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CONSTITUTIONAL LAW-EQUAL PROTECTION CLAUSE-USING THE BALLOT BOX TO OVERTURN AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS

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CONSTITUTIONAL LAW—EQUAL PROTECTION CLAUSE—USING THE BALLOT BOX TO OVERTURN AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS

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

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I. INTRODUCTION

Does the Constitution allow for preferential treatment of minorities? Do such policies discriminate against non-minorities? Does affirmative action degrade minorities by categorizing them into racial stereotypes? Why is race singled out for preferential treatment and not other factors? Are such policies *really* necessary to remedy the harms and injustices committed in the past? If so, who should decide? Universities? States? The federal government? For nearly forty years, American society has tried to answer these questions, and the state of Michigan remains at the heart of the debate. Following the Supreme Court's decisions in *Gratz v. Bollinger*[1] and *Grutter v. Bollinger*,[2] opponents of affirmative action organized a large movement to amend Michigan's Constitution and abolish affirmative action in college admissions.[3] Michigan placed the

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1. 539 U.S. 244, 244 (2003).
2. 539 U.S. 306, 306 (2003).
3. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1629 (2014).

initiative, known as Proposal 2, on the ballot for the November 2006 election.[4]

The Michigan electorate adopted Proposal 2 with 58% voting in favor of the measure,[5] thereby amending Article I of the Michigan Constitution to include § 26, which states the following:

> (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.[6]

The Coalition to Defend Affirmative Action filed suit in the Eastern District of Michigan along with other opposition groups, faculty, as well as current and prospective students from the University of Michigan.[7] The plaintiffs alleged that Proposal 2 was unconstitutional as a violation of the Fourteenth Amendment's Equal Protection Clause.[8] The district court granted Michigan's motion for summary judgment, holding that Proposal 2 did not violate the political process doctrine of the Equal Protection Clause because the doctrine only applied to situations where a law injured a minority group, not where a minority group was given preferential treatment on the basis of race.[9]

On appeal, the Sixth Circuit reversed in a 2-1 panel decision, holding that Proposal 2 violated the political process doctrine because it modified Michigan's political structure in such a way that placed "special burdens on the ability of minority groups to achieve beneficial legislation."[10] In applying strict scrutiny, the panel

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4. *Id.*

5. *Id.*

6. MICH. CONST. art. I, § 26.

7. *Schuette*, 134 S. Ct. at 1629–30 (discussing that the two groups of plaintiffs originally filed separate lawsuits but were later consolidated into one lawsuit by the district court).

8. *Id.* at 1629.

9. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich, 539 F. Supp. 2d 924, 957–58, 960 (E.D. Mich. 2008).

10. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 652

determined that Proposal 2 did not satisfy a compelling government interest.[11] Michigan subsequently petitioned for and obtained en banc review.[12]

The Sixth Circuit, sitting *en banc*, agreed that Proposal 2 violated the political process doctrine and was thereby unconstitutional under the Equal Protection Clause.[13] The court began its analysis by declining to consider the constitutionality of affirmative action since the Supreme Court decided the issue in *Gratz* and *Grutter*.[14] The court concluded that Proposal 2 both targeted the admissions policy that primarily benefited racial minorities and placed a discriminatory burden on minorities to participate in the political process.[15] The court also found that Proposal 2 failed strict scrutiny because Michigan did not present a compelling government interest.[16] On certiorari to the United States Supreme Court, *held*, reversed.[17] Proposal 2 is constitutional and the political process doctrine does not apply because Proposal 2 does not specifically injure minorities on account of race, nor does it reallocate political power in a way that hinders minorities from participating in the political process. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

II. ISSUE

Although the Fourteenth Amendment was ratified in 1868,[18] it was nearly a century later when the Warren Court began broadening and strengthening the equal protection doctrine to what it is today.[19] Two distinct and competing doctrines arose from that

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F.3d 607, 626 (6th Cir. 2011).

11. *Id.* at 631.

12. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 473 (6th Cir. 2012); Brief for Petitioner at 8, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (No. 08-1387); Brief for Respondent at 5, Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) (No. 08-1387).

13. *Coal. to Defend Affirmative Action*, 701 F.3d at 470; Brief for Petitioner, *supra* note 12, at 21; Brief for Respondent, *supra* note 12, at 12.

14. *Coal. to Defend Affirmative Action*, 701 F.3d at 473.

15. *Id.* at 470, 477.

16. *Id.* at 489 (stating that because the government "does not assert that Proposal 2 satisfies a compelling state interest, we need not consider this argument").

17. *Schuette*, 134 S. Ct. at 1638.

18. LIBRARY OF CONGRESS, http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html (last visited May 20, 2014) (noting that the Fourteenth Amendment was adopted on July 9, 1868).

19. *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (ruling that

era: the constitutional protection of racial-preference policies, known as affirmative action,[20] versus equal protection jurisprudence requiring all individuals be treated equally, regardless of race or gender.[21] Underlying these two doctrines is the balance between the majority's ability to enact laws through the democratic process versus the protection of minority interests. The difficult question prompting the Court to grant certiorari revolved around whether an amendment to a state's constitution prohibiting racial preferences, particularly in public university admissions, violates the Fourteenth Amendment's Equal Protection Clause.[22] In *Schuette v. Coalition to Defend Affirmative Action*, the United States Supreme Court held that the state constitutional amendment requiring race neutrality did not violate the Equal Protection Clause.[23]

A. The Traditional Analysis of the Equal Protection Clause

The Equal Protection Clause provides: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[24] The Supreme Court has held that the main "purpose of the Equal Protection Clause . . . is the prevention . . . of discriminating on the basis of race."[25] In *Adarand Constructors, Inc.* v. *Pena*, the Court held that all racial classifications, whether imposed by federal, state, or local law, must pass strict scrutiny review.[26] In other words, they "must serve a compelling government interest, and must be narrowly tailored to further that interest."[27]

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the segregation of children in public schools on the basis of race denied them equal protection under the law).

20. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314–16 (1978) (holding that the consideration of race is constitutionally permissible, so long as it is one of several factors considered when reviewing an applicant).

21. *See id.* at 289–90 (holding that the Equal Protection Clause "cannot mean one thing when applied to one individual and something else when applied to a person of another color").

22. *Schuette*, 134 S. Ct. at 1630 (stating that "[t]he question here concerns . . . whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions").

23. *Id.* at 1638 (stating that "[t]here is no authority in the Constitution . . . or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters").

24. U.S. CONST. amend. XIV, § 1.

25. Washington v. Davis, 426 U.S. 229, 239 (1976).

26. 515 U.S. 200, 227 (1995).

27. *Id.* at 235; *see Washington v. Davis*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/cases/1970-1979/1975/1975_74_1492

In *Washington v. Davis*, the Court extended the strict scrutiny standard to apply to facially neutral laws if they were passed with a discriminatory purpose and have a discriminatory impact on racial minorities.[28] The discriminatory purpose does not have to be obvious but may be inferred based on the facts.[29] The Court emphasized that a law's passage must be for the purpose of causing its adverse effects upon a minority group. The discriminatory effect of a law is not enough.[30] Moreover, if a law fails to have both a discriminatory purpose and a discriminatory impact, it need only satisfy a rational-basis test to overcome an equal protection challenge.[31]

B. The Development of the Political Process Doctrine

Unlike the traditional analysis, which looks for the discriminatory purpose of a law, the political process doctrine instead focuses on a law's discriminatory effect. The political process doctrine states that the Equal Protection Clause prohibits a political structure which purports to treat all individuals equally but "subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[32] The doctrine creates a two-prong test analyzing the discriminatory effect(s) of a law. First, the court considers whether the law is "racial in character" by looking for textual references to race or considering whether the law in question has a negative impact on minority interests.[33] Second, the court examines whether the restructuring of the political process posits a disproportionate burden on minorities to achieve legislation that is in their interest

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(last visited June 4, 2014) (summarizing the findings of Washington v. Davis).

28. *Davis*, 426 U.S. at 239–43 (discussing that the disproportionate impact of a law is not the only factor to be considered as courts must also examine whether a law has a racially discriminatory purpose).

29. *Id.* at 242.

30. *Id.* at 239–43.

31. *Id.* at 245–49 (explaining that the standard for review is only a rational-basis test because the Court found no evidence of a discriminatory purpose); *see generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152, 152 n.4 (1938) (ruling that a presumption of rationality would be applied "unless . . . facts made known or generally assumed . . . preclude[d] the assumption that [the regulation] rest[ed] upon some rational basis within the knowledge and experience of the legislators.").

32. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1982).

33. *See* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1030–31, 1034–35 (1996) (referring to how the political process doctrine examines solely the discriminatory effect of a law and not whether it has a discriminatory purpose).

when compared to that of other groups.[34] If both prongs are satisfied, then strict scrutiny will apply, meaning that the law must be narrowly tailored to a compelling government interest in order to comply with the Equal Protection Clause.[35] To understand the application of the political process doctrine, it is important to note that the doctrine is the product of over forty years of judicial inquiry, with its history and significance best understood in the context of its four foundational cases: *Reitman v. Mulkey*,[36] *Hunter v. Erickson*,[37] *Washington v. Seattle School District No. 1*,[38] and *Crawford v. Board of Education of the City of Los Angeles*.[39]

In *Mulkey*, the Court held that a state constitutional amendment that prohibited any legislative intrusion with the owner's choice to decline to sell or rent property to another for any reason violated the Equal Protection Clause.[40] In that case, voters amended the California Constitution to prohibit the legislature from interfering with a landowner's right to deny the sale or rent of their property for any reason.[41] Two couples brought suit in the state court of California, one who was turned down from renting an apartment despite being financially solvent and another who was evicted from their apartment.[42] Both parties were unable to seek protection from the legislature because of the amendment. The case eventually made its way to the U.S. Supreme Court, which concluded that the amendment "expressly authorized and constitutionalized the private right to discriminate," and therefore was unconstitutional under the Equal Protection Clause. [43]

In relying heavily on *Mulkey*, the Court formally adopted the political process doctrine two years later in *Hunter*.[44] The case

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34. *Seattle*, 458 U.S. at 467 (quoting Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring)); *see* Amar & Caminker, *supra* note 33 at 1024 (describing the Court's findings in *Hunter v. Erickson*, 393 U.S. 385, 387, 389–90 (1969)).

35. *See generally Carolene Prods. Co.*, 304 U.S. at 152–53 n.4 ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

36. 387 U.S. 369, 369 (1967).

37. 393 U.S. 385, 385 (1969).

38. 458 U.S. 457, 357 (1982).

39. 458 U.S. 527, 527 (1982).

40. 387 U.S. at 371, 378–79 (determining that the "that the provision would involve the State in private racial discriminations to an unconstitutional degree").

41. *Id.* at 371.

42. *Id.* at 372.

43. *Id.* at 376, 381.

44. *See* Hunter v. Erickson, 393 U.S. 385, 393 (stating that states may not

involved a city charter amendment by the city of Akron, which required voter approval for any law regulating the real estate market that involved racial considerations.[45] The Court struck down the charter amendment as a violation of equal protection because it primarily harmed racial minorities, who would have gained from fair housing ordinances.[46] In addition, the Court noted that the voter-approval requirement inhibited minorities from gaining such anti-discrimination laws in the real estate market.[47] Thus, because the charter amendment harmed racial minorities and restructured the political process in such a way to burden minorities from seeking redress, the Court applied strict scrutiny and struck down the amendment because Akron failed to present a compelling government interest for the measure.[48]

In *Washington v. Seattle School District No. 1*, the Court further extended the political process doctrine to situations where the power to enact laws in the interest of racial minorities is transferred from a lower level of government to higher level of government.[49] In that case, the Seattle school board adopted a mandatory busing system to alleviate de facto segregation in schools.[50] In response to the busing plan, Seattle voters organized and passed Initiative 350, a statewide policy that prohibited school districts from busing students to schools that were not "geographically nearest or next nearest [to] the student's place of residence . . . ."[51]

The Court struck down Initiative 350 as a violation of the Equal Protection Clause because the referendum primarily harmed racial minorities and made it more difficult for them to obtain legislation in their favor.[52] Similar to *Hunter*, Initiative 350 was facially neutral,

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disadvantage any particular group by making it more difficult for that group to enact legislation on its behalf); *see also* Amar & Caminker, *supra* note 33, at 1024 (describing the *Hunter* doctrine).

45. *Hunter*, 393 U.S. at 385.

46. *See id.* at 390–91 (describing that even though the law on its face treated all races equally, the reality was that the law's impact falls on the minority).

47. *Id.* (noting that the amendment does not discriminate "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.").

48. *Id.* at 391–93.

49. 485 U.S. 457, 487 (1982).

50. *Id.* at 460–62; *see generally* BLACK'S LAW DICTIONARY 1480 (9th ed. 2009) (defining de jure segregation: "segregation that is permitted by law"); BLACK'S LAW DICTIONARY 134 (9th ed. 2009) (defining de facto segregation: "segregation that occurs without state authority, usu[ally] on the basis of socioeconomic factors").

51. *Seattle*, 458 U.S. at 460–62.

52. *Id.* at 470–71, 487.

however, it created a discriminatory effect by targeting the busing program that was designed for the benefit of minorities.[53] The Court also struck down the measure's shifting of political power from the local level to the state level because Initiative 350 granted the state government power over racial busing policies, but busing policies for other purposes remained with the school board.[54] The Court reasoned that for minorities to achieve race-based busing policies, it would require approval of the state legislature, however, other groups only needed to convince a majority of the local school board for busing policy in their interests.[55] The Court concluded that such a reallocation of the political process by shifting power from the local school board to the state legislature placed a discriminatory burden on minorities and, therefore, unconstitutional.[56]

On the same day that the Court decided *Seattle*, it provided an important limitation on the political process doctrine in *Crawford*, holding that laws prohibiting racial preferences do not violate the political process doctrine.[57] In the case, California state courts enjoyed a greater degree of autonomy to remedy segregation, especially compared to that of federal courts.[58] State courts used this power to enforce mandatory busing plans, similar to that of the Seattle school board.[59] California voters subsequently amended the state constitution, prohibiting courts from ordering racial busing in situations where a federal court would not have the authority to do so.[60] In applying the political process doctrine, the Court held that the amendment was constitutional because California's decision to limit its busing program did not fall below the federal requirements

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53. *Id.* at 470–74 (noting Justice Harlan's concurrence in *Hunter* where "laws structuring political institutions or allocating political power according to 'neutral principles'—such as the executive veto, or the typically burdensome requirements for amending state constitutions — are not subject to equal protection attack, though they may make it more difficult for minorities to achieve favorable legislation" (internal quotation marks omitted) (citing *Hunter*, 393 U.S. at 394)).

54. *Id.* at 474 (stating that Initiative 350 removed the authority to address a racial problem in such a manner that burdens minority interests).

55. *See id.* at 487 (explaining that it is questionable for racial minorities to be exempted from a similar procedure).

56. *Id.* at 483–87.

57. Crawford v. Bd. of Educ. of L.A., 458 U.S. 527, 539 (1982) ("[T]he simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.").

58. *Id.* at 535.

59. *Id.* at 531; *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 460–62 (1982) ("permit[ing] students to transfer from their neighborhood schools to help cure the District's racial imbalance").

60. *Crawford*, 458 U.S. at 532, 532 nn.5–6.

but only limited the power of state courts to equal that of the federal courts.[61] Parallel to the holdings in *Seattle* and *Hunter*, the *Crawford* Court stated that the discriminatory effect of a law was not enough on its own to warrant an equal protection violation, but if the law was combined with a change in the political process that limits minorities from achieving their legislative interests, then such a measure would be unconstitutional.[62]

C. The Development Affirmative Action in University Admissions

The debate over affirmative action policies in university admissions began in 1978 with *Regents of the University of California v. Bakke*.[63] In that case, the University of California Medical School at Davis maintained a racial quota in admissions by reserving sixteen seats in its entering class for qualified minorities.[64] The basis of the policy was to provide reparations for past minority exclusions in the medical profession.[65] Allan Bakke, a white male, applied twice to the medical school and was denied both times.[66] Bakke's qualifications, particularly his grade point average and MCAT test score, were better than any of the scores of the admitted sixteen minority students.[67] Bakke brought suit against the University of California claiming that it excluded him on the basis of race, which violated the Civil Rights Act of 1964 and his Fourteenth Amendment right to equal protection.[68] The Supreme Court held in a 5-4 decision that the medical school must admit Bakke.[69] While there was no single majority opinion, four of the justices held that any racial quota admissions program violated the Civil Rights Act of 1964.[70] Justice Powell was the fifth vote and agreed that the racial quota was unconstitutional.[71] The other four justices joined together

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61. *Id.* at 540–43.

62. *Id.* at 539–42.

63. 438 U.S. 265, 265 (1978).

64. *Id.* at 274–76 (stating that African Americans, Hispanics, Asians, and Native American groups were deemed disadvantaged and their applications were considered by a special committee to fill the sixteen seats).

65. *Id.* at 279, 307 (agreeing that "the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests").

66. *Id.* at 277.

67. *Id.*

68. *Id.* at 277–78.

69. *Id.* at 271.

70. *Id.* at 235.

71. *Id.*

and argued that the Constitution allowed race to be considered in admissions.[72] Justice Powell also joined that opinion in part and argued that race was permissible so long as it was one of several factors to be considered when evaluating a potential applicant.[73]

Furthermore, the concurring opinion concluded that a policy which classified a person by his race was suspect, and therefore, strict scrutiny must be applied.[74] To overcome strict scrutiny, the government must show both that it has a compelling government interest in the policy and that the policy is narrowly tailored to achieve that interest.[75] Justice Powell noted that the government had a compelling government interest in achieving a diverse student body, and race-based admissions policies were permissible in achieving that end.[76] However, if a university were to use the admissions process to promote diversity, race can only be one of several factors taken into consideration when evaluating an applicant.[77] For the next twenty five years, *Bakke* would be the controlling case for affirmative action in higher education.

The Court would not consider affirmative action again until 2003 when it decided two cases from the University of Michigan. Both cases involved the constitutionality of an admissions policy that explicitly provided for the consideration of an applicant's race. The first case, *Grutter v. Bollinger*,[78] involved the University of Michigan Law School's use of racial preferences in admissions. The Court held that the consideration of race was constitutional because the law school's use was narrowly tailored to further the compelling interest in obtaining the educational benefits of a diverse student body.[79] The law school was able to satisfy strict scrutiny because it employed a highly-extensive review of each applicant.[80] The Court noted that because of the extensive review process and the consideration of a

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72. *Id.*

73. *Id.* at 314–15.

74. *Id.* at 357; *see* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (describing a more exacting judicial scrutiny when the Fourteenth Amendment is implicated).

75. *Bakke*, 438 U.S. at 299; *see* United States v. Carolene Prods. Co., 304 U.S. at 152–53 n.4 (discussing the heightened standard of judicial review when a minority group is targeted).

76. *Id.* at 312–313.

77. *Bakke*, 438 U.S. at 314; Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (stating that admissions policies must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application").

78. 539 U.S. 306, 306 (2003).

79. *Id.* at 329, 334.

80. *Id.* at 337, 341.

host of factors, no applicant's acceptance/rejection would be solely because of race.[81]

Despite upholding the law school's race-based admissions policy, the Court struck down Michigan's undergraduate admissions policy in *Gratz v. Bollinger*.[82] The University of Michigan utilized a point scoring system in their admissions process, with a hundred point threshold for gaining admission.[83] University policy held that certain underrepresented minorities were to receive an additional twenty bonus points to their application because of race.[84] By combining the bonus points with other factors, virtually all applicants from underrepresented groups were admitted.[85] The Court concluded that even though achieving a diverse student body was a compelling government interest, the automatic distribution of the twenty points was not narrowly tailored as it did not provide for the individualized consideration stated in *Bakke*.[86]

In 2013, the Court also struck down the use of racial preferences at the University of Texas at Austin on the basis that the admissions policy was not narrowly tailored to achieve a diverse student body by remanding the case to the Fifth Circuit of the United States Court of Appeals to apply the correct legal standard.[87] In 1997, the Texas legislature passed the "Ten Percent Rule," requiring the University of Texas to admit all high school seniors who ranked in the top ten percent of their class.[88] Upon discovering a large discrepancy between the percentage of minorities enrolled at the university compared to that of the state's population, university administrators enacted a policy that considered race in the admissions process for those applicants not admitted under the "Ten Percent Rule."[89]

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81. *Id.*

82. 539 U.S. 244, 244 (2003).

83. *Id.* at 255.

84. *Id.* at 253–54.

85. *Id.* at 256–57.

86. *Id.* at 270–71 ("Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

87. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013) (concluding that the Fifth Circuit gave too much deference to the University and did not utilize a rigorous form of strict scrutiny); *see generally* Robert H. Smith, *Affirmative Action Survives* Fisher *(Sort of), but What About* Schuette*?*, 1 SUFFOLK U. L. REV. ONLINE 65, 72 (2013), http://suffolklawreview.org/schuette-smith (stating reasons why the Court decided to remand the case to the Fifth Circuit).

88. *Id.* at 2416, 2433.

89. *Id.* at 2416.

The Supreme Court remanded the case to the Fifth Circuit, holding that the court of appeals granted too much deference to the University in applying strict scrutiny.[90] The Fifth Circuit held that Fisher could only challenge "whether the University's decision to use race as an admissions factor 'was made in good faith,'" and "presumed that the school had acted in good faith and gave petitioner the burden of rebutting that presumption. It thus undertook the narrow-tailoring requirement with a 'degree of deference' to the school."[91] In writing for the majority, Justice Kennedy said that it was the duty of the reviewing court to "verify" that the university policy at issue was necessary to achieve the benefits of a diverse student body.[92] More importantly, Justice Kennedy directed lower courts to examine whether other race-neutral alternatives would provide the same benefits when applying strict scrutiny.[93]

III. SECTION 26 OF THE MICHIGAN CONSTITUTION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

In *Schuette v. Coalition to Defend Affirmative Action*,[94] the United States Supreme Court held in a 6-2 decision that Michigan's constitutional amendment banning both discrimination and preferential treatment for "race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting[]"[95] did not violate the Equal Protection Clause of the Fourteenth Amendment.[96] The six justices ruling in favor of Schuette could not agree on a single majority opinion, resulting in a plurality. Justice Sotomayor wrote the dissenting opinion, which was joined by Justice Ginsburg.

In writing for the three-justice plurality, Justice Kennedy first stated that this case was not about the constitutionality of race-

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90. *Id.* at 2421.

91. *Id.* at 2414.

92. *Id.* at 2420.

93. *Id.* at 2420–21 ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity." (internal quotation marks omitted) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)).

94. Schuette v. Coal. to Defendant Affirmative Action, 134 S. Ct. 1623, 1623 (2014).

95. MICH. CONST. art. I, § 26.

96. *Schuette*, 134 S. Ct. at 1636 (plurality opinion) (concluding that there is no precedent for extending the political process doctrine to apply to race-based preferences).

based admissions, but whether voters may prohibit the use of racial preferences by governmental units.[97] The Sixth Circuit misconstrued the political process doctrine in *Seattle*, as it is "carefully tailored to interfere only with desegregative busing," and the political process doctrine "is best understood as a case in which the state action in question had the serious risk, if not the purpose, of causing specific injuries on account of race."[98] The plurality refrained from overturning *Seattle* but instead distinguished the present case finding that Proposal 2 did not specifically injure racial minorities, but only withdrew a preferential benefit.[99]

In addition, the Sixth Circuit's decision contradicted other well-settled rulings. For example, California voters passed a constitutional amendment prohibiting racial preferences in public contracting, which did not violate the political process doctrine.[100] The Ninth Circuit also upheld an amendment banning racial preferences in public education.[101] The plurality stated that the issue in this case closely resembled that of *Coral* and *Wilson*, rather than *Hunter* and *Seattle*.[102] In particular, the broad language used in *Seattle* went far beyond what was necessary to accomplish its goal by subjecting to strict scrutiny any state action with a racial focus that hinders racial minorities from achieving legislation in their interest.[103]

Justice Kennedy argued that such an expansive application of *Seattle* went against the Court's precedent on equal protection because the Court would be forced to declare which political policies serve the interests of a particular racial group.[104] With all policies entailing a racial interest to a certain degree, the *Seattle* rule would be virtually limitless, for the rule could be extended to issues of tax policy, housing, naming of public schools, and monuments.[105]

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97. *Id.* at 1630 (plurality opinion); *see generally* Fisher v. Univ. of Tex. at Austin 133 S. Ct. 2411, 2417–18 (2013) (considering race in university admissions was upheld by the Court, for the achievement of a diverse student body is a compelling government interest).

98. *Schuette*, 134 S. Ct. at 1632–33.

99. *Id.* at 1636.

100. *Id.* at 1636 (citing Coral Constr., Inc. v. City and Cnty. of San Francisco, 50 Cal. 4th 315, 327 (2010)).

101. *Id.* (citing Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 711 (1997)).

102. *Id.*

103. *Id.* at 1634; *see* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (quoting Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring)).

104. *Schuette*, 134 S. Ct. at 1634 (plurality opinion).

105.

> Tax policy, housing subsidies, wage regulations, and even the naming of

Moreover, those with a stake in the outcome of a policy would certainly "cast the debate in terms of racial advantage or disadvantage," reinforcing discrimination rather than ameliorating it.[106]

Furthermore, the classification of race would force the Court to assert racial stereotypes, and such a notion runs counter to the Court's rejection that "members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls."[107] The plurality noted that such an attempt to classify by race also runs the risk of extending the same racism that such policies were meant to alleviate.[108] Justice Kennedy noted that even if the Court were to adopt such an expansive rule, the task of classifying race is and will continue to be increasingly difficult as racial distinctions become more and more blurred.[109]

Justice Kennedy concluded that *Mulkey*, *Hunter*, and *Seattle* are not precedents to this case because they concerned a "political restriction [that was either] designed to be used, or was likely to be used, to encourage infliction of injury by reason of race."[110] The issue in this case was not about how racial preferences should be resolved, but who should resolve them.[111] There was no constitutional authority or judicial precedent for the Court to set aside Proposal 2

> public schools, highways, and monuments are just a few examples of what could become a list of subjects that some organizations could insist should be beyond the power of voters to decide, or beyond the power of a legislature to decide when enacting limits on the power of local authorities or other governmental entities to address certain subjects.

Id. at 1635.

106. *Id.*

107. *Id.* at 1634 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)); *see* Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990) ("Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens. Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own.").

108. *Schuette*, 134 S. Ct. at 1634–35 (plurality opinion).

109. *Id.* at 1634 ("[I]n a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own.").

110. *Id.* at 1636.

111. *Id.* at 1636 ("The instant case presents the question involved in *Coral* and *Wilson* but not involved in *Mulkey*, *Hunter*, and *Seattle*. That question is not how to address or prevent injury caused on account of race but whether voters may determine whether a policy of race-based preferences should be continued.").

and restrain voters from deciding this issue.[112] Through constitutional amendment, the electorate's order to governmental units to not allow racial preferences is the product of political will as voters may deem the policy unwise, for it may give way to the very discriminatory purposes for which it seeks to prevent.[113] Voters also have the authority to adopt the contrary, to increase diversity through admissions as a necessary remedy for past racism.[114] Both the prohibition and approval of race-based preferences are consistent with the Constitution.[115] Even though an issue is sensitive or controversial, it is not the role of the courts to deny voters from making such a decision, especially one that was decided by deliberative debate through the lawful political process.[116] "The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign."[117] Yet, if certain issues were decided to be too sensitive or controversial for voters to address, it would be denying voters the right to debate and act through the lawful democratic process.[118] Moreover, it is demeaning to the democratic process to presume that voters are incapable of deciding such a controversial issue for "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate."[119]

Both Chief Justice Roberts and Justice Breyer wrote separate, concurring opinions. Chief Justice Roberts raised suspicion as to whether racial preference policies actually reinforce discrimination.[120] He also criticized the dissent for proffering their own policy preferences for race-based admissions, despite admitting that those preferences do not suggest that it should inform the legal questions before the Court.[121] Chief Justice Roberts argued that if the governing bodies of the universities wanted to ban racial preferences policies, they could do so within the scope of their power.[122] However, other parties within the political process—i.e. voters—who reach the same conclusion "are failing to take race

112. *Id.* at 1638.
113. *Id.*
114. *Id.* at 1638.
115. *Id.* at 1638.
116. *Id.* at 1637–38.
117. *Id.* at 1637.
118. *Id.*
119. *Id.* 1638.
120. *Id.* at 1638–39 (Roberts, C.J., concurring).
121. *Id.* at 1638.
122. *Id.* at 1638.

seriously."[123] Justice Stephen Breyer wrote in his opinion that, although the Constitution permits the government to implement race-based policies, it is the voters who should ultimately decide the importance of such policies.[124] In noting that the university boards delegated the authority to establish admissions criteria to university faculty and administrators, Justice Breyer concluded that Proposal 2 did not involve reordering the political process at all.[125] Instead, the electorate utilized the current structure to take power away from unelected university faculty and administrators and decide the issue for themselves.[126]

Justice Scalia, in a concurring opinion joined by Justice Thomas, departed from the plurality's reinterpretation of the political process doctrine and advocated that *Seattle* and *Hunter* be overturned.[127] Instead of striking down a law because a discriminatory effect, plaintiffs must prove a discriminatory purpose under the traditional analysis for equal protection violations.[128] Furthermore, a law directing the government to provide equal protection is facially neutral and constitutional because it does what the Equal Protection Clause mandates: treating individuals equally under the law.[129]

In addition, Justice Scalia stated that the plurality reinterpreted the political process doctrine "beyond recognition" by finding a discriminatory purpose in *Hunter* when it was not present.[130] Specifically, he argued that the plurality reinterpreted *Hunter*, stating that the challenged act "targeted racial minorities."[131] However, Justice Scalia noted that the *Hunter* Court never found that the law had a discriminatory purpose but instead bypassed the intent consideration altogether and went straight to the political process doctrine to invalidate the charter amendment.[132]

Furthermore, the plurality also misinterpreted *Seattle* by holding that Initiative 350 had the consequence of preserving the harms by

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123. *Id.*

124. *Id.* at 1649–50 (Breyer, J., concurring).

125. *Id.* at 1650. *But see id.* at 1667 (Sotomayor J., dissenting).

126. *Id.* at 1650–51 (Breyer, J., concurring).

127. *Id.* at 1643 (Scalia, J., concurring).

128. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

129. *Schuette*, 134 S. Ct. at 1639 (Scalia, J., concurring) ("But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

130. *Id.* at 1641–42.

131. *Id.*

132. *Id.* at 1642.

prior *de jure* segregation,[133] but the effects of Initiative 350 were instead *de facto* segregation.[134] Despite disagreeing with most of the plurality's assertions, Justice Scalia joined the plurality in condemning the application of the political process doctrine because it forces judges to categorize individuals by racial stereotypes.[135]

Justice Scalia also argued that it would in fact be more difficult for minorities to overturn anti-affirmative action policies if they had to go through the existing political process of electing a new board of regents at each university, rather than amending the state constitution.[136]

Justice Scalia then addressed the balance between a state's sovereign power to design its own governing bodies versus political process doctrine's prohibition to reallocate power against minorities.[137] The logic of *Seattle* "would create affirmative-action safe havens wherever subordinate officials in universities (1) traditionally have enjoyed 'effective decision-making authority' over admissions policy but (2) have not yet used that authority to prohibit race-conscious admissions decisions."[138] The mere existence of a subordinate's discretion over the matter would preempt a higher level of government from deciding the issue.[139]

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133. BLACK'S LAW DICTIONARY 1480 (9th ed. 2009) (defining de jure segregation: "segregation that is permitted by law.").

134. *Id.* (defining de facto segregation: "segregation that occurs without state authority, usu[ally] on the basis of socioeconomic factors.").

135. *Schuette*, 134 S. Ct. at 1643–44 (Scalia, J., concurring); *see id.* at 1634 (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this 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—think alike, share the same political interests, and will prefer the same candidates at the polls.'" (citing Shaw v. Reno, 509 U. S. 630, 647 (1993)); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) ("Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens. Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own.").

136. *Schuette*, 134 S. Ct. at 1645 (Scalia J. concurring) ("Amending the Constitution requires the approval of only a majority of the electors voting on the question. By contrast, voting in a favorable board (each of which has eight members) at the three major public universities requires electing by majority vote at least 15 different candidates, several of whom would be running during different election cycles.") (internal quotation marks omitted) (citing MICH. CONST. art. XII, § 2)).

137. *See id.* at 1646.

138. *Id.*

139. *Id.*

Finally, Justice Scalia disagreed with *Hunter*, *Seattle*, and the plurality because each supported the proposition that a facially neutral law may deny equal protection solely because the law has a disparate racial impact.[140] Instead, a plaintiff must prove the state action was motivated by a discriminatory purpose in order to successfully claim an equal protection violation.[141] Respondents argued that the Court need not consider the discriminatory purpose since § 26 is a "racial classification," in that "when the political process is singled out for peculiar and disadvantageous treatment" then that "singling out" is a racial classification.[142] However, Justice Scalia noted that a law requiring race neutrality is not a racial classification.[143] Therefore, because Proposal 2 is race-neutral and lacks a discriminatory purpose, the measure is constitutional under the traditional equal protection analysis.[144]

In writing for the dissent, Justice Sotomayor, joined by Justice Ginsburg, disagreed with the majority's refusal to extend *Seattle* to the present case. The dissent argued that the Court changed the rules of the political process which disadvantaged and oppressed minorities because Proposal 2 created two standards: one for race, and another for everything else.[145] Instead, the dissent contended that the Court should have struck down the measure by applying the political process doctrine, as Proposal 2 contained both a racial focus by eliminating affirmative action and placed a greater burden on minorities to participate in the political process by shifting power to a higher level of government.[146]

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140. *Id.* at 1647.

141. *Id.* (citing Hernandez v. N.Y., 500 U.S. 352, 372–73 (1991) (O'Connor, J., concurring); *see* Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact."); *see also* Crawford v. Bd. of Educ. of L.A., 458 U.S. 527, 537–38 (1982) ("[T]his Court previously has held that even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown."); Arlington Heights v. Metro. Hous. Dev. 429 U.S. 252, 264–65 (1976) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

142. *Schuette*, 134 S. Ct. at 1648 (Scalia, J., concurring) (citing Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007)).

143. *Id.* at 1648 ("A law that neither says nor implies that persons are to be treated differently on account of their race is not a racial classification." (internal quotation marks omitted) (quoting *Crawford*, 458 U.S. at 537)).

144. *Id.*

145. *Id.*

146. *Id.* at 1653–54.

In describing the double standard for minorities, the dissent argued that the Equal Protection Clause does "not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else."[147] Under Proposal 2, minorities would need to secure a constitutional amendment to implement race-based admissions policies, whereas other groups need only satisfy a majority of a university's Board of Regents to incorporate their interests.[148] For example, an alumni wanting legacy status to be considered in the admissions process would need only to convince the Board of Regents to adopt such a policy.[149] However, if minorities want to include racial preferences in admissions, they would be forced to amend the state constitution, which is no small task to complete.[150]

The dissent agreed with Justice Scalia's assertion that the plurality had "rewritten [the political process doctrine] beyond recognition" because they read a discriminatory intent into *Seattle*, when no such intent was considered by the Court.[151] By doing so, the plurality shifted the focus away from the law's discriminatory effect on minorities and instead required proof of both a discriminatory purpose and discriminatory effect. Therefore, the plurality's reinterpretation of *Hunter* and *Seattle* violates judicial precedent and "cast[s] aside the political process doctrine *sub silentio*."[152]

The dissent also contended that the plurality and concurring opinions allow voters to take away the constitutional power given to each university's Board of Regents, rather than from unelected administrators.[153] The Michigan Constitution grants broad authority to each university's eight-member board, including the power to determine admissions policies.[154] The boards retain ultimate authority to accept or reject admissions policies because they can "enact [or amend] bylaws with respect to specific admissions policies," as well as "appoint university officials who share their admissions goals, and . . . remove those officials [who do not.]"[155] The boards are also a part of the state's political structure, as each

147. *Id.* at 1653.
148. *Id.*
149. *Id.*
150. *Id.* at 1661.
151. *Id.* at 1664; *id.* at 1642 (Scalia, J., concurring).
152. *Id.* at 1664 (Sotomayor, J., dissenting) ("The plurality's attempt to rewrite *Hunter* and *Seattle* so as to cast aside the political-process doctrine *sub silentio* is impermissible as a matter of stare decisis.").
153. *Id.*
154. *Id.* at 1660.
155. *Id.* at 1666–67.

political party nominates two candidates for eight-year terms, subject to a statewide election.[156] The candidates "frequently include[] their views on race-sensitive admissions in their campaigns."[157] Therefore, despite boards "entrust[ing] university officials with certain day-to-day admissions responsibilities, they often weigh in on admissions policies themselves...and retain complete supervisory authority over university officials and all admissions decisions."[158]

Instead of reordering the levels of government and limiting minority participation, opponents of affirmative action should have utilized the existing political structures to remove race-based admissions policies.[159] Opponents had the option to lobby each university's board of regents to abolish racial preferences in admissions as well as vote for like-minded candidates in the election process.[160] However, opponents instead opted to amend the state's constitution, which restructured the political process in such a way that requires a constitutional amendment for minorities to achieve their interests.[161]

Justice Sotomayor also challenged the plurality's argument that the political process doctrine is "unadministrable" because judges would be forced to classify individuals according to race.[162] The dissent maintained that such a task is no more difficult than determining whether a law has a "discriminatory intent" under *Washington v. Davis*.[163] Moreover, race matters in the context of a "long history of racial minorities being denied access to the political process" in addition to "persistent racial inequality in society," yet the plurality's refusal to examine the racial impact of legislation ignores this reality.[164] Instead of backing away, the judiciary should "interven[e] to carry out the guarantee of equal protection" and "confront[] the racial inequality that exists in our society."[165]

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156. *Id.* at 1660.

157. *Id.* at 1661.

158. *Id.* at 1667. *But see id.* at 1650 (Breyer, J., concurrence) ("Although the boards unquestionably retained the power to set policy regarding race-conscious admissions...in fact faculty members and administrators set the race-conscious admissions policies in question.").

159. *Id.* at 1670 (Sotomayor, J., dissenting).

160. *Id.*

161. *Id.*

162. *Id.* at 1675.

163. *Id.* at 1675 (citing 426 U.S. 229, 239 (1976)) (stating that classifying individuals by race is not more difficult than determining a discriminatory purpose).

164. *Id.* at 1676.

165. *Id.*

The dissent concluded by stating that "[r]ace-sensitive admissions policies are now a thing of the past in Michigan after [Proposal 2]"[166] and citing several studies that show a decrease in minority enrollment at Michigan's public universities since the enactment of Proposal 2.[167] The dissent also supported its claim with data from the state of California, where minority enrollment decreased after voters enacted a similar measure.[168] While such statistics may not influence others on the Court, they do support the Court's recognition in *Grutter* that race-based admissions are "necessary to achieve a diverse student body, when race-neutral alternatives have failed."[169] Universities must be free to promote diversity for the educational benefit of all students, but such a pursuit is virtually impossible under Proposal 2.[170] Although "[t]he Constitution does not protect racial minorities from political defeat," it does not permit "the majority free rein to erect selective barriers against minorities."[171] The political process doctrine stands as an impediment to such practices by ensuring that when the majority wins, it "does so without rigging the rules of the game to ensure its success."[172] The Court discarded such doctrine by allowing voters to strip away the constitutional authority of university boards, and in doing so, placing a substantial burden on minorities to participate in the political process.[173]

IV. CONSEQUENCES OF *SCHUETTE V. COALITION* TO DEFEND AFFIRMATIVE ACTION

The United States Supreme Court's decision in *Schuette v. Coalition to Defend Affirmative Action* reflects the Court's deference

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166. *Id.* at 1677.
167. *Id.* at 1677–79.
168. *Id.* at 1679–80.
169. *Id.* at 1682 (citing Grutter v. Bollinger, 539 U.S. 306, 371–73 (2003).
170.

> Colleges and universities must be free to prioritize the goal of diversity. They must be free to immerse their students in a multiracial environment that fosters frequent and meaningful interactions with students of other races, and thereby pushes such students to transcend any assumptions they may hold on the basis of skin color. Without race-sensitive admissions policies, this might well be impossible.

Id. at 1682–83.
171. *Id.* at 1683.
172. *Id.*
173. *Id.*

to the electorate's use of their basic democratic power: to debate, learn, and speak as a matter of political will through the lawful electoral process.[174] The Court's holding suggests that a citizen's right to organize and act through the democratic process is more significant than preserving racial-preference policies for select minority groups. In addition, the ruling highlights the incompatibility between racial-preference policies and the political process doctrine as well as signals the declining role of federal courts in protecting such racial-preference policies.

The Court correctly applied the traditional-analysis test to Proposal 2, as the measure overcomes strict scrutiny because it does not have a discriminatory purpose nor effect.[175] Under the traditional analysis, courts first look to whether the law has a discriminatory purpose by classifying individuals along racial lines. In distinguishing *Seattle* as a "state action [that] had the serious risk, if not purpose, of causing specific injuries on account of race," the plurality effectively found that *Seattle* had a discriminatory purpose of "targeting" minorities.[176] However, such a discriminatory purpose was absent in this case because Proposal 2 does not categorize individuals according to race but does the exact opposite by forbidding the use of racial classifications.[177]

As for the second prong, the plurality and concurring justices agreed that unlike *Hunter* and *Seattle*, Proposal 2 did not have a discriminatory effect, as it only burdened minorities' efforts to receive preferential treatment.[178] The Court stated that the

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174. *Id.* at 1637 (plurality opinion).

175. Washington v. Davis, 426 U.S. at 229, 239–43 (1976) (discussing that the disproportionate impact of a law is not the only factor to be considered as courts must also examine whether a law has a racially discriminatory purpose).

176. *Schuette*, 134 S. Ct. at 1633 (plurality opinion) ("*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, just as had been the case in *Mulkey* and *Hunter*.).

177. *See* MICH. CONST. art. I, § 26 ("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"); Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part) ("The Constitution proscribes government discrimination on the basis of race[.]"); Regents of Univ. of Cali. v. Bakke, 438 U.S. 265, 289–90 (1978) ("[The Equal Protection Clause] cannot mean on thing when applied to one individual an something else when applied to a person of another color. If both are not accorded the same protection it is not equal.").

178. *Schuette*, 134 S. Ct. at 1636 (plurality opinion) ("Here there was no infliction of a specific injury of the kind at issue in *Mulkey* and *Hunter* and in the history of the Seattle schools".); *see id.* at 1642 (Scalia, J., concurring) (describing how the Court in *Seattle* bypassed discriminatory intent and instead applied the

revocation of preferential treatment does not equate to the infliction of a specific injury, as voters may have contemplated a host of non-discriminatory reasons when voting on Proposal 2.[179] In addition, if the denial of preferential benefits constituted an injury, it would invalidate over fifteen years worth of public debate and longstanding precedent.[180] The plurality was silent as to whether a law with solely a discriminatory effect was unconstitutional.[181]

Justice Scalia correctly addressed this issue in his concurrence, arguing that equal protection jurisprudence mandates a showing of discriminatory intent and no facially neutral law can deny equal protection solely because of its disparate racial impact.[182] Under an equal protection inquiry, the discriminatory purpose of a law is a sufficient condition to show the law's discriminatory effect.[183] For example, a law that has a discriminatory purpose always has a discriminatory effect, however, a law may have a discriminatory effect even though it lacks a discriminatory purpose. Justice Scalia maintained that such facially neutral laws cannot be held unconstitutional solely because of their discriminatory effect, for all laws to a certain degree have such an impact. In addition, he noted that the Court affirmed this principle in *Crawford*, which was decided the very same day as *Seattle*.[184]

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political process doctrine, analyzing solely the effect of the law).

179. *Id.* at 1638 (plurality opinion) ("The electorate's instruction to governmental entities not to embark upon the course of race-defined and race-based preferences was adopted, we must assume, because the voters deemed a preference system to be unwise, on account of what voters may deem its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it.").

180. *Id.* at 1636 ("[B]y affirming the judgment now before [us], in essence [we] would announce a finding that the past 15 years of state public debate on this issue have been improper.").

181. *Id.* at 1647 (Scalia, J., concurring) ("[T]he plurality opinion leaves ajar an effects-test escape hatch modeled after *Hunter* and *Seattle*.").

182. *Id.* at 1647 (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977)) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact.").

183. *Id.* (quoting Crawford v. Bd. of Educ. of L.A., 458 U.S. 527, 537–38 (1982) ("[E]ven when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.")); *see also* Washington v. Davis, 426 U.S. at 239–43 (finding that disproportionate impact of a law is not the only factor to be considered as courts must also examine whether a law has a racially discriminatory purpose).

184. *Schuette*, 134 S. Ct. at 1647 (Scalia, J., concurring) (noting that *Crawford* and *Seattle* were both decided on June 30, 1982).

In distinguishing the present case from *Seattle*, the plurality drastically re-characterized the political process doctrine making it virtually inapplicable, and all but overturned. By reinterpreting *Seattle* as having a discriminatory purpose, the plurality effectively changed the elements of the political process doctrine.[185] Prior to *Schuette*, the political process doctrine was comprised of just two elements: (1) whether the law or policy has a negative impact on minority interests; and (2) whether the restructuring of the political process posits a disproportionate burden on minorities to achieve legislation that is in their interest.[186] However, now because of the plurality's reinterpretation of *Seattle*, the Court has added the element of discriminatory purpose to the doctrine. Both Justice Scalia's concurrence and Justice Sotomayor's dissent criticized the plurality for "reading in" the discriminatory purpose element.[187]

The post-*Schuette* political process doctrine is simply the traditional-analysis test with a third element, the question of whether a political restructuring that inhibits the ability of minorities to achieve legislation in their interest. Both tests apply strict scrutiny, determining whether a law has a discriminatory purpose as well as a discriminatory effect(s). The post-*Schuette* political process doctrine goes a step further in situations where political power has been restructured in such a way that inhibits minority participation. However, considering the restructuring is pointless because if a law was passed with a discriminatory purpose and has a discriminatory effect, then it would be unconstitutional under the traditional analysis test. Thus, it would be a waste of the court's time to consider the law's restructuring because the law itself would already be deemed unconstitutional.

Instead of focusing on the reinterpretation of *Seattle*, the dissent was critical of the majority's refusal to apply the political process doctrine altogether.[188] Justice Sotomayor argued that Proposal 2

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185. *Id.* at 1642 (criticizing the plurality for reinterpreting *Hunter* and *Seattle* "beyond recognition"); *id.* at 1664 (Sotomayor, J., dissenting) ("I agree with J[ustice] S[calia] that the plurality has rewritten those precedents beyond recognition.").

186. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467 (1942) ("[T]he Fourteenth Amendment also reaches 'a political structure that treats all individuals as equals' . . . ." (quoting Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring))); *see generally* Amar & Caminker, *supra* note 33, at 1024–25 (describing the Hunter line of cases outlining the evolution of the political process doctrine).

187. *Schuette*, 133 S. Ct. at 1642 (Scalia J., concurring) (criticizing the plurality for reinterpreting *Hunter* and *Seattle* "beyond recognition."); *id.* at 1664 (Sotomayor, J., dissenting).

188. *Id.* at 1667 (Sotomayor, J., dissenting) (stating that the majority disregards stare decisis by not apply the political process doctrine).

creates two conflicting standards for individuals wanting to influence university admissions policies: one for race-based admissions, and one for everything else.[189] The dissent then asserted that the two standards create "one process for racial minorities and a separate, less burdensome process for everyone else."[190] The dissent contended that Proposal 2 creates a stricter standard for minorities to achieve race-sensitive admissions by requiring a constitutional amendment whereas other groups would need only lobby their respective board of regents to implement their preferences.[191] Thus, the dual standard created a discriminatory effect upon minorities and made it more difficult for them to participate in the political process because they are held to a more stringent standard.

Yet, even if the Court applied the political process doctrine, Proposal 2 will still satisfy strict scrutiny because it does not single out minorities. The dissent's own characterization of the dual standards imply that a burden rests solely upon minorities, for the dissent equates "individuals" wanting to advance race-sensitive admissions with "minorities."[192] While minorities may very well want to advance race-based admissions policies, the dissent fails to include non-minorities who prefer race-sensitive admissions because of the educational benefits for all students associated with diversity. Moreover, the dissent makes the mistake that the majority cautioned against, assuming that individuals of the same race share the same political interests.[193] The dissent's characterization presumes that all racial minorities prefer race-sensitive admissions and fails to consider those minorities that want to do away with racial preferences for a host of reasons. In sum, Proposal 2 survives the political process doctrine because it does not single out racial

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189. *Id.* at 1660.

190. *Id.* at 1660 ("[Proposal 2] restructures the political process in Michigan in a manner that places unique burdens on racial minorities. It establishes a distinct and more burdensome political process for the enactment of admissions plans that consider racial diversity.").

191. *Id.* at 1661 ("After [Proposal 2], the board[] [of regents] retain plenary authority over all admissions criteria except for race-sensitive admissions policies. To change admissions policies on [racial] issue[s], a Michigan citizen must instead amend the Michigan Constitution.").

192. *Id.* at 1653 ("Our precedents do not permit political restructurings that create one process for racial minorities and a separate, less burdensome process for everyone else.").

193. *Id.* at 1625 (plurality opinion) (citing Shaw v. Reno, 509 U.S. 630, 647 (1993) ("In cautioning against impermissible racial stereotypes, this Court has rejected the assumption that all individuals of the same race think alike.").

minorities from everyone else. Instead, Proposal 2 draws the line between individuals who support racial-preference policies and those who do not, with minorities being on both sides of the issue.

In addition, the political process doctrine was never meant to extend to racial-preference policies because such policies are not related to the minority's ability to participate in the political process.[194] In relying upon *Seattle*, the dissent contended that Proposal 2 should be struck down because the amendment strips away the state constitutional authority of each university's board of regents.[195] While the Michigan Constitution does grant broad authority to each university's board of regents, authority that encompasses determining admissions policies, the *Seattle* Court never intended for the political process doctrine to apply to racial-preference policies. In the *Seattle* dissent, Justice Powell argued, "If the admissions committee of a state law school developed an affirmative action plan that came under fire, the Court apparently would find it unconstitutional for any high authority to intervene unless that authority traditionally dictated admissions policies."[196] The majority contemplated Justice Powell's argument and concluded that it did not apply, for affirmative action policies "have nothing to do with the ability of minorities to participate in the process of self-government" and "are entirely unrelated to this case."[197] Therefore, it seems that the *Seattle* Court never intended for their decision to extend to the repeal of racial-preference policies like Proposal 2.[198]

V. CONCLUSION

The decision in *Schuette v. Coalition to Defend Affirmative Action* signifies the Supreme Court's deference to the democratic process and the self-determination of voters to act collectively. By distinguishing the political process doctrine, the Court correctly held that the doctrine did not apply to affirmative action policies for the enactment of racially neutral laws does not injure minorities or

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194. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 498 n.14 (1982) (Powell, J., dissenting) (criticizing the majority's holding for "intrud[ing] too deeply into normal state decision-making.").

195. *See Schuette*, 134 S. Ct. at 1667 (Sotomayor J., dissenting) (internal quotation marks omitted) (stating that Proposal 2 removed their constitutional power to determine admissions policies and "placed it instead at a higher level of the political process in Michigan").

196. *Seattle*, 458 U.S. 457, 498 n.14 (1982).

197. *Id.* at 480 n.23.

198. *See* Brief for Petitioner, *supra* note 12, at 19 ("So even the *Seattle School District* majority did not view the opinion as controlling . . . .").

hinder their ability to participate in the political process. Despite reaching the correct outcome, the Court's reinterpretation of the political process doctrine has rendered the doctrine virtually moot. As for the impact on affirmative action, such policies have remained confined within their respective universities and outside the control of voters for nearly forty years. The holding in *Schuette v. Coalition to Defend Affirmative Action* changes all of that by providing the electorate a means to challenge such policies, but to do such they must overcome the "Herculean" task of amending their state constitution.[199]

199. *Schuette*, 134 S. Ct. at 1683 (Sotomayor J., dissenting) (noting the difficulty in amending a state constitution).