

BREAKING THE CYCLE: COUNTERING VOTER INITIATIVES AND THE UNDERREPRESENTATION OF RACIAL MINORITIES IN THE POLITICAL PROCESS

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ABSTRACT

This Article examines issues of inequality in education, minority representation, and access to the political process. The Article considers constitutional protections and other legal mechanisms available to racial minorities to nullify or circumnavigate majoritarian voter initiatives that seek to override federal constitutional guarantees and United States Supreme Court holdings on the validity of the use of race in university admissions decisions. Voter initiatives have been used to undermine the socio-economic and political interests of vulnerable communities. In the education realm, affirmative action opponents are increasingly adopting this instrument to defeat race-conscious admissions policies. This Article focuses on several seminal cases involving the political process doctrine, including the Court's most recent decision, Schuette v. Coalition to Defend Affirmative Action. In Schuette, the Court held that the amendment to Michigan's Constitution, which prohibits governmental entities from utilizing race-conscious policies, is valid under the Equal Protection Clause. In so holding, the Court failed to adequately address the argument that the amendment leaves some minorities without

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meaningful access to the political process. This Article proposes recommendations for ensuring that the rights of minorities are adequately represented.

This case is not about how the debate about racial preferences is resolved. It is about who may resolve it.¹

– Justice Anthony Kennedy

Today’s decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.²

– Justice Sonia Sotomayor

INTRODUCTION

Education and voting rights are intricately linked. The ability of racial minorities to influence matters of access to education is being diluted in two prominent ways. The first is through voter initiatives. A voter initiative is a political mechanism through which registered voters may organize, obtain a requisite number of signatures on a petition, and have that petition certified by the state for consideration by the general electorate to change the state’s laws.³ In the education context, voter initiatives and referenda have operated: (i) to render ineffectual fundamental constitutional guarantees such as the right to vote and have one’s vote count, as guaranteed by the Fifteenth Amendment and the 1965 Voting Rights Act, and the right to equal protection under the Fourteenth Amendment, (ii) to distort legislation such as Title VI of the Civil Rights Act of 1964, and (iii) to circumnavigate court decisions that validate constitutional protections and the use of protective strategies

1. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014).

2. *Id.* at 1683 (Sotomayor, J., dissenting).

3. In contrast, the voter referendum typically operates by having “the legislature and governor sign a bill into law and then, if enough citizens sign a petition to qualify a referendum, the bill is sent to the voters for final approval.” See Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33, 41 (Larry J. Sabato, Howard R. Ernst & Bruce Larson, eds., 2001).

(e.g. affirmative action) intended to address disparities in education.⁴ Anti-affirmative action voter initiatives are operating to disadvantage certain minorities precisely in the way that Justice Stone forewarned in his famous *Carolene Products* Footnote Four⁵ and in ways that John Hart Ely expounded upon in *Democracy and Distrust*, his influential work on representative government and political process theory.⁶ Political science scholars have documented well the politically disarming effects of the voter initiative on racial minority voters.⁷ *Schuette v. Coalition to Defend Affirmative Action*⁸ exemplifies the profound relationship between education and political participation in policy decisions and, therefore, is a focal point of discussion.

This Article argues that not only should society as a whole be concerned about the negative aspects of direct democracy mechanisms but also courts, in particular, should be circumspect because their role as effective adjudicators is being undermined. Courts are charged with the responsibility of engaging in legally grounded and reasoned analysis of matters involving the constitutional rights of citizens. Abdicating their duties should not be a matter left to their sole discretion. Yet this is exactly what is occurring.⁹ When confronted with the opportunity to reassert their authority with respect to cases involving the constitutional rights of racial minorities and matters of equal education, the United States Supreme Court and some lower courts have opted to eschew their responsibilities and anoint the electorate, through the direct democracy vehicles of voter initiatives and referenda, as the appropriate arbiter of constitutional rights. Evidence of this disturbing trend is furnished by cases involving plaintiffs who have brought challenges to anti-affirmative action laws.¹⁰ *Schuette* and the Ninth Circuit's decisions in *Coalition for Economic*

4. Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Barbara Gamble, *Putting Civil Rights to a Vote*, 1 AM. J. OF POL. SCI. 41 (1997).

5. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

6. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (Harv. Univ. Press 1981).

7. See, e.g., Cain & Miller, *supra* note 3, at 33–62; Bell, *supra* note 4; Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1545 (1990).

8. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

9. See *id.* at 1654 (Sotomayor, J., dissenting) (“[O]ur role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection.”).

10. An anti-affirmative action law is one that counters race-conscious legal measures designed to address present disparities in various realms (e.g. public education or employment) or remediate past discriminatory treatment.

Equity v. Wilson and *Coalition for Economic Equity v. Brown*¹¹ exemplify this concerning trajectory of jurisprudence.

Anti-affirmative action cases are another avenue by which the voting power of racial minorities in the realm of education is being diluted. The impact of these cases is that racial minorities are constrained in the contributions they are permitted to make in the shaping of laws, policies, and practices that concern their access to education and the quality of education they receive. White plaintiffs typically initiate these cases involving equal protection challenges to race-conscious college admissions policies.¹² Problematically styled as “reverse discrimination” cases, the plaintiffs assert that the policies academic administrators have designed to decrease educational disparities violate the Equal Protection Clause. As Reva Siegel has astutely argued, the Supreme Court’s review of the anti-affirmative action cases as compared to equal protection cases asserting that the interests of racial minorities have been harmed demonstrates that extraordinary constitutional protection is extended to the former while the latter are subjected to the rigors of strict scrutiny and thus, likely to be defeated.¹³ The downfall of race-conscious affirmative action measures is that they announce themselves in terms of race.¹⁴ Escaping that construct has proved to be challenging despite efforts to craft substitute schemes that take into account race without expressly stating that as a purpose.¹⁵ The Court’s approach to both types of cases is a perverse application of the Equal Protection Clause and Title VI, which at their inception were crafted to address racial inequalities experienced by certain racial minorities, particularly African Americans.¹⁶

11. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (facial challenge) (holding that section 31 did not violate the equal protection clause). The Ninth Circuit rejected the argument that racial classifications were involved, thereby precluding the political structure argument, because the face of the amendment prohibited racial discrimination. *Id.* at 702. See also *Coal. for Econ. Equity v. Brown*, 674 F.3d 1128 (9th Cir. 2012) (reaffirming previous holding that “section 31 under a political-structure equal protection analysis, did not violate the Fourteenth Amendment”).

12. See, e.g., *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

13. Reva Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

14. To the extent the policies state that they permit admissions committees to consider race, this factor is a visible one. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003).

15. The percentage plans in Texas and California are examples of alternative approaches.

16. See generally SAMUEL LEITER & WILLIAM LEITER, *AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY* (SUNY Press 2002).

While both of the foregoing counter affirmative action strategies (i.e. judicial deference to majority rule by initiative and litigation attacks on race-conscious policies) present substantial challenges to those who are concerned with fulfilling equality education objectives for racial minorities who historically have been underrepresented in higher education, this Article is primarily concerned with the promise of political process theory, the erosive aspects of voter initiatives, and how the judicial and legislative branches should deal with direct democracy instruments in racial equality in education and voting matters.

The *Schuette* case connects the anti-affirmative action cases with the discourse on equality in public policy decisionmaking. This Article argues that when courts are confronted with issues involving the education of historically marginalized racial minorities, the final determination of those matters should not be left to voters. Relying upon direct democracy leaves minorities vulnerable. Their voices will be stifled and they will be subject to majoritarian interests that may seriously undermine and constrain their socio-economic advancement. Various machinations of the majority often work to impair the ability of minorities to fully access fundamental resources in society (e.g. education) that are necessary for their well-being, development, and growth as human beings. Therefore, even when democracy is the prevailing political structure and formal equality exists, it is necessary to have mechanisms in place that are designed to protect racial minorities. The government's failure to facilitate their flourishing in this way limits their potential to make valuable contributions, advance, and ultimately impoverishes society as a whole.¹⁷ It is necessary to have processes and institutions that achieve the goals of participatory democracy *and* that interrogate the quality and impact of formal equality. Judicial interrogation should be informed by the history that gave rise to the guarantees of the Fourteenth and Fifteenth Amendments and certain legislative interventions of Congress (e.g. Title VI and the Voting Rights Act).

This Article proceeds in the following manner: Part I situates *Schuette* within the education jurisprudence of the United States Supreme Court, discusses the origins of political process theory,

17. Anthony P. Carnevale & Jeff Strohl, *Separate and Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege*, GEORGETOWN UNIVERSITY CENTER ON EDUCATION AND THE WORKFORCE (July 31, 2013), https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf.

provides background on the case, and critiques the *Schuette* decision. In particular, this Article highlights *Schuette*'s inconsistencies and errors regarding the political process theory.¹⁸ The Court articulated a new but grossly insufficient standard for protecting equal rights, and for facilitating their achievement for racial minorities who have been historically disenfranchised and prevented from participating fully in the benefits and privileges of American society. Moreover, the Court's treatment of political process theory as it pertains to matters of race differs markedly from its receptiveness to the theory as it relates to other groups, such as gays and lesbians, yet, the *Schuette* Court offered no principled rationale for the inconsistent approaches.¹⁹ Part II highlights some fundamental problems with voter initiatives that make them particularly inappropriate to decide issues involving fundamental constitutional guarantees. Part III makes recommendations. Part IV concludes the Article.

I. SITUATING *SCHUETTE*

As an initial matter, it is necessary to situate *Schuette* in the context of education jurisprudence. The importance of *Schuette* in relation to the line of contemporary education legal jurisprudence²⁰ has not been adequately appreciated. *Schuette* squarely fits in this canon. *Schuette* is about the avenues that historically disfavored racial minorities, such as African Americans, have available to them to shape the educational policies at public schools and to participate in an impactful way in decisions governing access to higher education as compared to the dominant population.

The litigants who brought the case at the lower level drew upon a creative potent theory that the Supreme Court was familiar with in the context of residential desegregation, school integration at the primary and secondary levels, and sexual orientation and public accommodations equality. The doctrine, known as the political process theory, has its origins in Justice Stone's Footnote Four in *Carolene*

18. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1623 (2014) (misframing the issue); see also *id.* at 1638 (failing to apply strict scrutiny).

19. Compare *id.*, with *Romer v. Evans*, 517 U.S. 620 (1996).

20. See, e.g., *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

*Products*²¹ and was further developed in the writings of John Hart Ely.²² Justice Stone's footnote is particularly relevant to the appropriate standard of review necessary to the evaluation of legal measures that burden racial minorities. There, he raised the question of "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."²³

Political process theory is designed to address the deficits of a democratic republic.²⁴ In particular, the theory positions the judiciary as a counterpoint to the will of the majority, which has the potential to repeatedly frustrate the political representation of minorities.²⁵ If the political structure facilitates the constant muting of minority voices (i.e. the expression of their political will), it has larger implications.²⁶ Justice Stone's footnote recognizes that the political disempowerment of minorities undermines democratic government. For those minorities who often see their political interests consistently disregarded, their faith in the political institutions purportedly dedicated to representing them is likely to be shattered. Political process theory operates from the premise that equality is not just a matter of being able to vote; it entails being able to propose and effect political outcomes. The theory aims to

21. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

22. JOHN HART ELY, *supra* note 6. The Federalist Papers – in particular Federalist No. 10 – provide additional historical grounding for the political process doctrine. THE FEDERALIST NO. 10 (James Madison). Federalist No. 10's significance for political process theory is Madison's proposal that a representative republican government is the means to counter the influence of factional interests. *Id.* Madison writes: "A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking." *Id.* The Supreme Court has developed or applied the theory in several cases. *See, e.g.*, *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Romer*, 517 U.S. at 620.

23. *Carolene Prods.*, 304 U.S. at 152 n.4.

24. Ely explains that in order to accomplish the goals of republican government to function "in the interest of the whole people" it was necessary to develop a theory of representation "so as to ensure not simply that the representative would not sever his interests from those of a majority of his constituency but also that he would not sever a majority coalition's interests from those of various minorities." ELY, *supra* note 6, at 82.

25. *Id.* at 77–88.

26. This discussion is not asserting that all individuals within a delimited minority think alike. Rather, the point is that there are societal benefits, resources, and institutions to which certain minorities do not have equal access. When these minorities attempt to act in unison or at least as a cognizable group, the political structure fails to adequately take into account their selections and critiques to make the appropriate reforms. Without a mechanism to intervene and change that circumstance, the system remains structured in a way that perpetually disempowers them.

accomplish the notion of equality expressed in the Equal Protection Clause.²⁷ The essential aspects of the political process argument require the court to apply strict scrutiny when the actions of a state work to place the “decisionmaking authority over” a legal measure or policy at a removed level of government that “inures primarily to the benefit of the minority” and that minorities would view as being “in their interest.”²⁸ A successful application of the theory by those that prevail upon it means that, state laws that “disadvantage[] any particular group by making it more difficult to enact legislation in its behalf” may be held constitutionally invalid.²⁹

Lani Guinier posits that admissions decisions are “political as well as educational acts.”³⁰ Included in the realm of the political are: the actions of weighing in on the decisionmaking processes and wielding influence over the governing bodies that issue decisions about how public academic institutions are structured; the criteria that determines who is admitted; and the programs that are implemented to stimulate the inclusion of diverse sectors of the population in the applicant pool. Therefore, it is necessary to consider the factors influencing the political process and to consider whether the power to guide, affect, and at times, determine the outcome of that process is evenly distributed or whether the process is structured in a way that preserves the status quo. *Schuette* presented this complex matter.

A. *Born in a Firestorm*

Schuette emerged from the actions of opponents seeking to dismantle the groundbreaking racial equality gains of civil rights activists in the areas of education and employment. In a carefully crafted decision, the Court upheld the University of Michigan Law School’s admissions decisions practices allowing for a consideration of race in a narrowly tailored way in *Grutter*.³¹ Anti-affirmative action

27. Ely comments that prior to the adoption of the Equal Protection Clause, the ideal of “equal concern and respect in the design and administration of the political institutions that govern them’ . . . functioned as a component—even on occasion as a judicially enforceable component[]—of the concept of representation that had been the core of our Constitution from the beginning.” (citation omitted) (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977)).

28. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)).

29. *Hunter*, 393 U.S. at 393. See also *Seattle Sch. Dist. No. 1*, 458 U.S. at 468.

30. Lani Guinier, *The Supreme Court, 2002 Term: Admissions Rituals as Political Acts: Guardians at the Gate of Our Democratic Ideals*, 117 HARV. L. REV. 113, 114 (2003).

31. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

groups in Michigan and in other parts of the country were determined to nullify the Court's ruling. Building upon a strategy tested by special interest groups in California,³² in 2004 a group led by conservative businessman Wardell Connerly³³ organized to secure the adoption of a ballot amending Michigan's Constitution.³⁴ The amendment, originally designated as Proposal 2, contained a provision prohibiting state entities (e.g. public schools) from drawing upon race-conscious policies in "public education, public employment, or public contracting"³⁵ As adopted, the effect of the amendment prohibited affirmative action in Michigan.³⁶ Equally disturbing for proponents of affirmative action, Proposal 2 organizers styled their amendment, which was aimed at preserving the status quo, as the "Michigan Civil Rights Amendment."³⁷ In so doing, they were attempting to appropriate the civil rights legacy, but their efforts were geared towards undoing the

32. See *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (involving the battle against the anti-affirmative action initiative, Prop 209).

33. Wardell Connerly is an African American businessman who has led several efforts in California and Colorado to abolish affirmative action in the United States. Mr. Connerly previously served on the University of California's Board of Regents. See Dean E. Murphy, *Top Foe of Affirmative Action Leaves California Regents*, N.Y. TIMES (Jan. 21, 2005), <http://www.nytimes.com/2005/01/21/us/top-foe-of-affirmative-action-leaves-california-regents.html>; Charlie Savage, *Affirmative Action Foe Is Facing Allegations of Financial Misdeeds*, N.Y. TIMES, Jan. 17, 2005, at A10. See also WARD CONNERLY, *CREATING EQUAL: MY FIGHT AGAINST RACIAL PREFERENCES* (2000).

34. Karen W. Arenson, *Ballot Measure Seen in Wake of Court Ruling*, N.Y. TIMES (July 10, 2003), <http://www.nytimes.com/2003/07/10/us/ballot-measure-seen-in-wake-of-court-ruling.html?ref=topics>. See also *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 931 (E.D. Mich. 2008).

35. The amendment added Section 26, Article I to the Michigan Constitution. It reads:

Affirmative action programs.

1. The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
2. The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
3. For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

MICH. CONST. art. I, § 26.

36. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1629 (2014) ("Under the terms of the amendment, race-based preferences cannot be part of the admissions process for state universities").

37. See *Michigan Civil Rights Amendment, Proposal 2 (2006)*, BALLOTPEDIA https://ballotpedia.org/Michigan_Civil_Rights_Amendment,_Proposal_2 (2006) (last accessed Feb. 3, 2017).

work of civil rights organizations that were dedicated to overcoming the vestiges of slavery and securing equality for African Americans, other racial minorities, and females. The Proposal 2 advocates even referenced the Equal Protection Clause and Title VI as the legal foundation for their initiative.³⁸

Proposal 2 was highly controversial. The Coalition to Defend Affirmative Action Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (“BAMN”) sued, alleging that the amendment to Michigan’s Constitution was unconstitutional in violation of the Equal Protection Clause, Title VI, and Title IX of the Education Amendments of 1972.³⁹ The district court concluded that in order to strike down Proposal 2, BAMN needed to show that the race-conscious measures drawn upon by Michigan’s public colleges and universities “were *required* to combat [*de jure*] racial discrimination or prevent resegregation.”⁴⁰ Because they failed to make this showing, the district court found Proposal 2 constitutionally valid.⁴¹

On appeal, the Sixth Circuit took an entirely different approach. Applying the political process doctrine,⁴² the Sixth Circuit held unconstitutional the “provisions affecting Michigan’s public colleges and universities.”⁴³ BAMN alleged that for racial minorities⁴⁴ who are the focus of corrective race-conscious admissions policies and practices⁴⁵ enacted in their interest, Proposal 2 as applied to Michigan’s public colleges and universities, “impermissibly restructure[d] the

38. *Id.*

39. *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 932.

40. *Id.* at 957. In so reasoning, the court sought to distinguish between affirmative action programs that are “mandated by the obligation to cure past discrimination” and antidiscrimination laws “intended to protect against discrimination.” *Id.* But, the court’s logic is flawed in that it fails to acknowledge that affirmative action practices are appropriately categorized as measures “intended to protect against discrimination.” *Id.* See also GIRARDEAU SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 75 (2000). The district court’s mischaracterization of affirmative action, serves as the central basis for its ruling.

41. *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 930.

42. *Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Mich. (BAMN)*, 701 F.3d 466, 491 (6th Cir. 2012), *rev’d en banc sub nom.*, *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

43. *Id.*

44. BAMN had previously identified in its district court pleadings three groups, African Americans, Latinos, and Native Americans, as being directly impacted by Proposal 2. Plaintiff’s Second Amended Class-Action Complaint for Injunctive and Declaratory Relief at ¶3, *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 960 (No. 06–15024).

45. The term “corrective” refers to the actions that federal and state governments along with their various agencies and civil rights groups deemed necessary to counter the historical practices that gave rise to the inequities in education that prevail today.

political process” concerning school administrative matters thereby denying them equal access to the political process in violation of the Equal Protection Clause.⁴⁶

Reversing the Sixth Circuit, the Supreme Court held that the amendment to Michigan’s constitution was constitutional under the Equal Protection Clause.⁴⁷ An exploration of how the Court arrived at its decision is necessary for highlighting what is at stake politically for historically marginalized racial minorities, and for exposing the inequitable and dangerous destabilizing risks that voter initiatives pose to substantive equality and fundamental constitutional guarantees.

All these maneuvers undermine representative government and pave the way for direct democracy to rule, which leaves the political interests of certain racial minorities imperiled. In failing to subject the Proposal 2 voter initiative to strict scrutiny, the Court permitted the populist mechanism⁴⁸ to replace the representative structure of republican government with its built in checks and balances. Furthermore, Justice Kennedy’s words alarmingly invited the supplanting of this structure. That is, in characterizing Michigan’s adoption of the voter initiative as properly “bypassing public officials” who were not acting in accordance with the wishes of the majority and in declaring that the Constitution and the Court’s precedents furnished no legal grounding for “the Judiciary to set aside Michigan laws that commit this policy determination to the voters,” the Court favored the populist process over one of reasoned judicial intervention and protection.⁴⁹

When the *Schuette* Court referenced the events leading up to Michigan’s adoption of Proposal 2, it characterized the process as “a

46. *BAMN*, 701 F.3d at 473.

47. *Schuette*, 134 S. Ct. at 1623.

48. Cain and Miller argue that populist strands eventually overtook progressive elements and co-opted the voter initiative. They maintain that current use of the initiative departs from the progressives’ initial conception of it “as an occasional ‘safety valve’ to make representative government more responsive and effective.” Cain & Miller, *supra* note 3, at 59.

49. This Article agrees with Ely’s conclusion that the failure of the judiciary to act in this countermajoritarian way constitutes a breakdown in the democratic structure as conceptualized by the founders. The resulting dysfunction harms racial minorities. Ely writes:

[E]ven before the enactment of the Equal Protection Clause, the Supreme Court was prepared at least under certain conditions to protect the interests of minorities that were not literally voteless by constitutionally tying their interests to those of groups that did possess political power – and, what is the same thing, by intervening to protect such interests when it appeared that such a guarantee of ‘virtual representation’ was not being provided.

ELY, *supra* note 6, at 84–85.

statewide debate on the question of racial preferences” and their consideration by state entities.⁵⁰ The use of the phrase “statewide debate” suggests that several events significant to the democratic process occurred. It suggests that the organizers or the state adequately disseminated informative accurate information regarding the ballot initiative. It conjures up the idea of state residents being invited to participate in numerous hearings concerning the initiative and that the proponents were available to answer questions regarding its purpose and design. It leads the reader to believe that opponents of the ballot initiative were able to participate in the hearings and present their assessment of the proposal, and that the state legislators were given an opportunity to explain how the proposal conflicted with or facilitated existing state laws.

Yet this was far from the truth. In contrast to the foregoing idealistic vision, Proposal 2’s saga was marked by deception, voter fraud, and a breakdown in the systems of state governance that are entrusted with protecting the rights of all its residents.⁵¹ This second tale of *Schuette* concerns the struggle of civil rights groups and pro-affirmative action supporters against the initiative in Michigan. Their battle unfolded in the context of community organizing and in the courts. Their enormous efforts demonstrate why it is not enough to propose reforming initiatives as a solution to the dangers they pose to minority rights issues. The saga demonstrates that in Michigan, and likely in other states as well, inadequate procedures are in place to ensure the integrity of the voting process.⁵²

Over a period of six months, Ward Connerly’s group, the Michigan Civil Rights Initiative (“MCRI”) collected signatures for its anti-affirmative action petition so that it could be placed on the November 2006 general election ballot.⁵³ From the beginning, serious issues

50. *Schuette*, 134 S. Ct. at 1629.

51. *Operation King’s Dream v. Connerly (OKD)*, No. 06-12773, 2006 WL 2514115 at *3 4 (E.D. Mich. Aug. 29, 2006) (discussing the history of Proposal 2).

52. NATIONAL CONFERENCE OF STATE LEGISLATURES, INITIATIVES AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE (July 2002) [hereinafter TASK FORCE REPORT].

53. *OKD*, 2006 WL 2514115 at *2. The procedures for Michigan’s initiative process are contained in Article XII, Section 2 of the Michigan Constitution. MICH. CONST. art. XII, § 2. *See* MICHIGAN CIVIL RIGHTS COMMISSION REPORT REGARDING THE USE OF FRAUD AND DECEPTION IN THE COLLECTION OF SIGNATURES FOR THE MICHIGAN CIVIL RIGHTS BALLOT PETITION 1 (June 7, 2006), http://www.michigan.gov/documents/PetitionFraudreport_162009_7.pdf [hereinafter COMMISSION REPORT]. *See also* Arenson, *supra* note 34.

plagued Proposal 2 concerning the conduct of MCRI's signature gatherers,⁵⁴ the wording of the petition, and the validity of the signatures obtained.⁵⁵ As a result, residents filed multiple complaints with several state agencies, including the Michigan Civil Rights Commission (the "Commission"). The Commission, acting under the powers granted to it in the state constitution, spent five months investigating the chief complaints that: (i) MCRI's proposal was misleading in that it used the words "discrimination" or "preferential treatment" instead of the phrase "affirmative action,"⁵⁶ and (ii) the signature gatherers falsely represented that the purpose of the petition was to support affirmative action rather than ban it.⁵⁷ After holding a series of public hearings in which citizens testified, the Commission issued a scathing report containing numerous findings and recommendations.⁵⁸ One essential finding was that MCRI engaged in several "misleading and false" practices that required the Attorney General's attention and that of the Michigan Supreme Court in order to properly remediate the harm to the civilrights of Michigan's electorate.⁵⁹

While the Commission conducted its investigation, a non-profit civil rights group, Operation King's Dream ("OKD"), and BAMN filed several unsuccessful state court actions.⁶⁰ Their attempts to stop the certification of MCRI's petition were finally thwarted at the state court

54. In preparation for his campaign for Proposal 2, Connerly revealed that he planned to hire a separate firm to obtain the necessary signatures and that he intended to pay them an estimated "\$1.50 a signature, or about \$725,000." Arenson, *supra* note 34. Connerly did in fact hire an independent signature gathering firm. See *OKD*, 2006 WL 2514115 at *9.

55. *Id.*

56. *Id.* at *4. See also COMMISSION REPORT, *supra* note 53. The controversial petition language reads in relevant part:

A Proposal to amend the Michigan Constitution by adding a Section 25 to Article I that would: (1) prohibit the University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district from discriminating against, or granting 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) prohibit the State from discriminating against, or granting 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.

OKD, 2006 WL 2514115 at *19 n.2.

57. *Id.* at *4.

58. COMMISSION REPORT, *supra* note 53.

59. *Id.* at 12-13.

60. On its website, BAMN describes itself as "a primarily student- and youth-based organization of leaders in our schools and communities, committed to making real the promises of American democracy and equality." See BAMN, <http://www.bamn.com/about-bamn> (last visited Jan. 2, 2017).

level when Michigan's Supreme Court declined to review the Commission's report and held that the relevant inquiry regarding the petition was limited to whether the board of canvassers acted within its limited scope of authority to verify that the required number of signatures had been obtained and to certify the petition on that basis.⁶¹ After making that determination, the court concluded it was not empowered to examine the specific actions and representations of the signature gatherers.⁶² The court reasoned that it was not appropriate for it to decide, "what constitutes a 'fair' representation concerning matters of political dispute" but rather those determinations should be left up to the voters.⁶³ Even though the stakes were high because of the initiative's potential impact on the federal constitutional rights of disfavored racial minorities to meaningfully participate in the political structure concerning educational policies that pertain to them, the court opted not to act. Instead, it severely circumscribed the contours of its duty. As a result, no probing evaluation of Michigan's initiative process occurred at the state court level.

Undeterred, in 2006 OKD filed a case against the state and MCRI in federal court alleging that MCRI had committed voter fraud in violation of the Voting Rights Act by engaging in several misleading practices that resulted in MCRI improperly obtaining signatures in support of its petition.⁶⁴ Two striking aspects of the OKD case demonstrate the real threat that voter initiatives pose to constitutional rights and to the structure of the legal system, which is dependent upon the counterweighting actions of its various branches to ensure that hard won protections and rights are safeguarded.⁶⁵ First, although the district court judge made findings⁶⁶ that recognized MCRI engaged in a

61. Mich. Civil Rights Initiative v. Bd. of State Canvassers, 716 N.W.2d 590 (Mich. 2006).

62. *Id.*

63. *Id.*

64. *OKD*, No. 06-12773, 2006 WL 2514115 at *1 (E.D. Mich. Aug. 29, 2006). Specifically, the plaintiffs alleged that: (i) MCRI directed its voter fraud practices towards certain communities based upon their race thereby denying them equal access to the political process; (ii) the petition did not clearly state that the purpose of the measure was to abolish the use of affirmative action by public schools and other entities in the state of Michigan but rather used phrases such as "preferential treatment," and "discriminating against"; and (iii) MCRI obtained a substantial number of signatures through their fraudulent practices. *Id.* at *1, *2, *19. There was evidence that approximately "125,000 signatures" of minorities were obtained in support of the petition, as a result of the fraudulent practices. *Id.* at *2.

65. *Id.*

66. The findings, *inter alia*, included: 1) "MCRI and its circulators engaged in a pattern of voter fraud by deceiving voters into believing that the petition supported affirmative action"; 2) "The conduct of the petitioners went beyond mere 'puffery' and was in fact fraudulent because it objectively misrepresented the purpose of the petition"; 3) "The MCRI defendants were aware

“pattern of voter fraud,” the court nonetheless concluded that no Michigan law prohibited signature gatherers from lying to individuals regarding the substance and purpose of the voter initiative petition being circulated.⁶⁷ Second, the judge ruled that the petition was subject to Section 2 of Voting Rights Act.⁶⁸ But rather than this resulting in a win for OKD, the court reasoned that because MCRI subjected all the petition signers to the same fraudulent practices, a Section 2 violation could not be established.⁶⁹ Despite the outcome, OKD’s framing of their issue in this way was useful because it invoked the history of discrimination in voting and it required the court to revisit the purposes of the Act.⁷⁰ Raising a Section 2 claim reminds courts that racial discrimination in voting may manifest itself in innumerable ways.⁷¹ Therefore, courts must be vigilant in ferreting them out.⁷² The exercise of judicial review illuminates places where there may be gaps between statutory voting laws, designed to achieve substantive equality in political representation and in equalizing the potency of the votes of racial minorities who are relegated to the periphery of political discourse, and current practices of discrimination.⁷³

of and encouraged such deception by disguising their proposal as a ban on “preferences” and “discrimination,” without ever fulfilling their responsibility to forthrightly clarify what these terms were supposed to mean”; and 4) Jennifer Gratz’s testimony was “evasive and misleading [and] [h]er denial of an invitation to participate in the [Commission’s] investigation was not credible in light of the Commission’s detailed and thorough report.” *See id.* at *11, *19.

67. Judge Tarnow summarized the testimony of State Director of Elections Christopher Thomas regarding the legality of making misrepresentations to individuals being solicited for their signatures on voter-initiative petitions: “[Thomas] also testified that there is no provision of state law addressing statements made by circulators of initiative petitions to potential signers Thomas testified that to his knowledge it is not a crime under Michigan law to misrepresent the purpose of an initiative petition.” *Id.* at *8. The court also found the evidence furnished by Michigan’s Secretary of State that fifty signatures out of a random sample of 500 were invalid. *Id.* at *2.

68. *Id.* at *14.

69. *Id.* at *17. The court further noted, “The Court finds it distressing that its finding of a lack of discrimination is based on the fact that minority and non-minority voters had equal access to a deceptive political process.” *See id.* at *19.

70. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2615 (2013) (Section 2 is intended to “to address entrenched racial discrimination in voting.”).

71. *See Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1651–79 (2014) (Sotomayor, J., dissenting).

72. *Reynolds v. Sims*, 84 S. Ct. 1362, 1381 (1964) (“any alleged infringement of the right to citizens to vote must be carefully and meticulously scrutinized.”). *See Shaw v. Reno*, 509 U.S. 630, 645 (1993).

73. This Article shares Bertrall Ross’s view that the Voting Rights Act, “rather than simply being seen as a vehicle that is enforcing a constitutional antidiscrimination requirement, should also be seen as one enforcing the constitutional principle of representative equality.” *See Bertrall L. Ross, The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 *FORDHAM L. REV.* 101, 166 (2012).

The *OKD* case highlights the lack of responsiveness of judicial, administrative, and local systems to address serious infringements that voter initiatives inflict on constitutional equality principles and civil rights.⁷⁴ If no level of government will acknowledge their duties, it leaves racial minorities who are seeking to defend their constitutional rights in a precarious state.

B. Critique of the *Schuette* Decision

One plausible interpretation of the *Schuette* decision is to view it as the product of a simplistic yet challenging syllogism: Affirmative action is not an express constitutional right; it is a privilege that state entities can extend under certain circumstances.⁷⁵ Because it is a privilege and not a right, the state can prohibit its use.⁷⁶ Relying upon a “democratic process” like an initiative to deny a privilege is not unconstitutional.⁷⁷ The University of Michigan was not required to use affirmative action; it was permitted to do so.⁷⁸ If Michigan’s public academic institutions elect not to incorporate affirmative action policies into their admissions decisions, this is not unconstitutional. Public colleges and universities are subject to state policy. State policy may be decided by popular vote.⁷⁹ Therefore, the decision regarding whether state institutions may utilize affirmative action may be determined by popular vote without infringing upon the constitution.⁸⁰ Casting the decision in this favorable light grounds *Schuette* in democratic principles and frames it in terms of objective standards.

The syllogism is deficient in that it fails to acknowledge that one of the purposes of the Equal Protection Clause is to allocate decisionmaking responsibility to the Court over matters concerning race. Where racial classifications are involved and a challenge is

74. *OKD*, No. 06-12773, 2006 WL 2514115 at *2 (E.D. Mich. Aug. 29, 2006) (“With the exception of Michigan’s Civil Rights Commission, the record shows that the state has demonstrated an almost complete institutional indifference to the credible allegations of voter fraud raised by the Plaintiffs.”).

75. *Schuette*, 134 S. Ct. at 1629–32.

76. *Id.*

77. *Id.* at 1636.

78. *Id.* at 1629–32.

79. Regarding the voters’ adoption of race-based policies or the prohibition of them in school decisions, the *Schuette* Court concluded, “[t]he holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow.” *Id.* at 1635.

80. *See id.* at 1636 (“By approving Proposal 2 and thereby adding §26 to their State Constitution, the Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power.”).

brought, it is the Court's responsibility to act.⁸¹ In other words, the Court not only must decide who gets to decide policy matters involving race, but also it must evaluate whether the laws and policies that implicate race are constitutionally permissible. Here, even if one accepts that the Court properly determined that it was constitutionally valid for Michigan to subject the question of race-conscious admissions to the electorate, it failed to fulfill its other responsibility to evaluate whether the legal measure was also consistent with the constitution. In order to perform that analysis, the Court needed to examine its effects. Even though the process may be constitutionally valid, the product of that process may not be. The following sections address the omissions of the *Schuette* Court in more detail.

1. Inadequate Framing of the Issues

Justice Kennedy framed the question in *Schuette* in terms of the democratic process:

[W]hether and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.⁸²

In posing this question, the Court was making certain assumptions about how democracy operates in the United States. The Court presumed that the political process unfolds with fairness and without the cloud of voter fraud. There was a presumption about intellectual, learned, rationale debate occurring amongst voters, and the suggestion that the votes were cast only after the issues had been thoroughly vetted and every interested party had an opportunity to express their opinions and present them in a public forum.⁸³ The Court's vision

81. *Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (“[T]he core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race.”).

82. *Schuette*, 134 S. Ct. 1623. Justice Kennedy's framing of the question is strikingly different from that of the Sixth Circuit, which concluded that:

[T]he sole issue before us is 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 admissions decisions — something they are specifically allowed to do under *Grutter*.

BAMN, 701 F.3d 466, 473 (6th Cir. 2012).

83. Justice Kennedy writes:

Here Michigan voters acted in concert and statewide to seek a consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustices . . . Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate . . . or that these matters are so arcane that the electorate's power must be limited because the people cannot prudently exercise that power even after a full debate, that holding be an unprecedented restriction on the exercise of a fundamental

further assumed a constitutional competency level amongst voters enabling them to make decisions regarding fundamental constitutional guarantees. This is a woefully inaccurate picture of what often occurs in initiative campaigns.⁸⁴ Moreover, as this Article highlights, the Michigan Amendment was not the result of a fully participatory process in which an informed and engaged electorate succeeded in having the initiative included on the general election ballot for consideration by Michigan voters, but rather the product of fraud and deception.⁸⁵ A fully participatory process must fulfill certain requisites related to the substance (i.e. the impact of one's vote on election outcomes) and procedures of voting.⁸⁶ Regarding procedure, the government must ensure that comprehensive and accurate information is provided to the citizenry.⁸⁷ The electorate must have extensive access to polling places.⁸⁸ There must not be unreasonable time, place, or eligibility restrictions.⁸⁹ Regarding substance, states and the federal government must take care to ensure that the political system is not structured in a way that chronically discounts the effect of the political choices of racial minorities.⁹⁰

The *Schuette* Court's query also ignored how the status of being a disfavored racial minority is politically disadvantaging in a way that is difficult (if not impossible) to overcome. The question failed to appreciate the necessity for the safeguards within our political system and the need for judicial intervention when certain constitutional rights

right held not just by one person but by all in common.

Schuette, 134 S. Ct. at 1637.

84. See Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1745 (2013). See also TASK FORCE REPORT, *supra* note 52.

85. See COMMISSION REPORT, *supra* note 53.

86. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964) (citing *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)) (“*Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State”).

87. As the Court concluded in *Burdick v. Takushi*, 504 U.S. 428, 442 (1992), “the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.” Providing reliable information so that voters can make informed choices is essential to the proper functioning of democracy. See James A. Gardner, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 897 (citations omitted) (“[A]ccurate issue voting depends upon [the voter having] accurate relevant information.”).

88. See *Katzenbach v. Morgan*, 384 U.S. 641, 654 (1966).

89. *Id.* at 656.

90. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 346–347 (1960) (“In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens.”).

and issues of equality are at stake.⁹¹ A more complex question that would have fully accounted for BAMN's arguments is: Do states violate the Equal Protection Clause when voters amend their state constitution to: 1) deny racial minorities a voice in the process that determines whether or not they have equal access to education; and 2) target racial minorities by prohibiting a policy that is designed to secure their equal protection rights? This question would have required the Court to apply strict scrutiny because it acknowledges that racial classifications are involved.⁹²

Reframing the Court's inquiry in the way proposed would be in keeping with precedent.⁹³ Voters are unlikely to evaluate initiatives from the vantage point of whether they are consistent with constitutional guarantees.⁹⁴ It is the responsibility of judges to undertake this analysis to assess whether constitutional rights have been adequately protected. This is their "special role."⁹⁵

Just as the *Schuetz* Court inadequately cast the relevant question for its consideration, it was incorrect in its conclusion that the "case is not about the constitutionality . . . of race-conscious admissions policies in higher education."⁹⁶ Proposal 2 threatened the Court's holding in *Grutter*. *Grutter* affirmed that higher education admissions committees

91. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1651–1679 (2014) (Sotomayor, J., dissenting).

92. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

93. As the Court concluded in *Washington v. Seattle Sch. Dist. No. 1*:

The issue here, after all, is not whether Washington has the authority to intervene in the affairs of the local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause.

458 U.S. 457, 476 (1982).

94. Ilya Somin, in critiquing idealist views of "deliberative democracy" (i.e. the practice of citizens substantially engaging in government through extensive debate over political policies and laws) argues that, in general, American voters lack essential knowledge regarding political institutions, the structure of government, and foundational documents such as the federal constitution. See Ilya Somin, *Deliberative Democracy and Political Ignorance*, 22 CRITICAL REV. 253, 257–62 (2010). Somin concludes that even with increased education levels and improvements in information accessibility through technology, voters are ill equipped to perform the tasks that deliberative democracy expects of them. See *id.* at 261. Applying those insights to voter initiatives supports the argument that voters lack the requisite political and constitutional literacy to decide constitutional issues that implicate matters of racial equality. See *id.* at 262. See also THE ANNENBERG PUBLIC POLICY CENTER, NEW ANNENBERG STUDY ASKS: HOW WELL DO AMERICANS UNDERSTAND THE CONSTITUTION? (2011), <http://www.annenbergpublicpolicycenter.org/new-annenberg-survey-asks-how-well-do-americans-understand-the-constitution/> (last accessed Nov. 16, 2016).

95. *Seattle Sch. Dist. No. 1*, 458 U.S. at 486 (stating courts have a "special role in safeguarding the interests of those groups 'relegated to . . . position[s] of political powerlessness'") (quoting *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

96. *Schuetz*, 134 S. Ct. at 1630.

can consider race in their admissions decisions, as long as the decisionmaking committees review candidate files in a holistic way. Considering race as one factor among several, this practice does not violate the Fourteenth Amendment.⁹⁷ Because Michigan's Amendment precludes the consideration of race, it impinges on the viability of the *Grutter* holding.

2. The *Schuette* Court's Encounter with the Political Process Doctrine

a. Failure to Apply the Political Process Doctrine

Building upon the inadequate frame the *Schuette* Court established for its decision, rather than applying the political process doctrine, the Court devoted substantial energy towards demonstrating that the theory did not apply.⁹⁸ The political process theory requires a multi-part analysis.⁹⁹ It must be demonstrated that the legal measure: 1) "has a racial focus targeting a policy or program that 'inures primarily to the benefit of the minority'"; and 2) "reallocates political power or reorders the decision making process in a way that places special burdens on a minority group's ability to achieve its goals through that process."¹⁰⁰ If these elements are satisfied, the challenged law is subject to strict scrutiny.¹⁰¹ Strict scrutiny requires that the state demonstrate that the challenged law serves a compelling state interest and that it is narrowly tailored.¹⁰²

At the district court level, BAMN argued, because Proposal 2:

creat[ed] a political process that sets aside race, among other categories, for consideration "at a new and remote level of government,' [it placed]'a substantial and unique burden on racial minorities."¹⁰³

97. *Grutter*, 539 U.S. 306.

98. *Schuette*, 134 S. Ct. at 1636 ("The instant case presents the question involved in *Coral* and *Wilson* but not involved in *Mulkey*, *Hunter*, and *Seattle*.").

99. *BAMN*, 701 F.3d 466, 477 (6th Cir. 2012) (citing *Seattle Sch. Dist. No. 1*, 458 U.S. at 472 and *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

100. *Id.* at 477 (6th Cir. 2012) (citing *Seattle School District No. 1*, 458 U.S. at 472 (1982); *Hunter*, 393 U.S. at 391 (1969)).

101. *Seattle Sch. Dist. No. 1*, 458 U.S. at 472, 474, 482 n.28.

102. *Grutter*, 539 U.S. 306.

103. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 934 (E.D. Mich. 2008) (quoting *Cantrell Amend. Complaint* at ¶¶57, 58; *Seattle Sch. Dist. No. 1*, 458 U.S. at 470, 483).

The political process BAMN was referring to was that of the public universities and colleges. Specifically, these institutions have a governance structure composed of the elected Board of Regents, or a board of trustees, and of entities delegated by the boards to serve that structure.¹⁰⁴ The boards authorize the various schools (including the faculties and administrators) within the system to design their own admissions procedures and policies.¹⁰⁵ This structure is common to many American public higher education institutions.¹⁰⁶ Prior to the adoption of Proposal 2, individuals had access to influence the decisionmaking of school administrations by petitioning or lobbying the boards on numerous matters.¹⁰⁷ In fact, supporters of the race-conscious policies successfully did exactly that.¹⁰⁸ After Michigan's adoption of Proposal 2, individuals could continue to present proposals and otherwise lobby the board with the prospect of influencing its decisions for all matters except issues concerning race.

Because Proposal 2 amended Michigan's constitution, the only available means to those seeking to restore race-conscious admissions policies in the state would be to secure the amendment's repeal. The monetary costs and political capital involved make the accomplishment of this feat extremely unlikely.¹⁰⁹ The procedure would require the amendment's opponents to organize voters, obtain enough signatures to have their ballot certified and presented to the general electorate, and then win a majority of the votes for its passage.¹¹⁰ If nothing else, it is clear that minority groups, such as African Americans, who have

104. *Id.* at 935.

105. *Id.* at 935–36.

106. See MIDWESTERN HIGHER EDUCATION COMPACT, STATE CONSTITUTIONAL PROVISIONS AND HIGHER EDUCATION GOVERNANCE POLICY REPORT 2 (2013), <http://www.mhec.org/sites/mhec.org/files/20130516state-constitutional-provisions-highered-governance.pdf>. See also *Colleges and Organizational Structure of Universities – Governing Boards, The President, Faculty, Administration and Staff, Students, Future Prospects*, <http://education.state.university.com/pages/1859/Colleges-Universities-Organizational-Structure.html> (last checked Jan. 2, 2017).

107. *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 954.

108. *Id.* at 930, 936.

109. The Court in *BAMN* summarized the Michigan's constitutional amendment process: Just to place a proposed constitutional amendment repealing Proposal 2 on the ballot would require either the support of two-thirds of both Michigan House of Representatives and Senate, see Mich. Const. art XII, § 1, or the signatures of a number of voters equivalent to at least ten percent of the number of votes cast for all candidates for governor in the preceding general election. See *id.* art XII, § 2. Once on the ballot, the proposed amendment must then earn the support of a majority of the voting electorate to undo Proposal 2's categorical ban. See *id.* art XII, §§ 1–2.

BAMN, 701 F.3d 466, 484 (6th Cir. 2012).

110. See MICH. CONST. art. XII, § 2.

historically been denied voting rights or have confronted significant barriers in their attempts to exercise their rights¹¹¹ and who may also have relatively constrained monetary wealth¹¹² are more burdened in seeking to accomplish a constitutional amendment that directly pertains to their interests concerning equal educational opportunities than the majority white population. Regardless of whether it is an economic and political reality that individuals are required to spend money in order to achieve certain socio-economic or political outcomes, the idea that individuals need to have enough wealth in order to secure their constitutional rights is disturbing. The process is unequal for racial minorities in a way it is not for other groups who may choose to petition public universities to consider other factors, such as athletic background, class status, or legacy ties.¹¹³ This is so because with the adoption of Proposal 2, it is no longer within the purview of the universities' discretion to consider race.

b. Failure to Distinguish Political Process Theory Precedents

The *Schuette* Court concluded that political process theory didn't apply.¹¹⁴ In so ruling, it not only sought to distinguish the facts of *Schuette* from the relevant precedents of *Hunter v. Erickson*¹¹⁵ and *Washington v. Seattle School District No. 1*,¹¹⁶ but also attempted to undermine the prior case law. Despite its efforts, the Court failed. The Court's approach and its inconsistent reception to the political process doctrine in other contexts raise serious questions of judicial fairness and contravene basic principles of representative government. As John Hart Ely observed, representative government does not:

111. See Atiba R. Ellis, *Race, Class, & Structural Discrimination: On Vulnerability Within the Political Process*, 28 J. OF C.R. & ECON. DEV. 33 (2015). See also SPANN, *supra* note 40, at 85–155.

112. The Pew Research Center reported in December 2014 that the “wealth of white households was 13 times the median wealth of black households.” RAKEESH KOKCHHAR & RICHARD FRY, PEW RESEARCH CENTER, WEALTH INEQUALITY REPORT (Dec. 14, 2015), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

113. *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 936 (E.D. Mich. 2008) (noting that “[i]n response to Proposal 2’s passage, the universities eliminated race from their admissions criteria but continued to consider various other nonacademic factors, such as geography, alumni connections, socioeconomic status, and athletic ability.”).

114. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637–38 (2014). (“For reasons already discussed, *Mulkey*, *Hunter*, and *Seattle* are not precedents that stand for the conclusion that Michigan’s voters must be disempowered from acting.”).

115. 393 U.S. 385 (1969).

116. 458 U.S. 457 (1982).

Mean that groups that constitute minorities of the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them,[] the denial to minorities of what Professor Dworkin has called “equal concern and respect in the design and administration of the political institutions that govern them.”¹¹⁷

The *Schuette* decision evinces the Court’s failure to give due attention to the racial minorities before them who were asserting their interests and highlighting how those interests had been compromised by direct democracy.

The *Schuette* Court structured its decision in terms of three cases, *Reitman v. Mulkey*,¹¹⁸ *Hunter*, and *Seattle*. All three cases involved voter-initiated amendments.¹¹⁹ All three measures were determined by the United States Supreme Court to be unconstitutional in violation of the Fourteenth Amendment.¹²⁰ *Schuette* grouped together *Reitman*, *Hunter*, and *Seattle* in support of the proposition that only where the state can be viewed as engaging in the constitutionally impermissible discriminatory action of “inflict[ing] injury by reason of race” (e.g. such as enacting or enforcing laws that prohibit certain races from being served in public restaurants)¹²¹ can the Court strike down the challenged legal measure under the Fourteenth Amendment.¹²²

The Court’s treatment of *Reitman* is flawed for several reasons. The main issue is the difference in the type of case that *Reitman* presents as compared to *Schuette* and its precedents. *Reitman* was not a political process doctrine case.¹²³ *Reitman* is not like *Hunter* and *Seattle* because

117. ELY, *supra* note 6, at 82 (footnotes omitted).

118. 387 U.S. 369 (1967).

119. 387 U.S. at 370–71 (describing that the state constitutional amendment was “an initiated measure submitted to the people as Proposition 14 in a statewide ballot in 1964”); *see also Hunter*, 393 U.S. at 386–89; *Seattle Sch. Dist. No. 1*, 458 U.S. at 462–63.

120. *Reitman*, 387 U.S. at 376; *Hunter*, 393 U.S. at 393; *Seattle Sch. Dist. No. 1*, 458 U.S. at 487.

121. *Reitman*, 387 U.S. at 375–81 (discussing cases involving equal protection violations).

122. In commenting on the three cases, the *Schuette* Court concluded:

Mulkey, *Hunter*, and *Seattle* are . . . cases . . . in which the political restriction in question was designed to be used, or was likely to be used, to encourage the infliction of injury by reason of race.

Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1637–38 (2014).

123. It is also worth noting that the *Hunter* Court specifically distinguished *Reitman*, noting that *Reitman* did not involve “an explicitly racial classification.” *See Hunter*, 393 U.S. at 389 (“Here, unlike *Reitman*, there was an explicitly racial classification treating racial housing matters differently from other racial and housing matters.”). While the *Hunter* Court’s description is accurate given that the *Reitman* initiative did not reference race, the point has limited utility because restricting the state from interfering with the “absolute discretion” of property owners in

it does not involve political process theory and does not shed light on how the theory is to be applied. In grouping the three cases, the *Schuette* Court undercuts and subverts the precedential value of *Hunter* and *Seattle*. Neither of the plaintiff-couples in the lower court cases related to *Reitman* framed their arguments in terms of the political process doctrine.¹²⁴ This is significant because a complainant asserting a political process argument must identify a political process that they are either excluded from participating in or their access to the process is significantly encumbered as compared to the politically or racially dominant majority.¹²⁵ Unlike *Hunter* which dealt with the process of enacting fair housing legislation,¹²⁶ or *Seattle* which dealt with the process of public school boards for making decisions regarding policies and procedures, or *Schuette* which dealt with the process of the boards of public universities concerning their policies and the process of adopting a state constitutional amendment, the plaintiff-respondents in *Reitman* did not allege that they were excluded from a political process. Instead, they asserted that the contested law was racially discriminatory and contravened the antidiscrimination provisions of the California Code.¹²⁷ As discussed below, the Court analyzed the case and rendered its decision based on the Equal Protection Clause.¹²⁸ *Reitman* supports the position that where the challenged law can be read as involving the state government in “invidious” “private discriminations,” it must be deemed violative of the Fourteenth Amendment and invalidated.¹²⁹ Accordingly, the *Reitman* Court’s focus was not on the political process doctrine but rather on identifying when the action or inaction of state government may be said to constitute racial discrimination.¹³⁰

their private real estate matters nonetheless implicates suspect classifications under the Federal Constitution. *Id.* This effect would be apparent with the filing of individual lawsuits alleging that landlords were engaging in racial discrimination in violation of the Fourteenth Amendment by failing to rent to people of certain races.

124. *Reitman* involved the consolidation of two cases. *Reitman*, 387 U.S. at 372. Both sets of plaintiffs grounded their arguments in terms of anti-discrimination provisions of the California Code. *Id.* On appeal, the California Supreme Court ruled in favor of the couples based upon the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 372–73.

125. *Seattle Sch. Dist. No. 1*, 458 U.S. at 485–87.

126. *Hunter*, 393 U.S. at 389.

127. *Reitman*, 387 U.S. at 372–73.

128. *See id.* at 376 (“The judgment of the California court was that s 26 unconstitutionally involves the state in racial discriminations and is therefore invalid under the Fourteenth Amendment. There is no sound reason for rejecting this judgment.”).

129. *Id.* at 380–81.

130. The *Reitman* Court specifically declined to propose a test for making the determination of when state action constitutes racial discrimination. *Id.* at 378. As to the facts of the case, the Court concluded, “Here we are dealing with a provision which does not just repeal an existing

The *Reitman* initiative concerned the private right to discriminate in real estate transactions.¹³¹ California voters adopted the initiative, known as Proposition 14, in 1964 in response to the state's anti-discrimination statutes, which were aimed at, *inter alia*, securing racial equality in housing.¹³² Proposition 14 prohibited the state from placing restrictions on the discretion of individuals or private entities to choose who to engage with in their private real estate exchanges.¹³³ The *Reitman* Court held that the challenged provision required the state to become unconstitutionally enmeshed in racial discrimination.¹³⁴ Relying upon this holding, the *Schuetz* Court concluded that because the same could not be said of Michigan's Amendment, it did not run afoul of the Equal Protection Clause.¹³⁵ Here, the Court misapplied *Reitman* and attempted to fashion a rule that does not encapsulate the elements of the political process doctrine.

If *Reitman* is to be applied, the lessons that one may draw from the case support invalidating Michigan's Amendment, not upholding it as the *Schuetz* Court concluded. Regarding the matter of state involvement, Michigan's Amendment does implicate the state in matters of racial discrimination. However, in *Schuetz* the argument pertains to the political process. This difference is significant. Michigan's adoption of the amendment alters the political process so as to burden certain minorities (e.g. African Americans, Latinos, and Native Americans), compared to the politically dominant white majority population in violation of the Equal Protection Clause. The constitutional amendment operates in a way that harms racial minorities who previously benefitted from race-conscious admissions policies. By allowing this inequitable treatment, which is linked to race, to persist, the state may be said to be condoning racial discrimination.

Another way that *Reitman* could be read to support the invalidation of the Michigan Amendment is by adhering to the principle that the

law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market." *Id.* at 380–81.

131. *Reitman's* Proposition 14 provided in relevant part:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses.

Id. at 371.

132. *Id.* at 374.

133. *Id.* at 374–76.

134. *Id.* at 376.

135. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637–38 (2014).

fact that voters generated the challenged measure does not alter the Court's duty to rigorously evaluate its impact on constitutional rights.¹³⁶ *Reitman* supports the argument that more than deferential scrutiny is warranted to determine how the state is operating when a voter initiative is at issue and a claim of discrimination is brought.¹³⁷ *Reitman's* place in deciding cases involving voter initiatives supports this paper's argument that, such mechanisms should not be permitted to automatically trump fundamental constitutional guarantees.

The next case that *Schuette* contends with is *Hunter*. Unlike *Reitman*, *Hunter* is a political process theory case. Accordingly, the *Schuette* Court needed to apply the conceptual approach of *Hunter* to the facts in order to properly evaluate BAMN's arguments.

In *Hunter*, voters in the City of Akron organized to counter an ordinance adopted by the city council to address racially discriminatory practices in Akron's residential real estate market. Relying upon the referendum mechanism,¹³⁸ opponents of the fair housing ordinance, after obtaining support from "[ten percent] of Akron's voters,"¹³⁹ successfully secured the inclusion of a proposed amendment to Akron's charter on the general election ballot. The charter amendment effectively repealed the city council's ordinance and reconfigured the process for passing similar fair housing ordinances in the future by requiring that a majority of the electorate approve them rather than merely the city council.¹⁴⁰

136. *Reitman* calls for a case-by-case assessment of when a state may be viewed as being involved in private discriminatory action to a degree that constitutes the state's endorsement or commission of discrimination. *Reitman*, 387 U.S. at 378. While the Court did not identify the level of scrutiny it applied to the *Reitman* initiative, it did reveal that like the California Supreme Court, it was focusing on the "purpose, scope, and operative effect" of the initiative. *Id.* at 374. In this respect, *Reitman* shares in common with *Hunter*, the conclusion that reliance upon direct democracy vehicles to accomplish constitutional changes does not insulate the initiative from the Court's scrutiny as to whether it complies with the Fourteenth Amendment. See *Hunter v. Erickson*, 393 U.S. 385, 392-93 (1969).

137. *Reitman*, 387 U.S. at 378-79 (rejecting the notion that there is an invariable test to determine impermissible state action in private discrimination).

138. Even though the mechanism is called a "referendum" in *Hunter*, it is not clear that the process involved the initial input of the legislature before being referred to the voters, as is typically the case. See *Hunter*, 393 U.S. at 390, 392 (concluding that the fact that the amendment was established through a referendum does not protect it from judicial scrutiny).

139. *Id.* at 387.

140. The amendment to the city charter read:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing agreement, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.

After a majority voted in favor of the amendment, Nellie Hunter, an African American female, brought suit to compel Akron's Commission on Equal Opportunity in Housing and other city officials' compliance with the fair housing ordinance.¹⁴¹ Hunter alleged that the amendment violated the Equal Protection Clause in that it subjected individuals who sought protection against racial discrimination in housing transactions to a more demanding process. The Court agreed, reasoning that because the charter amendment instituted a different more taxing process for matters involving "race, color, religion, national origin or ancestry"¹⁴² and real transactions, it "discriminates against minorities, and constitutes a real, substantial, and invidious denial of equal protection of the laws."¹⁴³ The differential treatment in government matters contravenes the Equal Protection Clause in that, "the State may no more disadvantage any particular group by making it more difficult to meet legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."¹⁴⁴

The *Schuette* Court distinguished *Hunter* by arguing that if the latter upheld the charter amendment it would have meant that the state was being compelled to commit or permit harm based upon race because the adopted law would preclude it from intervening to stop discrimination in real estate dealings.¹⁴⁵ In contrast, the same could not be said of the *Schuette* Court's decision to uphold the Michigan amendment because it has anti-discriminatory language in it. But given that there was no *de jure* discrimination at issue in *Hunter*,¹⁴⁶ the emphasis on state action as a basis for distinguishing both cases is not valid. Despite the *Schuette* Court's efforts to differentiate them, the amendments are facially similar.¹⁴⁷ Neither amendment expresses an

Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Akron City Charter § 137.

141. *Hunter*, 393 U.S. at 387.

142. *Id.* at 389 ("Only laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' must run s 137's gauntlet.").

143. *Id.* at 393.

144. *Id.* at 391-93.

145. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1632 (2014) (concluding that in *Hunter* "there was a demonstrated injury on the basis of race that, by reasons of state encouragement or participation, became more aggravated.").

146. The facts of *Hunter* recount that the city council implemented the fair housing ordinance based "on a recognition of the social and economic losses to society" which are outgrowths of de facto segregation. *Hunter*, 393 U.S. at 386.

147. *See* Akron City Charter § 137; *see also* *Reitman v. Mulkey*, 387 U.S. 369, 371 (1967).

intention to discriminate on the basis of race. In order to discern the impact of both amendments, it is necessary to refer to the context.¹⁴⁸ The political process doctrine requires the Court to focus on the harm that the legal measure inflicts.¹⁴⁹

The harm concerning the political process and racial minorities in both cases is the same. Both Proposal 2 in *Schuette* and the charter amendment in *Hunter* subject individuals to different processes. The primary basis of separating individuals is by race. This is clear when one considers the context of both amendments. The charter amendment arose in response to the city's adoption of anti-discriminatory housing ordinances. The impetus for Michigan's amendment was the Court's upholding of race-conscious admissions. While residential and school integration can be viewed as goods accruing to society's benefit as a whole, disfavored racial minorities are the ones who would immediately feel the harm of a real estate agent steering them away from a neighborhood of their choice based upon race (even if the reason is not made express by the agent). The same can be said of academically underrepresented racial minorities in Michigan who will experience the harm of not having the benefit of all the educational opportunities that they would have otherwise enjoyed absent the amendment. It is important to acknowledge that a central objective of affirmative action is to counter the disadvantages that racial minorities and females suffer as a result of persistent systemic, historical, and societal inequities. The consequence of upholding both amendments would be the same. There would be no immediately viable means for redressing the harm caused. The harmed parties would need to seek political change through the new process imposed.

Thus, where race is implicated, subjecting individuals seeking to secure or enforce laws or policies devoted to racial equality in housing and education to a different process from those individuals seeking to shape housing and educational laws and policies in other respects, without a compelling legitimate reason, constitutes a violation of the Equal Protection Clause. The decisive factor for the application of the political process theory is the manner in which the voter mechanism is

148. In ruling, the Court referred to the ordinance that was nullified by the *Hunter* amendment noting that, “[i]t is against this background that the referendum required by s 137 must be assessed.” *Hunter*, 393 U.S. at 391.

149. The *Hunter* Court underscored the importance of examining the effect of the law to conclude that, “although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is the law’s impact falls on the minority.” *Id.* at 391.

operating. Just as the *Hunter* Court concluded that the referendum must be struck down because it “disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor,”¹⁵⁰ the same logic would have applied in *Schuette*. With the enactment of Proposal 2, advocates of race-conscious university policies are treated differently from advocates of other types of university policies.

The third case the Court distinguished, *Seattle*, also involved the political process theory. Examining *Seattle* is not only relevant for its guidance on the application of political process doctrine to voter initiatives, but also for assessing the shortcomings of the *Schuette* decision. At issue in *Seattle* was an initiative (“Initiative 350”) that residents¹⁵¹ crafted in opposition to Seattle School District No. 1’s (“Seattle District”) plan to desegregate its schools through a compulsory busing scheme.¹⁵² Seattle District created the plan in response to the hyper-segregation¹⁵³ that pervaded the city’s neighborhoods. Residential racial segregation throughout the city in the 1960s until the 1980s contributed to extreme racial segregation in the public schools. Busing seemed like an appropriate antidote.¹⁵⁴ Initiative 350 mandated that:

[N]o school board . . . shall directly or indirectly require any student to attend any school other than the school which is geographically nearest or next nearest the student’s place of residence . . . and which offers the course of study pursued by such student.¹⁵⁵

Due to the numerous exceptions that Initiative 350 permitted under the broad prohibition, the effect was to grant the school district substantial latitude in assigning students for any reason so long as it was not related to racial desegregation. Using the political process

150. *Id.* at 390–91.

151. The group who organized the ballot initiative designated themselves “Citizens for Voluntary Integration Committee (CIVIC.)” *See* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461–62 (1982).

152. *Id.*

153. *See The Seattle Open Housing Campaign, 1959-1968*, SEATTLE MUNICIPAL ARCHIVES (Jan. 7, 2016, 3:45 PM), <http://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/the-seattle-open-housing-campaign> (discussing housing segregation in Seattle); *see also*, Kate Davis, *Housing Segregation in Seattle* (2005), http://s3.amazonaws.com/zanran_storage/evans.washington.edu/ContentPages/1832317.pdf; *see also* UNIVERSITY OF WASHINGTON, SEATTLE CIVIL RIGHTS AND LABOR HISTORY PROJECT, <http://depts.washington.edu/civilr/seggregated.htm>.

154. *Seattle Sch. Dist. No. 1*, 458 U.S. at 460–61.

155. Wash. Rev. Code § 28.A26.010 (1981).

theory, the Court held that the voter-initiated amendment, which distinguished between the types of decisions within the school board's purview on a racial basis, violated the Equal Protection Clause.¹⁵⁶

Justice Kennedy's attempt to distinguish *Schuette* and *Seattle* failed in several respects. Focusing on state involvement, Kennedy wrote, "[t]he *Seattle* Court . . . found that the State's disapproval of the school board's busing remedy was an aggravation of the very racial injury in which the State itself was complicit."¹⁵⁷ But just as the state in *Schuette* took a position in defense of the anti-affirmative action voter initiative, the state in *Seattle* acted in defense of the anti-busing voter-initiative. In terms of the effect, it is the same. Justice Kennedy's *de jure* distinction is of no consequence because this was not an issue in *Seattle* or in *Schuette*.¹⁵⁸ In both instances the state acted counter to policies that many historically disfavored racial minorities deemed to be in their interest, as indicated by their state court challenges to the initiatives and in their federal court constitutional challenges. The school district's busing policy was designed as a corrective to *de facto* not *de jure* segregation. This is a point that the *Schuette* Court concedes.¹⁵⁹ There was no finding of state sanctioned segregation. The *Seattle* Court's concern regarding the initiative's impact on *de facto* segregation was made clear when it noted that with the adoption of Initiative 350, "[t]hose favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate."¹⁶⁰

Affirmative action policies, as the executive office, courts, Congress, and academic institutions originally conceptualized them, were aimed at addressing inequalities that historically disfavored racial minorities (e.g. African Americans, Native Americans, and Latino Americans) and females experience.¹⁶¹ Numerous scholars have documented benefits of the policies.¹⁶² Yet, as with any complex and challenging problem, it

156. *Seattle Sch. Dist. No. 1*, 458 U.S. at 487.

157. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1633 (2014).

158. *See id.*

159. *Id.* at 1633. (relying upon an allegation made by the NAACP to argue that even though there was no finding of *de jure* segregation by the Seattle Court, *de jure* segregation existed).

160. *Seattle Sch. Dist. No. 1*, 458 U.S. at 475.

161. *See generally* LEITER & LEITER, *supra* note 16 (providing a historical treatment of affirmative action policies).

162. *See* CHRISTOPHER COTTON, BRENT R. HICKMAN & JOSEPH P. PRICE, AFFIRMATIVE ACTION AND HUMAN CAPITAL INVESTMENT: EVIDENCE FROM A RANDOMIZED FIELD EXPERIMENT (Nat'l Bureau of Econ. Research, Working Paper No. 20397) (2014), <http://www.nber.org/papers/w2039>; *see also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF

takes time to counter the damage of discrimination. Racial minorities continue to suffer inequities in education, employment, voting, and healthcare.¹⁶³ Therefore, laws that dismantle affirmative action policies inflict, in the case of racial minorities, “injury by reason of race.”¹⁶⁴ The vociferous expressions of minority dissent to Proposal 2 and other anti-affirmative action measures lend support to this conclusion. Just because the *Schuette* Court chose to ignore the likely consequences of Michigan’s amendment and focus instead on another question (i.e. the question of who gets to decide) does not change the probability based upon impressive empirical data, that the numbers of African Americans and other underrepresented racial minorities at selective colleges and universities will decline.¹⁶⁵

Next, the *Schuette* Court pointed to historical context to assert that *Seattle* may be distinguished based upon the relatively noncontroversial nature of busing, from the perspective of the State, as compared to the controversy surrounding race-conscious admissions. The Court maintained that, the constitutional validity of the remedy of school busing wasn’t an issue presented by the parties or interrogated by the Court¹⁶⁶ in *Seattle*, whereas affirmative action remains highly controversial. But the Court failed to give due attention to the fact that in *Seattle*, the ballot initiative was motivated by some individuals who questioned the appropriateness of the “remedy” of mandatory busing just as in *Schuette*, the ballot initiative was motivated by some individuals who questioned the “remedy” of incorporating race-

THE RIVER (2000); Eric Grodsky & Michal Kurlaender, *Mismatch and the Paternalistic Justification for Selective College Admissions*, SOC. OF EDUC. (May 2013), <http://journals.sagepub.com/doi/abs/10.1177/0038040713500772> (countering Sander’s mismatch arguments); Jamal Watson, *Study Says Affirmative Action Does Not Do a Disservice to Students*, in DIVERSE ISSUES IN HIGHER EDUC. (July 1, 2013), <http://diverseeducation.com/article/54320/#>.

163. See Neil Irwin, Claire Cain Miller & Margot Sanger-Katz, *America’s Racial Divide, Charted*, N.Y. TIMES (Aug. 19, 2014), <http://nyti.ms/1paArKg>; see also KOKCHHAR & FRY, *supra* note 112.

164. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014).

165. See Danny Yagan, *Affirmative Action Bans and Black Admissions Outcomes: Selection-Corrected Estimates from UC Law Schools* (Nat’l Bureau of Econ. Research, Working Paper No. 20361, 2014); see also Ford Fessenden & Josh Keller, *How Minorities Have Fared in States with Affirmative Action Bans*, N.Y. TIMES (Jun. 24, 2016), http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html?_r=0 (stating that “[a] ban on affirmative action could lead to fewer minority admissions, as it has in some states that have already outlawed it”).

166. The *Schuette* Court concludes, “[W]e must understand *Seattle* as *Seattle* understood itself, as a case in which neither the State nor the United States ‘challenge[d] the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior de jure segregation.’” See *Schuette*, 134 S. Ct. at 1633 (quoting *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 n.15 (1982)).

conscious elements into public college admissions decisions. Further, the *Schuette* Court’s analysis ignores the fact that it already thoroughly scrutinized and affirmed the legal and constitutional soundness of academic institutions incorporating race-conscious factors into their decisions in a holistic way in pursuit of diversity.¹⁶⁷ Just as there were dissenters to school busing in *Seattle* who registered their objections to that remedy through the voter initiative, there were dissenters who relied upon and voted for Proposal 2 in Michigan to register their objections to affirmative action. The *Schuette* Court should have accepted the “legitimacy and constitutionality of the remedy” (i.e. affirmative action policies) targeted by the voter initiative because it had previously decided this matter.¹⁶⁸ This approach would be in keeping with the State’s position that it was not asking the Court to revisit the *Grutter* holding¹⁶⁹ and with the Court’s representations that its decision did not involve overruling *Grutter*.¹⁷⁰

Another basis upon which the *Schuette* Court sought to distinguish *Seattle* was the matter of racial classification. The Court’s attention to this issue was necessary for two reasons. First, if the Court concluded that Michigan’s law had a “racial focus” such that it “target[s] a policy or program that ‘inures primarily to the benefit of the minority,’”¹⁷¹ this would satisfy an essential element of the political process doctrine.¹⁷² Second, if Michigan’s amendment could be viewed as drawing upon the concept of race to treat individuals differently, the Court would be compelled to apply strict scrutiny in its evaluation of the law’s constitutionality.¹⁷³

A determination that race was involved in the operation of Michigan’s law would have been favorable to BAMN. What the Court did, instead, was express resistance to the notion of racial classifications altogether. It maintained that in order to make the necessary determinations regarding the effect of Michigan’s law, it would be

167. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

168. *See id.*

169. *Schuette*, 134 S. Ct. 1623.

170. *Id.* at 1630 (stating the case “is not about the constitutionality, or merits, of race-conscious admissions policies in higher education . . . the Court [has] not disturb[ed] the principle that the consideration of race in admissions is permissible, provided that certain conditions are met.”).

171. *BAMN*, 701 F.3d 466, 477 (6th Cir. 2012) (citing *Seattle Sch. Dist. No. 1*, 458 U.S. at 472; *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

172. *Seattle Sch. Dist. No. 1*, 458 U.S. at 474.

173. *See supra* note 12 and accompanying text.

tasked with the unpleasant duty of having to racially classify people¹⁷⁴ and to assess whether certain challenged policies were for the benefit of particular racial minorities.¹⁷⁵ The *Schuette* Court rejected *Seattle*'s approach, reasoning that it would require judges to engage in the loathsome practice of racial stereotyping.¹⁷⁶ Because there were no clear legal standards to assist in this endeavor, the Court maintained that it could not conclude that the challenged legal measure implicated race in a constitutionally impermissible manner.¹⁷⁷

The *Schuette* Court's racial stereotyping argument is not grounded in sound reasoning. Political process theory does not require the judiciary to classify individuals by race. It does, however, require the courts to acknowledge that there are racial and ethnic identities that individuals and groups have historically asserted and continue to do so, and that American society acknowledges those identities. Race is complex. The meaning of race and racial identities are sites of ongoing contestation. Even though racial classifications are socially constructed categories,¹⁷⁸ they are social constructions that are infused throughout American discourse and diurnal life. American society is already racialized.¹⁷⁹ It will take more than the Court's refusal to recognize the classifications to unravel this complicated social structuring of existence.

The *Seattle* Court concluded, in deciding whether Washington's voter initiative had a racial component to it, "it is enough that

174. *Schuette*, 134 S. Ct. at 1634.

175. *Id.*

176. *Id.* ("It cannot be entertained as a serious proposition that all individuals of the same race think alike. Yet that proposition would be a necessary beginning point were the *Seattle* formulation to control.")

177. *Id.*

178. Ian Haney Lopez offers a rich and complex definition of race:

[A]s a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry. I argue that race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. In other words, social meanings connect our faces to our souls. Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions. As used in this Article, the referents of terms like Black, White, Asian, and Latino are social groups, not genetically distinct branches of humankind

Ian Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R. –C.L. LAW REV. 6, 7 (1994).

179. The Merriam-Webster Dictionary defines "racialization" as: "the act or process of imbuing a person with a consciousness of race distinctions or of giving a racial character to something or making it serve racial ends." *Racialization*, MERRIAM-WEBSTER UNABRIDGED DICTIONARY (2016), <http://www.merriam-webster.com/dictionary/racialization>.

minorities may consider [the challenged law or practice] to be ‘legislation that is in their interest.’”¹⁸⁰ In response to both questions concerning the identity of the racial groups targeted and the immediate intended beneficiaries, courts will have the benefit of the self-declarations of the litigants. Furthermore, regarding the latter inquiry, courts have the benefit of the legislative history of the laws, empirical data documenting how various racial groups perceive the legal measure under scrutiny, and the arguments asserted by the groups. The concept of “inur[ing] primarily to the benefit of the minority” is built into affirmative action policies.¹⁸¹ Regardless of how racial minorities would vote on an anti-affirmative action measure, it suffices that a challenge to the measure is raised asserting that the political power of some racial minorities is substantially impaired. If courts fail to thoroughly examine this claim, they, in effect, are denying the group any proper relief. The group’s representation within the democracy is diminished. The *Schuette* Court’s rejection of the racial focus element of the political process doctrine is tantamount to telling the BAMN plaintiffs, it does not matter that you say you are African Americans, Latinos, and Native Americans claiming that admissions policies which allow for considerations of race under restricted circumstances operate in your benefit. Because the Court cannot make that determination and has no legal standards for doing so, your argument has no merit.¹⁸² That position strips racial minorities who are attempting to challenge a measure that they deem counter to their political and legal interests of their voices. Lani Guinier invites public institutions to practice racial literacy.¹⁸³ Courts also need to adopt this practice of being cognizant of

180. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 395 (1969) (Harlan, J., concurring)).

181. The National Conference of State Legislatures defines “affirmative action” as:

In institutions of higher education, affirmative action refers to admission policies that provide equal access to education for those groups that have been historically excluded or underrepresented, such as women and minorities.

See *Affirmative Action: Overview*, NAT’L CONF. OF ST. LEGISLATURES (Feb. 7, 2014) <http://www.ncsl.org/research/education/affirmative-action-overview.aspx>.

182. This conclusion is supported by the *Schuette* Court’s reasoning:

[T]he court would next be required to determine the policy realms in which certain groups—groups defined by race—have a political interest. That undertaking, again without guidance from any accepted legal standard, would risk, in turn, the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage. There would be no apparent limiting standards.

Schuette, 134 S. Ct. at 1635.

183. Guinier explains:

A racially literate institution uses race as a diagnostic device, an analytic tool, and an instrument of process. As a diagnostic or evidentiary device, race helps identify the

America's racial history and the ways in which race pervades institutions and practices. Adjudicating cases from that perspective will ensure that courts appropriately interrogate legal measures that have the appearance of formal equality but the effect of unequal treatment corresponding to race.

Following *Seattle*'s guidance, the *Schuette* Court could have determined that Michigan's amendment implicated race by considering the law's language, genesis, and operation. Even though *Seattle*'s Initiative 350 did not expressly mention race or the policy of desegregation,¹⁸⁴ the Court in *Seattle* determined that there was evidence in the record to support the conclusion that the initiative was a response to the school district's plan to racially integrate schools by assigning children to various schools and busing them to designated locations.¹⁸⁵ Just as the *Seattle* Court looked to those factors, the *Schuette* Court could have done the same to conclude that Proposal 2 directly targeted race in that it was an anti-affirmative action measure. A finding that the challenged amendment draws upon race is even more supported in *Schuette* when one compares the language of both legal measures. Michigan's Proposal 2 used the word "race" whereas *Seattle*'s Initiative did not. Nonetheless, the *Seattle* Court determined that the conclusion regarding the initiative's racial focus was warranted. The Court reasoned that where "the political process or the decisionmaking mechanism used to address racially conscious legislation – and only such legislation – is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on distinctions based on race.'"¹⁸⁶

Given that *Schuette* misapplied *Reitman* and failed to distinguish *Hunter* and *Seattle*, the Court should have applied the political process doctrine. Upon determining that Michigan's amendment had a racial

underlying problems affecting higher education. Racial literacy begins by defining race as a structural problem rather than a purely individual one. Race reveals the ways in which demography is often destiny – not just for people of color, but for working-class and poor whites as well. Race constantly influences access to public resources, while also revealing the influence of class and geographical variables. Racial literacy, therefore, continuously links the underrepresentation of blacks and Latinos to the underrepresentation of poor people generally. At a minimum, it reminds public institutions of higher learning that 'the idea of access is deeply embedded in [their] genetic code' and thus, the underrepresentation of certain demographic groups illuminates their failure to fulfill their public responsibilities.

Guinier, *supra* note 30, at 201–02 (quotation marks and citation omitted).

184. See *Seattle Sch. Dist. No. 1*, 458 U.S. at 489; see Wash. Rev. Code § 28.A26.010 (1981).

185. See *Seattle Sch. Dist. No. 1*, 458 U.S. at 485–87.

186. *Id.* at 485 (citations omitted).

focus because it targeted affirmative action and that the amendment levied a special burden on certain minorities by removing race-conscious school policy decisions from the province of the board of trustees to a “new and remote level of government,”¹⁸⁷ the Court should have evaluated the constitutional soundness of the amendment in terms of strict scrutiny pursuant to the requirements of the political process doctrine and Equal Protection Clause precedent.¹⁸⁸

3. Strategic Maneuvers of the Court to Neutralize the Application of Disparate Impact Theory to Racial Inequalities in Education

The *Schuette* decision can be explained in part by the Court’s recognition of the strategic importance of the political process doctrine and the doctrine’s reliance, at times, on disparate impact theory.¹⁸⁹ The theory incorporates the disparate impact concept in that the inquiry does not stop at confirming whether formal equality has been achieved. Instead, it allows for the examination of the effect of the challenged legal provision on discrete and insular groups to assess whether it satisfies the Equal Protection Clause. Ely conceptualized judicial review of laws from a political process perspective as allowing the judiciary to draw “inference[s] of unconstitutional motivation” based upon “pattern of impact.”¹⁹⁰ From Ely’s perspective, courts may invalidate laws even when those laws formally require that individuals be treated equally.¹⁹¹

For example, in *Hunter*, the Court concluded that even though the amendment at issue was facially neutral, it nonetheless functioned to distinguish individuals on the basis of race, separating “those groups who sought the law’s protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends.”¹⁹² The *Schuette* Court recognized this relationship between the political process framework and disparate impact theory.¹⁹³ For this

187. *Id.* at 483.

188. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.”).

189. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1625 (2014). (conceding that Proposal 2 would not survive the doctrine).

190. ELY, *supra* note 6, at 139.

191. Ely concludes that the formal neutrality of the law is insufficient to shield it from judicial invalidation. *See generally* ELY, *supra* note 6, at 135–79.

192. *Hunter v. Erickson*, 393 U.S. 385, 390 (1969).

193. *Schuette*, 134 S. Ct. at 1627, 1630–38.

reason, it tried to dilute the doctrine, first by suggesting that there is a discriminatory intent requirement attached to it¹⁹⁴ and second by suggesting that the cases that gave rise to the doctrine should be overturned or not extended further.¹⁹⁵ Contrary, to the intimation of the *Schuette* Court, the political process doctrine does not have a requisite discriminatory intent element. As *Seattle* made clear, “[w]e have not insisted on a particularized inquiry into motivation in all equal protection cases.”¹⁹⁶ Therefore, establishing that the motivations prompting the adoption of the challenged law are of an invidious racial nature is not a prerequisite for a successful equal protection challenge by means of the political process theory.¹⁹⁷

4. Justice Kennedy’s New Replacement Standard for Strict Scrutiny

Julian Eule highlights Article VI as the source of the obligation of all government actors to operate in a manner that conforms with and sustains the United States Constitution.¹⁹⁸ The obligation imposes principled limitations on lawmakers and interpreters of this foundational document. As Eule persuasively argues, a comparable restraining element is absent in the case of the electorate.¹⁹⁹ This makes the *Schuette* Court’s conclusion all the more troubling.²⁰⁰ Instead of applying strict scrutiny, the *Schuette* Court adopted a deferential posture. In essence, the Court applied a rational basis standard.²⁰¹ Justice Kennedy, however, made a statement that invites the query of

194. *Id.* at 1625, 1629–38.

195. *Id.* at 1635–36.

196. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–85 (1982).

197. In support of this conclusion, the *Seattle* Court quoted *Personnel Administrator of Massachusetts v. Feeney*, stating that “[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.” *Id.* at 485 (quoting *Feeney*, 442 U.S. 256, 279 (1979)).

198. Eule, *supra* note 7 at 1536. Article VI provides in relevant part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI.

199. Eule, *supra* note 7, at 1537 (“Article VI imposes the obligations of constitutional compliance on public officers, not the electorate.”).

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

201. The Court does not expressly state the standard according to which it evaluated Michigan’s amendment. *See id.* However, its deferential posture towards the amendment, which is evident throughout the decision, and its conclusion that there is no legal authority that would permit it to invalidate the law, suggest that it applied a rational basis standard. *See id.*

whether the Court adopted a new standard of judicial review where racial minorities who bring equal protection challenges are concerned. His words lend support to Reva Siegel's claim that there is a disturbing division in the way that the Court has interpreted the Equal Protection Clause, since *Brown v. Board of Education*, to extend extraordinary protection to the rights of the majority population and limited protection to "discrete and insular" racial minorities.²⁰² Justice Kennedy opines that, "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on *decent and rational grounds*."²⁰³

If one may read "decent and rational" grounds as the replacement standard for strict scrutiny when laws that threaten the constitutional protections and guarantees of racial minorities are challenged, it is ill formed and fails to assure any protection whatsoever. In applying this lenient standard, the Court failed to fulfill its role of engaging in "representation-reinforcing . . . judicial review."²⁰⁴ One can read Kennedy's words as stating, if a majority of voters decide that racial minorities are not entitled to participate equally in the political process that determine matters which profoundly shape such minorities' lives, that is constitutionally permissible. Yet, such an outcome clearly contravenes the equal protection and political participation principles established in the Constitution and certain statutes.²⁰⁵

5. The U.S. Supreme Court's Receptiveness to the Political Process Doctrine in Other Contexts

In other contexts, the U.S. Supreme Court has been receptive to political process arguments. *Romer v. Evans*²⁰⁶ offers a revealing glimpse into the Court's view of voter initiatives that infringe upon the equal protection rights of other groups besides those which are racially constructed²⁰⁷ and it sheds light on what the Court deems to constitute

202. Siegel, *supra* note 13.

203. *Schuette*, 134 S. Ct. at 1637 (emphasis added).

204. ELY, *supra* note 6, at 87.

205. The Colorado Supreme Court drew a similar conclusion:

[T]he facts remain that '[o]ne's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcomes of no elections,' *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943), and that '[a] citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be.' *Lucas v. Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 736, 84 S. Ct. 1459, 1474, 12 L.Ed.2d 632 (1964).

See *Evans v. Romer (Evans I)*, 854 P.2d 1270, 1286 (Colo. 1993) (en banc).

206. *Romer v. Evans*, 517 U.S. 620 (1996).

207. Referencing numerous Colorado codes, the *Romer* Court identifies the protected class

animus. *Romer* involved a voter-initiated amendment to Colorado's constitution.²⁰⁸ According to Colorado's initiative process, in order to qualify a proposal for presentation to the general electorate, proponents must obtain "signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates of the office of secretary of state at the previous general election."²⁰⁹ Colorado voters and others drafted an amendment to their state constitution, known as Amendment 2,²¹⁰ in response to a series of municipal and state laws enacted prohibiting discrimination on several bases, including sexual orientation.²¹¹ After obtaining the required number of signatures, the secretary of state placed the amendment on the ballot for consideration by Colorado's voters. Amendment 2 "passed by a margin of 813,966 to 710,151 (53.4% to 46.6%)."²¹²

Several groups challenged Amendment 2 alleging that it hindered their ability to participate equally in the political process thereby impermissibly burdening their right to equal protection.²¹³ The Colorado Supreme Court in *Evans I*, relying upon *Hunter*, concluded that, "*Hunter* applies to a broad spectrum of discriminatory legislation"²¹⁴ not just racially-focused legislation that is discriminatory. The court further reasoned that, where an "identifiable group" is uniquely burdened in its ability to participate equally in the political process, the political process doctrine governs, and strict scrutiny of the challenged legal measure is warranted.²¹⁵ Relying upon that approach,

as "homosexual persons or gays and lesbians." *Id.* at 624.

208. *Evans I*, 854 P.2d at 1272.

209. COLO. CONST. art. V §1 para. 2.

210. Colorado Amendment 2 provides:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. amend. II.

211. *Romer*, 517 U.S. at 629 (noting Colorado's implementation of a variety of ordinances and statutes that "set forth an extensive catalog of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates – and, in recent times, sexual orientation").

212. *Evans I*, 854 P.2d at 1272.

213. *Id.* at 1273.

214. *Id.* at 1282.

215. *Id.* at 1276.

the Colorado Supreme Court upheld the trial court's issuance of a preliminary injunction staying the enforcement of Amendment 2.²¹⁶ The case came before the state supreme court again in *Evans II*, at which time that court affirmed that strict scrutiny was the appropriate standard of judicial review²¹⁷ and upheld the lower court's grant of a permanent injunction precluding the enforcement of Amendment 2 because of the government's failure to satisfy the requirements of strict scrutiny.²¹⁸ The United States Supreme Court affirmed the state supreme court's holding under different rationales.²¹⁹

Timing,²²⁰ the concept of neutrality,²²¹ the scope of Amendment 2 extending beyond the "private sphere"²²² requiring application to "general laws and policies that prohibit arbitrary discrimination in governmental and private settings,"²²³ and the singular focus of the amendment on persons of "homosexual, lesbian, or bisexual orientation" signaling animus²²⁴ are all rationales that the Court offered for its decision. The difference in justifications complicated *Romer*'s use as a valuable precedent for BAMN but it by no means disqualified it. Notably, the Court's reasoning with respect to the singular focus of the challenged law trained on a specific class and the different process the law subjected that class to if its members wished to restore the measures designed to ensure their equality evinces the influence of political process theory.²²⁵ If the Court had considered similar factors

216. *Id.* at 1286 ("Because the defendants and their amici have not proffered any compelling state interest to justify their enactment of Amendment 2 at this stage of the proceedings as required under the strict scrutiny standard of review [], we conclude that plaintiff's have met their burden.") (citations omitted).

217. *Evans v. Romer (Evans II)*, 882 P.2d 1335, 1341 (Colo. 1994) ("We reaffirm our holding that the constitutionality of Amendment 2 must be determined with reference to the strict scrutiny standard of review.").

218. *Id.* at 1350.

219. *Romer v. Evans*, 517 U.S. 620, 633–36 (1996). Although the Court did not explicitly reference political process theory, *Romer* is relevant to political process theory precedent because the Court relied upon aspects of the theory to reach its holding. *See id.*

220. *Id.* at 623–24.

221. *Id.* at 623.

222. *Id.* at 629.

223. *Id.* at 630.

224. *Id.* at 624.

225. The *Romer* Court's reliance upon the concepts of political process theory is particularly evident in two places in the decision. The Court noted that "[t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 627. In another place, the Court concludes that as a result of Amendment 2, "[h]omosexuals are forbidden the safeguards that others enjoy or may seek without restraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability." *Id.* at 631.

in *Schuette*, the result would have been the invalidation of Proposal 2. Just as the timing of Colorado's Amendment closely followed the passage of local and state laws prohibiting discrimination based upon sexual orientation, Proposal 2 was an immediate response to *Grutter*. Colorado's amendment impacted the quality of life for the LGBT community, in the areas of buying homes, shopping, securing employment, etc. So too, Michigan's Proposal 2 has had widespread reverberating negative effects—not only for disfavored racial minorities, but also for society as a whole. This is because Proposal 2 impacts equal access to education, which is essential to achieving the important societal goals of racial integration, having a well-educated polity, and having open pathways to assuming gainful employment and roles of leadership. Further, it forecloses avenues that were previously available to marginalized racial minorities to participate in the creation of educational policies that affect the quality of education available to them. Upholding Proposal 2 does not result in a neutral application of the laws; it preserves the status quo of racial inequality.

The *Romer* Court focused on the way that Amendment 2 operated to single out individuals based upon their sexual orientation. Specifically, the Court noted that the amendment “identifies persons by a single trait and then denies them protection across the board.”²²⁶ The Court also found credible the arguments asserting that Amendment 2 was motivated by animus towards the LGBT community.²²⁷ Because its origins were grounded in animus, the Court held that no legitimate interest could be stated for it.²²⁸ Regarding its conclusions that animus motivated the passage of Amendment 2, the Court considered both the singling out nature of the measure and the timing of placing the proposal on the ballot.²²⁹

As a preliminary matter, demonstrating that animus motivated the contested law is not a requirement necessary to assess the constitutional validity of a measure under political process theory as it was initially conceived²³⁰ and applied in race-based equal protection

226. *Id.* at 633–35.

227. *Id.* at 632.

228. The Court concluded the law must be held invalid because it was “born of animosity” and “a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* at 634–35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)).

229. *Romer v. Evans*, 512 U.S. 620, 632 (1996).

230. The *Carolene Products* footnote does not identify intentional discriminatory motivation as the predicate for judicial intervention. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Instead, the emphasis was on the failings of the political system which can operate to repeatedly discount the political interests of discrete and insular minorities or bar them from

challenges.²³¹ Accordingly, even if there is no evidence of the intention to discriminate on the basis of race, if the implementation of the legal measure results in unequal treatment in that respect, then strict scrutiny is required to assess whether it is legally justified.²³² In its future rulings on matters involving political process theory, the Court should not adopt an animus element. Introducing an intent standard divests the political process argument of its power and ensures that it will be difficult to invalidate voter initiatives that burden minority groups.

In any event, just as the Court found animus to be at the root of Amendment 2, it could have found that it was present in the *Schuette* case. There are similarities between the motivations prompting the state and local governments of Colorado to implement antidiscrimination laws to prohibit sexual orientation discrimination and the reasons prompting the federal government and higher education academic institutions to adopt laws and policies designed to protect racial minorities and ensure equal treatment for them. The federal government recognized in adopting civil rights legislation that African Americans were experiencing racial discrimination in employment, education and other venues in which they needed protection.²³³ American universities and colleges designed affirmative action policies for a variety of reasons including expanding access to their institutions for underrepresented ethnic and racial groups.²³⁴ Therefore, crafting legislation designed to eradicate such policies where there remain significant disparities in educational opportunities can be viewed as an intention to cause harm to those groups that immediately benefit from such measures.

Writing for the majority in *Romer*, Justice Kennedy concluded that the effect of Amendment 2 was to prohibit the maintenance or future adoption of any laws designed to protect gay people from

participating in the system altogether.

231. Neither *Hunter* nor *Seattle* list racial animus as a requirement of the theory. See *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982). Notably, racial focus is not the same as racial animus. Affirmative action policies designed to address racial inequalities may have a racial focus without being motivated by a malevolent purpose to inflict harm.

232. As the *Hunter* Court reasoned regarding the charter amendment, “[A]lthough the law on its face treats Negro and white Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority.” *Hunter*, 393 U.S. at 391.

233. See Civil Rights Act of 1964 Title VI, 42 U.S.C. § 2000d (2012).

234. See Caroline Keeler, *The Evolution of Affirmative Action in Higher Education*, in EDUC 300: EDUCATION REFORM, PAST, AND PRESENT (May 3, 2013), <http://commons.trincoll.edu/edreform/2013/05/the-evolution-of-affirmative-action-in-higher-education/>; see also CHARLES DALE, FEDERAL AFFIRMATIVE ACTION LAW: A BRIEF HISTORY (2005).

discrimination, which bore no reasonable relationship to the government's purported legitimate reasons. *Romer* demonstrates that the Court is capable of recognizing identifiable groups who assert their interests collectively²³⁵ and is capable of applying the concepts of political process theory, as necessary, to hold harmful disabling laws constitutionally invalid. The Court needs to adopt a similar posture in the future when evaluating anti-affirmative action ballot measures.

II. THE RISE OF THE VOTER INITIATIVE IN THE EDUCATION REALM AND THE ATTENUATING EFFECTS ON THE RIGHTS OF RACIAL MINORITIES

Race-conscious legal measures, policies, and programs are undergoing a siege. The voter initiative is one popular means of attack; another vehicle is legislative action.²³⁶ Numerous states including, California, Michigan, Arizona, Washington, Nebraska, and Oklahoma, have relied upon direct democracy mechanisms to prohibit affirmative action.²³⁷ When Florida's former Governor Jeb Bush led the charge against affirmative action with his One Florida executive order, minorities were effectively shut out of weighing in on the process because the governor implemented it "without inviting public comment."²³⁸

Derrick Bell, an early prognosticator of the dangers voter initiatives and referenda pose for racial minorities,²³⁹ concluded that such mechanisms "operate as a nonracial façade covering distinctly discriminatory measures."²⁴⁰ Many of his insights have been borne out in the cycle of actions concerning matters of inequality and

235. *Romer v. Evans*, 512 U.S. 620, 635 (1996).

236. In New Hampshire, for example, the legislature enacted a law prohibiting affirmative action in public employment and education. See New Hampshire, Chapter 227, HB 623, (2011 Session). See Peter Schmidt, *New Hampshire Ends Affirmative Action Preferences at Colleges*, CHRONICLE OF HIGHER EDUCATION (Jan. 4, 2012), <https://chronicle.com/article/New-Hampshire-Ends/130196/>.

237. For a list of states that have relied upon ballot initiatives to challenge affirmative action, see *Affirmative Action: State Action*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>. In 1998 Washington state adopted a voter-initiated ban on affirmative action, followed by Michigan in 2006, Nebraska in 2008, Arizona in 2010, and Oklahoma in 2012. See *id.*

238. See Peter T. Kilborn, *Jeb Bush Roils Florida on Affirmative Action*, N.Y. TIMES, February 4, 2000, <http://www.nytimes.com/2000/02/04/us/jeb-bush-roils-florida-on-affirmative-action.html>.

239. Bell, *supra* note 4.

240. *Id.* at 23.

education.²⁴¹ This defeating cycle begins with the well-intentioned race-conscious admissions policies designed to address inequalities and achieve ethnically and racially diverse student populations.²⁴² The cycle progresses to the lawsuits challenging the policies.²⁴³ The lawsuits are often framed in terms of the Equal Protection Clause.²⁴⁴ The cycle continues on through Supreme Court decisions, which either uphold the school's race-conscious policy but place severe restrictions on its use,²⁴⁵ or strike the policy down.²⁴⁶ If the Court upholds the policy, the next stage is the voter initiative that becomes a state law prohibiting affirmative action.²⁴⁷ In some instances, following the enactment of a state law, there is a later stage involving opponents of the state ban who challenge its constitutionality.²⁴⁸ The grim outcome of the cycle is that affirmative action is in danger of being eradicated as an option to address racial inequalities in education even though its objectives are far from complete.

Ballot initiatives present a particularly vexing challenge for civil rights advocates who seek to accomplish integrationist, education

241. *Id.* at 11–12.

242. *Id.* at 6.

243. *Id.* at 7.

244. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 275 (1978); Gratz v. Bollinger, 539 U.S. 244, 249–50 (2003); Grutter v. Bollinger, 539 U.S. 306, 317 (2003); Fisher v. Univ. of Tex. (*Fisher I*), 133 S. Ct. 2411, 2415 (2013); Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2205 (2016).

245. *See Fisher I*, 133 S. Ct. 2411 (remanding the case to the Fifth Circuit for the application of strict scrutiny to the University of Texas' admissions policies); *Grutter*, 539 U.S. 306 (upholding the use of race in admissions decisions but only as one of numerous “plus factors” that may be considered in evaluating candidates); *Fisher II*, 136 S. Ct. 2198 (2016) (upholding Texas' narrowly tailored incorporation of race as a factor in its admissions decisions but placing severe limits on when race can be considered). Because the jurisprudence is locked within a cycle, even the Court's holding in *Fisher II*, which is a positive outcome for affirmative action, provides insufficient protection for race-conscious policies because the next step in the process for Texas may be an anti-affirmative action ballot initiative. *See id.*

246. *See Gratz*, 539 U.S. at 275–76 (striking down Michigan's undergraduate race-conscious admissions policy); *Bakke*, 438 U.S. 265 (holding the school's race-sensitive admissions policies constitutionally-invalid).

247. *See* CAL. CONST. art. 1, § 31(a). The anti-affirmative action Proposition 209 “passed by a margin of 54 to 46 percent . . . [N]early 9 million Californians cast[] ballots, 4,736,180 voted in favor of the initiative and 3,986,196 voted against it.” *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 697 (9th Cir. 1997). The Ninth Circuit upheld the amendment in the *Wilson* case. *Id.* Several years later, in an applied challenge, the Ninth Circuit held that the equal protection claim was precluded by the court's previous 1997 ruling. *See Coal. for Econ. Equity v. Brown*, 674 F.3d 1128 (9th Cir. 2012)

248. The *Wilson*, *Brown*, and *Schuette* cases are examples of challenges to anti-affirmative action legal measures. *See Wilson*, 122 F.3d 692; *Brown*, 674 F.3d 1128; *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

access, and diversity goals,²⁴⁹ in part, through affirmative action. Empirical evidence suggests that when the majority white population is presented with ballot initiatives that are deemed counter to the interests of certain disfavored minority groups, they are likely to vote in favor of adopting them.²⁵⁰ Todd Donovan posits that whereas ballot initiatives that pertain to the populace at large (e.g. proposed laws on taxes) are likely to be voted upon based upon perceived economic interest. He states, “[r]eferendums on minority rights have the capacity to be largely about approving or disapproving members of a minority group[] . . . Indeed, awareness of which group is affected by a policy may itself be a heuristic that voters use when deciding on a proposal[].”²⁵¹ Racial minority groups who have experienced oppression and disenfranchisement within American society are unlikely to fare well when issues that are perceived to be in their interest are turned over to a plebiscite.²⁵² Where the issue is deemed to be detrimental to them, however, it is likely to pass by a majority vote.²⁵³

There are other reasons to be concerned about direct democracy. The characteristics of voter initiatives make them inimical to constitutional freedoms and guarantees. The contemporary “initiative process . . . lacks some of the critical elements of the representative system of government, including debate, deliberation, flexibility,

249. In her majority opinion for *Grutter*, Justice O’Connor enumerates a number of positives associated with diversity (including racial diversity) that make it a compelling interest such as, “promot[ing] learning outcomes,” “prepar[ing] students for an increasingly diverse workforce,” facilitating the “military’s ability to fulfill its principle mission to provide national security,” and achieving the nation’s civic objectives.” *Grutter*, 539 U.S. at 330–31 (citing various amici briefs). O’Connor further writes that, “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. *Id.* at 330–32.

250. See, e.g., Barbara Gamble, *Putting Civil Rights to a Vote*, 41 AM. J. POL. SCI. 245 (1997); Eule, *supra* note 7; Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1745 (2013) (“In sum, previous election results suggest that voters have not been sympathetic to minority rights and interests when questions affecting those issues were placed on the ballot.”); David Magleby, *Direct Legislation in the American States*, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY (David Butler & Austin Ranney eds., 1994)

251. Donovan, *supra* note 250, at 1735 (citations omitted).

252. Donovan claims that “[d]ecision making on issues that affect a clearly identifiable group, moreover, may be structured by positive or negative affect for the group.” Donovan, *supra* note 250, at 1737 (citation omitted).

253. See Donovan, *supra* note 250, at 1778 (concluding that “[m]inority rights and popular opinion are often in conflict in democratic political systems.”). See also John C. Brittain, *Direct Democracy by the Majority Can Jeopardize the Civil Rights of Minority or Other Powerless Groups*, 1996 ANN. SURV. AM. L. REV. 144 (1996) (reviewing scholarship and cases supporting his argument that direct democracy harms the rights of minorities); Magleby, *supra* note 250.

compromise and transparency.”²⁵⁴ Further, voter initiatives are susceptible to manipulation by special interest groups.²⁵⁵ The events surrounding Proposal 2, as discussed in the following section, clearly illustrate this point. The harm not only affects marginalized racial minorities, but also the Constitution and the goal of equal representation. Privileging direct democracy vehicles for matters concerning equal protection of the laws and voting rights undermines the principle of one person, one vote and the very notion of minority political representation.²⁵⁶

The legislative framework is preferable and more egalitarian, with respect to politically disadvantaged racial minorities, than a voter-initiative constitutional amendment process for several reasons.²⁵⁷ It adds a layer of protection to the constitutional rights being challenged. Legislatively adopting laws allows for an airing of the issues that will include advocates articulating minority interests, as identified by the advocates’ constituencies. Bruce Cain and Kenneth Miller posit that, when constitutional amendments and other laws are reviewed by elected officials in the legislature “[it] permits minorities to aggregate and leverage their strength; publicly recorded votes and electoral competition build accountability into the system and the mere presence

254. See TASK FORCE REPORT, *supra* note 52, at 4 (2002). Regarding transparency, proponents of the initiatives often do not heavily publicize them to make their passage easier. For example, in New Hampshire, State representative Gary Hopper who co-sponsored anti-affirmative action legislation there, attributed its successful adoption to the limited press it received and the incorrect assumptions of its likely opponents that it would be rejected. In his interview with State Representative Hopper, Peter Schmidt reported:

[Hopper] said he believes that supporters of affirmative action might have been lulled by the state’s defeat of similar measures in the past. When he first co-sponsored such a bill in 2000, he said, the legislature’s meeting rooms ‘were full of people fighting against it.’ This time around, he speculated, ‘people were caught off guard’ and ‘did not pay any attention’ because they assumed such a measure would fail.

See Schmidt, *supra* note 236.

255. Magleby, *supra* note 250.

256. Reynolds v. Sims, 377 U.S. 533, 564 (1964) (“[E]ach citizen has an inalienable right to full and effective participation in political processes of his state’s legislative bodies . . . full and effective participation . . . requires that each citizen has an equally effective voice in election of members of his state legislature.”).

257. For a counter view, see scholarship questioning the efficacy of state legislatures in protecting the rights of racial minorities. For example, Matthew Streb argues that the legislative record on minority issues as compared to voter initiative outcomes needs to be meticulously studied before any conclusions can be drawn regarding which mechanism is more favorable and fairer to minorities. See MATTHEW J. STREB, *RETHINKING AMERICAN ELECTORAL DEMOCRACY* 66 (3d ed. 2016). Richard Briffault comments that “it is difficult to argue that historically minorities—in particular, blacks and other racial minorities—did all that well in state legislatures. Racial discrimination was largely a product of state legislative action, not initiative votes.” Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1364 (1985).

of minorities in the legislature may deter the worst forms of legislative prejudice.”²⁵⁸ Legislative debate also positions the issues for review by courts. Litigants may draw upon the legislative record, as they prepare their equal protection cases. In turn, this information can provide useful source material for judges to comprehend the history of the legislation, its objectives, and the costs and benefits to the political interests involved.

In *Schuetz*, those organizing the voter initiative relied upon the unfiltered amendment process. Even though some groups raised issues regarding the fairness and integrity of the process early on, none of the courts adequately addressed them. The *Schuetz* Court developed a myopic vision of democracy when it placed its faith in a distorted process. When you permit state constitutional amendment through voter initiatives that ultimately impact on federal constitutional protections in place for racial minorities (and others), it potentially renders those protections ineffectual. This is true especially where courts adopt a deferential posture towards the amendments. The nuances, historical background, and intentions behind the Equal Protection Clause and race-conscious policies are not given due consideration by the larger populace. Failing to take these considerations into account can result in the invalidation of policies and programs geared towards achieving racial equality.²⁵⁹

III. RECOMMENDATIONS

A. *Breaking the Cycle*

The cycle that the fight for educational equality is enmeshed in can be broken by exposing the perils voter initiatives pose to a well-functioning representative republican government, by limiting their use, by challenging the rhetoric that casts direct democracy as the ultimate fulfillment of egalitarian objectives, by holding courts accountable for fulfilling their constitutional duties, and by positing an alternative vision of participatory democracy that aims at substantive equality. This Article’s recommendations are developed in three parts. One part pertains specifically to courts and their responsibilities in

258. Cain & Miller, *supra* note 3, at 50.

259. In another article, Cain and Miller reach a similar conclusion, commenting that “[i]nitiative government leads to a higher level of policy responsiveness to the median statewide voters, but it produces biases against individual and minority rights—precisely what the checks and balances system was meant to protect.” *Id.* at 42.

reviewing direct democracy instruments that infringe upon constitutional rights. The second part refers to voter initiatives. The third part concerns the public officials and administrators charged with the formulation of school policies.

1. The Court's Role in Achieving Substantive Equality in Education and the Participation of Racial Minorities in Public Policy Decisionmaking

Courts have an instrumental role to play in achieving substantive equality in education and in voting. The American legal regime permits individuals to craft initiatives on a wide range of issues that implicate federal constitutional principles and guarantees,²⁶⁰ but when those issues pertain to racial equality, the Court must treat them with circumspection, not deference. As *Schuette* demonstrates, voter initiatives can be structured and wielded in ways that limit the ability of marginalized racial minorities to fully participate in the democratic process and that effectively deny them political representation. If left unchecked, such mechanisms have the potential to undermine the Supreme Court's interpretations of the Constitution and statutory laws regarding equality principles. The Court in *Reynolds v. Sims*, emphasized that, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."²⁶¹ An informed judiciary that is versed in the Constitution and relevant state constitutions will render better decisions and engage in the proper balancing analysis as compared to the electorate. The arguments that litigants present to the court will be framed in terms of constitutional principles and other legal sources. By way of written opinion, courts will offer their reasoning in those terms or by reference to precedent. The exercise of judicial reasoning within this framework of legal doctrines, laws, and constitutional principles provides for a more thorough consideration of contested laws than voters who must decide on an initiative.

When confronted with a voter initiative, like Proposal 2, that seeks to undo Supreme Court precedent within a particular state, precedent should prevail because of the federal constitutional interests at stake. As the Court's recognized in *Gomillion v. Lightfoot*, "[w]hen a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried

260. See TASK FORCE REPORT, *supra* note 52.

261. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

over when state power is used as an instrument for circumventing a federally protected right.”²⁶² The right at stake is the ability of racial minorities to engage in meaningful political participation without being subjected to disenfranchising barriers that assume the shape of formal equality.

While it is important not to rely solely on courts for solutions, courts are an integral part of ensuring that representative government functions effectively for all. Exacting judicial review supported by state laws is necessary to strike down initiatives that have a disenfranchising effect or that are tainted by fraud.²⁶³ Courts are particularly important where there are no designated local or state agencies in place to counter the possibility that individual constitutional rights did not get fair and due consideration.

The *Schuette* case highlights the significance of the political process argument as a tool to ensure the equal representation of disfavored minority political interests. The plurality’s decision was seriously deficient in its treatment of this theory and left unresolved many questions regarding: the standard of judicial review when racial classifications are involved, federalism and the Court’s precedents and authority relative to state powers, and the political process doctrine.²⁶⁴ While the Court may be resistant to this theory in part because it entails disparate impact analysis, accomplishing substantive equality requires an examination of the effects of laws rather than merely looking to how they are facially characterized.²⁶⁵ It is necessary for the Court to affirm its power and authority to undertake the relevant analysis. Political process theory is an essential mechanism to counter majoritarian actions that subordinate the federal constitutional rights of racial minorities to the political will of the majority. For this reason, courts

262. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960); see *Reynolds*, 377 U.S. at 566.

263. This Article concurs with Derrick Bell regarding the level of judicial review necessary to furnish the requisite protection. Bell writes, “The evidence, both historical and contemporary, justifies a heightened scrutiny of ballot legislation similar to that recognized as appropriate when the normal legislative process carries potential harm to the rights of minority individuals.” Bell, *supra* note 4, at 23.

264. See Mark Strasser, *Schuette Electoral Process Guarantees and the New Neutrality*, 94 NEB. L. REV. 60 (2015) (discussing the confusion the *Schuette* opinion has caused in the areas of electoral processes, equal protection, and political process theory).

265. Christopher Schmidt engages in a textual and historical analysis of the word “equal,” the Fourteenth Amendment, and equal protection jurisprudence to conclude that in order to properly apply the Equal Protection Clause, the U.S. Supreme Court must recognize disparate impact theory. See generally Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of ‘Equal’ Requires a Disproportionate Impact Analysis When Laws Unequally Affect Racial Minorities*, 12 CORNELL J.L. & PUB. POL’Y 85 (2002).

should be receptive to the argument if it is presented in future cases.²⁶⁶

2. Restricting and Reforming Voter Initiatives

The next set of recommendations primarily pertains to voter initiatives. Direct democracy, without judicial review, is not the appropriate vehicle to decide matters concerning equal protection and voting rights guarantees. Due to the patriotic, idealistic, and nostalgic sentiments of the electorate, revising voter initiatives may prove to be taxing.²⁶⁷ Nonetheless, reform is desperately needed. The empirical evidence identifying the costs they inflict on the stability and proper functioning of the political system should provide substantial fuel for any reform campaign.²⁶⁸ Since it will be difficult to persuade states to reconfigure the parameters of ballot initiatives according to the recommendations herein, courts should be prepared to deter their use for the aforementioned purposes by invalidating them where it can be demonstrated that the burdens they place on federally protected rights are greater than the state interest advanced and any asserted interest in preserving direct democracy.

Despite the challenging aspects of reforming voter initiatives, states should make an effort to do so, consulting the best practices and recommendations of the National Conference of State Legislatures Initiative and Referendum Task Force and other useful empirical studies.²⁶⁹ The Task Force makes thirty-four recommendations that address many deficiencies of direct democracy.²⁷⁰ The recommendations cover the areas of the role of the legislature, the substance of the initiative, the “drafting and certification phase,” “the signature gathering phase,” “voter education,” “financial disclosure,” and “voting on initiatives.”²⁷¹

As its beginning point, the Task Force counsels against implementing voter initiative procedures in states that do not presently provide for them because of the threats they pose to fair and meaningful representation of the citizenry and to constitutional

266. For example, if *Fisher II* provokes activists to campaign for an anti-affirmative action ballot initiative and affirmative action proponents challenge it, the Court should at the very least, acknowledge that it possesses the power to decide the issues presented and proceed with the appropriate analysis.

267. See generally ROBERT ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 132 (2002).

268. See TASK FORCE REPORT, *supra* note 52.

269. *Id.*

270. See *id.* at ix–xii (summarizing the recommendations).

271. *Id.*

freedoms. In making this recommendation, the Task Force notes that voter initiatives often operate without adequate safeguards to ensure against voter manipulation and fraud and, furthermore, allow political interest groups to bypass the protections built into the political structure (e.g. legislative debate and hearings).²⁷² Although the Task Force proposes some sound strategies,²⁷³ notably the recommendation that states should not adopt a “constitutional amendment initiative process,”²⁷⁴ even with the proposed reforms, direct democracy poses significant risks to constitutional rights and exceptional risks for minorities that must be mitigated by judicial intervention.

It is the duty of all states to make a conscientious effort to structure democracy so that it is representative of and responsive to the whole polity. One step in that direction is ensuring that the instruments of political participation are properly used and designed to accurately register rather than impede the political interests of discrete and insular minorities. The following suggestions are offered with those objectives in mind.

States should place restrictions on the subject matter of voter initiatives to remove from their purview issues concerning fundamental federal constitutional guarantees. This is necessary given the substantial scholarship demonstrating that voters are either woefully uninformed of the implications of their votes, misled by the presentation of the issues, or acting out of negative stereotypes to the detriment of marginalized minorities.²⁷⁵ Further, states should restrict initiatives to being legislative proposals rather than permitting their use as direct vehicles for constitutional amendment.

272. *Id.* at ix.

273. It is beyond the scope of this project to evaluate all of the Task Force’s recommendations.

274. *Id.* at ix. Bruce Cain and Roger Noll have also decried the shortcomings of the initiative constitutional amendment process as compared to the more deliberative process of constitution revision. See Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1523 (2009). They note that the former is more destabilizing in that it is subject to manipulation by partisan groups seeking to constitutionally solidify their positions and it appeals to the emotions of voters rather than reasoned analysis whereas the latter has the advantage of a tiered process of ratification by voters and elected representatives. See *id.*

275. See John C. Brittain, *Direct Democracy by the Majority Can Jeopardize the Civil Rights of Minority or Other Powerless Groups*, 1996 ANN. SURV. AM. L. REV. 144 (1996). See also Donovan, *supra* note 84, at 1745; Bell, *supra* note 4; Eule, *supra* note 7, at 1545 (1990); TASK REPORT, *supra* note 52.

State governments should be required to have clear procedures for investigating complaints of voter fraud and deceptive practices associated with voter initiatives. The agencies charged with the task of investigation and enforcement should be identified and held accountable. Where an agency fails to appropriately fulfill its duty, the challenged initiative should not be certified. When substantial abuses of the system occur, like those leading to the certification of Proposal 2, the petition should be invalidated and penalties imposed on those committing and orchestrating the fraud. Courts should act with the necessary speed to resolve an issue before it is presented to the electorate. Where timing is an issue, the court should issue an injunction even if this means that consideration of the matter by the electorate is delayed for several months.

As the *OKD* case illustrates, not only can voter initiative review procedures be deficient at the early phases of signature gathering and certification, but also the process for constitutional amendment may be severely lacking in terms of the requirements for passage. For example, in many states, including Michigan, the ballot initiative only requires a simple majority.²⁷⁶ If states are resistant to restricting the subject matter of voter initiatives, at a minimum the correctives should include a supermajority requirement and legislative review and approval.²⁷⁷

3. The Role of Governing Boards, Public School Officials and Administrators in the Decisionmaking Process

Governing boards, public school officials, and administrators are integral to the decisionmaking that determines the content of the policies, such as whether to adopt legacy preferences,²⁷⁸ for public academic institutions. Boards also appoint university presidents, establish budgets, approve curriculum changes and university

276. MICH. CONST. art. 12, § 2.

277. In this respect, this Article agrees with numerous scholars, including Robert Ellis, who have written about the dangers of amending state constitutions through voter initiatives. Ellis considers the requirements that most states have in place to allow legislative changes to their constitutions in comparison to the requirements for constitutional amendment through voter initiatives. See ELLIS, *supra* note 267, at 124. He notes that while an amendment of the constitution by the legislature typically requires a supermajority, surprisingly, many states only require a simple majority to amend the state constitution via a voter initiative. *Id.* Ellis maintains that this difference in treatment is illogical. *Id.* If anything, it would make sense for the informed legislature to have more lenient requirements to accomplish a constitutional amendment. See *id.* at 127. Eule also posits that, “simple majorities cannot be expected consistently to honor the interests of minorities and guarantee individual liberties.” See Eule, *supra* note 7, at 1554.

278. See Richard Kahlenberg, *Elite Colleges, or Colleges for the Elite*, N.Y. TIMES (Sept. 29, 2010), <http://www.nytimes.com/2010/09/30/opinion/30kahlenberg.html>.

contracts.²⁷⁹ While their actions are also appropriately subject to judicial review, their positioning as entities that have extensive insight into the goals of institutions, the educational needs of their state, the demographics of their region, and the educational goals of society, mean that their decisionmaking power should not be so easily supplanted by the process of direct democracy. They are engaged in ongoing reflection on these matters in ways that differ from the larger electorate and courts. The decision to include race-conscious measures like affirmative action into admissions policies was the product of dialogue and consideration of the aforementioned factors.²⁸⁰ Affirmative action in this context is geared towards educational enrichment and equality, and decisions about that, when race is involved, must be made by educational authorities with appropriate judicial oversight, not popular votes. *Schuette* demonstrates that the popular vote suppresses the voices of racial minorities, whereas decisions by the educators enhance those voices.²⁸¹

B. Whether Formulating Arguments According to Yoshino's Vision of "The New Equal Protection" Offers A Viable Alternative Strategy for Achieving the Equal Access of Racial Minorities to the Political Process in Public Universities

Kenji Yoshino poses the provocative question of whether this moment in the jurisprudence of the Supreme Court marks “the end of constitutional civil rights in this country.”²⁸² He posits that the Court has turned its judicial frame away from equality-based arguments of the Fourteenth Amendment to liberty-based claims of the First Amendment.²⁸³ If his assessment is accurate, then groups, such as civil rights advocates, who traditionally relied upon equal protection arguments to achieve substantive gains need to find alternative

279. See *Association of Governing Boards of Universities and Colleges Statement on Board Responsibility and Institutional Governance*, STATE UNIVERSITY OF NEW YORK, <https://www.suny.edu/media/suny/content-assets/documents/boardoftrustees/BOT-AGB-governance.pdf>. See also *Public Trustees*, OHIO HIGHER ED, <https://www.ohiohighered.org/trustees> (last visited Nov. 18, 2016).

280. Brief for Respondents Bd. of Governors of Wayne State Univ. and Irvin Reid at 9, *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (No. 12-682).

281. The background on how Proposal 2 came into being, as discussed in Part I of this Article, reveals that the initiative process worked against the clearly expressed interests of various racial minorities in maintaining race-conscious policies. See *supra* Part I. In contrast, the success of racial minorities in securing the inclusion of such policies within the decisionmaking of university admissions boards suggests their voices were heard. See *supra* Part I.

282. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 781–83 (2011).

283. *Id.*

approaches to accomplish their objectives. As a way of compensating for the paradigm shift in thinking, Yoshino argues that the “liberty-based dignity claim” may be a way to respond to the Court’s rejection of disparate impact claims.²⁸⁴ By moving the claim to what he describes as a “high enough level of generality” those who are not advancing it can nonetheless relate to it and envision themselves in terms of it.²⁸⁵

But Yoshino’s proposition should include an important caveat. If the claim is too general, it will not fully explain the problem and account for why the claim is being made in the first instance. Yoshino maintains that the liberty-based dignity claim is likely to garner widespread support and to be accepted by the Court.²⁸⁶ Under his approach, this type of claim should be brought rather than one, for example, asserting that Proposal 2 constitutes direct discrimination in violation of the Equal Protection Clause. Yoshino equates this “high level of generality” with universal human rights.²⁸⁷ He predicts that the Court’s current analytical framework for addressing equal protection claims brought by minorities is likely to result in their failure. The Court’s posture towards arguments asserted by racial minorities in support of affirmative action bears out his thesis. Yoshino writes:

[S]tate action that seeks to help historically disadvantaged groups – “affirmative action” programs – are the governmental programs most likely to remain facially discriminatory. . . . In contrast, state action that perpetuates the subordination of historically disadvantaged groups will tend to express itself in facially neutral terms. . . . For this reason equal protection jurisprudence that turns formalistically on facial discrimination will, from an antisubordination perspective, get it exactly backward. On the one hand, this jurisprudence invalidates affirmative action programs seeking to aid historically subordinated groups. . . . On the other hand, it upholds second-generation discrimination that continues to subordinate groups.²⁸⁸

If one takes Yoshino’s arguments to heart and attempts to make inroads relying upon liberties arguments, it is not clear that they would fare any better. BAMN already tried this strategy, albeit at the district court level, and it did not work.²⁸⁹ Drawing from cases like *Grutter*,

284. *Id.*

285. *Id.* at 794.

286. *Id.*

287. *Id.*

288. *Id.* at 767–68.

289. The failure of this approach in *Schuette* is not a reason to abandon it. Rather, the goal

which contained aspects of the argument that universities have the freedom to make decisions about whom to admit and the substance of their curricula,²⁹⁰ BAMN argued that as “beneficiaries” of university policies that took into account diversity, Proposal 2 infringed upon their First Amendment right to academic freedom.²⁹¹ The district court rejected this argument, concluding that BAMN lacked standing in that the First Amendment right belonged to the universities rather than to them.²⁹²

The challenge to properly frame a cognizable liberty-style argument is evident. If courts are resistant to recognizing BAMN’s interests and the impact of a restrictive initiative, like Proposal 2, on the lived experiences of those represented, then regardless of how the argument is framed, courts will not act in a protective manner.²⁹³ While the academic freedom argument was persuasive in *Grutter*, it is not clear that even if the universities had been in a position to make this argument rather than the plaintiffs, that it would have changed the outcome of the case at the district court level or ultimately at the Supreme Court level.²⁹⁴ In fact, in a later moment in the litigation it is interesting that the *Schuette* Court articulated a liberty-based argument not in support of BAMN but rather as a rationale for its holding that the Court lacked the power to prohibit Michigan voters from deciding the question of the constitutional validity of race-conscious admissions.²⁹⁵ The question then for civil rights activists who seek to

here is to underscore the difficulty in framing substitute civil rights arguments that will protect racial minority interests in being able to fully participate and contribute to society.

290. See *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 924, 934–35, 942–43 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

291. *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 935.

292. *Id.* at 943 (“[T]he *Coalition* plaintiffs do not have a personal right to a diverse student body grounded in the First Amendment.”)

293. Reva Siegel persuasively argues that in the desegregation period, the United States Supreme Court has privileged the experience of “majority groups” protecting them “from actions of representative government that promote minority opportunities” while simultaneously disregarding the experiences “discrete and insular” racial minorities. Siegel, *supra* note 13, at 7.

294. It is important to note that the University of Michigan, Michigan State University, and Wayne State University were actually named as defendants in the case. They sought to be dismissed but the court refused their request concluding that they were “properly joined as parties.” See *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 941.

295. Justice Kennedy reasoned:

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. Quite in addition to the *serious First Amendment implications* of that position with respect to any particular election, it is

have the promise of the reconstruction amendments fulfilled and to see the fruition of the work of their campaigns is: Can they repackage their objectives as liberty-based arguments? The challenge is a daunting one.

CONCLUSION

There are long-term implications to the *Schuette* decision that extend beyond the realm of education. The success of voter initiatives such as Proposal 2 result in unequal political processes that give a permanency to majoritarian political advantages. Ballot initiatives distort the democratic process and undermine equality principles. For these reasons, severe restrictions should be placed on them where they seek to override fundamental equal protection and voting rights constitutional guarantees involving racial minorities. It is critically important for courts to intervene in the wake of disabling majoritarian political action in order to achieve the “representation reinforcing approach to judicial review”²⁹⁶ that functions to facilitate the effective participation and representation of racial minorities in the political process. Finally, the political process doctrine should be available to racial minorities who seek to protect their right to fully participate in democracy and influence the decisions that impact them.

inconsistent with the underlying premises of a responsible, functioning democracy. *See Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (emphasis added). Kennedy later writes, “First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.” *Id.*

296. ELY, *supra* note 6, at 87.