. In either case, the opinion is regrettable, if only because changing or ignoring the jurisprudence in this kind of case may be inferred to represent a weakening of the Court's commitment to eradicate invidious racial discrimination.

A. *Schuette and Electoral Process Guarantees*

The state of Michigan adopted a constitutional amendment by referendum that precluded preferences for or discrimination against certain groups in employment or school admissions.¹²⁶ The Sixth Circuit struck down the amendment, holding that it violated electoral process guarantees.¹²⁷ The United States Supreme Court reversed.¹²⁸

In a few different cases, the United States Supreme Court struck down referenda making it more difficult for minorities to secure benefits or avoid discrimination.¹²⁹ The Michigan amendment at least

¹²⁶ *Id.* at 1628.

The ballot proposal was called Proposal 2 and, after it passed by a margin of 58 percent to 42 percent, the resulting enactment became Article I, § 26, of the Michigan Constitution. As noted, the amendment is in broad terms. Section 26 states, in relevant part, as follows:

“(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 purposes 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 sub-section 1.”

Id. at 1628.

¹²⁷ *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary v. Regents of Univ. of Mich.*, 701 F.3d 466, 489 (6th Cir. 2012), *rev'd sub nom. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary* (BAMN), 134 S. Ct. 1623 (2014) (“Proposal 2 deprives the Plaintiffs of equal protection of the law under the political-process doctrine.”).

¹²⁸ *Schuette*, 134 S. Ct. at 1638 (“The judgment of the Court of Appeals for the Sixth Circuit is reversed.”).

¹²⁹ *See* *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (striking down state law precluding local school districts from using busing to achieve racial integration); *Hunter v. Erickson*, 393 U.S. 385 (1969) (striking down local referendum precluding implementation of antidiscrimination housing measures absent ratification by the

appeared constitutionally vulnerable¹³⁰—if the constitutionality of the Michigan referendum was going to be upheld without at the same time overruling the whole electoral process jurisprudence,¹³¹ the plurality would have to establish that the referendum did not have the fatal flaws associated with some of the other referenda struck down by the Court.¹³² The *Schuetz* plurality attempted to differentiate the referendum from the referenda involved in three other decisions: *Reitman v. Mulkey*,¹³³ *Hunter v. Erickson*,¹³⁴ and *Washington v. Seattle School District*.¹³⁵

In *Mulkey*, “voters amended the California Constitution to prohibit any state legislative interference with an owner’s prerogative to decline to sell or rent residential property on any basis.”¹³⁶ Because of that amendment, two couples who had been denied access to rental housing on the basis of race were prevented “from invoking the protection of California’s statutes; and, as a result, they were unable to lease residential property.”¹³⁷ The *Mulkey* Court agreed with the California Supreme Court that “the amendment operated to insinuate the State into the decision to discriminate by encouraging that practice.”¹³⁸

electorate); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (striking down California constitutional amendment approved via referendum that protected the right to discriminate in the housing market). *See also* *Romer v. Evans*, 517 U.S. 620 (1996) (striking down referendum precluding antidiscrimination protection on the basis of sexual orientation). However, the *Romer* Court did not base its decision on electoral process guarantees as did the Colorado Supreme Court, and instead affirmed on other grounds. *See id.* at 626.

¹³⁰ *Cf. Schuetz*, 134 S. Ct. at 1641 (Scalia, J., concurring in the judgment) (“The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case.”).

¹³¹ *But see Schuetz*, 134 S. Ct. at 1643 (Scalia, J., concurring in the judgment) (“*Hunter* and *Seattle* should be overruled.”).

¹³² *But see id.* at 1642 (Scalia, J., concurring in the judgment) (suggesting that the *Schuetz* plurality account of some of the previous cases “reinterprets them beyond recognition”). *See also Fourteenth Amendment–Equal Protection Clause–Political-Process Doctrine–Schuetz v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 128 HARV. L. REV. 281, 290 (2014) (“*Schuetz* rewrote *Hunter* and *Seattle* and discarded the political-process doctrine’s central idea.”).

¹³³ *Schuetz*, 134 S. Ct. at 1631 (discussing *Mulkey*, 387 U.S. 369).

¹³⁴ *Id.* at 1631–32 (discussing *Hunter*, 393 U.S. 385).

¹³⁵ *Id.* at 1632–36 (discussing *Seattle*, 458 U.S. 457).

¹³⁶ *Id.* at 1631.

¹³⁷ *Id.*

¹³⁸ *Id.*

The *Schuetz* plurality noted that several justices dissented in *Mulkey*¹³⁹ and, further, expressly included the *Mulkey* dissent's reasoning, namely, that "California, by the action of its voters, simply wanted the State to remain neutral in this area, so that the State was not a party to discrimination."¹⁴⁰ The plurality offered no explanation for the express inclusion of Justice Harlan's dissenting position in *Mulkey*, although the plurality had some sympathy for that position as evidenced by its wistfully noting that the "dissenting voice did not prevail against the majority's conclusion that the state action in question encouraged discrimination, causing real and specific injury."¹⁴¹

The plurality then addressed *Hunter*,¹⁴² a decision relied upon by those challenging the constitutionality of the Michigan referendum.¹⁴³ The Akron City Council had passed an anti-discrimination ordinance to prevent discrimination in the housing market.¹⁴⁴ Akron voters responded via referendum by "amend[ing] the city charter to overturn the ordinance and . . . requir[ing] that any additional antidiscrimination housing ordinance be approved by referendum."¹⁴⁵

The *Schuetz* plurality explained that the Akron amendment's targeting of minorities¹⁴⁶ could not be justified.¹⁴⁷ The "city charter amendment, by singling out antidiscrimination ordinances, 'places special burden on racial minorities within the governmental process,' thus becoming as impermissible as any other government action taken with the invidious intent to injure a racial minority."¹⁴⁸ The plurality also quoted Justice Harlan's *Hunter* concurrence in which he noted that Akron amendment's ratification requirement for antidiscrimination measures based on race "ha[d] the clear purpose of making it more difficult for certain racial and religious minorities to

¹³⁹ *Id.* ("In a dissent joined by three other Justices, Justice Harlan disagreed with the majority's holding.") (citing *Mulkey*, 387 U.S. at 387 (Harlan, J., dissenting)).

¹⁴⁰ *Id.* (citing *Mulkey*, 387 U.S. at 389 (Harlan, J., dissenting)).

¹⁴¹ *Id.*

¹⁴² For a brief discussion of *Hunter*, see *supra* notes 72-79 and accompanying text.

¹⁴³ *Schuetz*, 134 S. Ct. at 1631 ("Hunter v. Erickson, 393 U.S. 385 (1969), is central to the arguments the respondents make in the instant case.").

¹⁴⁴ *Id.* at 1632 ("Akron enacted a fair housing ordinance to prohibit . . . discrimination.").

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (noting that the "Court rejected Akron's flawed 'justifications for its discrimination,' justifications that by their own terms had the effect of acknowledging the targeted nature of the charter amendment") (quoting *Hunter v. Erickson*, 393 U.S. 385, 392 (1969)).

¹⁴⁸ *Id.* (citing *Hunter*, 393 U.S. at 391).

achieve legislation that is in their interest.”¹⁴⁹ After quoting Justice Harlan, however, the plurality seemed to disavow his analysis by noting that “without regard to the sentence just quoted, *Hunter* rests on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.”¹⁵⁰ By implicitly rejecting Justice Harlan’s conclusion about the purpose behind the Akron amendment and implicitly endorsing Justice Harlan’s rejection of invidious purpose in *Mulkey*,¹⁵¹ the plurality implies that invidious purpose to discriminate on the basis of race is difficult to establish absent the presence of some sort of smoking gun.¹⁵²

Even if invidious purpose could not be established, however, the “unremarkable principle that the State may not alter the procedures of government to target racial minorities”¹⁵³ might be thought to establish the unconstitutionality of the Michigan amendment, because that referendum arguably targeted racial minorities as much as the Akron referendum did.¹⁵⁴ The *Hunter* referendum applied to all races rather than racial minorities in particular—ratification of any housing antidiscrimination ordinance “on the basis of race, color, religion, national origin or ancestry”¹⁵⁵ was required. So, too, the Michigan amendment did not only apply to racial minorities, because it precluded “discriminat[ion] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.”¹⁵⁶ But if *Hunter* was plausibly understood to be targeting minorities even though it included race as a general category, then the Michigan amendment might also be understood that way.¹⁵⁷

¹⁴⁹ *Id.* (citing *Hunter*, 393 U.S. at 395 (Harlan, J., concurring)).

¹⁵⁰ *See id.*

¹⁵¹ *See supra* note 140 and accompanying text.

¹⁵² *Cf. Schuette*, 134 S. Ct. at 1641 (Scalia, J., concurring in the judgment) (suggesting that in *Hunter*, the Court “deemed the revocation an equal-protection violation *regardless* of whether it facially classified according to race or reflected an invidious purpose to discriminate”).

¹⁵³ *Id.* at 1632.

¹⁵⁴ *See infra* notes 156-58 and accompanying text.

¹⁵⁵ *Hunter v. Erickson*, 393 U.S. 385, 387 (1969).

¹⁵⁶ *Schuette*, 134 S. Ct. at 1628.

¹⁵⁷ *Cf.* 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, 269 (2013-2014) (“[I]t makes little sense to hold that (1) a referendum invalidating a ban on *private* housing discrimination as in *Mulkey* and *Hunter* inflicts a constitutionally cognizable injury on minorities even though private action is not covered by the Equal Protection Clause, but (2) when a referendum invalidates a policy that allowed *state* universities to adopt admissions

The *Schuette* plurality reasoned 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.”¹⁵⁸ However, the only *state* encouragement or participation was by virtue of passing the amendments prohibiting anti-discrimination measures—the discrimination itself was attributable to private parties.¹⁵⁹ If the state action at issue in *Mulkey* was invidious because of the message it sent by immunizing private discrimination within the state constitution,¹⁶⁰ the Michigan amendment was also arguably invidious because of the message sent to racial minorities that they were not welcome.¹⁶¹

The plurality’s suggestion that “the Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters”¹⁶² was not particularly helpful, since the Akron voters might have made an analogous claim about the Akron City Council. In short, the previous electoral process cases seemed to require the invalidation of the Michigan referendum as well.¹⁶³

The plurality offered its most extensive discussion of the electoral process jurisprudence when examining *Washington v. Seattle School District*.¹⁶⁴ The referendum at issue in that case involved a local school board decision to “adopt[] a mandatory busing program to alleviate racial isolation of minority students in local schools.”¹⁶⁵

policies that mitigate the vast “underrepresentation” of black and Hispanic students in *public* colleges, no constitutionally cognizable injury can be recognized.”).

¹⁵⁸ *Schuette*, 134 S. Ct. at 1632.

¹⁵⁹ Bernstein, *supra* note 157, at 264 (noting that *Mulkey* and *Hunter* involved “private housing discrimination”).

¹⁶⁰ *Cf. Reitman v. Mulkey*, 387 U.S. at 377 (“The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.”).

¹⁶¹ *Cf. Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (likening programs incorporating affirmative action to putting out “a welcome mat” for minorities).

¹⁶² *Schuette*, 134 S. Ct. at 1636.

¹⁶³ *Cf. id.* at 1641 (Scalia, J., concurring) (“The relentless logic of *Hunter* and *Seattle* would point to a similar conclusion in this case.”); *id.* at 1651 (Sotomayor, J., dissenting) (noting that “without checks, democratically approved legislation can oppress minority groups”).

¹⁶⁴ *See id.* at 1632-36 (discussing *Washington v. Seattle School District*, 458 U.S. 457 (1982)).

¹⁶⁵ *Id.* at 1632.

State voters reacted to that decision by “pass[ing] a state initiative that barred busing to desegregate.”¹⁶⁶ The plurality suggested that “*Seattle* is best understood 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.”¹⁶⁷ How?

[While] there had been no judicial finding of *de jure* segregation with respect to Seattle’s school district, it appears as though school segregation in the district in the 1940’s and 1950’s may have been the partial result of school board policies that ‘permitted white students to transfer out of black schools while restricting the transfer of black students into white schools.’¹⁶⁸

Thus, the plurality read *Seattle* as rectifying (unrecognized) state discrimination, and then concluded that the Michigan amendment did not involve an “infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools.”¹⁶⁹

Yet, as the plurality recognizes, the *Seattle* Court did not itself find the state complicit in the invidious discrimination.¹⁷⁰ Rather, the *Seattle* Court instead “stated that where a government policy ‘inures primarily to the benefit of the minority’ and ‘minorities . . . consider’ the policy to be ‘in their interest,’ then any state action that ‘place[s] effective decisionmaking authority over’ that policy ‘at a different level of government’ must be reviewed under strict scrutiny.”¹⁷¹

The *Schuette* plurality rejected the articulated *Seattle* position, which implied that the Court should “determine and declare which political policies serve the ‘interest’ of a group defined in racial terms.”¹⁷² Such a position is untenable in light of current equal protection jurisprudence¹⁷³—the “Court has rejected the assumption that ‘members of the same racial group—regardless of their age, education, economic status, or the community in which they live—

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1633.

¹⁶⁸ *Id.* (citing *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 807–08 (2007) (Breyer, J., dissenting)).

¹⁶⁹ *Id.* at 1636.

¹⁷⁰ *See id.* at 1633 (noting that there was “no judicial finding of *de jure* segregation with respect to Seattle’s school district”).

¹⁷¹ *Id.* at 1634 (citing *Seattle*, 458 U.S. at 472, 474).

¹⁷² *Id.*

¹⁷³ *See id.* (noting that “that rationale . . . raises serious constitutional concerns”).

think alike, share the same political interests, and will prefer the same candidates at the polls.”¹⁷⁴

At least two points might be made about the plurality’s analysis. First, even if the current Court does not share the *Seattle* Court’s apparent willingness to make a determination of which policies benefit minority groups, that does not justify offering an interpretation of the jurisprudence that renders it unrecognizable.¹⁷⁵ Second, even if the Court is precluded from making an assessment of which policies benefit minorities and which do not, a separate issue involves the appropriate level of scrutiny when state law expressly classifies on the basis of race (among other bases).¹⁷⁶ If such classifications trigger strict scrutiny regardless of whether minorities or members of the Court believe the classifications are beneficial or injurious,¹⁷⁷ then the plurality’s unwillingness to adopt the *Seattle* approach and assess whether a particular policy benefits or harms minority interests will not save the Michigan amendment in light of current equal protection analysis. So, too, if express racial classifications trigger strict scrutiny whether the purposes behind those classifications are benign or invidious, then the *Schuetz* plurality’s willingness to impute a non-invidious purpose to the electorate when adopting the referendum¹⁷⁸ will not save it from very close scrutiny.

B. *The Michigan Amendment and Equal Protection Guarantees*

The *Schuetz* plurality expressly refused to disturb the principle,¹⁷⁹ affirmed in *Fisher v. University of Texas at Austin*,¹⁸⁰ that “the consideration of race in admissions is permissible, provided that certain conditions are met.”¹⁸¹ The *Fisher* Court noted that “[s]trict scrutiny is a searching examination, and it is the government that bears

¹⁷⁴ *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

¹⁷⁵ *See id.* at 1641-42 (Scalia, J., concurring in the judgment) (“The plurality reinterprets [*Hunter* and *Seattle*] beyond recognition.”).

¹⁷⁶ *See supra* note 155 and accompanying text (noting the express classifications in the Michigan amendment).

¹⁷⁷ *See Johnson v. California*, 543 U.S. 499, 505 (2005) (“[A]ll racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny.”) (emphasis added) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

¹⁷⁸ *See Schuetz*, 134 S. Ct. at 1637 (“It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”).

¹⁷⁹ *Id.* at 1630 (“In this case, as in *Fisher*, that principle is not challenged.”).

¹⁸⁰ 133 S. Ct. 2411 (2013).

¹⁸¹ *Schuetz*, 134 S. Ct. at 1630.

the burden to prove “that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,”¹⁸² and explained that “good faith . . . [does not] forgive an impermissible consideration of race.”¹⁸³ As the *Croson* Court had already made clear, “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.”¹⁸⁴

The *Schuette* plurality’s position might be contrasted with that of Justice Scalia, who basically believes that the Equal Protection Clause precludes the state from classifying on the basis of race. If that were the correct understanding, then the question raised in *Schuette* might seem “frighteningly bizarre,”¹⁸⁵ because the Court would be addressing whether “the Equal Protection Clause of the Fourteenth Amendment *forbid[s]* what its text plainly *requires*.”¹⁸⁶ Basically, according to Justice Scalia’s interpretation, the Michigan amendment was constitutional because it only incorporated within the state constitution what the federal constitution already requires.¹⁸⁷

Justice Scalia implied that even if one accepted the plurality’s view that racial classifications are sometimes permissible, the constitutionality of the Michigan amendment was still obvious.¹⁸⁸ But the obviousness of that proposition was based on his having an incorrect reading of the amendment itself (which the plurality implicitly seemed to share), namely, that the Michigan referendum used a race-neutral classification.¹⁸⁹

In what sense might the Michigan amendment be thought race-neutral? It might be thought race-neutral in that it did not facially

¹⁸² *Fisher*, 133 S. Ct. at 2419 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)).

¹⁸³ *Id.* at 2421.

¹⁸⁴ *See id.* (citing *Croson*, 488 U.S. at 500).

¹⁸⁵ *Schuette*, 134 S. Ct. at 1639 (Scalia, J., concurring in the judgment).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (Scalia, J., concurring in the judgment) (“It is precisely this understanding—the correct understanding—of the federal Equal Protection Clause that the people of the State of Michigan have adopted for their own fundamental law. By adopting it, they did not simultaneously *offend* it.”).

¹⁸⁸ *Cf. id.* (Scalia, J., concurring in the judgment) (“Even taking this Court’s sorry line of race-based-admissions cases as a given, I find the question presented only slightly less strange: Does the Equal Protection Clause forbid a State from banning a practice that the Clause barely—and only provisionally—permits?”).

¹⁸⁹ *See id.* at 1647 (Scalia, J., concurring in the judgment) (suggesting that the plurality “endorses a version of the proposition that a facially neutral law may deny equal protection solely because it has a disparate racial impact”). *See also id.* at 1648 (Scalia, J., concurring in the judgment) (“[T]he question in this case, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the action reflects a racially discriminatory purpose.”).

distinguish among races. But race neutrality does not entail that the classification is not based on race—the Akron referendum also did not distinguish among races¹⁹⁰ but was nonetheless characterized by the *Hunter* Court as involving “an explicitly racial classification treating racial housing matters differently from other racial and housing matters.”¹⁹¹

There is another sense in which the Michigan referendum might be thought race-neutral. The referendum prohibited both discrimination and preferential treatment on the basis of race. This sort of neutrality (a person can neither be benefited nor harmed on the basis of her race) might be thought the antithesis of an equal protection violation. The *Fisher* Court explained that “judicial review must begin from the position that ‘any official action that treats a person *differently* on account of his race or ethnic origin is inherently suspect.’”¹⁹² Here, it might be claimed the referendum itself precludes treating anyone differently on the basis of race.

Yet, *Hunter* illustrates why such a claim is not plausible. The Court explained that the Akron amendment

disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.¹⁹³

Basically, those seeking housing protection or benefits on the basis of race were required to have their protections ratified by the electorate whereas those seeking housing protection or benefits on other bases did not require voter ratification. So, too, unlike those seeking preferential treatment on the basis of race, those seeking preferential treatment on other bases, e.g., athletic talent, legacy status, or religious

¹⁹⁰ *Hunter v. Erickson*, 393 U.S. 385, 390 (1969) (“It is true that the section draws no distinctions among racial and religious groups.”).

¹⁹¹ *Id.* at 389.

¹⁹² *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (emphasis added) (citing *Fullilove v. Klutznick*, 448 U.S. 488, 523 (1980) (Stewart, J., dissenting)).

¹⁹³ *Hunter*, 393 U.S. at 390-91.

affiliation, are not barred by the state constitution from doing so. To permit preferential admissions on a variety of bases but not to permit them on the basis of race imposes a disadvantage on the basis of race, claims of racial neutrality notwithstanding.

The *Schuette* plurality emphasized that *Hunter*, *Mulkey*, and *Seattle* had all been about preventing invidious harm.¹⁹⁴ Yet, those cases suggested that being barred from seeking particular kinds of benefits, e.g., better housing or schools, might itself be a harm. The Michigan amendment precludes the use of race to assure greater minority representation in the university setting, even when that usage would not violate federal constitutional guarantees.¹⁹⁵ But that means that the Michigan amendment targets race and imposes a burden related to its permissible use that is not imposed on other classifications, which is exactly what *Hunter* said could not be done.

IV. CONCLUSION

Equal protection jurisprudence has evolved over the years. The Court is no longer willing to make judgments about which racial classifications are invidious and which are not, instead imposing strict scrutiny on all statutes expressly classifying on the basis of race.

Some believe that the Court can distinguish between invidious and non-invidious discrimination in many cases,¹⁹⁶ while others believe such optimism is misplaced.¹⁹⁷ But that debate is not the difficulty posed in *Schuette*. Instead, the *Schuette* plurality interpreted an express classification on the basis of race to be facially neutral, and then employed the kind of scrutiny reserved for classifications not involving race.

Perhaps the Michigan referendum was adopted for non-invidious reasons. Perhaps not. The motivation behind the referendum's adoption is irrelevant under current equal protection jurisprudence, however, because express racial classifications, regardless of motivation, trigger strict scrutiny. But this makes interpretation of the *Schuette* plurality decision rather difficult. Is something more than the express usage of a racial classification required before the

¹⁹⁴ See *supra* note 170 and accompanying text.

¹⁹⁵ See *Schuette*, 134 S. Ct. at 1628 (“Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities.”); *id.* at 1630 (“[T]he consideration of race in admissions is permissible, provided that certain conditions are met.”).

¹⁹⁶ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

¹⁹⁷ See *id.* at 226.

classification will be deemed express for equal protection analysis? Is the Court's unwillingness to infer whether the motivation behind a classification is benign or invidious only applicable in certain kinds of cases? If so, which ones?

The *Schuette* plurality decision may have been prompted by a belief in the referendum's constitutionality and by a belief that racial classifications are sometimes permissibly employed by the state. The plurality is to be applauded for its unwillingness to hold that all racial classifications are per se unconstitutional, regardless of purpose or effect. But even compromise decisions must be written in light of the current jurisprudence, and the *Schuette* plurality decision is simply irreconcilable with the current approaches allegedly embraced by the Court. The Court should clarify at its earliest opportunity whether a new equal protection approach has been adopted *sub silentio* or whether, instead, *Schuette* is to be overruled or construed as narrowly as possible. Such a clarification might help shore up the integrity of the jurisprudence and the Court, both of which have been undermined by some of the regrettable opinions in *Schuette*.

