

A BRIDGE TOO FAR: THE LIMITS OF THE POLITICAL PROCESS DOCTRINE IN *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION*

CHRISTOPHER E. D’ALESSIO*

I. INTRODUCTION

In *Schuette v. Coalition to Defend Affirmative Action*,¹ the Supreme Court will consider whether Proposal 2, an amendment to the Michigan Constitution banning race as a factor in state university admissions, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.² Specifically, Proposal 2 makes it unconstitutional in Michigan for democratically-elected members of university governing boards to establish race-based affirmative action admissions programs, but does not place a corresponding burden on other admissions factors.³ The Sixth Circuit analyzed Proposal 2 using the political process doctrine⁴ established by the so-called “*Hunter* trilogy.”⁵ Under the political process doctrine, a political structure that places “special burdens on the ability of minority groups to achieve beneficial legislation” must be

* J.D. Candidate, 2015, Duke University School of Law.

1. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

2. *See id.* at 473 (identifying the relevant issue as “whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in university admissions decisions”).

3. *Id.* at 481–83.

4. *Id.* at 474–85 (applying the political process doctrine).

5. L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 291 (1997). The “*Hunter* trilogy” consists of *Hunter v. Erickson*, 393 U.S. 385 (1969), *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527 (1982).

analyzed under strict scrutiny.⁶ Proposal 2 failed strict scrutiny because Michigan did not provide a compelling interest for enacting the Amendment.⁷ Thus, Proposal 2 violated the Equal Protection Clause.⁸

Ambiguities in the political process doctrine create inconsistent judicial application,⁹ especially when judges apply the political process doctrine in affirmative action cases, as exemplified by *Schuette*.¹⁰ In fact, the Sixth Circuit opinion relies on an inaccurate application of affirmative action precedent because a valid affirmative action program cannot violate the political process doctrine.¹¹ Accordingly, the Court should reverse the Sixth Circuit and distinguish *Schuette* by holding that the political process doctrine does not apply when a government restructuring effectively repeals affirmative action in favor of race-neutral admissions policies. This holding would not require formally overruling the political process doctrine and would avoid the analytical problems that result due to the incompatibility between the political process doctrine and the Court's affirmative action jurisprudence.¹² After settling the political process question, the Court should analyze Proposal 2 under a traditional Equal Protection

6. *Seattle Sch. Dist. No. 1*, 458 U.S. at 467.

7. *Coal. to Defend Affirmative Action*, 701 F.3d at 488–89 (“[B]ecause the Attorney General does not assert that Proposal 2 satisfies a compelling state interest, we need not consider this argument.”).

8. *Id.* at 489 (“Therefore, those portions of Proposal 2 that affect Michigan’s public institutions of higher education violate the Equal Protection Clause.”).

9. See Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 269–70 (1997) (discussing problems with judicial application of the political process doctrine). Spann notes that ambiguity in the political process doctrine creates the undesirable outcome of allowing judges to tailor decisions based on their own personal views of affirmative action. *Id.*

10. See *Coal. to Defend Affirmative Action*, 701 F.3d at 493 (Boggs, J., dissenting) (“[H]olding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is vastly far afield from the Supreme Court precedents.”); but see *id.* at 485–86 (majority opinion) (holding that the political process doctrine applies to both race-neutral and race-preference measures).

11. David Bernstein, *Schuette v. Coalition to Defend Affirmative Action: Forgetting the Narrative*, VOLOKH CONSPIRACY (Oct. 2, 2013, 9:39 AM), <http://www.volokh.com/2013/10/02/schuette-v-coalition-defend-affirmative-action-forgetting-narrative/>. Bernstein notes that a valid affirmative action policy must benefit the entire student body, not just minority students. *Id.* However, the Sixth Circuit determined that Proposal 2 created political process concerns because it invalidated affirmative action policies that provided benefits to minorities. *Id.* Thus, the Sixth Circuit’s political process analysis cannot stand under a true reading of the Court’s affirmative action jurisprudence. *Id.*; Brief for Petitioner at 22–23, *Schuette v. Coal. to Defend Affirmative Action*, No. 12–682 (U.S. June 24, 2013).

12. See Brief for Petitioner, *supra* note 11, at 23 (“A *Grutter* plan and a political-restructuring theory are incompatible.”).

analysis, and hold that Proposal 2 is constitutional.¹³

II. FACTUAL & PROCEDURAL HISTORY

A. *Proposal 2*

Following the Supreme Court's decisions in *Gratz v. Bollinger*¹⁴ and *Grutter v. Bollinger*,¹⁵ opponents of affirmative action spearheaded a movement to amend the Michigan Constitution to invalidate affirmative action admissions policies.¹⁶ The initiative, known as Proposal 2, earned a spot on Michigan's November 2006 election ballot,¹⁷ and passed with 58 percent of the vote.¹⁸ Proposal 2 amended Article I of the Michigan Constitution to include provisions stating:

(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

13. *Id.* at 14–16.

14. 539 U.S. 244 (2003).

15. 539 U.S. 306 (2003).

16. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 471 (6th Cir. 2012), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

17. *Id.* The Michigan Constitution restricts ballot access to initiatives that receive signatures from ten percent of the total votes in the previous gubernatorial election. *Operation King's Dream v. Connerly*, 501 F.3d 584, 587 (6th Cir. 2007) (citing MICH. CONST. art. XII, § 2). Proposal 2 received 508,202 signatures, but only needed 317,757. *Id.*

18. *Coal. to Defend Affirmative Action*, 701 F.3d at 471. Notably, the Sixth Circuit considered an appeal concerning whether Proposal 2 received enough signatures to gain inclusion on the ballot by means of fraud, but dismissed the appeal as moot because Proposal 2 had already passed. *Operation King's Dream*, 501 F.3d at 592.

the State of Michigan not included in sub-section 1.¹⁹

B. Procedural History: The District Court and Sixth Circuit Panel Decision

Two plaintiffs groups filed suits in the Eastern District of Michigan challenging the constitutionality of Proposal 2 as applied to higher education: the Coalition plaintiffs, comprised of individuals and opposition groups, and the Cantrell plaintiffs, a group of faculty members and some prospective and current students at the University of Michigan (collectively, the Respondents).²⁰ The district court consolidated the cases and granted Michigan's motion for summary judgment, concluding Proposal 2 did not violate the political process doctrine of the Equal Protection Clause.²¹ The court found that the doctrine did not prohibit "programs that give an advantage on the basis of race as a remedy to combatting other social disadvantages."²²

However, in a 2-1 panel decision, the Sixth Circuit reversed and granted summary judgment for Respondents, holding that Proposal 2 violated the political process doctrine.²³ Specifically, Proposal 2 "modifie[d] Michigan's political process to place special burdens on the ability of minority groups to achieve beneficial legislation," but was not alleged to fulfill a compelling state interest as required under strict scrutiny.²⁴ The Sixth Circuit granted Michigan's subsequent request for en banc review.²⁵

III. LEGAL BACKGROUND

A. The Equal Protection Clause: Traditional Analysis

The Equal Protection Clause of the Fourteenth Amendment declares: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁶

19. MICH. CONST. art. I, § 26.

20. *Coal. to Defend Affirmative Action*, 701 F.3d at 472. The Coalition plaintiffs included the Coalition to Defend Affirmative Action, Integration, and Immigration Rights and Fight for Equality by Any Means Necessary. *Id.*

21. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 932, 960 (E.D. Mich. 2008).

22. *Id.* at 957.

23. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 631, 633 (6th Cir. 2011).

24. *Id.* at 631 (citation omitted) (internal quotation marks omitted).

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

26. U.S. CONST. amend. XIV, § 1.

The Supreme Court has held that “[t]he central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.”²⁷ Accordingly, all explicit racial classifications, including benign racial classifications, receive strict scrutiny review.²⁸ To survive strict scrutiny, the law must be narrowly tailored to fulfill a compelling government interest.²⁹

Facially neutral laws also receive strict scrutiny review if they have a discriminatory impact on a racial minority and were passed for a discriminatory purpose.³⁰ The discriminatory purpose need not be explicit and may “be inferred from the totality of the relevant facts, including . . . that the law bears more heavily on one race than another.”³¹ However, the Court has clarified that to find a discriminatory purpose the law must have been passed “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”³² Without both discriminatory impact and discriminatory purpose, the law need only satisfy rational basis review, under which the law survives an equal protection challenge if it can “rationally . . . be said to serve a purpose the Government is constitutionally empowered to pursue.”³³

B. The Equal Protection Clause: Political Process Doctrine

1. The *Hunter* Trilogy: Introduction

The political process doctrine is a “less familiar and more nuanced branch of equal protection doctrine.”³⁴ It holds that the Fourteenth Amendment prohibits “‘a political structure that treats all individuals as equals,’ yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to

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

28. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

29. *Id.* at 235.

30. *See Washington*, 426 U.S. at 239–42 (noting that “[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution” and that the Court’s “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 discriminatory impact”).

31. *Id.* at 242.

32. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

33. *See Washington*, 426 U.S. at 245–48 (applying only rational basis review even though the race-neutral qualification test had a disproportionate impact on minorities, because the Court found no evidence of a racially discriminatory purpose).

34. Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1024 (1996).

achieve beneficial legislation.”³⁵ Unlike traditional equal protection analysis, which focuses on discriminatory intent, the political process doctrine focuses on the discriminatory effect of government restructuring.³⁶ The doctrine is rooted in three cases known as the “*Hunter* trilogy”³⁷: *Hunter v. Erickson*,³⁸ *Washington v. Seattle School District*,³⁹ and *Crawford v. Los Angeles Board of Education*.⁴⁰ Each case in the *Hunter* trilogy adds a separate element to the doctrine, and it is therefore worthwhile to consider each case in turn.

i. *Hunter*: The Foundation

In *Hunter*, the Court first established that a government restructuring violates the Equal Protection Clause if it burdens minority interests, and only minority interests, within the political process.⁴¹ There, the Akron City Council passed a fair housing ordinance designed to prevent racial discrimination in the real estate market.⁴² Akron voters subsequently amended the city charter so that any law regulating the real estate market based on racial considerations had to receive a majority vote at a general election to pass.⁴³

The Court held that the charter amendment violated the Equal Protection Clause.⁴⁴ It noted that although the amendment was facially neutral, it primarily harmed racial minorities because minorities would have benefitted from the fair housing ordinance.⁴⁵ Further, the majority vote requirement burdened future efforts by

35. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) (quoting *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (Stevens, J., concurring)).

36. See Amar & Caminker, *supra* note 34, at 1035 (discussing “concern for effect rather than intent” in the political process doctrine). Amar and Caminker point to evidence in the Court’s *Seattle School District* opinion to refute the argument that the political process doctrine is an implicit “soft intent” inquiry that allows the Court to find discriminatory intent when the Court believes there is discriminatory intent, but lacks sufficient evidence to meet the *Washington v. Davis* test. *Id.* at 1034–35. They also observe that although the political process doctrine’s focus on effect differs from the traditional equal protection framework, it aligns the political process doctrine with cases dealing with burdens imposed on the “exercise of political rights such as voting and jury service.” *Id.* at 1035.

37. Weeden, *supra* note 5, at 291.

38. 393 U.S. 385 (1969).

39. 458 U.S. 457 (1982).

40. 458 U.S. 527 (1982).

41. See Amar & Caminker, *supra* note 34, at 1024.

42. *Hunter*, 393 U.S. at 386.

43. *Id.* at 387.

44. *Id.* at 393.

45. *Id.* at 390–91.

minorities to secure laws prohibiting racial discrimination in the housing market, but placed no corresponding burden on laws forbidding discrimination based on other classifications, such as political affiliation.⁴⁶ Because the amendment targeted a law designed to benefit racial minorities and restructured the political process to discriminatorily burden minority interests, the Court applied strict scrutiny.⁴⁷ In the strict scrutiny inquiry, the Court noted that Akron did not justify the amendment with a compelling government interest, and therefore the amendment was unconstitutional.⁴⁸

ii. *Seattle School District*: Removing Authority to a Higher Level of Government

In *Seattle School District*, the Court further developed the political process doctrine by holding that a government restructuring creates a discriminatory burden when it moves only the power to enact policies benefitting racial minorities from a lower level of government to a higher level of government. There, the Seattle School District adopted the “Seattle Plan,” a mandatory busing system designed to remedy de facto racial segregation in the local school system.⁴⁹ In response, Seattle residents passed Initiative 350, a state-wide policy which forbid school boards from busing students to a school that was not “geographically nearest or next nearest the student’s place of residence.”⁵⁰

Relying on *Hunter*, the Court struck down Initiative 350 as a violation of the Equal Protection Clause.⁵¹ The Court noted that although Initiative 350 was facially neutral, it targeted busing to remedy racial segregation, a program designed to benefit racial minorities.⁵² Moreover, Initiative 350 reallocated the power to enact racial busing policies from local government to state government, but did not place a corresponding burden on busing for other purposes.⁵³

46. *Id.* at 391.

47. *Id.* at 391–93.

48. *Id.* Akron attempted to justify the amendment as a reflection of the public’s desire to move slowly when forming policies impacting race relations. *Id.* at 392. Akron also argued that the state has free reign to allocate legislative power. *Id.* Finally, Akron argued that because the amendment passed through a referendum, it should be immune from judicial review. *Id.* The Court rejected all these justifications. *Id.* at 392–93.

49. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 460–61 (1982) (citation omitted) (internal quotation marks omitted).

50. *Id.* at 461–62.

51. *Id.* at 470.

52. *Id.* at 471–74.

53. *Id.* at 474 (“The initiative removes the authority to address a racial problem—and only

Through this reallocation of power, Initiative 350 created a discriminatory burden against minorities and therefore violated the Equal Protection Clause.⁵⁴

iii. *Crawford*: Repealing Policies Designed to Benefit Racial Minorities

In *Crawford*, the third and final case in the *Hunter* trilogy, the Court held that the repeal of legislation benefitting racial minorities does not violate the political process doctrine.⁵⁵ There, California voters passed Proposition I, an amendment to the California Constitution that prohibited California courts from ordering racial busing in situations in which a federal court would not have authority to order busing.⁵⁶ Prior to the passage of Proposition I, California state courts had more expansive authority than federal courts when ordering student busing to remedy public school segregation.⁵⁷

The Supreme Court analyzed Proposition I under the political process doctrine and held that it was constitutional.⁵⁸ The Court noted that “the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.”⁵⁹ Thus, having provided more expansive busing than that required by the United States Constitution, California’s decision to curtail its busing program so as to better align it with the federal criteria was valid.⁶⁰ However, the Court noted that a repeal coupled with a burden on future minority efforts to achieve beneficial legislation, such as the majority vote requirement in *Hunter*, would violate the political process doctrine.⁶¹

a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests.”).

54. *Id.* at 483–84, 486–87.

55. *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 542 (1982).

56. *Id.* at 531–32.

57. *Id.* at 535.

58. *Id.* at 540–42.

59. *Id.* at 539.

60. *Id.* at 542.

61. *Id.* at 540–42.

2. *Coalition for Economic Equity*

In 1997, the Ninth Circuit decided *Coalition for Economic Equity v. Wilson*,⁶² a case with facts virtually identical to those in *Schuette*. In *Wilson*, California voters passed Proposition 209, an amendment to the California Constitution that forbid race-based discrimination and preferential treatment in public employment, public education, and public contracting.⁶³ In the ensuing challenge, the Ninth Circuit concluded that Proposition 209 did not violate the Equal Protection Clause under a traditional analysis.⁶⁴ The court also held Proposal 2 did not trigger political process concerns because the political process doctrine did not apply to the repeal of race-preference policies, like affirmative action.⁶⁵ The court characterized Proposition 209 as race neutral because, by prohibiting racial discrimination, it prevented minorities from achieving preferential treatment through affirmative action.⁶⁶ The Ninth Circuit distinguished *Hunter* and *Seattle*, noting that those cases concerned burdens on enacting policies designed to remedy racial discrimination, whereas Proposition 209 repealed race-preference policies to create a baseline of racial neutrality.⁶⁷

3. The Test

The political process doctrine creates a two-part inquiry.⁶⁸ If both prongs are satisfied, strict scrutiny applies, meaning the law must be narrowly tailored to a compelling government interest to survive an equal protection challenge.⁶⁹ In the first prong, a court considers

62. 122 F.3d 692 (9th Cir. 1997).

63. *Id.* at 696.

64. *Id.* at 702.

65. *See id.* at 709 (referring to application of the political process doctrine as an “erroneous legal premise”).

66. *See id.* at 708 (“Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are ‘equal’ and ‘protection.’ Impediments to preferential treatment do not deny equal protection.”).

67. *Id.* at 706–07.

68. Amar & Caminker, *supra* note 34, at 1022. The Sixth Circuit majority opinion in *Schuette* follows a nearly identical two-part inquiry. *See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 477 (6th Cir. 2012) (noting that *Hunter* and *Seattle* held that the political process doctrine applies when the government action “(1) has a racial focus, targeting a policy or program that ‘inures primarily to the benefit of the minority,’” and (2) “reorders the decisionmaking process in a way that places special burdens on a minority group’s ability to achieve its goals through that process”), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

69. Amar & Caminker, *supra* note 34, at 1055 (advocating application of strict scrutiny to California’s Proposition 209 because it fulfills the racial character and discriminatory burden prongs).

whether the law is “racial in character,” meaning it both “regulates a racial subject matter” and “regulates the subject matter to the detriment of the racial minority.”⁷⁰ The Supreme Court has held this prong can be satisfied through laws that have “textual references to race,” laws that exclusively impact “racial matters,” and laws that have a negative impact on “the interests of minorities.”⁷¹

In the second prong, a court considers whether the governmental restructuring places an asymmetric burden on the ability of minority groups to advocate for legislation.⁷² This means the restructuring burdens minority interests, but does not place a corresponding burden on non-minority interests.⁷³ For instance, in *Hunter*, the Court noted the amendment subjected only legislation prohibiting racial discrimination to a majority vote, but placed no corresponding burden on legislation prohibiting discrimination based on other factors, such as political affiliation.⁷⁴ On the other hand, the repeal of legislation beneficial to minorities, absent the imposition of a burden on future efforts to secure beneficial legislation, does not create a discriminatory burden, and thus fails the second prong.⁷⁵

C. *The Court’s Limits on Affirmative Action*

The Supreme Court has set out a well-defined roadmap for establishing valid affirmative action admissions policies. Affirmative action policies at state universities must pass strict scrutiny because they explicitly classify applicants along racial lines.⁷⁶ Thus, these programs must be narrowly tailored to further a compelling government interest. A valid affirmative action program furthers the compelling government interest in achieving holistic diversity in higher education.⁷⁷ Diversity in this context benefits all students, regardless of race, by breaking down stereotypes and by preparing

70. *Id.* at 1029 (internal quotation marks omitted).

71. *Id.* at 1030–32 (internal quotation marks omitted) (discussing *Hunter*, *Seattle*, and *Crawford*).

72. *Id.* at 1041.

73. *Id.* at 1042–43.

74. *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

75. Amar and Caminker, *supra* note 34, at 1044 (discussing *Crawford’s* holding that repeal does not trigger strict scrutiny as “consistent with . . . the central message of *Hunter-Seattle*”).

76. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013) (holding that both the district court and the court of appeals conducted improper strict scrutiny analyses of the University’s admissions program by granting too much deference to the University); *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

77. *See Grutter*, 539 U.S. at 329–30.

students to enter a diverse workforce.⁷⁸ Holistic diversity often encompasses race, but only as a single element among others, such as regional identity.⁷⁹ Yet, the narrow tailoring prong forbids the use of explicit racial quotas.⁸⁰ To satisfy the narrow tailoring prong, the admissions policy must treat race as a single, non-dispositive factor, within the context of individual review.⁸¹

IV. HOLDING

In an en banc decision, the Sixth Circuit held 8-7⁸² that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment.⁸³ The court began by noting that the case did not present a “second bite at *Gratz* and *Grutter*”⁸⁴ and thus it refused to consider the constitutionality of affirmative action policies as a general matter.⁸⁵ Rather, the court considered Respondents’ claim that Proposal 2 is unconstitutional under both traditional and political process equal protection analyses.⁸⁶

The court applied the political process doctrine in a two-step inquiry.⁸⁷ First, it considered whether Proposal 2 targeted a program that specifically benefitted a racial minority—in other words, whether a racial minority could consider the policy to be in its interest.⁸⁸ Accordingly, because minorities lobbied for the implementation of

78. *Id.* at 330–33 (discussing benefits of holistic diversity).

79. *See id.* at 333 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”).

80. *Id.* at 334.

81. *Id.*

82. The 8-7 vote broke entirely along party lines, with the eight judges in the majority nominated by Democratic presidents and the seven judges in the minority nominated by Republican presidents. However, one judge in the majority was first nominated by President Clinton and later renominated by President Bush as part of a compromise. Adam Liptak, *‘Politicians in Robes’? Not Exactly But...*, N.Y. TIMES (Nov. 26, 2012), http://www.nytimes.com/2012/11/27/us/judges-rulings-follow-partisan-lines.html?_r=0.

83. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 470 (6th Cir. 2012) (“The existence of such a comparative structural burden undermines the Equal Protection Clause’s guarantee We therefore . . . find Proposal 2 unconstitutional.”), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

84. *Id.* at 473.

85. *Id.* (“[W]e are neither required nor inclined to weigh in on the constitutional status or relative merits of race-conscious admissions policies as such.”).

86. *See id.* (noting that both the Coalition and the Cantrell plaintiffs challenged Proposal 2 under a political process analysis, but only the Coalition plaintiffs raised a traditional equal protection challenge).

87. *Id.* at 477.

88. *Id.* at 478.

affirmative action policies, Proposal 2 satisfied this prong.⁸⁹

For the second prong, the court considered whether Proposal 2 altered the political structure in a way that placed a special burden on racial minorities' ability to participate in the political process.⁹⁰ This entailed two considerations.⁹¹ First, the court determined that because Michigan voters elected the board members at Michigan's state universities, and the board members have the authority to determine admissions policies, affirmative action policies are a political decision.⁹² Second, the court noted that Proposal 2 forces racial minorities to seek a constitutional amendment in order to secure future affirmative action policies.⁹³ Lobbying board members for the implementation of affirmative action policies would be ineffective because under Proposal 2 board members are prohibited from enacting such policies.⁹⁴ However, groups favoring the inclusion of other admissions factors, such as alumni connections, can still effectively lobby board members.⁹⁵ Thus, Proposal 2 imposes a discriminatory burden on minorities alone.⁹⁶

Accordingly, the court applied strict scrutiny and found Proposal 2 failed because Michigan did not present a compelling state interest.⁹⁷ Because Proposal 2 violated the political process doctrine, the court declined to evaluate Proposal 2 under a traditional Equal Protection Clause analysis.⁹⁸

The dissenting judges filed five separate opinions.⁹⁹ All of the dissenters argued, to some degree, that because Proposal 2 only repeals affirmative action, a race-preference policy, in favor of race-neutral admissions policies, it should not be held unconstitutional.¹⁰⁰

89. *Id.* at 478–79.

90. *Id.* at 480.

91. *Id.*

92. *Id.* at 480–83.

93. *Id.* at 484.

94. *Id.*

95. *Id.* at 484–85.

96. *Id.* at 485.

97. *Id.* at 488–89 (noting that “because the Attorney General does not assert that Proposal 2 satisfies a compelling state interest, we need not consider this argument”).

98. *Id.*

99. *Id.* at 470.

100. *Id.* at 493 (Boggs, J., dissenting) (“[H]olding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is vastly far afield from the Supreme Court precedents.”); *id.* at 511–12 (Griffin, J., dissenting) (“The post-Civil War amendment that guarantees equal protection to persons of all races has now been construed as barring a state from prohibiting discrimination on the basis of race.”); *id.* at 498

Judge Griffin took this argument a step further, arguing that the political process doctrine conflicts with mainstream equal protection jurisprudence by eliminating the inquiry into discriminatory intent.¹⁰¹ Accordingly, the political process doctrine operates as “an aberration inconsistent with the Fourteenth Amendment” and should be invalidated.¹⁰² Judges Gibbons and Sutton noted that affirmative action policies are not constitutionally required because they deviate from the constitutional norm of non-discrimination.¹⁰³ Thus, Michigan should be free to effectively repeal affirmative action policies and adopt race-neutral admissions policies.¹⁰⁴ Finally, Judge Rogers observed that the court’s holding made it impossible for a state with local governments to pass an anti-discrimination law.¹⁰⁵

Michigan appealed, and the Supreme Court granted its petition for writ of certiorari to consider whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public-university admissions decisions.¹⁰⁶

(Gibbons, J., dissenting) (“[E]qual treatment is the baseline rule embodied in the Equal Protection Clause, from which racial-preference programs are a departure.”); *id.* at 505 (Rogers, J., dissenting) (joining Judge Gibbons’s dissent); *id.* at 505 (Sutton, J., dissenting) (joining Judge Gibbons’s dissent).

101. *Id.* at 512–13 (Griffin, J., dissenting) (noting that in *Hunter* and *Seattle* “the Supreme Court held that strict scrutiny applied without any need for the respective plaintiffs to show that the laws were enacted as a result of discriminatory intent or were inexplicable on grounds other than race”).

102. *Id.* at 512 (discussing the need to invalidate the political process doctrine).

103. *Id.* at 494 (Gibbons, J., dissenting) (referring to “absence of any precedent suggesting that states must employ racial preferences in university admissions”); *id.* at 506 (Sutton, J., dissenting) (“If racial preferences are only occasionally and barely constitutional, it cannot be the case that they are always required.”).

104. *Id.* at 494 (Gibbons, J., dissenting) (“Although it has convinced a majority of this court, plaintiffs’ argument must be understood for the marked departure it represents—for the first time, the presumptively invalid policy of racial and gender preference has been judicially entrenched as beyond the political process.”); *id.* at 506 (Sutton, J., dissenting) (“A first premise for resolving this case is, and must be, that a State does not deny equal treatment by mandating it.”).

105. *Id.* at 505 (Rogers, J., dissenting) (“Under the majority opinion, it is hard to see how any level of state government that has a subordinate level can pass a no-race-preference regulation, ordinance, or law.”).

106. *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013); *Petition for Writ of Certiorari* at i, No. 12-682 (U.S. Nov. 28, 2012).

V. ARGUMENTS

A. Arguments for Petitioner

1. Affirmative Action Jurisprudence

Petitioner argues that the Sixth Circuit decision is inconsistent with the Supreme Court's affirmative action jurisprudence.¹⁰⁷ The Sixth Circuit concluded that Proposal 2 repealed affirmative action programs that benefited minorities, thereby satisfying the first prong of the political process analysis.¹⁰⁸ However, Petitioner notes that the only compelling government interest that justifies affirmative action programs is holistic diversity benefitting *all* students.¹⁰⁹ A valid affirmative action program cannot primarily benefit minority students.¹¹⁰ Thus, the majority finds itself in a bind.¹¹¹ By holding that Michigan's affirmative action policies benefit minorities, the Sixth Circuit's decision runs afoul of the Court's affirmative action precedent.¹¹² Conversely, the court cannot conclude that Michigan's affirmative action policies fulfill the compelling interest in holistic diversity because the first prong of the political process test requires that the policy in question specifically benefit minorities.¹¹³ Such a holding would push Proposal 2 outside the scope of the political process doctrine.¹¹⁴ Thus, the Sixth Circuit's opinion illustrates the incompatibility between the political process doctrine and the Court's affirmative action jurisprudence.¹¹⁵

2. Policy Consequences

Petitioner also contends that the Sixth Circuit's application of the political process doctrine calls into question the constitutionality of anti-discrimination laws.¹¹⁶ For instance, the Fair Housing Act of 1968 prohibits racial discrimination in the real estate market and preempts state laws granting preferential treatment based on race.¹¹⁷ In effect,

107. Brief for Petitioner, *supra* note 11, at 22–23.

108. *Id.* at 22.

109. *Id.*

110. *Id.*

111. *Id.* at 23.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* (“A *Grutter* plan and a political-restructuring theory are incompatible.”).

116. *Id.*

117. *Id.*

the Fair Housing Act restructures the political process, moving anti-discrimination policies in real estate from the local level to the federal level.¹¹⁸ Consequently, minorities can no longer effectively lobby local or state governments for legislation that would grant them special consideration in the real estate market.¹¹⁹ Thus, Petitioner concludes that the Fair Housing Act, and other anti-discrimination legislation, could be invalidated on political process grounds, a far-reaching implication that Petitioner concludes is inconsistent with the rationale behind *Hunter* and *Seattle School District*.¹²⁰

3. Proposal 2 is Distinguishable from *Hunter* and *Seattle School District*

Petitioner asserts that Proposal 2 is distinguishable from both *Hunter* and *Seattle School District*.¹²¹ Proposal 2 eliminates affirmative action policies that grant minorities special consideration.¹²² Conversely, the amendment in *Hunter* eliminated an anti-discrimination policy and burdened future attempts to reach racial neutrality.¹²³ Further, *Seattle School District* is distinguishable because Initiative 350 repealed a busing plan designed to remedy de facto racial segregation.¹²⁴ Thus, unlike Proposal 2, the busing system was anti-discriminatory, not preferential.¹²⁵

B. Arguments for Respondents

1. The Sixth Circuit Properly Applied Precedent

Respondents argue that the Sixth Circuit decision should be upheld as a faithful application of the political process doctrine set forth in *Hunter* and *Seattle School District*.¹²⁶ Prior to Proposal 2, all groups could lobby for special consideration in the admissions process.¹²⁷ Accordingly, minorities advocated for affirmative action, a constitutional means of ameliorating the impact of past racial

118. *Id.*

119. *Id.*

120. *Id.* at 24.

121. *Id.* at 17.

122. *Id.* at 20.

123. *Id.* at 18.

124. *Id.* at 18–19.

125. *Id.*

126. See Coalition Respondents' Brief on the Merits at 30, *Schuetz v. Coal. to Defend Affirmative Action*, No. 12–682 (U.S. Aug. 30, 2013) [hereinafter Coalition Brief].

127. *Id.* at 38.

discrimination.¹²⁸ Moreover, Respondents note that racial minorities are just one of many groups, including children of alumni and athletes, that receive preferential treatment in the admissions process.¹²⁹ However, by making affirmative action illegal, Proposal 2 deprives minorities, and only minorities, of the ability to advocate for preferential treatment.¹³⁰ This creates a discriminatory burden in the same manner as did the situations in *Hunter* and *Seattle School District*.¹³¹ Because Proposal 2 singles out minorities for this special burden, it violates the Equal Protection Clause under a political process analysis.¹³²

2. Refuting the Fair Housing Act Hypothetical

Respondents refute Petitioner’s argument that the political process doctrine could invalidate antidiscrimination legislation, like the Fair Housing Act.¹³³ Respondents note that federal law preempts state law under the Supremacy Clause of the United States Constitution, so long as Congress acts in an area of enumerated authority.¹³⁴ Therefore, the Constitution requires that in certain circumstances the “locus of decisionmaking” move from the state or local level to the federal level.¹³⁵ Accordingly, our federal system envisioned that federal legislation, like the Fair Housing Act, would preempt conflicting state laws.¹³⁶ Thus, the political process doctrine cannot require the invalidation of federal antidiscrimination legislation, like the Fair Housing Act, because doing so would be inconsistent with the Supremacy Clause.¹³⁷

128. *Id.*

129. *Id.* at 37.

130. *Id.* at 38.

131. *Id.* at 30–31.

132. *Id.* at 38.

133. Brief for Respondents Chase Cantrell, et al. at 44, *Schuetz v. Coal. to Defend Affirmative Action*, No. 12–682 (U.S. Aug. 23, 2013) [hereinafter *Cantrell Brief*].

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

VI. ANALYSIS

The Supreme Court should reverse the Sixth Circuit decision. The Court's affirmative action jurisprudence and the political process doctrine are incompatible because a valid affirmative action program cannot violate the political process doctrine.¹³⁸ Further, ambiguity in the political process doctrine provides judges too much leeway to apply their own views of affirmative action, resulting in inconsistent opinions. To combat these problems, the Court should hold that the political process doctrine does not apply when a government restructuring effectively repeals affirmative action programs in favor of race-neutral admissions policies. The Court should consider Proposal 2 under a traditional equal protection analysis and find it constitutional.¹³⁹

A. *Problems with the Political Process Doctrine*

The political process doctrine fails to resolve the baseline question of whether race-neutral policies implicate political process concerns.¹⁴⁰ Professor Spann argues that this ambiguity allows judges to exploit their own personal opinion of affirmative action when applying the political process doctrine in affirmative action cases.¹⁴¹ For instance, the Ninth Circuit's *Wilson* opinion characterizes Proposition 209 as race neutral because it prohibits racial discrimination.¹⁴² But this holding only follows if one disregards the residual impacts of past racial discrimination. Conversely, the *Wilson* district court characterized Proposition 209 as a race-based classification, adopting a baseline that considers the effects of past discrimination.¹⁴³ The problem is that Proposition 209 can be characterized as either discriminatory or neutral, depending on whether or not the judge

138. Brief for Petitioner, *supra* note 11, at 23 (“A *Grutter* plan and a political-restructuring theory are incompatible.”); Bernstein, *supra* note 11.

139. Brief for Petitioner, *supra* note 11, at 14–16.

140. See Spann, *supra* note 9, at 269–70 (“[E]qual protection doctrine itself is simply too indeterminate to produce a resolution of the constitutional issues raised by Proposition 209.”).

141. *Id.* at 270 (“It seems that a judge’s only choice is to fall back on his own political preferences in order to give the Equal Protection Clause operative meaning.”).

142. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997) (“A state law that prohibits classifications based on race or gender is a law that addresses in a neutral-fashion race-related and gender-related matters.”).

143. See *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1505 (N.D. Cal. 1996) (“Because the Court finds . . . that Proposition 209 singles out an issue of special concern to minorities and women—race- and gender-conscious affirmative action—and alters the political process solely with respect to this issue, it concludes that the initiative plainly rests on distinctions based on race.” (citation omitted) (internal quotation mark omitted)).

adopts a baseline that considers past racial discrimination.¹⁴⁴ However, the doctrine does not establish a baseline.¹⁴⁵ This allows judges to use the ambiguity in the discriminatory-neutral distinction as a proxy to substitute their own preferences regarding affirmative action, which creates divergent opinions.

The majority and dissenting opinions in *Schuette* highlight this ambiguity. For instance, Judge Boggs's dissent argues that the political process doctrine should not apply because Proposal 2 creates race-neutral admissions programs and only burdens minorities' efforts to receive preferential treatment.¹⁴⁶ Conversely, the majority holds that the political process doctrine applies to Proposal 2 because *Hunter* and *Seattle School District* establish that courts should apply the political process doctrine for both race-neutral and race-preference policies.¹⁴⁷ *Schuette* thus presents another example of how ambiguity in the political process doctrine creates inconsistent judicial application.

B. The Political Process Doctrine Clashes with Affirmative Action Jurisprudence

The Court's affirmative action jurisprudence and the political process doctrine are completely incompatible.¹⁴⁸ If, as the Sixth Circuit holds, state university affirmative action programs are designed to benefit minorities, then the affirmative action programs are unconstitutional because holistic diversity benefitting *all* students is the only compelling interest that can justify race-conscious admissions policies.¹⁴⁹ However, if the affirmative action programs do not benefit minorities in particular, then the affirmative action programs cannot satisfy the political process doctrine, which requires that the policy in

144. See Spann, *supra* note 9, at 261.

145. See *id.* at 269–70 (“The reason that neither the district court nor the court of appeals was able to articulate a doctrinally satisfying justification . . . is that equal protection doctrine itself is simply too indeterminate to produce a resolution of the constitutional issues raised by Proposition 209.”).

146. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 493 (6th Cir. 2012) (Boggs, J., dissenting) (“[H]olding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is vastly far afield from the Supreme Court precedents.”), *cert. granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

147. *Id.* at 485–86.

148. Brief for Petitioner, *supra* note 11, at 23 (“A *Grutter* plan and a political-restructuring theory are incompatible.”); Bernstein, *supra* note 11.

149. Brief for Petitioner, *supra* note 11, at 22–23.

question specifically benefit minorities.¹⁵⁰ Thus, a valid affirmative action program cannot violate the political process doctrine.¹⁵¹ Because the Sixth Circuit majority opinion relies on an inaccurate reading of the Court's affirmative action precedent, the decision must be overturned.¹⁵²

Tellingly, neither *Hunter* nor *Seattle School District*, the doctrinal bases for the Sixth Circuit's decision, involve an affirmative action program.¹⁵³ In fact, *Seattle School District* suggests that the political process doctrine was never meant to apply to affirmative action.¹⁵⁴ In a footnote, Justice Powell's dissent emphasizes that the logical extension of the *Seattle School District* decision is that "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 higher authority to intervene unless that authority traditionally dictated admissions policies."¹⁵⁵ The *Seattle School District* majority considered Powell's point, but ultimately concluded it was inapplicable because university admissions policies were not related to minority participation in government.¹⁵⁶ Thus, it seems as though the *Seattle School District* Court never intended its decision to apply to a situation involving the effective repeal of an affirmative action program as with Proposal 2.¹⁵⁷

C. Proposal 2 Survives Traditional Equal Protection Analysis

To overcome these problems, the Supreme Court should hold that the political process doctrine does not apply to the effective repeal of affirmative action programs in favor of race-neutral admissions policies. Here, like the busing remedy in *Crawford*, Michigan's state universities adopted affirmative action, a policy that is not constitutionally required.¹⁵⁸ By eliminating affirmative action,

150. *Id.* at 23.

151. *Id.*

152. *Id.*

153. Emily Bazelon, *The Michigan Experiment: The Affirmative Action Case Liberals Deserve to Lose*, SLATE (Oct. 14, 2013, 5:44 PM), http://www.slate.com/articles/new_and_politics/jurisprudence/2013/10/supreme_court_s_michigan_affirmative_action_case_liberals_deserve_to_lose.html?wpisrc=burger_bar.

154. See Brief for Petitioner, *supra* note 11, at 19 ("So even the *Seattle School District* majority did not view the opinion as controlling the outcome in a case like this one.").

155. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 498 n.14 (1982) (Powell, J., dissenting).

156. *Id.* at 480 n.23 (majority opinion).

157. See Brief for Petitioner, *supra* note 11, at 19.

158. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466,

Proposal 2 merely creates race-neutral admissions policies.¹⁵⁹ In effect, Proposal 2 repeals affirmative action policies, thus bringing it within the scope of the *Crawford* decision.¹⁶⁰

With the political process question settled, the Court should find Proposal 2 constitutional under a traditional equal protection analysis.¹⁶¹ Under a traditional equal protection analysis, legislation that classifies individuals along racial lines receives strict scrutiny.¹⁶² However, Proposal 2 does not classify along racial lines.¹⁶³ In fact, it forbids the use of racial classifications in the college admissions process.¹⁶⁴

The next inquiry under the traditional Equal Protection Clause analysis is whether Proposal 2 has a discriminatory impact and discriminatory purpose.¹⁶⁵ The Court should find that Proposal 2 has a discriminatory impact because it deprives minorities of the special consideration they receive under affirmative action.¹⁶⁶ However, Proposal 2 did not pass because of a discriminatory purpose.¹⁶⁷ Voters may have considered a host of non-discriminatory factors when voting on Proposal 2 and therefore it is not possible to say Proposal 2 passed due to a discriminatory purpose.¹⁶⁸ Absent a discriminatory

511 (6th Cir. 2012) (Sutton, J., dissenting) (“If racial preferences are only occasionally and barely constitutional, it cannot be the case that they are always required.”), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013).

159. Brief for Petitioner, *supra* note 11, at 14.

160. *Coal. to Defend Affirmative Action*, 701 F.3d at 511 (Sutton, J., dissenting) (noting that a repeal, similar to that in *Crawford*, is “all that happened here”).

161. Brief for Petitioner, *supra* note 11, at 14–16.

162. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (holding that even benign racial classifications receive strict scrutiny).

163. Brief for Petitioner, *supra* note 11, at 14.

164. *Id.*

165. *See Washington v. Davis*, 426 U.S. 229, 239–42 (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”). The Court also noted that “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 discriminatory impact.” *Id.*

166. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 705 (9th Cir. 1997). The Supreme Court will likely agree with the Ninth Circuit’s *Wilson* opinion and hold that “Proposition 209 burdens members of insular minorities . . . who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities.” *See id.*

167. *See* Brief for Petitioner, *supra* note 11, at 15–16 (endorsing the district court’s finding that there are alternative justifications for supporting Proposal 2 other than racial animus and neither Proposal 2’s ballot history, nor the public arguments in support of its passage suggest discriminatory purpose).

168. *See id.* The district court lists a series of non-discriminatory motivations that proponents of Proposal 2 may have based their decision upon, including: a belief that affirmative action policies actually harm minorities, self-interest in receiving acceptance to a

purpose, Proposal 2 must only survive rational basis review.¹⁶⁹ Proposal 2 can satisfy rational basis review because it “[i]t was not irrational for a majority of Michigan’s voters to end race- and sex-conscious admissions policies.”¹⁷⁰

V. CONCLUSION

Schuette presents an opportunity for the Supreme Court to clarify ambiguity in the political process doctrine and avoid the doctrinal problems that arise when courts apply the political process doctrine in an affirmative action case.¹⁷¹ The political process doctrine is ambiguous on whether the repeal of a race-preference program in favor of a race-neutral program implicates political process concerns.¹⁷² This ambiguity allows judges to inject their own view of affirmative action into the inquiry, creating widely divergent opinions,¹⁷³ a trend illustrated by the Sixth Circuit majority and dissenting opinions.¹⁷⁴ Further, applying the political process doctrine in an affirmative action case creates a catch-22 where a court cannot find that a valid affirmative action program satisfies the two-part political process test.¹⁷⁵ The Sixth Circuit opinion relies on this improper analysis.¹⁷⁶

Therefore, the Court should reverse the Sixth Circuit and distinguish *Schuette* by holding that the political process doctrine does not apply to the effective repeal of affirmative programs in favor of

state university, a belief that affirmative action perpetuates stereotypes, and a preference for implementation of affirmative action programs based on socio-economic factors. *Id.*

169. *Id.* at 16.

170. *See id.* (noting that Proposal 2 can likely survive rational basis review).

171. *See* Spann, *supra* note 9, at 269–70 (discussing problems inherent in applying the political process doctrine).

172. *See id.* (“The reason that neither the district court nor the court of appeals was able to articulate a doctrinally satisfying justification . . . is that equal protection doctrine itself is simply too indeterminate to produce a resolution of the constitutional issues raised by Proposition 209.”).

173. *See id.* at 270 (“It seems that a judge’s only choice is to fall back on his own political preferences in order to give the Equal Protection Clause operative meaning.”).

174. *See* Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 493 (6th Cir. 2012) (Boggs, J., dissenting) (“[H]olding it to be a violation of equal protection for the ultimate political authority to declare a uniform policy of non-discrimination is vastly far afield from the Supreme Court precedents.”), *cert. granted sub nom.* *Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013); *but see id.* at 485–86 (majority opinion) (holding that the political process doctrine applies to both race-neutral and race-preference measures).

175. *See* Brief for Petitioner, *supra* note 11, at 23 (“A *Grutter* plan and a political-restructuring theory are incompatible.”).

176. *Id.* at 22–23.

race-neutral admissions policies. The Court should find Proposal 2 constitutional under a traditional equal protection analysis because there is insufficient evidence for the Court to find that Proposal 2 passed with a discriminatory intent, a requirement for an equal protection violation under the traditional analysis.¹⁷⁷

177. *Id.* at 14–16.